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The *Conrail* "Arguably Justified" Test and a Public Employer's Unilateral Imposition of an Unconstitutional Drug Testing Program Under the Railway Labor Act

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The Railway Labor Act[1] ("RLA") imposes obligations on railway and airline employers to bargain with employee unions over pay, workplace rules, and working conditions. The RLA divides employer-employee disputes into two categories, which the courts have termed "major disputes" and "minor disputes."[2] A major dispute arises when an employer unilaterally attempts to "change the rates of pay, rules or working conditions of its employees . . . except in the manner prescribed in [existing collective bargaining] agreements."[3] A major dispute must be resolved through an often long and arduous process of bargaining and mediation.[4] Minor disputes, which involve a party's "interpretation or application of [existing] agreements concerning rates of pay, rules, or working conditions,"[5] are subject to compulsory and binding arbitration before the National Railroad Adjustment Board ("NRAB").[6] Significantly, during a major dispute a court must grant an injunction preserving the pre-dispute status quo until the dispute is resolved,[7] but during a minor dispute the pre-dispute status quo is not similarly preserved.[8]

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[1] 45 USC § 151 *et seq* (1988).

[2] See, for example, *Consolidated Rail Corp. v Railway Labor Executives' Association*, 491 US 299 (1989) ("*Conrail*").

[3] 45 USC § 152(7) (1988).

[4] 45 USC § 156 (1988).

[5] 45 USC § 152(6) (1988).

[6] 45 USC § 153(1)(i) (1988).

[7] 45 USC § 156. See *Detroit & T. S. L. R. Co. v Transportation Union*, 396 US 142 (1969) (upholding an injunction to maintain the pre-dispute status quo during arbitration of a major dispute).

[8] *Conrail*, 491 US at 304. Compare *Locomotive Engineers v Missouri-K-T Railroad Co.*, 363 US 528, 531 (1960) (noting that during a minor dispute the employer is not obliged to preserve the pre-dispute status quo).

In *Consolidated Rail Corp. v Railway Labor Executives' Association*,[9] the Supreme Court established the standard for determining whether an employer-employee dispute is "major" or "minor" under the RLA. The Court held that a dispute is minor if either party can "arguably justify" the disputed action under the existing agreement.[10] Applying the "arguably justified" test, the *Conrail* Court held that the railroad's unilateral inclusion of urinalysis drug screening in all periodic and return-from-leave physical examinations of employees constituted a minor dispute to be arbitrated before the NRAB.[11] The result of the Court's determination was to keep the drug testing program in effect pending the NRAB's resolution of the dispute.[12] Significantly, because the union did not allege irreparable injury in its request for preliminary injunctive relief, the Court explicitly declined to resolve whether an injunction based on a claim of irreparable injury would be appropriate.[13]

The Supreme Court's decision in *Conrail* does not prescribe the appropriate response to a public employer's[14] unilateral imposition of an unconstitutional policy of purely random, mandatory, and suspicionless drug testing of its employees.[15] Two pre-*Conrail* Supreme Court decisions suggest that absent a compelling interest such as public safety, such a testing program would violate employees' Fourth Amendment right to remain free of un-

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[9] 491 US 299 (1989).

[10] Id at 307.

[11] Id at 320.

[12] Id at 320.

[13] *Conrail*, 491 US at 304 n 5.

[14] This Comment focuses upon the actions of public sector employers subject to the RLA. Such employers may not unilaterally act in a way that infringes upon their employees' constitutional rights. A private sector employee is protected in this manner only where the private employer's actions constitute "public action" because of heavy government regulation. See generally *Survey of the Law on Employee Drug Testing*, 42 U Miami L Rev 553, 567-609 (1988) (discussing the constitutional implications of employee drug testing); Note, *Mandatory Drug Testing of Public Sector Employees: Constitutional Implications*, 65 U Detroit L Rev 315 (1988).

[15] This Comment addresses in particular the imposition of a purely random, mandatory, and suspicionless drug testing program because, under two recent Supreme Court decisions, such a testing program is clearly unconstitutional. See Part III of this Comment. "Purely random" means that the test does not distinguish between workers in safety-sensitive positions and those in non-safety-sensitive positions. "Mandatory" means that the employees must submit to the testing. "Suspicionless" means that the employer has no reasonable grounds for suspecting an employee's drug use. Finally, the hypothetical contemplates that the employer has unilaterally imposed the unconstitutional testing program over the objections of the employees.

