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WORKING ON THE RAILROAD: THE NINTH CIRCUIT'S FOURTH AMENDMENT ANALYSIS OF MANDATORY DRUG AND ALCOHOL TESTING OF RAILROAD WORKERS IN *RAILWAY LABOR EXECUTIVES' ASS'N v. BURNLEY*

I. INTRODUCTION

In *Railway Labor Executives' Ass'n v. Burnley*[1] the Ninth Circuit held that Federal Railroad Administration regulations authorizing employee blood, urine and breath tests after specified train accidents, fatal incidents and rule violations violated the Fourth Amendment of the U.S. Constitution.[2] The court held that "intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment."[3]

The Ninth Circuit reasoned that the administrative search exception for closely regulated industries did not apply to blood, urine and breath testing of railroad workers and concluded that particularized suspicion is required to insure the reasonableness of post-accident drug and alcohol testing.[4]

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1. 839 F.2d 575 (9th Cir.) (per Tang, J.; the other panel members were Pregerson, J., and Alarcon, J., dissenting), *cert. granted* 108 S.Ct. 2033 (1988).

2. *Id.* at 577.

3. *Id.* at 592.

4. *Id.* The court also considered RLEA's arguments that the regulations violated the equal protection and due process clauses of the United States Constitution and various federal statutes. *Id.* at 590-92. Finding little merit in these arguments, the Ninth Circuit extensively analyzed the regulations mandating or authorizing drug and alcohol testing under the Fourth Amendment. *See infra* note 188 (discussion of plaintiff's other argu-

II. FACTS

On August 2, 1985, the Federal Railroad Administration issued regulations permitting private railroads to test covered employees for current drug and alcohol use.[5] The Railroad Labor Executives' Association (RLEA) objected to the new regulations and was able to delay their implementation for approximately six months.[6] The regulations went into effect February 10, 1986.[7]

The RLEA's principal contention was that the regulations violated railroad workers' Fourth Amendment rights. RLEA objected to subparts C and D of the regulations.[8] Subpart C man-

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ments and the court's analysis of them).

5. The regulations were codified in DOT Control of Alcohol and Drug Use, 49 C.F.R. Part 219 (1987).

6. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 577 (9th Cir. 1988). The Railway Labor Executives' Association [hereinafter RLEA] had been a party to the rulemaking process. *Id.* Disagreeing with the provisions regarding post-accident toxicological testing, RLEA filed a petition for reconsideration that was denied by the Secretary of Transportation. *Id.* RLEA then brought suit in federal district court and received a temporary restraining order (TRO) prohibiting the implementation of the regulations. *Id.* The TRO remained in effect until the district court granted summary judgment for the government. Id. RLEA obtained a stay from the Ninth Circuit, pending appeal, but the U.S. Supreme Court vacated the stay. Dole v. RLEA, 474 U.S. 1099 (1986).

7. *Burnley*, 839 F.2d at 577.

8. DOT Control of Alcohol and Drug Use, 49 C.F.R. §§ 219.201 and 301 (1987). 49 C.F.R. § 219.201 (1987) sets out the following as the events that trigger mandatory testing without suspicion:

> 219.201 Events for which testing is required.
> (a) List of events. On and after March 10, 1986, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (3) of this section:
> (1) Major train accident. Any train accident that involves one or more of the following:
> (i) A fatality;
> (ii) Release of a hazardous material accompanied by—
> (A) An evacuation; or
> (B) A reportable injury resulting from the hazardous material release (e.g., from fire, explosion, inhalation, or skin contact with the material); or
> (iii) Damage to railroad property of $500,000 or more.
> (2) Impact accident. An impact accident resulting in—
> (i) A reportable injury; or
> (ii) Damage to railroad property of $500,000 or more.
> (3) Fatal train incident. Any train incident that involves a fatality to any on-duty railroad employee.
> (b) Exception. No test shall be required in the case of a

dates alcohol and drug testing of all covered employees directly involved in major train accidents,[9] impact accidents,[10] or fatal train incidents.[11] The regulations require that blood and urine samples be taken from all covered employees directly involved in such accidents as soon as possible following an accident.[12] Blood samples are to be taken at independent medical facilities.[13] Refusal to provide a sample results in a nine-month period of disqualification from work.[14]

Subpart D authorizes railroads to require covered employees to submit to breath or urine tests when a supervisor has a reasonable suspicion that an employee is under the influence of or impaired by alcohol or drugs.[15] To require a urinalysis, two supervisors must have reasonable suspicion that the employee is currently under the influence of drugs or alcohol, and if drug use is suspected, one of the supervisors must have received training in spotting drug use.[16] The railroads are also given the authority under Subpart D to test when an employee is involved in an accident or incident that must be reported under 49 C.F.R. Part

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collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing.

