Oklahoma Law Review

Volume 42 | Number 3

1-1-1989

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RECENT DEVELOPMENT

DRUG TESTING: The Supreme Court Joins the War Against Drugs

In two cases decided the same day, the United States Supreme Court joined the Bush administration in its war against drugs.[1] Because the court decided both cases under the same precedent, only the first decision, *Skinner v. Railway Labor Executives' Association*, will be addressed.

Respondents, The Railway Labor Executives Association ("Railway"), brought the first suit in the United States District Court for the Northern District of California. Railway sought to enjoin, on various statutory and constitutional grounds, the Federal Railroad Administration's ("FRA") enactment of drug testing regulations.[2]

The injunction centered around the Federal Railroad Safety Act of 1970 which authorizes the Secretary of Transportation to promulgate any necessary rules or regulations for all areas of railroad safety.[3] Finding that alcohol and drug abuse by railroad employees posed a serious threat to safety, the FRA prescribed regulations that mandated blood and urine tests for employees who are involved in certain train accidents. The FRA also adopted regulations that do not require, but do authorize, railroads to administer breath and urine tests to employees who violate particular safety rules. The issue in this case was whether these regulations violate the fourth amendment.

Of interest to this case were subparts C and D of the new regulations.[4] Subpart C, the mandatory section, is titled "Post Accident Toxicological Testing." Subpart C provides that railroads shall assure that all covered employees of the railroad directly involved in a "major train accident," defined as any train accident that involves (1) a fatality, (2) the release of hazardous material accompanied by an evacuation or a reportable injury, or (3) damage to railroad property of $500,000 or more, provide blood and urine samples for testing by the FRA.[5] The regulations also require the railroad to collect blood and urine samples for testing after an "impact accident," defined as a collision that results in a reportable injury, or in damage to railroad property of $50,000 or more.[6] The railroad is also

1. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Rab, 109 S. Ct. 1384 (1989).

2. At issue were various regulatory provisions now embodied in 49 C.F.R. §§ 219.1-.505 (1988).

3. *Skinner*, 109 S. Ct. at 1407; The Federal Railroad Safety Act of 1970, 45 U.S.C. § 431.

4. Subpart C is set forth at 49 C.F.R. §§ 219.201-.213 (1988); subpart D is found at 49 C.F.R. §§ 219.301-.309 (1988).

5. 49 C.F.R. §§ 219.201, 219.203 (1988).

6. *Id.*

obligated to test after "any train accident that involves a fatality to any on-duty railroad employee."[7]

After the accident, the railroad must transport all crew members and other covered employees directly involved in the accident to an independent medical facility where each employee must provide blood and urine samples.[8] The regulations also require that the FRA notify tested employees of the test results and afford them an opportunity to respond in writing before the issuance of any final investigative report.[9] Employees who refuse to provide the blood or urine samples are not allowed to perform covered services for nine months, but they are entitled to a hearing concerning their refusal to take the test.[10]

The regulations of subpart D, the permissive section, are titled "Authorization to Test for Cause." This section authorizes railroads to require covered employees to submit to breath or urine tests in certain circumstances not addressed by subpart C. The railroad may order the test (1) after a reportable accident where a supervisor has a reasonable suspicion that an employee's acts or omissions contributed to the occurrence or severity of the accident, or (2) in the event of certain specific rule violations including noncompliance with a signal and excessive speeding.[11] The railroad may also require breath tests where a supervisor has a reasonable suspicion that an employee is under the influence of alcohol.[12]

In a 7-2 decision, with Justice Marshall and Justice Brennan dissenting, the United States Supreme Court reversed the decision of the Ninth Circuit and held that the alcohol and drug tests contemplated by subparts C and D of the FRA's regulations are reasonable within the meaning of the fourth amendment.[13] Before the Court rendered its decision, it had to determine whether the tests were performed by a government actor and then whether the tests amounted to searches and seizures.[14]

