

**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: JAMES J. BURNLEY, IV, SECRETARY OF
TRANSPORTATION, ET AL., Petitioners V. RAILWAY
LABOR EXECUTIVES' ASSOCIATION, ET AL.

CASE NO: 87-1555

PLACE: WASHINGTON, D.C.

DATE: November 2, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES J. BURNLEY, IV, SECRETARY :

4 OF TRANSPORTATION, et al., :

5 Petitioners :

6 v. : No. 87-1555

7 RAILWAY LABOR EXECUTIVES' :

8 ASSOCIATION, et al. :

9 -----x

10 Washington, D.C.

11 Wednesday, November 2, 1988

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:02 o'clock a.m.

15 APPEARANCES:

16 DICK THORNBURGH, ESQ., Attorney General, Department of
17 Justice, Washington, D.C.; on behalf of the
18 Petitioners.

19 LAWRENCE M. MANN, ESQ., Washington, D.C.; on behalf of
20 the Respondents.

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LAWRENCE M. MANN, ESQ.	
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P R O C E E D I N G S

(10:02 a.m.)

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 87-1555, James J. Burnley v.
5 Labor Railway Labor Executives' Association.

6 Mr. Attorney General, you may proceed whenever
7 you're ready.

8 ORAL ARGUMENT OF DICK THORNBURGH

9 ON BEHALF OF THE PETITIONERS

10 MR. THORNBURGH: Mr. Chief Justice, may it
11 please the Court:

12 This is a case about railway safety, about the
13 need to protect railroad employees, the traveling public
14 and the communities through which railroads travel from
15 the hazards created by the use of drugs and alcohol by
16 those in charge of trains, and from the risks posed by
17 their impairment. The case involves the legality of
18 testing for the presence of drugs and alcohol among
19 railroad employees while on duty and, in particular,
20 subsequent to certain types of railroad accidents.

21 The American railroad industry and its
22 employees have a long history of safety regulation by
23 government, beginning with the Safety Appliance Act in
24 1893 running through the Comprehensive Railway Safety
25 Act of 1970 and thereafter. Regulation of rolling

1 stock, equipment, track and signals and employees has
2 been authorized to protect fellow employees, citizens
3 and communities throughout the United States.

4 The Hours of Service Act in 1907 was the first
5 legislation to deal with employees by imposing limits on
6 the number of hours that they could work. That
7 legislation, as noted by this Court in language we
8 suggest to be equally applicable here, was -- and I
9 quote -- "induced by reason of the many casualties in
10 railroad transportation which resulted from requiring
11 the discharge of arduous duties by tired and exhausted
12 men whose power of service and energy had been so
13 weakened by overwork as to render them inattentive to
14 duty or incapable of discharging the responsible labors
15 of their positions."

16 The 1970 Act --

17 QUESTION: Mr. Attorney General -- Mr.
18 Attorney General, does that legislation and those
19 regulations prohibit the use of alcohol by railroad
20 employees?

21 MR. THORNBURGH: The 1907 Act did not deal
22 with that problem, and I would propose to walk us
23 through briefly, as briefly as I can, what led up to
24 what I submit is an authority to carry out that kind of
25 testing --

1 QUESTION: No, I'm not asking about the
2 testing. I mean, just -- are -- are -- are railroad
3 employees forbidden to use alcohol the night before they
4 get on -- they go to work?

5 MR. THORNBURGH: They are, indeed, by
6 operating rules adopted by nearly all railroads, Rule G,
7 which states forth -- sets forth in no uncertain terms
8 the prohibition against working or showing up for work
9 under the influence of alcohol or drugs and provides for
10 dismissal in those cases.

11 QUESTION: What is the period of time between
12 arrival at work and the last time they can have alcohol?

13 MR. THORNBURGH: That would be a --

14 QUESTION: Is it governed by --

15 MR. THORNBURGH: -- a judgmental matter.

16 QUESTION: It's not governed by regulation.

17 MR. THORNBURGH: It is not governed by
18 regulation to my knowledge, Your Honor, no.

19 QUESTION: Well, Mr. Attorney General, what
20 employees are subject to that prohibition? Trained
21 service personnel, for example?

22 MR. THORNBURGH: Yes, operating service
23 employees.

24 QUESTION: Well, would that include the dining
25 car waiters?

1 MR. THORNBURGH: I'm not sure, Your Honor. I
2 can't answer that because --

3 QUESTION: I can testify no.

4 MR. THORNBURGH: You can testify no.

5 QUESTION: No.

6 MR. THORNBURGH: I will accept an expert
7 witness' testimony on that.

8 (Laughter.)

9 MR. THORNBURGH: Adopt the statement by Mr.
10 Justice Marshall.

11 MR. THORNBURGH: Well, the program that we
12 have before us today -- would that include the dining
13 car waiter?

14 MR. THORNBURGH: It would include all in the
15 operating service, yes.

16 QUESTION: Dining car waiters, and --

17 MR. THORNBURGH: That's my understanding.

18 QUESTION: -- porters, and --

19 MR. THORNBURGH: Yes.

20 QUESTION: Not just those charged with running
21 the train.

22 MR. THORNBURGH: Well, specifically and most
23 importantly those charged with running the train.

24 QUESTION: But the others as well.

25 MR. THORNBURGH: That's my understanding. If

1 I'm mistaken, I will advise the Court otherwise.

2 QUESTION: I think it's rather important.

3 MR. THORNBURGH: We will undertake to --

4 QUESTION: At least it is for me.

5 MR. THORNBURGH: We will undertake to tighten
6 down on that.

7 Our focus understandably is on those persons
8 who have the actual manual -- literal manual control --

9 QUESTION: That's the engineer.

10 MR. THORNBURGH: Yes, brakeman, fireman, yes.

11 QUESTION: Firemen. There's no firemen
12 anymore. That sort of thing.

13 QUESTION: But do we take it as a given in the
14 case that the regulation covers some employees that are
15 not engaged in safety-sensitive tasks?

16 MR. THORNBURGH: The definition is under the
17 Hours of Service Act, which includes operating employees
18 -- and I stand corrected and will revert to the practice
19 noticed by Mr. Justice Marshall that dining car
20 employees are not covered by the regulations --

21 QUESTION: Well, is it your submission that
22 all of those employees are engaged in safety-sensitive
23 tasks?

24 MR. THORNBURGH: The Hours of Service
25 employees? That's the basis of that designation, yes,

1 Your Honor.

2 QUESTION: Thank you.

3 QUESTION: I'm not sure I followed this. Now,
4 you're saying the regulation does not cover dining car
5 employees, not the prohibition on use of alcohol.
6 You're saying the testing regulation doesn't cover that.

7 MR. THORNBURGH: No. I'm saying that the
8 Hours of Service Act definition does not cover dining
9 car employees and it is that definition upon which both
10 Rule G and the regulations here at issue operate.

11 QUESTION: (Inaudible). Are they covered?

12 MR. THORNBURGH: Pullman car employees.

13 QUESTION: Well, they're on the train.

14 MR. THORNBURGH: Well, the thrust and the
15 focus of this regulation and the regulatory scheme that
16 has been generally promulgated with regard to railroad
17 employees relates to those employees that have a clear
18 and palpable relationship to the safety of the protected
19 persons, fellow employees, traveling public, citizens
20 and communities around it.

