ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CONSOLIDATED RAIL CORPORATION, Petitioners, vs. RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

CASE NO: 88-1

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v. : No. 88-1
RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

Washington, D.C.

Tuesday, February 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

DENNIS J. MORIKAWA, Philadelphia, Penna.; on behalf of Petitioner.

JOHN O'B. CLARKE, JR., Washington, D.C.; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

10:07 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 88-1, Consolidated Rail Corporation v. Railway Labor Executives' Association. Mr. Morikawa.

ORAL ARGUMENT OF DENNIS J. MORIKAWA

ON BEHALF OF PETITIONER

MR. MORIKAWA: Thank you. Mr. Chief Justice, and may it please the Court:

At issue today is the right of Conrail's Medical Department to continue its longstanding practice of establishing and maintaining the standards by which its employees will be deemed medically fit for duty.

The standards have always included Conrail's right to require that its employees submit to physical examinations, the purpose of which is to determine these employees' fitness for duty. These examinations have routinely been required throughout Conrail's history as part of its regular business.

The focal point of this litigation then is the addition by Conrail of a drug test to these routine physical fitness examinations. It is our contention this morning that the addition of that drug test was at least arguably related to the general fitness for duty

standards which Conrail had the right to maintain, as it had over the years. And, as a result, the challenge by the unions to the addition of this drug test to the physical examinations represented a claim which should have been resolved in the statutory adjustment process of arbitration provided under the Railway Labor Act.

We will demonstrate that the lower court exceeded the limited judicial role which the courts play in the process of determining the proper forum in which these disputes are to be resolved because in this case, we contend, that the lower court proceeded to decide the merits of the underlying dispute and in that process, exceeded that role which the courts have clearly carved out in determining whether minor disputes exist in this -- under the Act.

Now, I'd like to take a moment to examine Conrail's longstanding medical fitness for duty practices that have existed since 1976, the year when Conrail was first created, because we believe that these facts amply demonstrate the particular reasons why Conrail contended in the first place that the addition of the drug test was clearly related to its fitness for duty determinations.

First of all, since 1976, at the time Conrail first came into existence, the railroad had a Medical

Department which determined standards for employee fitness. Throughout the history of Conrail the Medical Department has had the discretionary right to always determine fitness-for-duty standards, part of that being the inclusion of these kinds of physical examinations. Not --

QUESTION: Is this -- is this pursuant to a collective bargaining agreement, Mr. Morikawa?

MR. MORIKAWA: No, your Honor, it was not. It was pursuant to the general policies that were implemented at the time that Conrail was created. But it was never bargained over with the unions. In fact, the whole issue of medical fitness-for-duty standards has been a subject which traditionally in the railroad industry has not been a subject over which the railroads and the unions have bargained.

QUESTION: Mr. Morikawa, I gather that before 1987 the medical screening did not include testing for drug use except on the basis of particularized suspicion. Is that right?

MR. MORIKAWA: The lower court in this case characterized the kind of drug testing that had been done as being done on particularized suspicion. And, frankly, your Honor, we're not quite clear what that term really means in the context of a physical

examination.

QUESTION: But we accept that as the case, do we not?

MR. MORIKAWA: As a matter of fact, we believe that if you look into the practices of the parties that did exist, it included not just testing at the discretion of a physician, as in that situation, but it also included drug testing that had been done by Conrail on a broader base in 1984 when for a period of six months it implemented drug testing across the board and part of these routine physical examinations.

QUESTION: Do you see any limits on the tests that Conrail could require for medical testing? Could it test -- initiate testing for AIDS or pregnancy, for example, in the urine specimens without characterizing it as a major dispute?

MR. MORIKAWA: We contend that Conrail had the right to determine fitness for duty, as it had been its practice.

QUESTION: Uh-huh.

MR. MORIKAWA: The question of whether or not AIDS relates to fitness for duty is certainly problematic. Or pregnancy, as to whether that relates to fitness for duty.

The question, however, is that the Medical

Department has seen fit to develop various standards over the years which in its judgment it felt appropriate to the question of employee fitness. As a consequence of that, the Medical Department, we contend, has had the right and must continue to have the right, based on these practices, to be able to respond to emerging threats to employee fitness for duty.

And in this particular situation, whether or not pregnancy or AIDS would represent a fitness for duty threat we don't know at this point, but we believe that the Medical Department should have that right to make determinations.

Now, I'd like to continue on --

QUESTION: Well, their system didn't work very well with respect to the Maryland disaster, did it?

MR. MORIKAWA: It certainly did not, your Honor. One of the problems that occurred at the Chase, Maryland accident on January 4, 1987 was the discovery consequently by the National Transportation Safety Board that the Conrail engineer and breakman involved in that collision had been using marijuana just prior to the accident.

And I think this highlights one of the critical problems that we've had to face with respect to the drug issue. I think it was quite well known at the

time that when Ricky Gates, the engineer of that Conrail engine, left the Baltimore Yard he was seen by a trainmaster who testified later that Ricky Gates seemed normal, did not seem to have any apparent problem or difficulty. And yet 15 minutes later the consequential crash occurred in the Northeast Corridor.

This highlighted in our minds the major problem that we had with respect to the question of drugs. The difficulty of detecting drugs and yet its profound impact on employee fitness and on performance of our employees.

QUESTION: Now, you have a new test out, I'll put it that way. To what extent does the desired test differ in any way as far as the individual is concerned from what it was before the test for drug was instituted? The blood is drawn -- is it any different with respect to the individual?

MR. MORIKAWA: The test that's involved in this case, your Honor, is a urine sample, not a blood test.

QUESTION: Yes.

MR. MORIKAWA: But the urine sample was required to be taken as part of the routine physical examinations back to 1976. So, this test has always been part of the physical.

QUESTION: But the patient does nothing any different now than he did before the test was refined?

MR. MORIKAWA: That is precisely correct, your Honor. The only thing we did in this case was to add another test to the existing urine sample to test for the existence of drugs under the circumstances.

QUESTION: And I suppose this is to be anticipated as medicine develops and we find out more about urine and its possibilities.

MR. MORIKAWA: To give you one example, the issue of cocaine has always been a profound problem in the industry and in the public at large. Only eight or nine years ago magazines were touting the fact that cocaine was a major new drug which had come on the scene and that people could use it and they could use it to their pleasure without worrying about the problems of addiction related to cocaine.