9. 49 C.F.R. §§ 219.201(a)(1)(i-iii) (1986). A major train accident for the purposes of the regulation involves a fatality; 49 C.F.R. § 219.201(a)(1)(i), a release of a hazardous material accompanied by an evacuation or reportable injury 49 C.F.R. § 219.201(a)(1)(ii); or damage to railroad property of $500,000 or more. 49 C.F.R. § 219.201(a)(1)(iii).

10. 49 C.F.R. § 219.201(a)(2) (1987). *See supra* note 8 and accompanying text.

11. 49 C.F.R. § 219.201(a)(3) (1987). *See supra* note 8 and accompanying text.

12. 49 C.F.R. § 219.203(b) (1986) states the following: "The railroad shall make every reaonable effort to assure that samples are provided as soon as possible after the accident or incident."

13. 49 C.F.R. § 219.203(c)(1) (1986) states the following: "Employees shall be transported to an independent medical facility where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional."

14. 49 C.F.R. § 219.213(a)(1) (1986) states the following: "An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months."

15. 49 C.F.R. § 219.301 (1986). Under this section, workers are subject to breath tests when a supervisory employee has a reasonable suspicion that the employee is currently under the influence or impaired by alcohol, or alcohol in combination with drugs. The supervisory employee's suspicion must be based upon specific, personal observations that can be articulated. *See* § 219.301(b)(1).

In addition to breath testing based on reasonable suspicion of alcohol use, such testing can be predicated upon a supervisor's suspicion that an employee's actions caused an accident, incident or rule violation. *See also* § 219.301(b)(2).

16. 49 C.F.R. § 219.301(c)(2)(i) (1986).

225,[17] and a supervisor has reasonable suspicion that the employee's acts or omissions contributed to the accident.[18] The railroads may also test when a covered employee has violated certain railroad operating rules.[19]

The only factual dispute in this case concerned the extent of drug and alcohol abuse in the railroad industry.[20] The record adopted[21] by the Ninth Circuit showed that accidents or incidents involving drug or alcohol abuse by railroad workers comprised 4.7 percent of the total accidents between 1975 and 1984.[22] The government argued that the 4.7 percent figure was lower than it should be because of underreporting by the industry.[23] The government further argued that the transportation of hazardous materials and the pervasiveness of drug and alcohol use in society made the use of drugs and alcohol by railroad employees a serious national concern.[24] The plaintiff RLEA conceded that the problem was serious.[25]

The Ninth Circuit's principal task was to determine the constitutionality of the drug and alcohol testing scheme under the Fourth Amendment.[26]

III. BACKGROUND

A. What the Fourth Amendment Protects

The Fourth Amendment of the United States Constitution protects the individual from unreasonable governmental

17. 49 C.F.R. § 225.5(b) (1987). Under this section, an accident/incident is defined as (1) any impact between on-track train equipment and a motor vehicle, bicycle, farm vehicle or a pedestrian at a rail-highway grade crossing; (2) any collision, derailment, fire, explosion, act of God, or other event involving operation of railroad equimpment that results in more than $5,200 in damages to on-track equipment, etc.; and (3) any event which results in the death of one or more persons, or injury to employees or other persons that requires medical treatment.

18. 49 C.F.R. § 219.301(b)(2) (1986).

19. 49 C.F.R. § 219.301(b)(3) (1986).