21 I am not going to palm myself off on this
22 Court as an expert upon where that line is drawn because
23 I think the essence of the argument that the government
24 is making here on behalf of the Federal Railway
25 Administration is that what has been promulgated meets

1 the needs of protecting those designated classes of
2 persons.

3 I would agree in the premise that underlies
4 the questions that if there is a spare category out
5 there that has no relationship whatsoever to the safety
6 of those individuals or classes of persons, that it
7 would be an overreaching. I am not aware that there is
8 such a category, however.

9 QUESTION: Well, are you saying that if the
10 regulation reaches employees who are not in a
11 safety-sensitive position, then it would be invalid?

12 MR. THORNBURGH: No. I --

13 QUESTION: You just say you don't think it
14 does --

15 MR. THORNBURGH: Again, with respect to those
16 employees, there might be a -- a question.

17 QUESTION: I think that's part of your
18 opponent's argument, that it's broader than necessary
19 even on your own rationale.

20 MR. THORNBURGH: Well, I think when you look
21 at the regulation in its gross operation -- and again, I
22 -- I don't want to represent to this Court that there
23 may not be somewhere out there an employee or two or
24 category that has -- with respect to which Your Honor's
25 concerns might be justified. What I am saying is that

1 given the extensive review process that was undertaken
2 in the promulgation of this legislation by those who are
3 far more expert than I and most of this Court probably
4 in the categories that have a direct relationship to
5 safety, I know of no such group that is -- with respect
6 there may be an overreaching taking place.

7 QUESTION: Is any such group pointed out in
8 your opponent's briefs, do you recall? I don't recall
9 it. I guess we can ask them.

10 MR. THORNBURGH: I don't, but I suspect that
11 my opponent will scour his brief for such a designation.

12 QUESTION: General Thornburgh, as long as
13 you're interrupted, may I change the focus of the --

14 MR. THORNBURGH: Certainly.

15 QUESTION: -- questioning a minute to inquire
16 about what happens to the reports that are received
17 after the drug testing? For instance, would the FRA
18 turn them over to police for any criminal negligence
19 prosecutions? What happens to -- to the evidence that is
20 gathered in these drug tests?

21 MR. THORNBURGH: They could be used in either
22 civil or criminal proceedings. There is no bar under
23 the statute.

24 QUESTION: Does that raise any concerns under
25 this Court's holding in Schmerber that the evidence

1 gathered after the crash is turned over for a subsequent
2 criminal prosecution?

3 MR. THORNBURGH: I don't think so because what
4 you're dealing with here is not some ruse to carry on a
5 criminal investigation under the guise of an
6 administrative proceeding, but a set of regulations that
7 has an independent rationale and an independent basis
8 for carrying out the responsibilities of the Federal
9 Railway Administration to investigate accidents and to
10 enforce the rules that are promulgated against drug and
11 alcohol abuse.

12 QUESTION: Well, is the purpose to discipline
13 the employee involved and get them out of the business
14 of operating a dangerous instrumentality while under the
15 influence of drugs?

16 MR. THORNBURGH: That is one of a number of
17 purposes that are identified in the regulations deriving
18 their authority from the Railway Safety Act.

19 QUESTION: How would it affect that goal if
20 there were some prohibition against turning the evidence
21 over to the police for criminal prosecution?

22 MR. THORNBURGH: I don't know that it
23 necessarily would, Your Honor, because the purpose and
24 focus of the FRA, as Your Honor suggests, is toward the
25 safety portion of the Act which obviously would be

1 enhanced by removing or in some cases rehabilitating
2 through programs that the railroads carry out those
3 employees who have drug and alcohol problems. It is not
4 a --

5 QUESTION: But in any event --

6 MR. THORNBURGH: -- law enforcement criminal
7 undertaking that --

8 QUESTION: But as this particular program is
9 designed, there are no restrictions on turning the
10 evidence over to the police I take it.

11 MR. THORNBURGH: No, there aren't.

12 QUESTION: Okay.

13 MR. THORNBURGH: And my suggestion is that
14 that is a concern that is not before the Court in this
15 case if the Court accepts the designation that has been
16 adopted all the way through of the concern about railway
17 safety, which doesn't necessarily turn upon the civil or
18 criminal exposure of any individual using, abusing or
19 being under the influence of drugs or alcohol.

20 I would like to turn to the basis for the
21 Federal Railway Administration's adoption for these
22 regulations because I think it etches the severity of
23 the problem in a way that indicates the reasonableness
24 of the response.

25 In the hearings held with respect to these

1 regulations, or what culminated in these regulations,
2 the FRA found that alcohol and drug impairment had
3 contributed to a number of accidents and fatalities.
4 From 1975 to 1983, at least 45 train accidents and
5 incidents that involved some 34 fatalities, 66 non-fatal
6 injuries, and \$28 million in property damage.

7 They further noted that these figures were
8 likely to be understated due to what they identified as
9 a conspiracy of silence resulting from the fear of
10 employees to come forward on account of their concern
11 about tort liability or the loss of the job if accurate
12 reporting was forthcoming.

13 All of this existed -- these conditions and
14 these difficulties -- despite the existence for decades
15 of operating Rule G referred to before which literally
16 prohibits employees from using, possessing or being
17 under the influence of drugs or alcohol while on duty
18 and subjecting them to dismissal for violation.

19 The procedures adopted are two in number: one
20 mandatory on all railroads, and the other optional. I
21 think it's significant to note that the regulations did
22 not call for the testing of all employees or for
23 periodic random testing procedures. They were tied
24 instead to specific events and particular groups of
25 employees, both defined by objective standards.

1 Subpart C mandates the taking of blood and
2 urine samples from covered employees in three instances:
3 first, following a major train accident, that is, one
4 involving a fatality, the release of hazardous material
5 accompanied by evacuation or a reportable injury, or
6 damage to railroad property exceeding a half a million
7 dollars; secondly, an impact accident resulting in a
8 reportable injury or damages to railroad property
9 exceeding \$50,000; and third, a fatality to an on-duty
10 railroad employee.

11 The samples are to be taken as soon as
12 possible at an independent medical facility and
13 subjected to laboratory analysis using state of the art
14 methods. The employees are to be notified of results
15 and given an opportunity to respond. If they refuse to
16 submit to a test, they are taken out of service for nine
17 months.

18 QUESTION: Now, Mr. Attorney General, I gather
19 there have to be both a blood test and a urine test.

20 MR. THORNBURGH: That's under Subpart C
21 required, yes.

22 QUESTION: Well, what does the urine test
23 produce in the way of information that you don't get
24 from the blood test? Why do you need both?