Seven or eight years later now, we now determine through the medical industry that cocaine -- it may be the most addictive drug in the market today and may represent the greatest threat to employee fitness. So, you see that the whole concept of medicine and the way it addresses certain kinds of problems constantly evolves in changes.

And in our situation we felt that it was

necessary to be able to have the Medical Department be in a position to be able to respond to these kinds of changes in employee fitness questions.

QUESTION: Mr. Morikawa, is the consequences of being unfit for duty for medical reasons -- are they determined by the collective bargaining agreement or are they set by the railroad?

MR. MORIKAWA: The consequences of being determined unfit for duty are determined by the past practices between the parties in this case.

QUESTION: And what were the consequences before this change?

MR. MORIKAWA: An employee who was disqualified based on a medical condition was disqualified from duty and was not paid until that same employee was requalified to go back to duty.

QUESTION: And have those -- are those same consequences attached to failure of this test a couple of times?

MR. MORIKAWA: Yes, your Honor. That same situation occurs here. An employee tests positive for drugs, is immediately disqualified, and is not paid, similar to all other conditions.

The slight difference in this situation, however, is that we have developed a response to deal

with the question of drugs. One of those responses is we have devised a network for providing drug counseling and assistance to employees, recognizing the drug-dependency problem that can exist --

QUESTION: And what happens if the employee fails two or three times?

MR. MORIKAWA: The employee goes into the program. There are two components to the program, as we have it. One is the counseling program. The employees work with drug counselors, and not a single employee has ever been disciplined in that program at all.

The other aspect of the program is a 45-day aspect. And that simply says this. If you are not dependent upon drugs, what the Medical Department says is: If you have drugs in your system, we don't want you coming back to duty.

So, the 45-day period was addressed by the Medical Department recognizing the fact that drugs potentially could stay in a person's system for up to 45 days. The employee in this situation who tests positive can test as many times as he or she wants to do in the 45-day period. If they test negative, they go back to work. If they test positive, nothing happens.

QUESTION: Will they ever get to the point where they are discharged?

MR. MORIKAWA: The end of the 45-day period could occur conceivably in which an employee refuses to test negative for the existence of drugs. And under those circumstances the employee has in our view taken a choice. That is, he said that he is not going to provide a urine sample that is clean of drugs in order to go back to --

QUESTION: Well, see, he's willing to provide the sample, but it doesn't turn out to be clean.

MR. MORIKAWA: Another aspect of the program is this --

QUESTION: Well, I'm trying to find -- is there a point where he'll be discharged?

MR. MORIKAWA: There is a point in this process in which an employee who is unable -- who does not provide a clean urine sample can be dismissed. But we contend that --

QUESTION: Now, was that true before under your old practice that you say this is just a continuation of?

MR. MORIKAWA: Employees have for years been required by the Medical Department to comply with its rules and regulations and instructions. And employees have in the past, for example, been disciplined or dismissed for failing to show up for a physical

examination.

QUESTION: Well, I understand. But, say, somebody got pneumonia and he came -- he thought he was well and he took a test, and no, you're not healthy enough to go back in to work. And then he comes back 45 days later and fails again. Would he be fired?

MR. MORIKAWA: That employee would probably be treated by the Medical Department given the fact that that was a physical condition that was affecting that employee.

I think the comparison, your Honor, if I can make that, is this. Employees who have an affliction -- that is, are drug-dependent -- are the real core of employees to be compared to the employees who are suffering from physical problems and maladies. As to those employees, our program provides assistance, counseling, and treatment.

As to employees who say they are not drug-dependent, our contention is that these employees are being told by the Medical Department simply to stop using drugs. That's a voluntary act on the part of the employee. He or she has a choice, to get the drugs out of their system or not go to work under the circumstances.

So, the volitional and non-volitional side of

drugs is the way that this has been reflected in the program.

QUESTION: Well, I'm not so much concerned about whether it's volition or not as whether it's a continuation of the past practice or if there is a significant change. And I think arguably it would be a significant change if the failure of this test could result in discharge while the failure of the prior test would just result in waiting another week or two to go back to work.

MR. MORIKAWA: Well, certainly, our contention in this case is that the purpose of this program -- and, in fact, the practical effect of this program, has not been disciplinary at all. Unfortunately, what the court did in this case --

QUESTION: But aren't you trying to get people addicted to drugs off -- off the line?

MR. MORIKAWA: We certainly are trying to prevent employees from using drugs in the industry because we believe it affects fitness.

But the problem we see here is that in determining the existence of the minor dispute in this case by determining the practical impact, the court in this case went beyond its limited role. It determined that because the impact -- potentially -- of the use of

drugs was different than it conceived the prior impact of other physical conditions, that this would change the question of whether or not Conrail's position was even arguable.

I think that's the important focal point of this case. What we are contending in this case is --

QUESTION: Is there a statute that we're dealing with here? What?

MR. MORIKAWA: The Railway Labor Act, your Honor.

QUESTION: What provision are we talking about? I mean, you've been talking for half of your time now and I don't even know what statutory standard is supposed to be met or not. What language of the statute are we talking about?

MR. MORIKAWA: The statutory language we're discussing is contained in two sections of the Act, Section 27 and Section 6 of the Act.

QUESTION: Where are they in the materials we have?

MR. MORIKAWA: They are at the end of the materials in your materials, at page -- beginning at page 131 is a list of the provisions of the Act.

QUESTION: 131 of what?

MR. MORIKAWA: Of the Joint Appendix. The

Section 2 Seventh is contained at page 134 of the Joint Appendix and provides, "no carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements in Section 156," which is Section 6 of the Act. Requiring --

QUESTION: Now, is that a minor dispute section?

MR. MORIKAWA: The question of minor dispute, your Honor, is not found in the Act per se. Implicit in the Act --

QUESTION: Well, isn't that -- isn't there a question here whether we have a major dispute or a minor dispute?

MR. MORIKAWA: That is correct.

QUESTION: If it's a major dispute, there's jurisdiction. If there's a minor dispute, there is not --

MR. MORIKAWA: That's correct.

QUESTION: -- in the district court. And it was held below that it was a minor dispute?

MR. MORIKAWA: That is right, your Honor.

QUESTION: And therefore no jurisdiction in the district court?

MR. MORIKAWA: That's correct. Yes. The court -- forgive me.

QUESTION: In this -- disputes in this drug testing program, may not some be minor and some be major?

