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National Engineering & Contracting Co v. OSHA Review Comm. 45 F 3d 476 (D. C. 1995)

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National Engineering & Contracting Company is the petitioner and the Occupational Safety And Health Act (OSHA) Review Commission is the respondent represented by the Secretary of Labor, United States

Department of Labor in the United States Court of Appeals, District of Columbia Circuit. Case no 93-1468 Argued Oct. 18, 1994.—February 03, 1995 before Circuit Judges Buckley, Williams and Henderson.

Petition for review of \$ 400 imposed on National Engineering and Contracting Company (National) by the OSHA Review Commission for violations of the OSHA.

### **Facts:**

Petitioner's construction worksite at Cleves, Ohio (near Cincinnati) was inspected by the respondent as part of their routine inspection program as per the written mandate to monitor compliance with workplace health and safety standards prescribed under the OSHA, OSHA Field Operations Manual and Instructions CPL. The inspection is done on the worksites randomly generated by computer at the University of Tennessee. The criteria of selection are not challenged by the petitioner. The application for an inspection warrant stated that it was as per the computer chosen worksites that the application was being made for issue of inspection warrant due to the written policy of the petitioner that government inspection could be not done without a warrant. The magistrate judge issued warrant on April 27,

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1992. Inspector Denton who visited the proposed inspection site wanted to inspect without first showing the warrant. At first he was not allowed to enter without petitioner's lawyers but later Denton served the warrant and proceeded with the inspection. On the second day of inspection, the petitioner issued Denton a notice of protest regarding issuance and validity of the warrant. Denton found six violations of workplace standards of which three are at issue in the case. The petitioner contended that the warrant was invalid but the Administrative Law Judge (ALJ) before whom the petitioner contested decided that the warrant was a valid and properly issued in accordance with OSHA's administrative plan. The petitioner pleaded for a verdict in its favor after OSHA presented the case as the petitioner chose not to present any evidence. The ALJ found two violations, not serious but only one rebar violation serious and levied a penalty of \$ 400 on the petitioner.

### **Analysis /decision of appeal court**

Petitioner challenged the validity of warrant and sufficiency of the evidence relied on by the ALJ. Petitioner's contention was that the OSHA did not explain how and why it was chosen for inspection and the application for a warrant misrepresented one fact and hence the warrant was not supported by probable cause. Supreme Court has already held that the establishment of probable cause is not necessary for a routine inspection as it is not as stringent as search for evidence of crime. OSHA must only demonstrate that its inspection program is a neutral one as held in *Marshall v. Barlows* (1978). Petitioner has not disputed that OSHA inspection program was a neutral one. The petitioner's reliance on the 5th Circuit's decision in *Brock v. Gretna Mach & Iron Works* (1985) that the warrant application must include a document

showing how the inspection target was selected. This was not accepted by the present appeal court because no other circuit court held in that manner and moreover, the 5th Circuit itself has clarified its view that the test is whether magistrate can be satisfied that the inspection target was placed on the register on neutral criteria. Hence, the petitioner's application for review was denied and the levy of penalty of \$ 400 was upheld.

- The OSHA law allows inspections without a warrant by surprise as the inspector can enter the inspection target site before any hazardous condition could be altered or cleaned up. However, if the owner of the establishment so requires then a warrant is necessary as decided in *Marshall v. Barlow's Inc.* The law has not been made ineffective due to demands for one by a business as in either case a business cannot deny entry on arrival by the inspector and no hazardous operations can be stopped without a trace.

- Neutrality standard is what should be met by OSHA for issue of a warrant. OSHA may not be able to justify every inspection with warrant if the business is not an encoded establishment since the business can sometimes demonstrate that its name was placed on the list for reasons other than neutral criteria.

- Unless the business has been selected randomly by a computer, it cannot be neutral criteria. There could be extraneous reasons that the business may be able to cite with evidence. In both situations, it is possible to show that neutral criteria were not followed.

## **Works Cited**

*Brock v. Gretna Mach. & Ironworks, Inc.*, 769 F. 2d 1110, 1112 (5th Cir. 1985)

Marshall v. Barlow's, Inc., 436 U. S. 307, 320, 98 S. Ct. 1816, 1824, 56 L. Ed. 2d 305 (1978)

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