For a further discussion of the reasons that the testing program is unconstitutional and the relevance of these factors, see Part III of this Comment.

reasonable searches and seizures.[16] Under *Conrail*, however, a court might determine that, given practice, usage, and custom, a public employer's unilateral imposition of such a program constitutes a minor dispute. Because the pre-dispute status quo is not preserved during a minor dispute, the employer's drug testing program would remain in effect pending the NRAB's resolution of the dispute. In the interim, the program would violate the employees' Fourth Amendment rights.

This Comment argues that the *Conrail* "arguably justified" test does not adequately protect employees' Fourth Amendment rights when a public employer unilaterally imposes a purely random, mandatory, and suspicionless drug test. This Comment therefore proposes that a court faced with this issue should adopt a presumption that a disputed unconstitutional program is not "arguably justified" and thus that the dispute is major, thereby preserving the pre-dispute status quo and protecting employees from deprivation of their constitutional rights.

Part I of this Comment examines the distinction between major and minor disputes under the RLA. Part II describes the *Conrail* "arguably justified" test for distinguishing between major and minor disputes, noting that the *Conrail* Court declined to decide whether preliminary injunctive relief to preserve the pre-dispute status quo would be appropriate during a minor dispute.

Part III argues that a public employer's imposition of a purely random, mandatory, and suspicionless drug testing program violates its employees' Fourth Amendment right to remain free from unreasonable searches and seizures. Part III also observes that because deprivation of employees' constitutional rights constitutes irreparable injury, a preliminary injunction is ordinarily the appropriate remedy. After *Conrail*, however, a disagreement over such a test might constitute a minor dispute, allowing the program to continue during NRAB arbitration.

Part IV then examines cases addressing whether a court may grant a preliminary injunction preserving the pre-dispute status quo pending the NRAB's disposition of a minor dispute where constitutional rights are implicated. Part IV argues that once a court characterizes a dispute as minor, it may not subsequently

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[16] *Skinner v Railway Labor Executives' Association*, 489 US 602, 616-21 (1989) (suggesting the unconstitutionality of requiring public sector employees to submit to a mandatory drug and alcohol testing program absent a compelling governmental interest); *National Treasury Employees Union v Von Raab*, 489 US 656, 665 (1989) (requiring that a mandatory drug testing program of public sector employees comport with the reasonableness requirements of the Fourth Amendment).

grant a preliminary injunction because it no longer retains jurisdiction over the dispute.

Part V concludes that a court faced with this issue should adopt a presumption that a disputed unconstitutional program is not "arguably justified" and thus that the dispute is major. Even though a court may desire to protect employees from a possible violation of their constitutional rights by enjoining further testing pending NRAB resolution of the dispute, the court may not enjoin the program after classifying the dispute as minor because it no longer retains jurisdiction over the dispute. Because a court should not determine that an unconstitutional program is "arguably justified" by practice, usage, and custom,[17] imposing a judicial presumption that a disputed unconstitutional program is not "arguably justified" takes seriously the *Conrail* dividing line between an "arguably justified" policy and a unilateral change in the terms of a collective bargaining agreement while protecting employees from violation of their rights.

I. THE DISTINCTION BETWEEN A MAJOR DISPUTE AND A MINOR DISPUTE UNDER THE RLA

A. The Definition of a Major Dispute Under the RLA

The RLA divides employer-employee disputes into two categories, commonly termed "major" and "minor." In defining a major dispute, the RLA provides that no carrier "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" or through the mediation procedures set forth in the RLA.[18] The Supreme Court has held that a major dispute

> relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not

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[17] See generally Comment, *Employee Drug Testing: Federal Courts Are Redefining Individual Rights of Privacy, Will Labor Arbitrators Follow Suit?*, 44 U Miami L Rev 489 (1989) (arguing that a union is extremely likely to contest an employer's unilateral imposition of an unconstitutional drug testing program).

[18] 45 USC § 152(7).

> to assertion of rights claimed to have vested in the past.[19]

To resolve a major dispute, the parties must undergo a complex process of RLA-mandated bargaining and arbitration: "Until they have exhausted those procedures, the parties are obligated to maintain the status quo, and the employer may not implement the contested change in rates of pay, rules, or working conditions."[20] As a matter of law, the union may request a preliminary injunction to preserve the pre-dispute status quo.[21]

B. The Definition of a Minor Dispute Under the RLA

The RLA provides for compulsory NRAB arbitration of minor disputes,[22] defined as disputes that grow "out of grievances or out of the interpretation or application of [existing] agreements concerning rates of pay, rules, or working conditions."[23] Minor disputes pertain to

> "the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case *the claim is to rights accrued, not merely to have new ones created for the future*."[24]

Unlike a major dispute, during which the union is entitled to a preliminary injunction preserving the pre-dispute status quo, during a minor dispute the court normally does not retain juris-

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[19] *Conrail*, 491 US at 302, quoting *Elgin, J. & E. Railroad Co. v Burley*, 325 US 711, 723 (1945).