MR. MORIKAWA: We contend that the disputes regarding the right of Conrail to add drug tests, or the particular details of the effect that the drug may have on particular employees are matters for arbitration.

QUESTION: Minor disputes?

MR. MORIKAWA: They are minor disputes.

QUESTION: Uh-huh. And the court of appeals held --

QUESTION: They were major.

MR. MORIKAWA: They were major.

QUESTION: And the district court?

MR. MORIKAWA: The district court concluded it was a minor dispute. What the district court did in this case -- and I think this is a good place to focus on what the court did -- the district court looked at the totality of the circumstances of the past practice and they focused on the precise issue that we began with today. They looked at Conrail's ongoing practice --

QUESTION: Forgive me. Don't they look at whether or not -- a subject matter in any respect of the collective bargaining agreement if there is one?

MR. MORIKAWA: They attempt to examine whether in the past practices of the parties the change that is being sought here has any plausible relationship to --

QUESTION: Well, doesn't the existence or not of a collective bargaining agreement bear on whether you have a major or a minor dispute?

MR. MORIKAWA: It conceivably can. In fact, the whole question is if the dispute is over an agreement or a past practice, then it is a minor dispute because that's your classic issue that goes to arbitration.

QUESTION: How do we know that? What is minor and major a shorthand for in the statute? The statute doesn't say major or minor, does it?

MR. MORIKAWA: In Section 3 of the Act, Justice Scalia, our provision --

QUESTION: I really would like to know what language of the Act we're talking about here.

MR. MORIKAWA: Okay.

QUESTION: What language of the Act is equivalent to a major dispute? What language of the Act is equivalent to a minor dispute? That will help me to understand what major and minor is supposed to be.

MR. MORIKAWA: Okay. Your Honor, the language of the Act pertaining to major and minor disputes --

there is no -- there is no proviso for major and minor disputes in the Act. That's a court-made concept.

QUESTION: Well, but it's based on the language of 152 Seventh and 153 First. I mean, the Elgin, Joliet, & Eastern --

MR. MORIKAWA: Correct.

QUESTION: -- case didn't just go off totally --

MR. MORIKAWA: That's right.

QUESTION: -- into the air.

(Laughter.)

MR. MORIKAWA: The court in Elgin read into the Act two distinct kinds of matters or disputes that can arise. The first being major disputes which are disputes over new conditions in the future, new agreements. And those are provisions which would be governed by Section 6.

The other aspect of these kinds of disputes are minor disputes. The larger number of disputes that occur day to day between carriers and unions.

QUESTION: What was the basis for this distinction? What statutory language was the basis for this distinction?

MR. MORIKAWA: Section 3 of the Act, 153 of the Act, which provides for the Statutory Adjustment

Boards to determine disputes that arise daily between carriers and unions.

QUESTION: And that's the operative language?

MR. MORIKAWA: That's correct, your Honor.

QUESTION: Where -- where is that found in your Joint Appendix?

MR. MORIKAWA: It's found at page 138 and 139. If you proceed through Section 3 of the Act, to page 141, we see the various provisions of the Act pertaining to the authority of the various Adjustment Boards to resolve disputes between employees and certain unions and the carriers.

And what Elgin read into that was the understanding that these kinds of disputes, minor disputes, would be resolved through the provisions of the Act in Section 3 by one of these designated statutory Adjustment Boards.

QUESTION: No particular phrase or clause? Just -- just from the whole -- I mean, it goes on for a number of pages -- and one reads all of that and gets a notion of minor dispute?

MR. MORIKAWA: That's essentially correct, your Honor. The court looked into the provisions of the existence of the Adjustment Boards and read into that the fact that these kinds of disputes would be resolved

by these Adjustment Boards, and that's precisely why they were created.

Now, the issue involved in this case, in terms of the lower court's decision, pertain to the court's conclusion that this was not a minor dispute, but in fact a major dispute. And we believe what drove the court's decision was drug testing standing alone.

In the court's opinion, the lower court concluded, that because drug testing was so controversial, was so full of practical dilemmas and problems, it looked back -- it caused it to look back into the past practices of the party, and instead of looking at the overall right which Conrail had to determine fitness for duty, it focused only on one narrow portion of the past practice involving when Conrail had tested based on what it described as particularized suspicion.

By doing that, we contend --

QUESTION: When you say "what it described," you mean the court or Conrail? Which is the antecedent?

MR. MORIKAWA: The court described that as particularized suspicion. As I mentioned earlier, there is no concept of particularized suspicion in the medical community or in our Medical Department. Physicians do not test on particularized suspicion. They examine

employees and they determine solely whether or not that employee may have a detectable condition.

Now, in this situation what the court did then was to do essentially what we often ask the arbitrator to do in the process of adjustment. We ask the arbitrator to determine whether or not this new policy was in fact justified by the old, whether or not drug testing is important or not, whether or not there is some impact, for example, on employees.

Because the point that needs to be emphasized here is -- in this situation the Court's role is only to determine the forum for deciding the dispute, not whether somebody gets a resolution of the dispute.

QUESTION: And I take it that the Adjustment Board itself can determine that it's a major dispute after it hears the evidence?

MR. MORIKAWA: The Adjustment Board could determine precisely that. It could say -- it could contend in its findings, for example, that the drug testing program, as involved in this case, was not in fact justified by the prior practice.

QUESTION: Is there explicit statutory authorization for that authority?

MR. MORIKAWA: There is no specific statutory authorization to determine a major dispute per se. What

the Adjustment Boards do is they simply determine the dispute in question between the carrier and the union. And in doing that, they determine whether or not that practice was in fact justified.

The issue of major and minor, again, is a court-ordered decision. That is, a court determination which has been developed in a series of circuit courts.

QUESTION: But I thought that at some point the Adjustment Board could say, "We've concluded that this is a major dispute and, therefore, that it is not within our purview to resolve." Am I incorrect?

MR. MORIKAWA: The characterization of what the Adjustment Board finds I think is incorrect in this respect -- the Adjustment Board solely determines whether or not the current practice was justified by the prior practice in the course of deciding the grievance. But it doesn't make a specific finding that a major dispute exists or a minor dispute exists in the process.

QUESTION: Yeah, but it does decide whether it's within its jurisdiction.

MR. MORIKAWA: It certainly does do that.

QUESTION: And that's really -- and if it thinks it's a minor dispute, it will decide it. If it isn't a minor dispute, it won't.