20. *Burnley*, 839 F.2d at 579.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 592. (Alarcon, J., dissenting)

searches and seizures.[27] The Supreme Court has noted that the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[28]

In deciding whether the Fourth Amendment applies, courts analyze whether a search has taken place and whether there has been sufficient government involvement to subject the actions to the limits of the amendment.[29] Generally, a search occurs when a person's "reasonable expectation of privacy" is invaded.[30] A reasonable expectation of privacy is one that "society is prepared to recognize as 'reasonable.' "[31]

Government involvement sufficient to trigger the Fourth Amendment's protection occurs when the government participates in a significant way in a total course of conduct leading to a search.[32] The determining factor is the actual participation of a government official in the initiation of a search.[33]

B. Alcohol and Drug Testing as Searches

Blood tests,[34] urine tests,[35] and breath tests[36] have been de-

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27. The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. *See generally*, W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment (2d ed. 1987). [Hereinafter LaFave]

28. Schmerber v. California, 384 U.S. 757, 767 (1966). See infra note 44.

29. Railway Labor Executives' Association v. Burnley, 839 F.2d 575, 580 (9th Cir. 1988).

30. Katz v. United States, 389 U.S. 347, 360 (1967). In *Katz*, the issue before the Supreme Court was the admissibility of evidence of a telephone conversation gathered through the use of an electonic "bug" attached to the outside of a telephone booth. *Id.* at 349 The Court held that the warrantless search was unconstitutional because the search violated Katz's reasonable expectation that his conversation in the public telephone booth would be private. *Id.* at 353.

31. *Id.* at 361.

32. *Burnley*, 839 F.2d at 581 (quoting United States v. Davis, 492 F.2d 983, 897 (9th Cir. 1973)).

33. *Id.* (paraphrasing Lustig v. United States, 338 U.S. 74, 79 (1949)).

34. *See, e.g., Schmerber*, 384 U.S. 757, 767. *See infra* note 44.

35. *See, e.g.*, McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987). In this case,

termined to be searches for the purposes of the Fourth Amendment. To determine the reasonableness of the bodily intrusion involved with the three types of tests, courts have applied different standards.[37]

1. General Warrant Requirement

The traditional rule of reasonableness is that "[E]xcept in certain carefully defined classes,"[38] a search is unreasonable unless it has been authorized by a search warrant.[39] Because the Fourth Amendment demands that "no warrant shall issue, but upon probable cause. . . ."[40] the general rule requires a warrant supported by probable cause[41] for a search to be reasonable.[42]

2. Exceptions to the Warrant Requirement

In general, the requirement of a warrant has been dispensed with when "special need, beyond the normal need for law en-

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the Eighth Circuit was faced with the issue of the constitutionality of a Department of Correction rule that mandated random or reasonable suspicion-based urinalysis of corrections officers. *Id.* at 1304. The court held that the urinalysis was constitutional because the government interest in prison security outweighed the diminished privacy interests of the officers. *Id.* at 1308.

36. *See, e.g.*, Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986).

37. The traditional standard of reasonableness demands a warrant supported by probable cause. *See, e.g.*, O'Connor v. Ortega, 107 S.Ct 1492, 1499-1501 (1987). An exception to the warrant requirement is found when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." New Jersey v. T.L.O., 469 U.S. 325, 351 (1985), (Blackmun, J., concurring.)

38. Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

39. *Id.*

40. U.S. Const. amend IV. *See supra*, note 27.

41. Probable cause has been said to exist "when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that an offense has been or is being committed." United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972). In *Davis*, two police officers saw a man talking with a group of men exhibiting traits symptomatic of drug addiction. *Id.* at 820. The officers subsequently saw the man approach a very well-dressed man, and conduct a furtive transaction in which the defendant slid the well-dressed man money, and received a brown package in return. *Id.* The officers arrested both men and found heroin. *Id.* at 820-21. The D.C. Circuit held that probable cause to arrest existed because of the "total circumstances, judged in light of the officer's experience." *Id.* at 822.