25 MR. THORNBURGH: The urine tests act as a

1 preliminary screening process because of their
2 propensity to reach back over a period of up to 30 days
3 to identify those who might be habitual users. And that
4 would mean that if someone had no substance in the
5 urine, that they would not have to go forward with the
6 blood test. The blood test, after the urine test,
7 identifies someone as a user of drugs or alcohol over a
8 period of time can make a determination as to current
9 disability so that in the one case the urine test
10 narrows the field of concern to those employees who have
11 used drugs at some time. The blood test is able to
12 target those who are currently impaired.

13 QUESTION: Yes, but you take both tests, do
14 you not? You don't take -- what's the sequence?

15 MR. THORNBURGH: The sequence would be the
16 urine test and then the blood test for the reasons
17 indicated.

18 QUESTION: And if the urine test produces
19 nothing, you still give the blood test.

20 MR. THORNBURGH: Yes.

21 QUESTION: Mr. Attorney General, how accurate
22 is the test?

23 MR. THORNBURGH: As accurate as can be. It
24 represents the state of the art and the technology we
25 have today to determine --

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QUESTION: Well, is it perfect or not?

MR. THORNBURGH: Excuse me?

QUESTION: You say accurate as it can be. Is it perfect or not?

MR. THORNBURGH: Nothing is perfect in this imperfect world, Your Honor, but --

QUESTION: Well, how close is it to being perfect?

MR. THORNBURGH: I think you'd get differing assessments on that. It is a recognized, medically and scientifically recognized, method of determining the presence of drug and alcohol in the blood or in the urine, both of these tests. They have been used and recognized for a considerable period of time.

QUESTION: Does -- does the urine test show alcohol traces for a longer -- at all and, if so, for a longer period than the blood would show it?

MR. THORNBURGH: Yes.

QUESTION: Yes to both questions?

MR. THORNBURGH: Yes.

QUESTION: So that the urine test could show that alcohol had been used, say, four or five days previous?

MR. THORNBURGH: Yes.

QUESTION: And would that be an indication

1 that the impairment -- of an impairment of the
2 operator's skills?

3 MR. THORNBURGH: Not necessarily, but it would
4 operate as a flag that further inquiry was justified and
5 should be undertaken.

6 QUESTION: (Inaudible) the drug was used, Mr.
7 Attorney General?

8 MR. THORNBURGH: I can't answer that
9 quantitatively, but clearly it's recognized as a more
10 current indicator of use or impairment.

11 QUESTION: It would show impairment at the
12 time of the test, would it?

13 MR. THORNBURGH: That's my understanding.
14 Again, I -- I have to beg off somewhat on the technical
15 precision with which that can be established, but it is
16 the basis for using blood tests in a whole variety of
17 cases that have been before this Court at one time or
18 another.

19 QUESTION: I understand your position, is it
20 not, as to how bad off it is -- if he uses at all, he's
21 in trouble.

22 MR. THORNBURGH: Well, in trouble is not the
23 conclusion that I would append to that observation, Your
24 Honor. I think what it would be was an aid, an
25 indicator, in trying to determine the cause of the

1 accident.

2 QUESTION: Suppose -- right. Suppose a man
3 had one ounce of alcohol 20 hours ago. He wouldn't lose
4 his job, would he?

5 MR. THORNBURGH: Not necessarily.

6 QUESTION: That's what -- so, it's not a final
7 determination.

8 MR. THORNBURGH: No.

9 QUESTION: The tests.

10 MR. THORNBURGH: No, it would not be.

11 And I think the point about these tests is
12 they have to be viewed in the context of the totality of
13 the investigative process that's going forward. The
14 process that the FRA is charged by law with carrying out
15 is to determine the cause of accidents.

16 In the case where those accidents are not
17 related to drug or alcohol abuse, the tests in question
18 would provide a degree of assurance that some other kind
19 of cause related to the accident in question. In the
20 case where drug or alcohol abuse shows up in one or more
21 of the covered employees, then further investigation and
22 the accumulation of observations that may have been made
23 contemporaneously would be suggested. But as in any case
24 where evidence is divined to produce a conclusion, the
25 process is uncertain and cumulative in its nature.

1 Subpart -- the other subpart of the
2 regulations is a -- it permits the railroad to do more
3 than required in Part C and involves other mixes of
4 urine, breath and -- and blood tests.

5 These regulations, as the Court knows, were
6 sought to be enjoined. The district court granted
7 summary judgment denying same, and the Ninth Circuit
8 Court of Appeals reversed. That brings us here today.

9 And I would like, if the Court please, to move
10 to a discussion of what we suggest are the relevant
11 questions of constitutional law that are involved here.

12 Under the Fourth Amendment, the rights of
13 people to be secure in their persons against
14 unreasonable searches and seizures is not to be
15 violated. In the normal criminal investigation case,
16 both probable cause and a warrant are generally
17 necessary to render a search reasonable. In certain
18 criminal and most non-criminal cases, neither is
19 required or has been required by this Court.

20 The circuit court found neither to be
21 necessary here. And we would urge the same finding on
22 this Court; that is, this is not a case where probable
23 cause or a warrant are necessary.

24 This Court in determining the reasonableness
25 of searches and seizures has adopted a balancing test

1 which requires balancing the intrusion of the
2 individual's Fourth Amendment interests against the
3 promotion of legitimate governmental interests. The
4 court of appeals did not apply such a test.

5 It found instead that the procedures set forth
6 in the regulations were deficient because they failed to
7 require a particularized suspicion as a trigger for the
8 testing procedures offering the observation -- and I
9 quote -- that "accidents, incidents, or rule violations
10 by themselves do not create reasonable grounds for
11 suspecting the tests will demonstrate alcohol or drug
12 impairment in any one railroad employee much less an
13 entire train crew," a conclusion which we submit assumes
14 much of what is in issue.

15 The circuit court reached this conclusion
16 because of its mistaken premise that finding a search
17 justified at its inception requires a determination that
18 there are reasonable grounds for suspecting that the
19 search will turn up the evidence sought. The court, in
20 short, failed to undertake the balancing test because it
21 presumed the need for a particularized suspicion.

22 This Court has stated that the Fourth
23 Amendment protects only an expectation of privacy that
24 society is prepared to consider reasonable and that
25 what is reasonable depends upon the context within which

1 such a search takes place. I would like to move to that
2 resolution of those balancing questions.

3 New Jersey v. T.L.O. emphasizes that
4 exceptions to the requirement of individualized
5 suspicion relied upon by the Ninth Circuit may be made
6 -- and I quote, "where the privacy interests implicated
7 by a search are minimal and where other safeguards are
8 available to assure that the individual's reasonable
9 expectation of privacy is not subject to the discretion
10 of the officer in the field."

11 In applying this test here, first, it's
12 readily apparent that the search authorized by the
13 regulations at issue manifestly takes place in an
14 atmosphere of diminished expectations of the privacy of
15 the employee. They take place in the context of an
16 ongoing employment relationship, circumscribed by
17 longstanding concern for the employee's mental and
18 physical wellbeing. They take place during employment
19 in an historically highly regulated industry, and they
20 take place in an industry which has a history of
21 imposing health and fitness requirements, including in
22 some cases the taking of blood and urine samples and
23 testing similar to that prescribed here.