MR. MORIKAWA: Well, it would decide in either

event. For example, in other cases involving special boards of adjustment where they have considered the use of certain kinds of detection devices, the courts have seen fit to address the question of whether use of detection devices in aid of a rule was in fact justified by the prior practice.

But in concluding that they weren't, in some case, in a sense, your Honor, they are deciding that this was not justified and, therefore, it was not a minor dispute. But, by the same token --

QUESTION: And not arbitrable.

MR. MORIKAWA: And in a sense not arbitrable. But the Adjustment Board still was making a determination based upon a review of the past practice and the change sought by the carrier. And I think that is a critical component of the error of the court below in this case.

QUESTION: But Mr. Morikawa, can I go back to Justice Scalia's concern about the statute? Your argument seems to proceed as though this is all a judge-made doctrine. But isn't it true that paragraph 7 says in so many words that the carrier cannot make a change in the rates of pay, rules, or working conditions of its employees as a class except by following the bargaining procedure.

That is the definition of a major dispute, is making a change prohibited by that section unless you follow a certain procedure, isn't it?

MR. MORIKAWA: That is essentially correct.

QUESTION: That --

MR. MORIKAWA: That's the operative provision that talks to that.

QUESTION: And so you have to convince us that this is not a change in rates of pay, rules, or working conditions of its employees as a class. That's the issue, isn't it?

MR. MORIKAWA: Essentially correct. That was part of the complaint below, that the action of adding the drug test was a change in the agreements between the parties with respect to --

QUESTION: As a class and affecting the entire population, as opposed to a minor dispute with a particular employee who claims that he did or did not -- or, there was or was not a violation of the collective bargaining agreement.

MR. MORIKAWA: That's correct.

QUESTION: And why isn't this precisely that kind of change?

MR. MORIKAWA: It's not that kind of change, your Honor, because, as the courts have long recognized

-- a number of circuit court decisions which have considered it -- if you are doing something which is consistent with your past practice, that is at least arguably related to your past practice, then you have not made a change which violates Section 2 Seventh by definition.

And, by the same token, if it is a minor dispute, the courts -- the cases recognize that the carrier has the right to continue to take that action whether or not it is subsequently bargained over between the parties. This gets into the issue of the status quo that is supposed to exist at the time that bargaining occurs, for example.

This Court in Shore Line --

QUESTION: Mr. Morikawa, I know you haven't wanted to talk about this. But if you're going to talk about it, I would think you would want to emphasize the phrase "as embodied in agreements." It's not just changes in rates of pay, rules, or working conditions of employees as a class. But it's changes of pay -- in rates of pay, rules, or working conditions as embodied in agreements.

And I suppose your argument is that unless the agreement specifically provides for something which the employer wants to change then it's a minor dispute. If

he wants to change the actual specific provision of the agreement, then you need a new agreement and that goes to the major bargaining provisions of the Act.

Isn't that the language that's crucial for you? As embodied in agreements?

MR. MORIKAWA: As embodied in agreements certainly is the concept that we're discussing here. As embodied in agreements -- the language of embodied in agreements as interpreted by this Court has also been intended to include prior practices and customs broadly conceived between the parties that have been in existence at the time.

So, as a consequence --

QUESTION: And even if not spelled out?

MR. MORIKAWA: Even if not --

QUESTION: Like with the bargaining agreement itself, nevertheless we regard it as part of it if it's part of the relationship in the past between the parties?

MR. MORIKAWA: Yes, your Honor. The whole point is that not all agreements are specifically written down in form. But, in fact, many of the agreements exist by practice and custom between the parties based upon the past practice. And that's precisely the kind of agreements that we're talking about here. The past practice being the right of

Conrail to set these medical fitness for duty standards.

The question then was whether the addition of the drug test changed that agreement, or was it arguably, at least, related to that agreement in a way that it would allow an arbitrator to ultimately determine who was right and wrong.

And we find that in this case, your Honor, the Court proceeded to take that additional step to determine who was right and who was wrong and the consequences of that action. And I think in doing that it usurped the function that arbitration plays in this process.

I'd like to close at this point and reserve my remaining time.

QUESTION: If I may just ask you one more question. The Government's brief at page 9 says that if the Adjustment Board concludes that a dispute is a major one, it will issue an order to that effect and will remit the parties to negotiation and mediation under the statute.

Do you agree with that?

MR. MORIKAWA: We disagree with that, your Honor. We contend that the issue for the Adjustment Board is solely to decide whether or not the practice as a whole in the context of agreements may well have been

justified as --

QUESTION: So you disagree that an Adjustment Board can ever say this is a major dispute, we have no jurisdiction, we remit you to mediation? That's wrong as a matter of law?

MR. MORIKAWA: The Adjustment Boards do not make determinations, your Honor, with respect to the violations of the Act per se. We believe that that jurisdiction is in the courts, to determine per se the question of a violation.

QUESTION: So, an Adjustment Board must adjudicate any dispute that's submitted to it by a court even if it considers it to be major?

MR. MORIKAWA: No. The Adjustment Board, your Honor, in that situation would resolve the dispute in the context of the claims that exist between those parties.

QUESTION: Well, how can it do that if it's a major dispute?

MR. MORIKAWA: It would not determine a major dispute because a major dispute would be something that would be subject to bargaining.

QUESTION: Let's assume that it finds that it's a major dispute after it has been remitted to it.

MR. MORIKAWA: If it finds that it's a major

dispute in that situation, in that hypothetical, then the parties would be relegated to -- to --

QUESTION: Well, then the Government's brief is correct.

MR. MORIKAWA: It's -- It's correct to the extent as follows. If the Adjustment Board finds that you have a major dispute in a case, the parties would then be relegated to deciding whether or not they want to bargain over it.

QUESTION: By order of the Board.

MR. MORIKAWA: It would not necessarily mean they would have to bargain. It's really a question of choice on the part of the union or the carrier in this case. If something is a major dispute, it doesn't necessarily mean that the parties must go out and then begin bargaining. Bargaining begins by the initiation of a process in Section 6, which is a service of a notice initiating the process of bargaining.

In addition to that, the question of the particulars of a bargain that they may want to talk about may be the subject of a different version, completely different, from what the Adjustment Board may have characterized the dispute below.

