Federal court holds that use of neutral gate by supplier of nonunion contractor removes resewed gate protections.

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In a recent decision, the U.S. Court of Appeals for the District of Columbia has ruled that delivery of materials for use by a nonunion contractor “taints” the neutral gate at a construction project, even though the materials are ordered and owned by the owner and merely installed by the nonunion contractor.

The case, J.F. Hoff Electric Co. v. NLRB, concerned whether picketing of a “neutral” gate at a construction project used by a company supplying electric fixtures ordered by the owner but installed by a nonunion electrical sub-contractor using its “reserved” gate is a secondary boycott, which is illegal under Section 8(b)(4)(B) of the National Labor Relations Act. J.F. Hoff Electric Company, a nonunion electrical contractor, was performing electrical work at a residential project in North Palm Beach, Florida. The general contractor, and various union contractors and suppliers used the “neutral” south gate, and Hoff used its “reserved” north gate to the project. Local Union 323, IBEW picketed the project, but initially confined its picketing to the gate reserved for Hoff Electric. However, when the picketing IBEW members noticed that electrical fixtures were being delivered through the “neutral” south gate and then installed by Hoff employees, the union picketed the “neutral” gate. Hoff filed unfair labor practice charges alleging that by picketing the neutral gate, the local IBEW union was engaging in an illegal secondary boycott.

Although Hoff did obtain a District Court injunction halting the picketing at the neutral gate, the NLRB refused to find that the union was engaged in a secondary boycott, on the ground that the electrical fixtures, which were purchased by the general contractor from Consolidated Electric Supply Company but installed by Hoff employees, were “supplies” of Hoff.

The decision reached by the Court of Appeals is that the delivery of electrical fixtures through the neutral gate destroyed its neutrality, thus permitting the union to picket at either or both gates as it chose without violating Section 8(b)(4)(B). The decision simply reflects the basic legal principle that a successful reserved gate system must avoid any “mixed use”, such as occasional use of the neutral gate by employees or suppliers of the contractor who is the target of the union.

Hoff Electric Company argued that its case was different, since the owner ordered the materials and had legal title to them. The Court of Appeals and the NLRB disagreed, finding that legal ownership was not in itself determinative since the materials were ordered for the purpose of Hoff’s installing them at the project, thereby making Consolidated Electric Supply in substance a “supplier” to Hoff.

In light of this case, it is more than ever necessary to avoid any “mixed use” of neutral gates by employees or suppliers of contractors operating under a reserved gate system. Such “mixed use”, which could include delivery of materials for the “reserved gate” contractor’s use, can undermine the usual legal protections from union picketing at the neutral gate.

The problem of administrative searches touches almost every business at one time or another. Many regulatory statutes and ordinances authorize on-site investigations as a primary means of enforcement. However, these statutory provisions do not override the constitutional protection against warrantless entry onto private property. For example, the Occupational Safety and Health Act of 1970 (OSHA) authorizes official entry to the workplace for purposes of inspecting the place of employment. However, the Supreme Court held in *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978) that the part of OSHA which authorized warrantless inspections without an employer’s consent was unconstitutional. The court concluded that OSHA could conduct inspections with an employer’s consent or, where consent has been denied with a search warrant. The regulated party who objects to entry is protected from unreasonable searches by the requirement that the agency prove to a neutral judge the necessity and reasonableness of its action.

In addition, the court concluded that a revised regulation setting out a procedure for *ex parte* warrants (i.e., warrants obtained without the employer being heard in opposition) would be within the authority of OSHA and would be constitutional. OSHA recently issued a final amendment rule confirming the authority of the Secretary of Labor to obtain *ex parte* inspection warrants. The majority of district courts have rejected challenges to the Secretary’s authority to obtain *ex parte* warrants.

In a new twist on the subject of the Secretary’s authority to obtain *ex parte* warrants for OSHA inspections, Chief Judge Winner of the U.S. District Court in Colorado rejected the contention of the Labor Department that the warrant which was sought must be issued *ex parte*. The application for a warrant was filed as a result of some complaints by Colorado Fuel and Iron Co. (C.F. & I.) employees to OSHA. Fifteen months after the dates of three of the five complaints the Secretary of Labor filed the application for a warrant with the U.S. District Court in Colorado. The application assures that the inspection is part of an “inspection program designed to assure compliance with the Act and that there are reasonable legislative and administrative standards for conducting the inspection.” How-
ever, what the “program” is or what the “reasonable standards” are is not enunciated. The application then lists the complaints and the urgency with which the follow-ups were conducted. The application then requested that the court issue, ex parte, a 20-man, 60-day inspection warrant.

In responding to the application, the Judge first asked to hear from an OSHA witness who was sitting in the courtroom in camera testimony regarding the need for the issuance of a warrant ex parte, but the Secretary refused. Admitting that, to meet an emergency or to avoid surreptitious removal of a dangerous situation, warrants should be issued ex parte, Judge Winner was perplexed at the argument that ex parte action was essential to a 20-man, 60-day operation. But the Secretary refused to substantiate his contention that the warrant had to be issued ex parte with any reasons for that contention. Without a showing of cause by OSHA or without granting C.F. & I. a right to be heard, Judge Winner refused to issue the warrant ex parte without a hearing on the issue.

It is clear to most observers at this point that OSHA has the authority to obtain warrants ex parte, but it is an unwarranted extension of that proposition to insist that a magistrate has no choice but to issue the warrants ex parte. The Supreme Court held in Barlow’s that the employer’s rights are protected by the issuance of a warrant by a neutral officer. One week after the decision in Barlow’s, the Supreme Court in State of Michigan v. Tyler, 436 U.S. 499 (1978), considered the inspection of a building by fire inspectors after a fire. The Court rejected an argument that a magistrate could “do little more than rubber stamp an application to search fire-damaged premises for the cause of the blaze.” The Court held, that even under those circumstances, the magistrate’s duty was to assure that the proposed search was reasonable, “a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption of the occupant on the other.” In order to protect the interests of an employer, a magistrate or judge must necessarily do more than rubber stamp an application for a warrant. The judge must make inquiry into the need for and reason-