[20] Id at 302-03.

[21] See Marion Crain, *Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table*, 64 NYU L Rev 1286, 1299 (1989).

[22] The RLA provides that "[a] minor dispute in the railroad industry is subject to compulsory and binding arbitration before the [NRAB] . . . or before an adjustment board established by the employer and the unions representing the employees." *Conrail*, 491 US at 303-04.

[23] 45 USC § 152(6) and § 153(1)(i).

[24] *Conrail*, 491 US at 303, quoting *Burley*, 325 US at 723 (emphasis added).

diction to preserve the pre-dispute status quo.[25] *Conrail*, however, left open the question of whether a court retains jurisdiction to grant a preliminary injunction preserving the status quo in a minor dispute where the disputed change may inflict irreparable harm on employees by depriving them of their constitutional rights.[26]

II. THE *CONRAIL* "ARGUABLY JUSTIFIED" TEST

In *Consolidated Rail Corp. v Railway Labor Executives' Association*,[27] the Supreme Court established the "arguably justified" standard for determining whether an employer-employee dispute is major or minor under the RLA. The *Conrail* Court held that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major."[28] The Supreme Court stressed the "relatively light burden which the railroad must bear" in establishing that the dispute is minor and thus subject to the exclusive jurisdiction of the NRAB.[29]

In *Conrail*, a railroad employees' union opposed the railroad's unilateral imposition of urinalysis drug screening as part of all periodic and return-from-leave physical examinations.[30] The Court held that inclusion of drug testing in these physical examinations was "arguably justified" by the implied terms of the collective bargaining agreement between the railroad and the union, thus constituting a minor dispute within the exclusive jurisdiction of the NRAB.[31]

In holding that the railroad's testing scheme was arguably justified, the Court first noted that "[c]ollective bargaining agreements often incorporate express or implied terms that are designed to give management, or the union, a degree of freedom of action within a specified area of activity."[32] In addition, the Court held that

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[25] Id at 304.

[26] Id at 304 n 5.

[27] 491 US 299 (1989) ("*Conrail*").

[28] Id at 307.

[29] Id, quoting *Brotherhood of Maintenance of Way Employees, Lodge 16 v Burlington N Railroad Co.*, 802 F2d 1016, 1022 (8th Cir 1986).

[30] Id at 300.

[31] *Conrail*, 491 US at 320.

[32] Id at 308.

> if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the [NRAB].[33]

Therefore, if an employer can demonstrate that an implied-in-fact contractual term grants it discretion to make a particular change or alteration in working conditions, then the dispute is minor. In determining whether such an implied term exists, a court should interpret the agreement in light of "'practice, usage, and custom.'"[34]

Observing that the plaintiff railroad had always required periodic and return-to-duty physical examinations, and noting that "[i]n the past, the parties have left the establishment and enforcement of medical standards in [the railroad's] hands,"[35] the *Conrail* Court found an implied-in-fact agreement that the railroad would determine the scope of such examinations.[36] Thus, the minor dispute fell within the exclusive jurisdiction of the NRAB.[37]

Significantly, because the railroad employees' union did not allege irreparable harm in their request for injunctive relief, the *Conrail* Court declined to resolve "whether a status quo injunction based on a claim of irreparable injury would be appropriate."[38] In a footnote, however, the Court alluded to a First Circuit case holding that a "union [might] be able to enjoin changes in working conditions if it would be impossible otherwise later to make the workers whole."[39] The Court also cited a case in which

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[33] Id at 310.

[34] Id at 311, quoting *Transportation-Communication Employees Union v Union Pacific Railroad Co.*, 385 US 157, 161 (1966).

[35] *Conrail*, 491 US at 317.

[36] Id at 317-20. See also Crain, 64 NYU L Rev at 1316-17 (cited in note 21) (observing that in *Conrail* the Supreme Court accepted the argument that the employer could choose its desired drug-testing methodology based upon an implied-in-fact term in the collective bargaining agreement).

[37] Id at 319.

[38] Id at 304 n 5. See also *Air Line Pilots Association International v Alaska Airlines, Inc.*, 898 F2d 1393, 1400 (9th Cir 1990) (Brunetti dissenting) (noting that under *Conrail* it is uncertain whether a court retains jurisdiction to issue a preliminary injunction based on the traditional showing of irreparable injury).