So that in that sense the Adjustment Board's decision is not dispositive with respect to what is to

be bargained in the future. It's simply a determination of whether or not the parties dispute in this case was justified by the practice or was a new practice that was not contemplated by the original.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Morikawa. We'll hear now from you, Mr. Clarke.

ORAL ARGUMENT OF JOHN O'B. CLARKE, JR.

ON BEHALF OF RESPONDENTS

MR. CLARKE: Mr. Chief Justice, may it please the Court:

This case, although it arises in a sense out of a drug testing problem, is not really a drug testing case. That's just the facts in it. The real issue in this case is the jurisdiction of the federal courts to enforce the specific commands of the Railway Labor Act.

Now, going to those specific commands and what are involved here, we submit the first and most crucial command that's involved is Section 2 First of the Act, that the carriers exert every reasonable effort to make and maintain agreements and to settle all disputes.

QUESTION: Where do we find that? In the --

MR. CLARKE: 2 First, your Honor, is at page 131 of the Joint Appendix. The crucial phrase in that is to exert every reasonable effort.

The second issue, or the second statutory

provision that's involved, is Section 2 Seventh of the Act, which was added in the 1934 Act. 2 First was a part of the original 1926 Act, and it has remained unchanged since that Act was enacted. 2 Seventh was added in 1934 and it was added, according to its legislative history, to emphasize the intent of Two First and 6 that no change shall be made in rates of pay, rules, or working conditions as embodied in an agreement, except in the manner prescribed in the agreement or in the manner prescribed in Section 6.

That was, according to the legislative history -- which you can go back to the Bankruptcy Act of '33 and the Emergency Transportation Act of '33, where this provision came from -- the intent of that provision was to stop practices that had been going on where the carriers had been by bulletin suddenly changing the actual working conditions of the employees, claiming that they weren't in violation of the agreement, but just making the change.

QUESTION: So, one of the critical question is, is this a change or not?

MR. CLARKE: That is correct, your Honor. The next statutory provision that's involved in this case is 3 First(l) of the statute. 3 First(l) is located at page 142. And what -- excuse me?

QUESTION: Where do we find that?

MR. CLARKE: On page 142 -- (i) -- you go back into the indentation again. It's right at the very bottom.

And in the middle of that paragraph what it basically -- well, up in the early part -- what it says is that disputes between an employee or group of employees and the carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, and working conditions are to be handled on the property up to the usual manner. And then, if still unresolved, may be referred by either party to an Adjustment Board.

Now, a crucial factor of this particular section is that this is very unique, for this reason. In the Railway Labor Act both the employer and the employees can refer a dispute over the interpretation or application of an agreement to the dispute resolution grievance procedure, the Adjustment Board process, the arbitration found -- that you have under the NLRA.

And the NLRA, it's normally -- sometimes limited to just the employees. But in the Railway Labor Act, from the very beginning -- and this was a provision that started in 1926 and actually predates that, as we explained it in our brief -- it goes back to the

railroad's control by the Federal Government in 1918. Both parties to the dispute, if they are unsatisfied with the results on the property can have an outside force take a look at it and determine what the real meaning of the contract is.

Now, the next provision that's involved in this case --

QUESTION: Before you leave that, does that refer to minor and major disputes?

MR. CLARKE: Your Honor, this is the tricky question in this whole case, what is major and minor.

QUESTION: But --

MR. CLARKE: That is --

QUESTION: -- in your view, does the language that we've just examined refer both to major and minor disputes?

MR. CLARKE: Your Honor, it refers simply to the jurisdiction of the Board to determine -- Adjustment Board to determine the interpretation of a contract. That is typically a --

QUESTION: So then in --

MR. CLARKE: -- minor dispute.

QUESTION: So then in that view the Adjustment Board could determine the dispute, whether or not it was major or minor?

MR. CLARKE: The Adjustment Board's sole role, your Honor, is to determine what the contract means. It doesn't determine whether a dispute is major or minor.

QUESTION: Mr. Clarke, now you've really confused me. You -- You say if it comes within (i), it is typically a minor dispute?

MR. CLARKE: Yes, your Honor.

QUESTION: I thought that minor dispute was shorthand for its coming within (i). That it had no other meaning except that.

MR. CLARKE: That's the problem that's arisen. That was not the intent of the statute but --

QUESTION: Well, the statute doesn't even use minor dispute or major dispute.

MR. CLARKE: That's correct, your Honor. But those terms were used, and they were common terms in the industry in the 1920s and in 1934 when the Act was amended.

QUESTION: Well, but that's how the courts have been using them, certainly, as synonymous with what comes within (i).

MR. CLARKE: That's correct, your Honor. But what point --

QUESTION: If all you mean to say is that what's a minor dispute may be a big deal, that's fine

with me.

MR. CLARKE: No, your Honor, I'm not saying --

QUESTION: I understand that.

MR. CLARKE: The colloquial use of the terms back in the time the Act was amended in '34 when the Adjustment Board process was set up and it was given exclusive jurisdiction over interpretation of contracts was that that would deal with what were known in the industries as minor disputes.

What has happened since 1934 is the courts have said if you have an interpretation issue involved in a dispute, it's a minor dispute.

QUESTION: Exclusively?

MR. CLARKE: Exclusively. And that's the problem.

QUESTION: Only because it's a difficulty or dispute over the meaning of the contract or a provision of the contract.

MR. CLARKE: That is correct, your Honor.

QUESTION: And if it's a dispute that does not involve the interpretation or the meaning of the contract, then is it a major dispute?

MR. CLARKE: If it involves -- a major dispute involves a change. And the point that we're trying to emphasize here, your Honor, --

QUESTION: Right.

MR. CLARKE: -- Is that a change can carry with it a dispute over the interpretation of a contract.

QUESTION: Of course. But it seems to me that all the courts have done is to -- is to give the benefit of the doubt to the -- to the least severe mechanism. What -- What we're arguing about here is whether this particular change is a change in the rates of pay, rules, or working conditions as embodied in the agreement under Part 7.

MR. CLARKE: That's correct, your Honor.

QUESTION: Or, rather, whether it's a change arising out of the interpretation or application of the agreement.

MR. CLARKE: Your Honor, not a change.

QUESTION: And it seems to me what the courts have said is that if there is any doubt it, if it's arguable, we'll consider that what we're arguing about is the interpretation of the agreement rather than a change in the agreement.

MR. CLARKE: That's correct, your Honor. But one --

QUESTION: Well, why isn't that reasonable?