24 QUESTION: Mr. Attorney General, the Ninth
25 Circuit majority, as I read their opinion, said that the

1 regulated industry example didn't apply here because the
2 railroad regulations were basically were for the benefit
3 of employees. And they -- they thought that our other
4 regulated industry cases depended on the fact that the
5 industry itself was regulated for the benefit of the
6 public.

7 MR. THORNBURGH: Mr. Chief Justice, I think we
8 look at this case as one that doesn't necessarily turn
9 on the regulated industry exemption, but which focuses
10 on the balancing test enunciated by this Court. And in
11 so doing, in looking at the expectation of privacy that
12 is forthcoming on the part of the individual employee,
13 must look at the characteristics of the employment
14 relationship and of the history of the regulation of
15 that relationship, not just the industry, but of that
16 relationship, for whose ever benefit that may be.

17 The other safeguards in the test from T.L.O.
18 that are available is that the testing is not of a
19 random kind or is it subject to the discretion of
20 supervisors who might target or harass particular
21 employees, but is triggered by objective events and, in
22 the case of Subpart C, is required of all covered
23 employees involved in the incident in question. The
24 testing must take place as soon as possible at an
25 independent medical facility by qualified medical

1 personnel.

2 Applying the second part of the balancing
3 test, it seems clear that the searches carried out take
4 place in an area of intense governmental interest. The
5 public needs to be reassured that every step is being
6 taken to ensure the safety of those who operate these
7 trains.

8 And with the increasing frequency of the
9 carriage of hazardous materials over the nation's
10 railroads, none of these concerns are matters of little
11 consequences. Judge Alarcon noted below in dissent:
12 "An idle locomotive sitting in the roundhouse is
13 harmless. It becomes lethal when operated negligently by
14 persons who are under the influence of alcohol or drugs,
15 the substantial equivalents of time bombs endangering
16 the lives of thousands."

17 It might be asked here what are these
18 intrusive tests necessary for? Why can't simple
19 personal observation exist? I would suggest the record
20 indicates that this has been tried and found wanting and
21 that the --

22 QUESTION: Mr. Attorney General, on that
23 point, you test after the time bomb explodes, which is
24 one of the problems here. And the major accidents that
25 you -- that your expert cited is one that took place

1 somewhere in Maryland killing a number of people while
2 the program was in effect, and it didn't deter that.
3 How do we know this really works?

4 MR. THORNBURGH: No suggestion is made or
5 intended that this program is the fool-proof, complete
6 answer to the problem of railway safety. We're still
7 dealing with human beings and with their judgment and
8 their frailties and their fallibilities. What we are
9 suggesting is that this is a reasonable response to a
10 gradually increasing phenomenon of drug and alcohol
11 abuse as the cause of major rail accidents.

12 QUESTION: But your statistics seem to show
13 there's less drug use in the last couple of years than
14 there was before the program went into effect.

15 MR. THORNBURGH: One would hope that this
16 program has contributed to that, Your Honor.

17 QUESTION: But the accident I referred to
18 certainly doesn't suggest that.

19 MR. THORNBURGH: Nor will accidents in the
20 future indicate a complete prophylactic effect of these
21 types of regulations. We are focusing we hope on the
22 reasonableness and the results of the balancing that has
23 to ensue --

24 QUESTION: Is it correct that the principal
25 rationale is one of deterrence?

1 MR. THORNBURGH: I think there are more than
2 deterrent capabilities present here, but that is an
3 important one.

4 QUESTION: (Inaudible) if (inaudible) also if
5 you find somebody who's involved in an accident has been
6 using drugs you might do something about it --

7 MR. THORNBURGH: Yes, indeed.

8 QUESTION: -- with respect to that particular
9 person.

10 MR. THORNBURGH: There is a capability through
11 relevant collective bargaining agreements to terminate
12 those individuals or suspend them or to rehabilitate
13 them through programs that have been adopted by most of
14 the major railroads.

15 Before closing, I would like to specifically
16 direct the Court's attention to the Third Circuit Court
17 of Appeals holding in Shoemaker where the court found
18 warrantless breath-o-lyzer and urine tests of jockeys to
19 be reasonable under the Fourth Amendment based on the
20 highly regulated nature of the horse racing industry and
21 its employees and the public interest and the integrity
22 of horse racing and the revenues it produced for the
23 State of New Jersey.

24 Surely the appropriateness of similar tests to
25 the jockeys of these mammoth, high-speed and potentially

1 death-dealing locomotives and other rolling stock
2 properly described by Judge Alarcon as time bombs must
3 be beyond doubt. What is at stake here is not the
4 public interest in the integrity of the sport of kings,
5 as in Shoemaker, or the revenue it produces, but the
6 very lives, health, safety and property of innocent
7 employees and citizens and of whole communities through
8 which --

9 QUESTION: Thank you, Mr. --

10 MR. THORNBURGH: -- the nation's railroads
11 pass.

12 QUESTION: Thank you, Mr. Attorney General.

13 MR. THORNBURGH: Thank you, Your Honor.

14 QUESTION: We'll hear now from you, Mr. Mann.

15 ORAL ARGUMENT OF LAWRENCE M. MANN

16 ON BEHALF OF THE RESPONDENTS

17 MR. MANN: Thank you, Mr. Chief Justice, and
18 may it please the Court:

19 The purpose of the regulations cannot be
20 complied with under the scheme that's devised in the
21 federal regulation because -- and I read -- "the purpose
22 of this part is to prevent accidents and casualties in
23 railroad operations that result from impairment of
24 employees by alcohol or drugs."

25 The record is clear that neither the alcohol

1 nor the drug test by urine nor by blood can demonstrate
2 impairment. A urine test only can show the metabolites
3 of a drug that's in the system. And in the -- indeed,
4 in the regulation itself, the Federal Railroad
5 Administration recognizes that in some cases it can
6 remain in the system up to 60 days.

7 Now, we have no problems in the railroad
8 unions that one who is using alcohol or drugs should not
9 be working in the railroad system. That's not the issue
10 here. The issue is whether or not one in his sole
11 privacy of their homes 60 days ago on a vacation may
12 have used drugs -- I'm not suggesting that we condone
13 it, but the mere fact that they used drugs does not in
14 any way have any nexus that while that employee is
15 working that he or she may have used drugs on the job
16 because the tests don't demonstrate it.

17 QUESTION: Do you assert that a blood test
18 cannot show current extent of impairment from alcohol or
19 drugs?

20 MR. MANN: No, Justice O'Connor. What I'm
21 suggesting is that the -- the blood test can show
22 relatively recent usage. What it cannot demonstrate is
23 that the person is impaired. And that's what the
24 purpose of this rule is, to prevent impairment.

25 QUESTION: Well, can't it show, for example,

1 blood alcohol content --

2 MR. MANN: It can.

3 QUESTION: -- in the person?

4 MR. MANN: Yes.

5 QUESTION: And doesn't that relate to
6 impairment?

7 MR. MANN: Yes, and the alcohol --

8 QUESTION: It's relevant to that inquiry.

9 MR. MANN: Yes, that's correct.

10 QUESTION: How about in the drug area?

11 MR. MANN: In the drug area, it can show an
12 active ingredient in the blood system, yes. But it
13 points out the fact, however, that the urine test for
14 metabolites is useless test because it doesn't
15 demonstrate anything different from what a blood test
16 would demonstrate. And the mere fact that it remains in
17 the system for such a long period of time, at the very
18 minimum, it stays in the system several days even one
19 ingestion of a drug.