[39] *Conrail*, 491 US at 304 n 5, citing *Air Line Pilots Association International v East-*

the Sixth Circuit did not resolve whether a court could grant a preliminary injunction in a minor dispute based on a showing of irreparable harm.[40]

The *Conrail* Court also declined to resolve whether the absence of "cause"[41] in the railroad's testing justified enjoining the testing on Fourth Amendment grounds.[42] Instead, the Court merely observed that "it is not the role of the courts to decide the merits of the parties' dispute" in the context of a minor dispute.[43]

III. THE UNCONSTITUTIONALITY OF A PURELY RANDOM, MANDATORY, AND SUSPICIONLESS DRUG TESTING PROGRAM

If a public employer subject to the RLA unilaterally instituted a purely random, mandatory, and suspicionless drug testing program, a court would likely find the testing scheme unconstitutional. However, if a court simultaneously held that the testing program constituted a minor dispute under the *Conrail* "arguably justified" test, the court would need to consider the appropriateness of preliminarily enjoining the employer from continuing the unconstitutional testing program pending the NRAB's disposition of the dispute.

A. The Supreme Court's Decisions in *Skinner* and *Von Raab*

In two Supreme Court cases decided just months before *Conrail*, the Supreme Court ruled that suspicionless drug testing violates the Fourth Amendment unless the testing serves a compelling government interest that outweighs the employees' interest in privacy. In *Skinner v Railway Labor Executives' Association*,[44] railway labor organizations sued to enjoin regulations promulgated by the Federal Railroad Administration ("FRA") governing drug and alcohol testing of railroad employees.[45] The

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ern Air Lines, Inc., 869 F2d 1518, 1520 n 2 (DC Cir 1989).

[40] Id, citing *Division No. 1, Detroit, Brotherhood of Locomotive Engineers v Consolidated Rail Corp.*, 844 F2d 1218, 1224 n 10 (6th Cir 1988).

[41] Under *Skinner v Railway Labor Executives' Association*, 489 US 602 (1989), and *National Treasury Employees Union v Von Raab*, 489 US 656 (1989), discussed at length in Part III below, in certain contexts a public employer's imposition of a suspicionless drug test (i.e. a test imposed in the absence of "cause") violates its employees' Fourth Amendment protection against unreasonable searches and seizures. *Skinner*, 489 US at 620; *Von Raab*, 489 US at 669.

[42] *Conrail*, 489 US at 318.

[43] Id.

[44] 489 US 602 (1989).

[45] In *Skinner*, the Court ruled that the Fourth Amendment, which protects the public

Court ruled that drug and alcohol testing requiring "'compelled intrusio[n] into the body'" constitutes a search and seizure under the Fourth Amendment.[46] However, the Court held that because certain railroad employees engage in safety-sensitive tasks, the government's interest in public safety constituted a "'special nee[d]'" justifying departure from the normal warrant and probable-cause requirements of the Fourth Amendment.[47] Therefore, the drug and alcohol tests mandated by the FRA regulations were deemed reasonable under the Fourth Amendment[48] because a compelling governmental interest—public safety—outweighed the employees' privacy concerns.[49]

On the same day, in *National Treasury Employees Union v Von Raab*,[50] the Court held that the United States Customs Service's drug testing program, which affected employees applying for promotions to drug-interdiction positions where they would carry firearms, was subject to the Fourth Amendment's reasonableness requirement.[51] However, the Court found that the government's compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment outweighed the agents' privacy interests.[52] Thus, despite the absence of individual suspicion or probable cause, the drug testing survived scrutiny under the Fourth Amendment.[53]

Together, *Skinner* and *Von Raab* stand for the proposition that, unless a compelling governmental interest such as public safety outweighs employees' privacy interests, a mandatory and suspicionless drug testing program does not satisfy the Fourth Amendment's reasonableness requirement. Thus, if a public em-

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from unreasonable searches and seizures, applied to the FRA regulations; railroads comply with the governmental rules under threat of law and are therefore viewed as agents of the government. *Skinner*, 489 US at 615-16. The effect of this ruling is that private sector employers subject to such regulations are treated as "public sector employers" for purposes of constitutional analysis.

[46] *Skinner*, 489 US at 616, quoting *Schmerber v California*, 384 US 757, 767-68 (1966).

[47] Id at 620, quoting *Griffin v Wisconsin*, 483 US 868, 873-74 (1987).

[48] Fourth Amendment jurisprudence dictates that a warrant or reasonable suspicion is normally required before a drug test can be imposed on an unconsenting subject. Of course, where a sufficiently compelling governmental interest exists, individualized suspicion is not a prerequisite. *Skinner*, 489 US at 619, 624.

[49] Id at 633.

[50] 489 US 656 (1989).

[51] Id at 665.

[52] Id at 669-70.