MR. CLARKE: The one dispute I have of what you said is that if it's a change arising out of the

interpretation or application of an agreement it's a minor dispute -- that's not what the statute says.

The difference is this: If it's a change, unless it is authorized by the agreement, it is prohibited by the statute.

QUESTION: Sure. Of course.

MR. CLARKE: Now --

QUESTION: It's not a change, however, if the agreement is interpreted one way. And it is a change if it's interpreted another way.

MR. CLARKE: Your Honor, that gets into the question of when you have a dispute over whether you have a change. That is not what we're dealing with here.

In this case there is without a doubt a change. Now, --

QUESTION: Everyone agrees to that, Mr. Clarke?

MR. CLARKE: Your Honor, the record is a --

QUESTION: No, I --

MR. CLARKE: -- a finding of fact.

QUESTION: Does the other side agree with you that what's involved here is a change?

MR. CLARKE: Your Honor, I don't think they agree, but the records -- the finding of fact below, which is unassailable here, is that it is a change. So, --

QUESTION: Would you agree with -- do you agree with the arguable standard or not?

MR. CLARKE: Your Honor, the arguable standard is a good test of the court's jurisdiction where you have a question as to whether there is a change.

QUESTION: Uh-huh.

MR. CLARKE: But once you --

QUESTION: Well, what if it's just -- what if the question is, well, if you interpret the contract one way, this is a change; if you interpret it another way, it's not a change? And it's arguable that the contract would -- there is an arguable interpretation of that contract which would indicate this is not a change?

MR. CLARKE: That -- That's contrary to the intent of the drafters of the Act as to what they meant by change. They --

QUESTION: So, you say -- you say if it's arguable, the courts have to decide it in the first instance?

MR. CLARKE: No, your Honor. What --

QUESTION: What do you say?

MR. CLARKE: What I'm saying is that if there is a change, what the courts have to do is to enforce the status quo obligation that the Act carries with it.

QUESTION: Well, can they do that until they

determine that there has been a change?

MR. CLARKE: Your Honor, there is -- the Act --

QUESTION: Don't they have to determine that what's involved is a change before they can do anything?

MR. CLARKE: Yes, your Honor. But the point that I'm getting at on change is the change that the statute used is the literal broad meaning of the word change and not the meaning of the word change in that it's something that is authorized by a contract.

And that's -- you take a look at 2 Seventh and it brings it out in this sense. If 2 Seventh means that if you have a dispute over whether or not there is a change in what's going on, and whether that change is authorized, the dispute is basically this. I say I'm authorized by the agreement to do it so, therefore, I'm not changing it. You say I'm not authorized by the agreement so, therefore, it's a change.

We have a dispute as to whether there is a change. If that's what 2 Seventh means, then the language, except in the manner prescribed in the agreement, means nothing.

QUESTION: But what about the word arguable? Where did the word arguable come into RLA jurisprudence? It's not in the statute.

MR. CLARKE: It's not, your Honor. The --

QUESTION: Did it come from Elgin, Joliet & Eastern?

MR. CLARKE: No, your Honor, it didn't come from that. It came basically in the -- it first started to prop up as plausible and then arguable in the '60s.

QUESTION: Where did it prop up?

MR. CLARKE: It comes basically from --

QUESTION: Or crop up?

MR. CLARKE: -- the NLRA concept of clear and patent breach.

QUESTION: Well, but the courts -- courts construing the RLA have used the term, have they not?

MR. CLARKE: Yes, your Honor.

QUESTION: Has this term -- Court used it?

MR. CLARKE: This Court has never used that term.

QUESTION: The term arguable?

MR. CLARKE: Arguable. It has never -- this Court has never addressed the issue except tangentially in the Chicago and Northwestern case as to a classification of a dispute as major or minor. In Chicago and Northwestern there was a moratorium clause specifically prohibiting a bargaining Section 6 notice. The carrier claimed that the bargaining notice was prohibited by the moratorium clause, which said that no

notice on that subject would be served for this period of time.

And then they argued that since the question of whether our interpretation of the moratorium clause is correct, there is no obligation to bargain over the notice. This Court rejected that by saying only one word need be said about that.

It's -- It's impossible to talk about a proposal to change an agreement as not being what was covered by Section 6.

QUESTION: Mr. Clarke --

QUESTION: Mr. Clarke, back up a minute. What exactly was the change here?

MR. CLARKE: Yes, your Honor. The change in this case was -- there are two sets of rules that apply. The medical fitness standards which the courts below found are in fact an implied agreement. So we're -- this is an agreement case.

Secondly, as Rule G, and the manner in which Rule G has been enforced, the implied agreement that the record shows exist is that Rule G is enforced solely by sensory observations of the supervisors and by particularized cause. That goes into the question of the doctor and the doctor's taking of the test.

The difference between the two -- and this is

where the change comes in -- is this. Under medical fitness when someone is disqualified for medical fitness purposes, they are held out of service until the medical fitness problem dissipates or is cured or is somehow corrected. Under Rule G, if you are found guilty of violating Rule G which simply prohibits the use of drugs or hallucinogens, alcohol or hallucinogens, while on duty or while subject to call, you are subject to discipline, which includes being fired.

Medical fitness never had discipline involved in it. Under this standard, we now have 45 days to test negative or you're discharged. No other medical fitness problem is treated in that way.

QUESTION: Now, is it true that for another disease that requires some kind of medical consultation or treatment that if the employee were ordered to take certain treatment to cure the disease and the employee refused to cooperate and do that, that no disciplinary action could be taken?

MR. CLARKE: Your Honor, there is nothing --

QUESTION: The employee fails to show up for the medical appointments or fails to do what the doctor instructs, can no discipline be enforced?

MR. CLARKE: Your Honor, there is nothing in the record on that. We would submit that discipline

cannot be enforced by that. You can't rule --

QUESTION: Well, the other side takes the other view and says, "We've always disciplined employees who fail to cooperate."

MR. CLARKE: They discipline employees who fail to show up for -- to take an exam, to come in for a routine physical or some kind of scheduled exam. That's accepted practice.

QUESTION: Uh-huh.

MR. CLARKE: And they fail to come in -- they are then disciplined for not complying with carrier instruction.

QUESTION: And suppose that it's a completely curable medical condition if they take the medication that's prescribed or do the exercises that they're told to do and they just refuse to do it? They can't be disciplined?