20 So, what is to prevent -- what makes it
21 impracticable under your standards of Griffin, as an
22 example? What makes it impracticable for the government
23 to seek a warrant when they are going to attempt to have
24 a urine test? Absolutely nothing because the metabolite
25 will always be in that body system. It will be there no

1 matter how long it's going to take to go to some neutral
2 person to seek a warrant.

3 Now, with respect --

4 QUESTION: None of the courts that have
5 considered this, Mr. Mann, have -- even the ones who
6 have ruled in your favor, as -- as the Ninth Circuit,
7 have suggested that the government had to obtain a
8 warrant.

9 MR. MANN: They did not. That's correct, Your
10 Honor. But I'm suggesting that there's nothing that
11 would make it impracticable. That is the standard --
12 you have said that it would be impracticable to obtain
13 one --

14 QUESTION: The Fourth Amendment prohibits
15 unreasonable searches, so the test is reasonableness.

16 MR. MANN: That's correct. And in this case
17 we're saying it is unreasonable for -- for one basic
18 purpose. It cannot demonstrate what the rule was
19 intended to accomplish, that is, impairment particularly
20 with urine testing. But that doesn't --

21 QUESTION: Excuse me. It can't demonstrate
22 that impairment was there in this particular accident
23 with a certainty. But certainly someone who has cocaine
24 traces, or however that's discovered, in the urine
25 sample, even if it's shown that the cocaine was -- was

1 ingested some time before, sufficiently before that you
2 can't say whether there was impairment, don't you think
3 it is reasonable for the railroad to say we want to know
4 that because we don't want someone who is using cocaine
5 to be -- to be driving the train next time?

6 MR. MANN: Your Honor, it seems that the
7 proper focus would be using alcohol or drugs on the
8 job. And the urine test can't demonstrate anything with
9 respect to --

10 QUESTION: Is --

11 MR. MANN: -- usage on the job.

12 QUESTION: Is not someone who uses cocaine
13 more likely to use it on the job than someone who
14 doesn't use cocaine?

15 MR. MANN: I don't think that follows
16 necessarily.

17 QUESTION: It doesn't?

18 MR. MANN: Not necessarily. A person who is
19 not concerned about being involved in an accident is not
20 going to be concerned about use of drugs or not. That
21 -- I don't think it follows. It can follow, of course,
22 and it does happen. Obviously, it happens.

23 But the urine test doesn't demonstrate -- the
24 only thing that urine does is shows a metabolite. It
25 can't determine how much you use, when you use it or the

1 effects.

2 QUESTION: Is it your position that the public
3 has no interest in whether or not railroad employees are
4 chronic drug users so long as the drugs are not used
5 while they're on the job?

6 MR. MANN: I think it --

7 QUESTION: Is that your position?

8 MR. MANN: I think it's certainly the interest
9 of the government to know who uses drugs and when, but
10 there are other means to determine that. For example,
11 in -- in the --

12 QUESTION: So -- so it -- so, we do have an
13 interest in knowing that.

14 MR. MANN: Yes, I think --

15 QUESTION: And isn't one of the reasons we
16 want to know that because there is a likelihood or a
17 higher probability that drugs will be used on the job if
18 they're used off the job? It's just that simple.

19 MR. MANN: Well, that conclusion I don't
20 necessarily agree with, sir. The reason I don't is
21 because --

22 QUESTION: Could -- could reasonable people
23 disagree on that?

24 MR. MANN: I think so --

25 QUESTION: All right. Then it's reasonable

1 for the government to take the position that they do,
2 isn't it?

3 MR. MANN: That is certainly what the
4 government has done in this case. They have made that
5 determination. But it -- it -- it begs the question
6 what they are attempting to accomplish. How they're
7 going about it accomplishes that result. And we don't
8 think it does.

9 It does with respect to blood because it can
10 show a relatively recent active usage, but not with
11 respect to urine. And the urine doesn't show anything
12 that the blood test would not reveal. The blood test
13 reveals both active ingredient and metabolites. The
14 urine test only shows metabolites. It cannot
15 demonstrate any -- any active usage.

16 QUESTION: Mr. Mann, isn't there a concern
17 about use of drugs even if it's off-duty hours so long
18 as that usage might impair the person's capacity to
19 operate the equipment safely when he is on the job or
20 she is on the job? It isn't just usage of the drugs
21 while on the job, is it?

22 MR. MANN: It's the --

23 QUESTION: I mean, if somebody takes a drink
24 before going in the engine of the train or has a shot of
25 some drug immediately before or soon before, that's an

1 equal concern, is it not?

2 MR. MANN: It is an equal concern, Justice
3 O'Connor, but the concern should be not what one does in
4 their privacy of their home. The concern should be what
5 one does on the job and the effects on the job. And
6 that can be determined.

7 QUESTION: Well, the concern is what one does
8 before going on the job that will impair the ability of
9 the person to perform the job safely.

10 MR. MANN: Yes.

11 QUESTION: Isn't that true?

12 MR. MANN: That's correct, and we agree with
13 that.

14 QUESTION: And do you think that a -- the
15 taking of -- the physical taking of blood is less
16 intrusive than a urine specimen?

17 MR. MANN: I don't think it's less intrusive,
18 no. I think the intrusiveness of blood is more so than
19 urine, but --

20 QUESTION: Then why the focus on a blood test
21 is all right, but not a urine test?

22 MR. MANN: No, I'm not saying that. I'm just
23 pointing out to the Court what one can show and what one
24 can't. And in urine, you can't demonstrate any recent
25 usage. That's the problem with the urine test. With

1 the blood test, at least you can determine relatively
2 recent usage.

3 QUESTION: The urine test is better, is it
4 not, for demonstrating traces of use over a period of
5 time?

6 MR. MANN: It can --

7 QUESTION: That's how I understand the record.
8 That's a fact, isn't it?

9 MR. MANN: Well, so can blood, Your Honor.

10 QUESTION: Isn't urine better than blood for
11 establishing residues over a period of, say, 30 days?
12 It's better.

13 MR. MANN: It may be more effective, but the
14 blood tests can also demonstrate that by the fact that
15 in the measurement --

16 QUESTION: Not may be more effective. It is
17 more effective, isn't it, for that purpose?

18 MR. MANN: I don't think I can honestly answer
19 that, sir.

20 QUESTION: Mr. Mann, you've spent about eight
21 minutes or more on the difference between the urine and
22 the blood tests. You have to win on both of them.