[53] Id.

ployer subject to the RLA unilaterally imposed a purely random,[54] mandatory, and suspicionless program on its employees absent a compelling governmental interest, then the program would be unconstitutional with respect to those employees occupying non-safety-sensitive positions.[55]

B. The Third Circuit Court of Appeals' Decisions in *Transport Workers' Union* and *Bolden*

The Supreme Court has not specifically considered whether a public sector employer's imposition of a purely random, mandatory, and suspicionless drug testing program violates its employees' Fourth Amendment rights. However, two recent decisions by the United States Court of Appeals for the Third Circuit reiterated that a valid public safety concern must exist before such a testing program will pass constitutional muster.

In *Transport Workers' Union of Philadelphia, Local 234 v SE Pa. Transportation Authority*,[56] which was reconsidered in light of the Supreme Court's decision in *Conrail*, the Third Circuit held that a random drug testing program is constitutionally valid only where (1) adequate safeguards protect the workers' privacy rights, and (2) a compelling public safety concern is present.[57] In *Bolden v SE Pa. Transportation Authority*,[58] the same court held that the transportation authority's imposition of a mandatory, suspicionless drug test on a maintenance worker was unconstitutional, absent suspicion of drug use or a public or worker safety concern related to the janitor's employment tasks.[59]

In neither *Transport Workers' Union* nor *Bolden* did the Third Circuit establish a specific test to determine when an employee's job raises a public or worker safety concern; rather, the determination is seemingly made on a case-by-case basis. Taken together, however, the cases make clear that a public employer's unilateral imposition of a purely random, mandatory, and suspicionless drug test violates the affected employees' Fourth Amendment rights.

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[54] As noted above, a "purely random" drug test does not distinguish between employees occupying safety-sensitive positions and other employees. See note 15.

[55] For example, if such a test were imposed upon janitors in a transit authority's administrative offices, then the test would not be justified by any pressing public safety concern and would violate these employees' Fourth Amendment rights.

[56] 884 F2d 709 (3d Cir 1988).

[57] Id at 711-12.

[58] 953 F2d 807 (3d Cir 1991).

[59] Id at 822-24.

IV. THE POSSIBILITY OF PRELIMINARILY ENJOINING A DRUG TESTING PROGRAM DURING A MINOR DISPUTE

Given that a public employer's unilateral imposition of a purely random, mandatory, and suspicionless drug testing program is unconstitutional, employees subject to the program could normally establish a likelihood of irreparable harm, thereby allowing a court to grant a preliminary injunction.[60] Under *Conrail*, however, a court would classify a dispute arising from such a testing policy as minor if it believed that the program were "arguably justified."[61] Under the RLA, once a court characterizes a dispute as minor, it loses jurisdiction: the dispute falls under the exclusive jurisdiction of the NRAB.[62] When a court loses jurisdiction, it normally may not issue a preliminary injunction. However, the *Conrail* Court left unresolved whether, after classifying a dispute as minor, a court can grant a preliminary injunction preserving the pre-dispute status quo.[63]

Since *Conrail*, none of the circuits have applied the *Conrail* "arguably justified" test to a dispute arising over a public employer's unilateral imposition of an unconstitutional drug testing program. Three courts, however, have addressed whether it would be appropriate to enjoin a drug testing program during a minor dispute where the affected employees have successfully established that they would suffer irreparable harm if injunctive relief were denied.

In *Railway Labor Executives' Association v Metro-North Commuter Railroad*,[64] the District Court for the Southern District of New York followed *Conrail* in ruling that, in light of practice, usage, and custom, periodic and return-from-leave drug testing constituted a minor dispute.[65] Although the court declined to

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[60] Although the requirements vary among the circuits, the general elements a movant must establish for a court to grant a preliminary injunction are that: (1) movant will suffer irreparable injury if the injunction is not granted; (2) movant is likely to succeed on the merits; (3) the harm to the movant if the injunction is not granted outweighs the harm to the opposing party if the injunction is granted; and (4) the injunction benefits the public interest. 7 Moore's Federal Practice ¶ 65.04[1], at 32-33 (Matthew Bender, 1994). With respect to the irreparable harm element, the deprivation of constitutional rights generally constitutes irreparable injury justifying a preliminary injunction. Id at 59-60. See also *Elrod v Burns*, 427 US 347, 373 (1976) (plurality opinion emphasizing that violation of First Amendment rights for even one minute constitutes irreparable injury).

[61] *Conrail*, 491 US at 319. See note 37 and accompanying text.

[62] *Conrail*, 491 US at 304.

[63] See notes 31-34 and accompanying text.

[64] 759 F Supp 1019 (S D NY 1990).