MR. CLARKE: Your Honor, we submit no. They can't be returned to duty until they comply with the instructions. There is a set procedure of another -- outside doctor's opinion, and then an arbitration if you have a dispute over whether the standards and stuff are proper. But the point is, we submit the person cannot be disciplined in that type of situation because what is happening is that the medical standard is that you're

taken out of service until you're cured.

What is going on is a question of whether or not there is any insubordination.

QUESTION: You said there are set procedures for having you taken out of service until you're cured. Are those in the contract or are they outside the contract?

MR. CLARKE: They're mainly in the contracts, your Honor. There are procedures for outside doctors for getting a second opinion. And then the -- if there is a dispute, there's an arbitration process. There's --

QUESTION: Well, aren't there a whole set of procedures under the -- that the company has adopted for the administration of its own physical examinations that are not in the contract?

MR. CLARKE: That's correct, your Honor. Those are the medical fitness policies that the company establishes. And they have --

QUESTION: May --

MR. CLARKE: -- historically been established by prohibition.

QUESTION: May I go back to a question that you started to answer and then I don't think you ever answered. What if you have a dispute over whether there

is a change within the meaning of the statute? Who decides that?

MR. CLARKE: We submit, your Honor, that there is a -- that if there is a dispute over a -- whether there is a change, the -- that dispute, if the carrier's position that what it is doing is not a change is arguable -- in other words, that the union's position --

QUESTION: Arguable that it's not a change?

MR. CLARKE: Arguable --

QUESTION: Who decides that?

MR. CLARKE: The court makes that threshold determination. Now, that is what has been the standard in --

QUESTION: The Adjustment Board can't make that determination?

MR. CLARKE: Your Honor, this is the problem that we have. The fact that something is labeled as a major dispute doesn't eliminate the jurisdiction of the Adjustment Board to resolve the contract interpretation issue. Even a frivolous claim, the unions have the right to present to an Adjustment Board.

So, an Adjustment Board can make the determination that there is or is not a change. What is done in the court is not in any way affecting the Adjustment Board's jurisdiction. Now --

QUESTION: You support the use of the word arguable then, don't you?

MR. CLARKE: I do for a limited type of test, your Honor. Essentially what the union submits is that you have to look at 2 Seventh for the standard on the court's jurisdiction. The courts clearly have the jurisdiction to enforce 2 First. They clearly have the jurisdiction to enforce 2 Seventh.

Now, 2 Seventh said no change shall be made if there is a dispute over whether or not change is used in the statute. And the legislative history makes it clear that whether or not a carrier claims a right under a contract to make the change is not the issue as to whether there is a change. The change that --

QUESTION: That is not what 2 Seventh says. It does not say all changes. It says all changes in working conditions as embodied in agreements.

MR. CLARKE: That's right.

QUESTION: Suppose a railroad decides that it's going to open its locker room 15 minutes later than it used to, that's a change.

MR. CLARKE: That's right.

QUESTION: Do you have to go through the massive --

MR. CLARKE: No, your Honor.

QUESTION: -- negotiations procedures --

MR. CLARKE: No.

QUESTION: -- for that? Why not? Because the agreement didn't say anything about that particular subject and, therefore, it's a change in the working conditions but not a change in working conditions as embodied in the agreement. So, what's always at issue under 2 Seventh is whether it's a change in what had been agreed to.

MR. CLARKE: Not --

QUESTION: So you have to get to the issue of whether it's arguable that this was agreed to or not. Not just whether it's arguable that this is a change.

MR. CLARKE: Your Honor, it's not whether there's a change in what was agreed to. It's whether there is a change that is affecting what is -- what was agreed to. That's what the legislative history makes clear.

QUESTION: Well, I'm reading the statute. It says working conditions as embodied in agreements.

MR. CLARKE: Yes, your Honor. That was added in 1934 at the request of the railroads because they indicated that working conditions -- the conditions of employment are specifically established by agreement.

Now, the point --

QUESTION: In which case is, is this a change in something that's been agreed to. And if it arguably is a change in something that's agreed to, it's major -- minor if it is clear that nothing that's been agreed to is being changed here, you don't have to go through a major renegotiation of the contract.

MR. CLARKE: Your Honor, there are two aspects that are being confused into one. There is the question of notice. What triggers the obligation of notice. And the second question is what is the status quo obligation -- that is in place -- comes into place once the notice obligation is triggered.

What the legislative history shows is that language means -- and this was added basically at the request of labor -- that if the carrier is making a change that affects rates of pay, rules, or working conditions that are embodied in an agreement.

The clearest example are the line sales -- even though it might not be prohibited by an agreement, a violation of the agreement, if what they are doing changes the working conditions. And the prime example of that is the use of the legislative history of 1924 where Mr. Richberg explained the intent of this language. And that was that where they -- the contracts at that time had the expiration clauses that provided

that they died at the end of a year unless 30 days prior to that time notice of change had been given.

And the purpose of the statute that they were proposing back in 1924, which was enacted as 2 First and 2 Sixth, was that even though the contract language said this is -- you can change, you might make all your changes, they couldn't do it if what was being done would affect the rates of pay, rules and working conditions while that bargaining process was going on.

QUESTION: Why isn't my locker room example covered by your theory? Why don't you have to go through a major renegotiation for that?

MR. CLARKE: Because, your Honor, whether or not you report 15 minutes or a half hour later is not affecting the working conditions that are embodied in the agreement. But where you change the --

QUESTION: It affects working conditions, doesn't it?

MR. CLARKE: But not as embodied in an agreement. And for that reason it is not one that requires notice. But, assume that you get --

QUESTION: That's -- that's my point.

MR. CLARKE: Right.

QUESTION: When you put the stress in, as embodied in an agreement, it seems to me that's the

other side's case.

MR. CLARKE: It is not, your Honor, for this reason. If you interpret something as being -- if there's a question as to whether there is a change in the literal use of that word that the Congress used, then you do have a question -- we have to interpret the agreement first to determine if there's a change. But where you clearly have a change and the carrier comes back and says, "But it is authorized by the agreement," that's the point we're getting to here.

They recognize that there is a new policy that was implemented. It's clear that it's different than what they did before. But they are coming in and saying, "We have the right under our agreement with you to make this change."

So, the difference between this case and the other case, the arguable standard which is the reverse of the NLRA's clear and patent breach of contract standard, or breach -- is basically this. Where you have a dispute as to whether the contract is being changed by what they're doing, the Adjustment Board has the ability in enforcing the contract to give complete relief to both sides.