23 MR. MANN: Well --

24 QUESTION: Why are you drawing a line?

25 MR. MANN: Your Honor, I think that --

1 QUESTION: I mean, can you win on just one?

2 MR. MANN: Well, I think the Court could reach
3 a decision that because --

4 QUESTION: (Inaudible) you don't aim at both
5 of them.

6 MR. MANN: Well, I aim at both --

7 QUESTION: At one time you say urine is bad,
8 and the next time you say blood is bad.

9 MR. MANN: I do believe that the Court could
10 draw a distinction. I think they're both --

11 QUESTION: Do you want us to?

12 MR. MANN: -- bad because --

13 QUESTION: Do you want us to draw a
14 distinction?

15 MR. MANN: No, sir. I want you to say that
16 they're both improper.

17 QUESTION: Well, why are you arguing that?

18 MR. MANN: I think they're both improper. I
19 just wanted to demonstrate to the Court what the
20 distinction is between the two.

21 QUESTION: (Inaudible).

22 MR. MANN: The -- the whole concept of the
23 drug test and the alcohol test here is reasonableness
24 and fairness. For example, the -- the tests are
25 performed by companies that are not certified. These

1 drug companies -- and it's an absolute essential that
2 whoever performs these tests that they do be certified.
3 The -- the federal regulations, as they apply to the
4 federal government testing program, does require
5 certified laboratories in accordance with the National
6 Institutes on Drug Abuse. This regulation doesn't
7 provide that. That's one aspect of the reasonableness.

8 Another is --

9 QUESTION: I -- what is -- I don't see how
10 that has to do with whether -- whether my privacy has
11 been unlawfully and excessively invaded. You mean if my
12 privacy is invaded by a good scientist, it's okay, but
13 if it's by a bad scientist, it's not any good?

14 (Laughter.)

15 MR. MANN: No, sir. I think that it is one of
16 the factors in determining what privacy rights are
17 invaded, and --

18 QUESTION: How so?

19 MR. MANN: -- it is just one of the factors to
20 show that --

21 QUESTION: It seems to me it's a factor in
22 determining whether it's a -- it's a -- it's a -- an
23 effective program, but how can that bear upon the -- the
24 degree of invasion of my privacy?

25 MR. MANN: Because if -- in our judgment, if

1 the test is not valid and the consequences which flow
2 from that could be criminal prosecution, it goes to the
3 invasiveness of this test and it goes to the overall
4 reasonableness of the testing program. And that relates
5 to whether or not the search in this case is reasonable
6 or unreasonable and the consequences that apply and
7 affect the employee. And that's one factor.

8 QUESTION: Yes, Mr. Mann, but isn't one of the
9 purposes of this program to find out why these accidents
10 occur, not merely deterrence? That's one of the
11 rationales they put forward. And if you take these
12 tests and you find negative results, you can at least
13 rule out drug-relatedness or alcohol for a significant
14 percentage of the accidents. Isn't it -- doesn't it
15 have an informing purpose that at least is rational?

16 MR. MANN: I think it does -- in this case
17 it's not designed to determine that because we're only
18 talking about a microcosm of accidents. Last year and
19 the year before, we've had two years now of history.
20 Last year there were 170 events which triggered a test.
21 In the railroad industry, there are over 14,000
22 accidents or incidents each year. So, this is only 170
23 that they're looking at.

24 QUESTION: But (inaudible) 170 more serious?

25 QUESTION: Well, is it the more serious ones?

1 MR. MANN: That is not where the most people
2 are killed, Your Honor.

3 QUESTION: That's where anyone is killed.

4 MR. MANN: Pardon me?

5 QUESTION: Where anyone is killed.

6 MR. MANN: It's the least area where someone
7 is killed in the railroad industry.

8 The most people who are killed in the railroad
9 industry are at grade crossings. That's completely
10 exempt from this regulation. There were 5,000 --

11 QUESTION: But the fact is the regulation does
12 purport to focus on -- on accidents of a certain
13 demonstrated degree of gravity.

14 MR. MANN: It does, but that gravity is so
15 small that it doesn't show the causes of accidents in
16 the railroad industry.

17 QUESTION: Well, would it be valid if they
18 extended it to reach every accident? Is that the point
19 you're trying to make?

20 MR. MANN: It would certainly be more valid as
21 far as statistical data goes.

22 QUESTION: So, if they took more tests, then
23 it would be somehow more reasonable.

24 MR. MANN: As to the -- as to the data
25 gathering, it would have more reliability and validity.

1 But here we're only talking about 170 events.

2 QUESTION: (Inaudible). Do you think it's
3 very reasonable to talk about crossing accidents? The
4 railroad has hardly anything to do with crossing
5 accidents.

6 MR. MANN: In -- in many, that's true, Your
7 Honor. But that's one aspect.

8 Now, the other is --

9 QUESTION: Well, it's an important aspect --

10 MR. MANN: It is.

11 QUESTION: -- since you want to go by the
12 numbers.

13 MR. MANN: But they don't have --

14 QUESTION: Just eliminate all crossing
15 accidents, and how many have you got left?

16 MR. MANN: Oh, you have close to 2,000.

17 QUESTION: All right, 2,000, which you say the
18 railroad may, maybe, have something to do with.

19 MR. MANN: Well, we don't know as it relates
20 to alcohol or drugs. The point is that the government's
21 rationale for the governmental interest here is
22 deterrence, on one hand, and secondly, the statistical
23 data that they will get. But it really is
24 insignificant, and it's minimal -- the statistical data
25 part of it.

1 With respect to deterrence, I'd like to point
2 out to the Court that in the first 10 months when this
3 rule was operative in 1986, there were 3.7 percent found
4 to be positive for drugs. In 1987, it increased to 5.1
5 percent. For the first six months of this year, it's
6 6.5 percent which points out that, indeed, this is not a
7 deterrent, this rule, because it's not -- it's not
8 focused and it's not directed to the real problem.

9 QUESTION: So, the -- so, the greater the
10 incidence of -- of drug use, the less need for a test.

11 MR. MANN: No. I'm -- I'm saying, Your Honor,
12 that the basis of the government's rule is that this
13 would be a deterrent, this regulation. Now, the gut --
14 your gut feeling would be, sure, anything that's going
15 to -- urine, a blood test would be a deterrent. But the
16 facts are that this rule is not getting at the problem.

17 And on -- a comparison is that we have in the
18 railroad industry a program whereby all of these tests
19 that are provided in the federal rule plus additional
20 testing after certain accidents and incidents are
21 carried out. On the CSX system, as an example, which is
22 the largest railroad in the country, they perform
23 exactly the same tests as the federal rule plus
24 additional testing. And under that program, which is a
25 fair and balanced program, it shows 3.2 percent positive

1 throughout the system. Now, that is an effective
2 deterrent program. And --

3 QUESTION: Do you have any reason as to why
4 you think --

5 MR. MANN: Yes.

6 QUESTION: -- it deters more than the
7 government program?

8 MR. MANN: Yes, I do, Your Honor. First of
9 all, I don't believe that this program of the federal
10 government is directed at the real problem areas, first
11 of all.

12 Secondly, it is a -- a program which builds in
13 several components that is not here in this case. One
14 is there is an opportunity for rehabilitation. The
15 quality of the laboratories are stringently watched.
16 The --

17 QUESTION: I can see why those were -- are
18 fairness arguments, but I can't see why those would
19 provide more deterrence than the government program.