[65] Id at 1022.

enjoin the employer from implementing the disputed drug testing program, the court nevertheless declared that in an appropriate case a court should grant a preliminary injunction preserving the pre-dispute status quo pending arbitration.[66] In particular, the court suggested that it would have enjoined the employer if the employees had been able to establish that they would suffer irreparable harm if the injunction were not granted.[67]

Similarly, in *Allied Pilots Association v American Airlines, Inc.*,[68] the Fifth Circuit, following *Conrail*, scrutinized the past practices of the employer and employees in addition to the language of their collective bargaining agreement to determine that a dispute between an airline and the pilots' union over the airline's alcohol testing procedures was minor.[69] Reversing the district court's grant of a preliminary injunction, the court stated that the possibility of irreparable harm to an employee's reputation is insufficient to warrant preliminary injunctive relief.[70] In so holding, however, the court suggested that if the plaintiff had established more substantial irreparable harm, then preliminary injunctive relief would have been appropriate.[71]

Finally, in *Air Line Pilots Association, International v Alaska Airlines, Inc.*,[72] the Ninth Circuit ruled that a dispute over a policy requiring mandatory drug testing without notice after an employee tested positive for drug use in a test based upon reasonable suspicion constituted a minor dispute; past practice demonstrated that the employees consented to the prior suspicion-based drug testing. Refusing to reconsider the district court's denial of a preliminary injunction, the court stated: "[W]e uphold the district court's determination that the evidence presented did not indicate a sufficient likelihood of [the plaintiff] prevailing on the merits to grant the preliminary injunction."[73]

Dissenting in *Air Line Pilots*, however, Judge Brunetti correctly noted that the majority opinion failed to separate the juris-

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[66] Id at 1023.

[67] Id.

[68] 898 F2d 462 (5th Cir 1990).

[69] Id at 465.

[70] Id at 465-66.

[71] Id. See also *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of American-Airline Div. & Teamsters Local 19 v SW Airlines Co.*, 875 F2d 1129, 1136 (5th Cir 1989) (holding that to grant a status quo injunction, the employee must demonstrate substantial irreparable harm).

[72] 898 F2d 1393 (9th Cir 1990) ("*Air Line Pilots*").

[73] Id at 1397.

dictional issue at hand from resolution on the merits. Judge Brunetti stated:

> I dissent from the majority opinion because it characterizes the decision on whether a dispute is "minor," under the Railway Labor Act . . ., as a decision on the merits. This decision is clearly jurisdictional, not a decision on the merits. Once the district court determined, as a matter of law, that the dispute was minor, the district court properly held that it had no jurisdiction to consider the merits of appellants' claim or to grant injunctive relief under the RLA. The district court also properly denied appellant's request for an injunction based on traditional, equitable principles.[74]

The district court had first determined that the dispute was minor, and it had then considered whether to grant a preliminary injunction based on traditional equitable principles, namely "a showing of 'irreparable injury' and the probability of success on the merits."[75] At the appellate level, the majority also denied the injunction as part of its inquiry into the merits of the case,[76] thereby conflating the purely jurisdictional nature of the major/minor determination with resolution of the dispute on the merits.

Judge Brunetti's dissenting opinion in *Air Line Pilots* correctly explains that once a court classifies a dispute as minor, it no longer retains jurisdiction over the case. This argument is extremely potent: once a court classifies the dispute as minor, the case immediately falls under the jurisdiction of the NRAB, and a court cannot subsequently grant a preliminary injunction.[77]

Moreover, a court certainly cannot grant a preliminary injunction before classifying the dispute as minor. Although the legislative history of the RLA is silent on this issue, one of the obvious purposes behind the major/minor dispute classification system is to ensure that disputes are resolved in the forum Congress has designated. If a court were to grant a preliminary injunction preserving the status quo before classifying the dispute

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[74] Id at 1398 (Brunetti dissenting).

[75] Id (Brunetti dissenting).

[76] *Air Line Pilots*, 898 F2d at 1396-1400 (Brunetti dissenting).

[77] Significantly, Judge Brunetti also expressly observed that under *Conrail* "[i]t is not clear whether the court had jurisdiction to issue a preliminary injunction, pending the decision on the merits by the Board, based on the traditional showing of 'irreparable harm.'" Id at 1400 (Brunetti dissenting).

as minor, then the court would undermine the jurisdictional aspect of the major/minor distinction. Congress determined that when a court characterizes a dispute as minor, it loses jurisdiction. Thus, if a significant reason exists for a court to retain jurisdiction even after characterizing the dispute as minor, it is likely that Congress did not intend for such a dispute to be classified as minor in the first place.