The Court first reasoned that the fourth amendment does not apply to a search or seizure by a private party at the party's own initiative.[15] However, the fourth amendment does protect against such intrusions if the private party acted as an instrument or agent of the government.[16] The Court concluded that the tests conducted by private railroads in reliance on subpart D are not primarily the result of private initiative because it was the government that removed all legal barriers to the subpart D testing and

7. 49 C.F.R. § 219.201(a) (1988).
8. 49 C.F.R. § 219.203 (1988).
9. 49 C.F.R. § 219.211(a)(2) (1988).
10. 49 C.F.R. § 219.213 (1988).
11. 49 C.F.R. § 219.301 (1988).
12. *Id.*
13. *Id.* at 1422.
14. *Id.* at 1411. The fourth amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the government or those acting at their discretion. U.S. CONST. amend. IV.
15. *Skinner*, 109 S. Ct. at 1411.
16. *Id.*

made plain its strong preference for testing.[17] In addition, the Court emphasized that the government mandated that the railroads not bargain away the authority to perform the tests granted by subpart D.[18] According to the Court, these are "clear indices of the government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment."[19]

The Court next held that the testing procedures amounted to searches and seizures under the fourth amendment.[20] The Court stated that it has long recognized that a compelled intrusion into the body for blood is a fourth amendment search.[21] The Court concluded that "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."[22] The Court also held that the later chemical analysis of the blood sample is a further invasion of the employee's privacy interest.[23] Likewise, the Court found the urine tests to be searches under the fourth amendment.[24]

But finding that the fourth amendment was applicable to the regulations was only the beginning of the Court's inquiry. The Court stated that the "Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable,"[25] and that what is reasonable will depend on all the circumstances surrounding the search and the nature of the search itself.[26] Accordingly, the Court concluded that "the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests."[27]

In examining its past criminal cases wherein the balance was struck in favor of the procedures described by the warrant clause of the fourth amendment, the Court indicated that it has recognized exceptions to this rule when special needs beyond the normal need for law enforcement make the warrant and probable cause requirement impracticable.[28] Thus, the Court first held that the government's interest in regulating the conduct of railroad employees to insure safety presents a special need beyond normal law enforcement that may justify departure from the usual warrant and probable

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1412.
21. *Id.*
22. *Id.*
23. *Id.* The same is also true of the breath testing procedures required under subpart D of the regulations. *Id.*
24. *Id.* at 1413.
25. *Id.* at 1414.
26. *Id.*
27. *Id.*
28. *Id.* Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. *Id.*

cause requirements.[29] The Court stated that this act covers only employees engaged in safety sensitive tasks presenting a need beyond normal law enforcement.[30]

Next, the Court reasoned that the only purpose of a warrant is to assure the citizen that the intrusion is authorized by law and that it is narrowly limited in its objectives and scope.[31] Likewise, the Court noted that a warrant also provides the detached scrutiny of a neutral magistrate, thus insuring an objective determination of whether an intrusion is justified in any given case.[32] Nevertheless, the Court concluded that a warrant would do little to further these objectives in the case of the FRA drug testing because the circumstances justifying the testing and the permissible limits of the intrusions are narrowly and specifically defined in the regulations and are well known to covered employees.[33] In addition, the Court found that under this drug testing scheme there were virtually no facts for a neutral magistrate to evaluate.[34]

The Court also reasoned that the government's interest in dispensing with the warrant requirement is at its strongest when, as here, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[35] The Court found that imposing strict warrant procedures upon railroad supervisors, who would otherwise have no reason to be familiar with such procedures, would simply be unreasonable.[36] Thus, the Court concluded that imposing a warrant requirement upon the drug testing procedures would add little to the assurances of certainty and regularity already afforded by the regulations, while at the same time, would hinder, and in many cases frustrate, the objectives of the government's testing program.[37] Therefore, the Court held that a warrant is not essential to render the intrusions of the FRA drug testing procedure reasonable under the fourth amendment.[38]

The Court next indicated that a warrantless search must be based on a probable cause to believe that the person to be searched has violated the

29. *Id.* The Court compared the government's interest in regulating the conduct of railroad employees to the government's interest in supervision of probationers or regulated industries, or its operation of a government office, school, or prison. *Id.*

30. *Id.* The Court reasoned that the persons covered by these regulations include those engaged in handling orders concerning train movements, working on operating crews and engaged in the maintenance and repair of signal systems. *Id.*

31. *Id.* at 1415.