20 MR. MANN: Well, the -- the workers realize
21 that if we have a fair program, they are involved in it.
22 They are involved in this program from every level. And
23 by being involved, they assist in assuring that on this
24 railroad, since it is a voluntary program, that the
25 problem will be erased. And, indeed, it has been

1 effectively erased on the CSX system.

2 QUESTION: Well, is that a broader program
3 than one limited, as is the government program, to
4 post-accidents?

5 MR. MANN: It -- it's much broader, yes, sir.

6 QUESTION: And broader in the coverage of the
7 employees as well?

8 MR. MANN: It covers -- it covers those
9 employees who are -- who have actually entered into an
10 agreement with the railroad. But, in addition, the
11 railroad automatically extends this to every person in
12 the railroad system. And that is not the case --

13 QUESTION: Incidentally, Mr. Mann, do you make
14 any argument that this government program reaches
15 employees like dining car waiters and such?

16 MR. MANN: Oh, well, how it works --

17 QUESTION: Well, do you have any argument that
18 this goes to far in that respect?

19 MR. MANN: I have an argument that the rule as
20 drafted provides that the entire crew is tested. There
21 is no discretion. The entire crew is tested
22 automatically. And --

23 QUESTION: By crew you mean those involved in
24 movement of the train. Correct?

25 MR. MANN: On --

1 QUESTION: The Hours of Service Act --

2 MR. MANN: Hours of Service Act.

3 QUESTION: -- only covers those involved in
4 movement of the train.

5 MR. MANN: But let me give you --

6 QUESTION: Which would not be dining car
7 porters, right, and would not be sleeping car porters?

8 MR. MANN: Well, let me --

9 QUESTION: Is that right or wrong?

10 MR. MANN: That's not --

11 QUESTION: It does not include those people.

12 MR. MANN: That's not necessarily accurate
13 because if they are performing certain work, they can
14 perform dining car work and other related work, and that
15 would bring them under the coverage of the Hours of
16 Service Act on that train.

17 QUESTION: But the related work would have to
18 be work related to the movement of the train. Correct?

19 MR. MANN: To -- to -- not necessarily --
20 well, movement in the very general term. A ticket
21 taker --

22 QUESTION: Let me -- let me read you what the
23 Hours of Service Act says. "The term 'employee' means
24 an individual actually engaged in or connected with the
25 movement of any train, including hostlers," whatever

1 that is.

2 MR. MANN: That -- those persons who move
3 locomotives in yards.

4 But to give you an example, on the Amtrak
5 train in the Amtrak accident at Chase, the -- the ticket
6 takers on the train -- they were subjected to testing.
7 Now, they're Hours of Service employees. They are not
8 involved directly in the movement of that train in any
9 way, shape or form.

10 QUESTION: Well, it seems to me that's the
11 provision of the federal -- you ought to be contesting
12 the application of the Wage and -- of the Hours of
13 Service Act to those employees if that's the problem.

14 MR. MANN: Well, we're saying it's --

15 QUESTION: Surely that's a different issue. I
16 mean, we're dealing here, though, with a statute that
17 says you have to be engaged in or connected with the
18 movement of any train.

19 MR. MANN: But the rule is broader. It covers
20 all Hours of Service employees, but they don't
21 necessarily have to be involved in the movement of the
22 train at the time of an accident.

23 QUESTION: The rule refers to the definition
24 -- the rule only covers people covered by the Hours of
25 Service Act, doesn't it?

1 MR. MANN: Yes, sir. But they're not all --

2 QUESTION: Which only covers people connected
3 with the movement of the train.

4 MR. MANN: No, sir, that doesn't follow
5 because --

6 QUESTION: It doesn't?

7 MR. MANN: -- because a ticket taker on an
8 Amtrak train is I guess theoretically involved in the
9 movement of a train because they take up tickets. They
10 are covered under this rule. It's just too broad. They
11 have nothing to do with what caused that particular
12 accident.

13 QUESTION: Then -- then the Hours of Service
14 Act is too broad. The Hours of Service Act is --

15 MR. MANN: No, sir.

16 QUESTION: -- as I recall it --

17 MR. MANN: No.

18 QUESTION: -- says that you can't work for --
19 it's like we have the same thing for --

20 MR. MANN: Twelve hours.

21 QUESTION: -- for airline pilots that you
22 can't work an excessive period of time --

23 MR. MANN: Yes.

24 QUESTION: -- because it would be dangerous.

25 MR. MANN: Yes. And that's the purpose of

1 that law.

2 QUESTION: And that -- and that covers, you
3 say, conductors as well.

4 MR. MANN: Yes.

5 QUESTION: Well, if it --

6 MR. MANN: Sure.

7 QUESTION: If there's reason to cover them for
8 that, I guess there's reason to cover them for drug
9 abuse too.

10 MR. MANN: They don't want them overworked,
11 Your Honor, which is a good law. We have no problem
12 with the Hours of Service Act.

13 QUESTION: Oh, other employees can be
14 overworked, but just these --

15 MR. MANN: I think some are, yes. I think the
16 -- the law should be extended to other employees not
17 just those who are working on the train. It should be
18 extended to others.

19 QUESTION: Can -- can we assume for purposes
20 of -- of deciding this case that the vast bulk of the
21 employees covered by this rule are in safety-sensitive
22 positions?

23 MR. MANN: Yes.

24 QUESTION: I mean, that --

25 QUESTION: And --

1 QUESTION: There may be some on the fringes,
2 but we're really talking about safety-sensitive
3 (inaudible).

4 MR. MANN: That's correct. But it doesn't --

5 QUESTION: And even if -- even if the -- even
6 -- even if this regulation covers non-safety-sensitive
7 positions, it doesn't mean that it's invalid on its face.

8 MR. MANN: Not on its face.

9 QUESTION: Well, it would just be invalid to
10 that extent.

11 MR. MANN: But -- but it doesn't mean that
12 that employee was involved in any way in the cause of
13 the accident. We -- we believe that when you look at
14 the entire rule and how it's administered, the manner of
15 the test -- for example, the testing procedure itself is
16 one urinates under the direct observation of a
17 technician. And we think that's just overly broad and
18 overly reaching, and it's unfair the way that people are
19 treated here.

20 They are herded into -- all of the crew
21 members are herded into an atmosphere of tension, first
22 of all, because they don't know whether or not the test
23 is going to be accurate in the first place, and if it
24 shows any positive residue -- and you have to understand
25 also the numbers we're talking about.

1 We're dealing -- marijuana as an example in
2 nanograms. A nanogram is one-billionth of a gram. And
3 if it shows five nanograms, they consider that to be
4 positive.

5 There are no thresholds unlike the federal
6 regulations that deal with federal employees. There are
7 threshold limits below which it is considered to be
8 negative, a negative test result. Here it's .0001.

9 And if that shows any kind of residue, that
10 person is considered to be impaired by the regulation
11 and they're going to be fired. They're fired in the
12 railroad industry. Only a couple railroads provide for
13 rehabilitation unlike what the Attorney General stated
14 to you.