V. A COURT FACED WITH THIS ISSUE SHOULD IMPOSE A PRESUMPTION THAT A DISPUTED UNCONSTITUTIONAL PROGRAM IS NOT "ARGUABLY JUSTIFIED" AND THUS THAT THE DISPUTE IS MAJOR

A court confronted with an RLA dispute arising from a public employer's unilateral imposition of a purely random, mandatory, and suspicionless drug testing program faces a serious dilemma. Because the drug testing program does not further a compelling governmental interest such as public safety, the testing clearly violates the Fourth Amendment's reasonableness requirement. Because employees suffer irreparable harm when deprived of their constitutional rights, normally they can seek a court's protection by requesting a preliminary injunction.[78] Under the RLA, however, a court initially possesses jurisdiction over the employer-employee dispute only for the purpose of classifying the dispute as major or minor. Therefore, if the dispute is minor under the *Conrail* "arguably justified" test, then the court does not have the authority to grant a preliminary injunction. Can a court nevertheless protect the employees from suffering irreparable harm pending the NRAB's disposition of the dispute?

This Comment recommends that in order to protect such employees, a court facing this issue should presume that the disputed program is not "arguably justified" and thus that the dispute is major, thereby preserving the pre-dispute status quo.[79] Since *Conrail*, the courts have endeavored where possible to read an implied-in-fact term authorizing implementation of drug testing programs into existing collective bargaining agreements, thus classifying the disputes as minor.[80] However, this

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[78] See note 60 and accompanying text.

[79] This Comment recommends more than that a court should presume that the disputed program is not "arguably justified." This Comment proposes that when a dispute arises over the unilateral imposition of any clearly unconstitutional program, a court should presume that the disputed program is not "arguably justified" except under the specific circumstances discussed below.

[80] See, for example, *Allied Pilots*, 898 F2d at 464-65; *Metro-N Commuter*, 759 F Supp

approach is inappropriate in situations where a unilaterally imposed drug testing program violates employees' constitutional rights. Given the nature of the potential harm, it is illogical to assume that employees have contractually waived their Fourth Amendment rights based upon practice, usage, and custom where such practice, usage, and custom did not implicate the employees' constitutional rights. In situations where employees establish that they will suffer irreparable harm through violation of their constitutional rights, a court applying the *Conrail* "arguably justified" test should impose a rebuttable presumption that the disputed drug testing program is not "arguably justified." An employer may rebut the presumption only if the testing program is explicitly articulated in the collective bargaining agreement or if practice, usage, and custom clearly signify the employees' contractual waiver of their rights.[81]

Imposing a presumption that the disputed program is not "arguably justified" makes sense for five reasons: (1) the presumption yields the correct legal ruling because it is unlikely that employees impliedly consent contractually to the unilateral imposition of an unconstitutional testing program; (2) the presumption creates economic incentives encouraging both parties to negotiate the issue *ex ante*, thereby avoiding the dispute altogether; (3) the presumption is inexpensive to institute and administer; (4) the presumption satisfies equitable considerations; and (5) the presumption is the best available alternative for resolution of this issue.

First, it is highly unlikely that employees impliedly consent to the unilateral imposition of unconstitutional drug testing programs. Where an employer and a union negotiate a collective bargaining agreement, the employees' contractual waiver of a constitutional right represents a major negotiating issue. To preserve its rights under the agreement, an employer would probably insist upon the express memorialization of any such employee waiver within the collective bargaining agreement. Therefore,

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at 1022.

[81] Simply classifying the dispute as major would not comport with the manner in which courts have applied the *Conrail* test. As presently applied, the *Conrail* test virtually demands classifying disputes as minor. See note 80 and accompanying text. For equitable reasons, this Comment essentially proposes that courts apply a different standard to this category of disputes. In particular, as discussed below, applying a less permissive standard by means of imposing a presumption produces the correct legal result in an efficient manner without interfering with the normally smooth functioning of the *Conrail* test.

where a court finds that the bargaining agreement does not contain an express waiver of a constitutional right, it should recognize the limited value of examining practice, usage, and custom to determine whether the disputed change is "arguably justified" by the agreement, especially in situations where past practices have not raised constitutional issues. A presumption that the disputed program is not "arguably justified" recognizes that practice, usage, and custom are not sufficiently probative in this context to warrant classifying the dispute as minor unless the employees expressly contractually waived their Fourth Amendment rights in the past.

Second, establishing a presumption that the disputed program is not "arguably justified" creates the proper economic incentives. Resolution of a major dispute is more time-consuming and more expensive than resolution of a minor dispute.[82] Therefore, if parties know *ex ante* that a court will presume the disputed program is not "arguably justified" unless an explicit term in the collective bargaining agreement contradicts this presumption, then the employer and the union will vigorously bargain over and explicitly document any such drug testing program before finalizing future collective bargaining agreements, thereby avoiding the potentially high costs associated with resolving a major dispute.