32. *Id.*

33. *Id.*

34. *Id.* at 1416.

35. *Id.* The Court recognized that alcohol and other drugs are eliminated from the blood stream at a constant rate and that the blood and breath samples taken to measure whether the substances were in the blood stream when a triggering event occurred must be obtained as soon as possible. *Id.* The Court reasoned that the delay necessary to procure a warrant could result in the destruction of valuable evidence. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

law.[39] The Court, however, recognized that in limited circumstances, "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[40] The Court held that the intrusions in this case do not require individualized suspicion.[41]

The Court found that the intrusions on privacy under the FRA testing program are very limited because an employee consents to significant restrictions on his freedom of movement by accepting railroad employment, and few railroad employees are free to come and go as they please during working hours.[42] The Court recognized that privacy expectations of the covered employees are diminished because they participate in an industry that is pervasively regulated to insure safety.[43] Therefore, the Court found that the testing procedures contemplated by subparts C and D pose only limited threats to the justifiable expectations of privacy of the covered employees.[44]

The dissent by Justice Marshall, with whom Justice Brennan joined, was concerned that this case marked a return to the World War II relocation camp cases.[45] The dissent reasoned that "[p]recisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great."[46]

The dissent read the past precedent of the Court differently than the majority, and found that a search may be conducted only pursuant to a warrant or under one of the recognized exceptions to the warrant requirement.[47] The dissent concluded that the Supreme Court could only relax the probable cause standard where the government action clearly fell short of a full-scale search.[48] Furthermore, the dissent found that even if the testing program was analyzed under a multifactor balancing test rather than under the literal terms of the fourth amendment, the program would still be invalid.[49] The dissenting justices reasoned that the benefits of suspicionless

39. *Id.* The Court has held that when the balance of interest precludes insistence on a showing of probable cause, the Court has usually required some quantum of individualized suspicion before concluding that a search is reasonable. *Id.*

40. *Id.* at 1417.

41. *Id.*

42. *Id.*

43. *Id.* at 1418. Safety is a goal dependent, in substantial part, on the health and fitness of the covered employees. *Id.*

44. *Id.* at 1419.

45. *Id.* at 1422 (citing Hirabayashi v. United, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944)).

46. *Id.* History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. *Id.*

47. *Id.* at 1424.

48. *Id.*

49. *Id.* at 1430.

blood and urine testing are far outweighed by its impositions on personal liberty.[50]

While the dissent has some valid points, the majority's view is the better reasoned. The only difference between the two views is how restrictively the majority and dissent read the search and seizure precedent of the Court. The majority demonstrated why it employed the balancing test rather than the dissent's restrictive warrant requirement. The majority backed its balancing analysis and conclusions with law.

The dissent is simply concerned that the Court could extend this decision to frightening limits in future search and seizure cases. They worry that *Skinner* could open the door to significant drug testing in the work place. Arguably, the majority's rationale could lead to unreasonable and regrettable positions such as mandatory AIDS testing for all Americans. From this point, it is only a small step to a total loss of fourth amendment protection from search and seizure.

But the majority opinion, if followed closely, could never be the catalyst for such a narrowing of fourth amendment rights. The reasoning employed by the majority is designed only to allow drug testing in the most limited circumstances involving substantial public safety issues and employees already subject to considerable regulation. While the Court could conceivably expand *Skinner* to frightening limits, such enlightened and capable jurists would never open this Pandora's box.

50. *Id.* at 1431.