But where the dispute is whether the change is authorized by the agreement -- not whether the agreement

is being interpreted properly -- if the dispute is whether the change is authorized by the agreement, the only thing the Adjustment Board can say is that no, it's not, or yes, it is.

If the Adjustment Board says it is not, then what you have has been a change in working conditions that's not in the manner prescribed by Section 6, not in the manner prescribed in the agreement. And that is a major dispute.

But, in the meantime, by the standards that the courts have been applying recently, adopting the arguable standard to this defense, defensive use of an agreement, is that the status quo obligation has been changed. And the point that I'm trying to get to in all of this --

QUESTION: You -- You don't support the reasoning of the Third Circuit then, although it ruled in your favor?

MR. CLARKE: We do, your Honor, in the sense -- to this degree. In this case it's not even arguable that there was in fact an authorization to make this change. But the reason why we're presenting this standard, this view of Section 2 First and Sixth is that the courts have combined the status quo concept with the minor dispute concept and they've twisted things

around. The lower courts have twisted around. And when you look at a dispute as being all major or all minor and never the twain shall meet, what you come up with is you adulterate the Act.

The Act was intended, from the very initial enactment in 1926, to put a status quo obligation on all disputes. No change shall be made until the Act's processes have been completed is what the intent of the Act was.

In the initial 1926 Act minor disputes were also considered by the Congress. The only difference was that minor disputes initially went to an Adjustment Board that could be set up by voluntary agreement. And if that Adjustment Board was able to resolve it, well, that ended the problem. But if the Adjustment Board didn't resolve it, it went immediately back -- if any party requested -- to the mediation process. And from the mediation process to the Emergency Board process.

And during that entire processing no party shall make any change in the conditions out of which the dispute arose.

QUESTION: Mr. Clarke, can I ask you a question?

MR. CLARKE: Yes, sir.

QUESTION: Would it be consistent with what

you've just said all the way through for the railroad to say after you filed your lawsuit, well, we didn't think there was any change here, we think we were just making a -- pursuing a past practice that is implicitly authorized by the collective bargaining agreement? But a dispute now seems to have arisen and therefore, pursuant to subparagraph (i), we will file some kind of a proceeding before the Adjustment Board and say, please tell us whether we are right or wrong about our reading of the agreement.

MR. CLARKE: That is correct, your Honor, and that's the point that we are trying to make here.

QUESTION: And had they done that, and had the Adjustment Board said, yes, this is authorized by the agreement, then your lawsuit would be gone.

MR. CLARKE: Well, that's correct, your Honor, because then it isn't being in a manner authorized by the agreement. But until that --

QUESTION: And also, you could have done that too, couldn't you?

MR. CLARKE: Your Honor, the unions could also protest, but the unions' position is that there is no way you could say that the unions by agreeing to allow the carrier to set medical fitness standards has ever agreed to allow the merger of medical fitness and drug

testing. They are two separate standards. In one you're not fired; the other one you are fired.

QUESTION: What you're saying is it is so clear that there is no change in the terms of the agreement that it's not even arguable --

MR. CLARKE: That's correct, your Honor.

QUESTION: -- and, therefore, no basis -- there is no way in the world the arbitrator could have --

MR. CLARKE: That is correct, except for one problem. We are now to this Court, for the first time, addressing the interplay between major and minor disputes. And the point that we have to emphasize to this Court is that if the lower courts -- and I don't just mean the Third Circuit, but all of the courts -- standard is applied --

QUESTION: There have been about five of them, have there not?

MR. CLARKE: Well, your Honor, it's basically all of the -- except possibly the Tenth Circuit -- have adopted the arguable standard. And we have no objection to the arguable standard where the Adjustment Board can give complete relief, it can resolve the entire dispute. But where the Adjustment Board is one step in the resolution of the dispute, where if the Adjustment

Board concludes that there is no contract authorization for what is going on -- not that it violates the agreement, it changec the working conditions because you're taking away the man's seniority, but it doesn't violate it -- then what you have is the Adjustment Board can say to the employees, "Sorry, folks, we can't give you any relief because you haven't gotten the contract which prohibits what they're doing."

The only thing that prohibits what they're doing is the statute, and the statute's status quo period. So, what that means, when the Adjustment Board rules a couple of years down the pike, is that in the meantime all of this was being done in violation of the statute.

Now, Pitney, when this Court addressed the concept of minor dispute and the Court's jurisdiction, the Court said that where there is a clear violation of the statute the court should not withhold its hand. But where there is a question as to whether there is a violation of the statute the court in the exercise of its equity discretion should withhold its hand and let the Adjustment Board resolve the case.

QUESTION: What happens, again, with my locker room example where they just want to open the locker room 15 minutes later?

MR. CLARKE: Your Honor, --

QUESTION: That's a change. Okay?

MR. CLARKE: It's not a change --

QUESTION: It's a change within the scope of changes that I think the agreement allows the employer to implement. Right?

MR. CLARKE: Your Honor, --

QUESTION: No?

MR. CLARKE: -- whether it's in the scope doesn't matter. It's not a change unless you have an agreement dealing with the starting time and the location. A change of 15 minutes in when you can go in or out is not the type of change that requires a notice. This is the point I'm getting -- there is a difference between the notice obligation under 2 Seventh and the status quo --

QUESTION: Is there anything written in this agreement about -- about medical -- medical inspections?

MR. CLARKE: There is nothing written in the agreement --

QUESTION: It's just a practice, right?

MR. CLARKE: No.

QUESTION: And that's why --

MR. CLARKE: No, it is not --

QUESTION: -- you say it's not --

MR. CLARKE: -- your Honor.

QUESTION: No?

MR. CLARKE: That's why this is a different case than a practice case. If this was a practice, there would have to be something that would trigger the bargaining process, and that would have to be a change in agreements, in the working relations that are embodied in the agreement.

In this case the record below, according to the courts, provides that there is in fact an implied in fact agreement dealing with Rule G, its enforcement, medical fitness. So we are now dealing --

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Clarke.

MR. CLARKE: I'm sorry.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:07 o'clock a.m., the case in the above-entitled matter was submitted.)

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:

Consolidated Rail Corporation, Petitioner, v. RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., CASE NO. 88-1

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

BY Judy Freilicher

(REPORTER)