Third, this presumption is inexpensive to institute and administer.[83] For the most part, the *Conrail* "arguably justified" test works extremely well in practice. As noted above, the *Conrail* test renders it extremely easy for an employer to show that a program is "arguably justified" in light of practice, usage, and custom. Such a low threshold reduces litigation costs for both parties and lowers the court's fact-finding costs. It also creates an incentive for both parties to avoid costly disputes by carefully negotiating the terms of collective bargaining agreements. Similarly, instituting a presumption that the disputed program is not "arguably justified" is also efficient because such a presumption functions as a predictable, bright-line rule around which both employers and unions can structure their bargaining activities. At the same time, instituting the presumption does not interfere with the normally smooth functioning of the *Conrail* test because

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[82] Crain, 64 NYU L Rev at 1296-97 (cited in note 21).

[83] This argument assumes that both parties negotiate over this program *ex ante*. If both parties do not negotiate *ex ante*, then the presumption will actually increase costs because of the increased cost of resolving a major dispute. The danger of this increased cost, however, will serve as an incentive to both parties to negotiate over this program *ex ante*.

the presumption applies only to a limited number of readily-identifiable cases.

Fourth, the presumption that the disputed program is not "arguably justified" is an equitable solution to a pressing legal problem: it vindicates employees' Fourth Amendment rights without requiring them to suffer irreparable harm pending NRAB resolution of the dispute. Furthermore, because the presumption is rebuttable, it also accommodates those rare cases in which employees have, in fact, contractually waived their Fourth Amendment rights. An employer can easily rebut this presumption if it can point to a provision in the collective bargaining agreement expressly waiving the right.[84] An employer can also rebut the presumption in situations where a court properly finds that employees clearly waived their rights based on practice, usage, and custom.[85]

Finally, the alternative resolution of this issue — granting a preliminary injunction preserving the pre-dispute status quo — is improper. It seems likely that the *Conrail* Court refused to pass on whether a status-quo injunction in a minor dispute might function as an appropriate remedy in part to preclude subsequent courts from issuing a preliminary injunction where the court no longer retained jurisdiction. Allowing a preliminary injunction after a court classifies the dispute as minor contradicts the jurisdictional aspect of the major/minor dispute distinction.[86]

Moreover, if a court were first to classify a dispute as minor and then to issue a preliminary injunction preserving the pre-dispute status quo, granting the injunction would imply that the court did not believe that the dispute was minor in the first place. Instead, it must have believed that the employees expressly or impliedly consented contractually to the unconstitutional

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[84] Constitutional rights may be waived by contract where the facts and circumstances surrounding the waiver establish that the waiving party waived its rights of its own volition, with full understanding of the consequences of its waiver. *Erie Telecommunications, Inc. v City of Erie, Pa.*, 853 F2d 1084 (3d Cir 1988).

[85] It is not particularly easy to imagine such a situation. Perhaps where the employees have given consent to the imposition of a similarly unconstitutional test, then a dispute over a different unconstitutional drug test should be classified as minor. However, this argument holds only if the employees have waived their rights after the collective bargaining agreement has taken effect. If the employees have expressly waived their rights within the collective bargaining agreement, then the fact that a waiver of the right to object to the new test is not memorialized in the agreement suggests that the employees have not impliedly consented to the imposition of such a test. The memorialization of the first waiver suggests a custom that all waivers must be included within the express terms of the collective bargaining agreement.

[86] See Section IV.

program, thereby waiving their Fourth Amendment rights and thus their right to a preliminary injunction to prevent irreparable harm. A court would be behaving inconsistently if on the one hand it classified the dispute as minor and on the other hand it found that the employees might suffer irreparable harm pending the dispute's disposition by the NRAB.

CONCLUSION

If required to classify a dispute arising from a public employer's imposition of a purely random, mandatory, and suspicionless drug testing program under the RLA, a court should protect employees against violation of their Fourth Amendment rights. The best method to accomplish this goal is for a court to presume that the disputed unconstitutional test is not "arguably justified" unless explicitly articulated in the collective bargaining agreement or unless practice, usage, and custom clearly signify the employees' contractual waiver of their rights. Imposing this presumption, and thus classifying the dispute as major, preserves the status quo before the testing program was instituted, thereby enjoining the testing pending NRAB scrutiny. Classifying the dispute as major also recognizes that such testing is so inherently intrusive that it would be illogical for a court to find that employees contractually submitted to such testing through an implied-in-fact term in their collective bargaining agreement. Finally, this presumption creates the proper incentives for avoiding the dispute in the first place by encouraging both sides to negotiate and memorialize the specifics of a drug testing program before signing the collective bargaining agreement.