15 So, the consequences are grave. There's no
16 assurances that the test results are going to be
17 accurate. And you -- you have to deal with this in
18 terms of what's fair and reasonable.

19 QUESTION: Can't we deal with it without
20 tension?

21 MR. MANN: I don't.

22 QUESTION: Do you think this case is going to
23 be decided on tension?

24 MR. MANN: No, no, not on tension, but --

25 QUESTION: You're arguing it.

1 MR. MANN: But that is one of the aspects in
2 my judgment, Your Honor. The -- the testing standards
3 are such that it triggers both psychological intrusions,
4 which this Court has held to be one of the factors, as
5 well as physical intrusions. And certainly there are
6 psychological factors involved here to deal with what
7 intrusiveness is taking place. The fact that you are
8 subjected to these kinds of procedures --

9 QUESTION: (inaudible) the agreement on the
10 railroads, all of the employees have to get physical
11 examinations periodically?

12 MR. MANN: Yes.

13 QUESTION: Without this statute.

14 MR. MANN: That's correct.

15 QUESTION: So, getting a physical examination
16 doesn't give them tension, does it?

17 MR. MANN: But the physical examination, Your
18 Honor -- if someone is found to be ill, as an example,
19 they're not fired. They're given an opportunity to be
20 rehabilitated.

21 QUESTION: (Inaudible).

22 MR. MANN: Here they're fired.

23 QUESTION: The physical examination is not the
24 point. You're against the physical examination.

25 MR. MANN: No, sir. I'm not against the

1 physical examination.

2 QUESTION: You're against the physical
3 examination that includes a urine test.

4 MR. MANN: Yes.

5 QUESTION: Is that accurate?

6 MR. MANN: It does include a urine test.

7 And --

8 QUESTION: Well, doesn't -- doesn't that go on
9 all the time?

10 MR. MANN: It does from pre-employment, Your
11 Honor, and in pre-employment --

12 QUESTION: For years back.

13 MR. MANN: Yes. Oh, certainly.

14 QUESTION: No problem.

15 MR. MANN: No problem --

16 QUESTION: Blood tests.

17 MR. MANN: -- because it was consented to. It
18 was freely consented to.

19 QUESTION: (Inaudible) consented to in order
20 to keep your job.

21 MR. MANN: That's correct.

22 (Laughter.)

23 MR. MANN: But at the pre-employment stage,
24 you consent to that condition of employment.

25 QUESTION: In order to keep your job.

1 MR. MANN: The existing employees have not
2 consented to a alcohol and drug test for purposes of
3 determining usage. That is not what they've consented
4 to when they were first hired. They are imposing a
5 condition after the fact on the employee. And that goes
6 again to the -- to the aspects of voluntarily consenting
7 to an unconstitutional search.

8 QUESTION: It sounds -- it sounds to me like
9 you have a good breach of contract claim if this is
10 something that they weren't -- that wasn't --

11 MR. MANN: Well, Your Honor, you have a case
12 pending before you, which you have accepted cert in,
13 Conrail v. Railway Labor Executives' Association, in
14 this term which you will be hearing.

15 QUESTION: But surely that's a different
16 issue. I mean, it's not --

17 MR. MANN: Yes.

18 QUESTION: It seems to me it's not an invasion
19 of -- of privacy any more or less because it's a breach
20 of contract --

21 MR. MANN: No.

22 QUESTION: -- or because the consequence is
23 firing rather than -- rather than counseling, or -- or
24 because good or bad scientists are used. What does any
25 of that have to do with whether it's an invasion of --

1 MR. MANN: The consensual aspects, Your Honor,
2 whether or not the employee has consented to the -- the
3 invasion, the search. And we contend that is not
4 voluntary. It is a coerced consent.

5 QUESTION: The government doesn't rely on pure
6 consensual basis for the -- for the upholding of it.

7 MR. MANN: They -- in part only. They mandate
8 -- there's a mandated implied consent in the regulation.
9 And we contend that obviously is improper in this case
10 as well.

11 QUESTION: If -- if -- if the government were
12 arguing consent and it were right, that would be the end
13 of it. You wouldn't look into the reasonableness and so
14 forth.

15 MR. MANN: That's correct. That's correct.

16 QUESTION: Mr. Mann, is this situation
17 analogous at all to the situation after a fire where
18 we've held there can be a search without any --

19 MR. MANN: In -- in Michigan v. --

20 QUESTION: -- particularized suspicion?

21 MR. MANN: Yes. In Michigan v. Clifford and
22 Taylor --

23 QUESTION: Taylor, yes.

24 MR. MANN: -- you said that the fireman can go
25 on the scene to determine the cause of the accident.

1 However, where it goes to determining a violation of a
2 -- of a rule or a statute or regulation, that requires
3 probable cause or at least particularized suspicion.
4 And that's what we have here. It's a very similar
5 situation.

6 QUESTION: You think particularized --

7 MR. MANN: They are looking for violations.

8 QUESTION: You think particularized suspicion
9 is a threshold requirement for any drug testing program?

10 MR. MANN: That's what we believe based on
11 your decision.

12 QUESTION: Would that be true for the operator
13 of a nuclear plant?

14 MR. MANN: Well, there is one case, Your
15 Honor, the Rushton case, that the Court held that that
16 did not mandate particularized suspicion. But in that
17 case, there were no sanctions imposed on the employee.
18 It was a random test. The -- the results were
19 confidential. There were many factors of reasonableness
20 that was built into that rule that is absent here.

21 And the same thing with Shoemaker. In
22 Shoemaker, the jockeys -- they were directly regulated.
23 The employees are not directly regulated in the railroad
24 industry by statute. Only -- no one is licensed. Only
25 the -- the railroads themselves are subjected to the

1 regulations. And only recently did Congress say that
2 the Federal Railroad Administration had to license
3 engineers. That's still not in effect, but it's only as
4 to engineers.

5 Moreover, the Shoemaker case -- in the first
6 instance, there's only a letter warning. Secondly,
7 there's rehabilitation. And thirdly, only after three
8 events of positive is there any sanction imposed.

9 QUESTION: Mr. Mann, what about the physical
10 inspections that are required periodically? Is -- is
11 there -- does there have to be a particularized
12 suspicion that the individual is ill before the -- the
13 physical examination can be required?

14 MR. MANN: No, the physical examinations are
15 voluntarily agreed to by the employee periodically.

16 QUESTION: To keep their job.

17 MR. MANN: Yes, sure. They have to be fit.

18 QUESTION: Same with this.

19 MR. MANN: Only with one respect difference,
20 and that is this is an invasive search seeking to have
21 one fired; whereas the medical examination, once you're
22 rehabilitated, you're able to go back to work, and
23 you're not when you have a positive blood or urine test.

24 QUESTION: Thank you, Mr. Mann.

25 MR. MANN: Thank you.

1 CHIEF JUSTICE REHNQUIST: The case is
2 submitted.

3 (Whereupon, at 11:03 o'clock a.m., the case in
4 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1555 - JAMES J. BURNLEY, INC, SECRETARY OF, TRANSPORTATION, ET AL.,

Petitioners V. RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

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