42. *See*, O'Connor v. Ortega, 107 S.Ct 1492 (1987). In *O'Connor*, the Supreme Court held that the constitutionality of a search of a state hospital employee's office should be judged by a standard of reasonableness under all of the circumstances. Under this standard, both the inception and scope of the intrusion must be reasonable. *Id.* at 724.

forcement, make the warrant and probable cause requirement impracticable."[43]

The exceptions to the general rule requiring a warrant considered relevant by the Ninth Circuit were; (1) compelled blood tests in drunk driving arrests,[44] (2) the administrative inspection of closely regulated industries,[45] (3) the search by public employers of government workers for work-related purposes and for investigations of work-related misconduct,[46] and (4) searches of schoolchildren, where the requirement of obtaining a warrant would hinder the administrator's ability to preserve school discipline.[47]

a. Blood Tests in Drunk Driving Arrests

In *Schmerber v. California*,[48] the Supreme Court considered the constitutionality of a warrantless blood test given incident to a drunk driving arrest. The Court determined that because of the rapidity with which the percentage of alcohol diminished in the blood stream,[49] an officer's ability to test for the presence of alcohol in the blood should not be burdened with the requirement of obtaining a warrant. No warrant is necessary if reasonable methods are used, there is probable cause to believe that evidence of intoxication will be found, and there are exigent

43. New Jersey v. T.L.O. 469 U.S. 325, 351 (1985).

44. Schmerber v. California, 384 U.S. 757 (1966). Schmerber was in an auto crash and had been taken to a hospital for treatment. *Id.* at 758. At the hospital, a police officer saw signs of drunkenness and arrested Schmerber. *Id.* at 769. The officer ordered a blood test to find evidence of intoxication. *Id.* at 758. The Supreme Court found that despite the lack of an authorizing search warrant, the search was reasonable because it was conducted incident to a valid arrest and because delaying the procedure would have probably resulted in the loss of the evidence. Id. at 769-72.

45. New York v. Burger, 107 S.Ct. 2636 (1987). *Cf.* note 37, *supra*. In this case, a junkyard owner challenged the constitutionality of a New York statute authorizing the warrantless inspection of junkyards. *Id.* at 2649. The Supreme Court held that the statute was constitutional because the search fell within the closely regulated industry exception to the warrant requirement. *Id.* at 2648-49.

46. O'Connor v. Ortega, 107 S.Ct. 1492 (1987). *See supra*, note 42.

47. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). In this case the Court was faced with the constitutionality of a warrantless search of a student's purse by the school principal. *Id.* at 328. The Court held that neither a warrant nor probable cause was required, and that the search was reasonable under the totality of the circumstances standard. *Id.* at 341.

48. 384 U.S. 757 (1966).

49. *Id.* at 770-71.

circumstances making it impractical to obtain a search warrant beforehand.[50]

b. The Closely Regulated Industry Exception to the Warrant Requirement

In *New York v. Burger*,[51] the most recent case to discuss the closely regulated industry exception to the warrant requirement, the U.S. Supreme Court stated that such a search is reasonable when the following three criteria are met; (1) a "substantial" government interest underlies the regulatory scheme; (2) warrantless inspections are necessary to fulfill the regulatory scheme; and (3) the inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.[52]

The administrative search of closely regulated industries exception to the warrant requirment developed principally from three decisions. In *Colonnade Catering Corp. v. United States*[53] the Supreme Court held that inspections of liquor establishments by federal agents did not require a warrant because the liquor industry had a history of close regulation[54] and Congress had the power to set the standards of reasonableness regarding the searches of such industries.[55]

In *United States v. Biswell*,[56] the Supreme Court held that the federal government's need to regulate the interstate transportation of firearms justified statutes allowing the warrantless inspection of firearms businesses.[57] The Court stated the rationale of this exception to the warrant requirement: ". . . if inspec-

50. *Id.*

51. New York v. Burger, 107 S.Ct. 2636 (1987).

52. *Id.* at 2644.

53. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). In this case, the Supreme Court was asked to decide whether a warrant was necessary to search the premises of a liquor dealer. *Id.* at 74. The Court held that because the liquor industry had a history of close regulation, Congress had broad powers to determine the standard of reasonableness applicable to searches of the premises of those businesses, and therefore a warrant would not necessarily be required. *Id.* at 77.

54. *Id.*

55. *Id.*

56. 406 U.S. 311 (1972).

57. *Id.* at 315-16.

tion is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection. . . ."[58]

The third case underpinning the closely regulated industry exception, *Donovan v. Dewey*,[59] involved the warrantless inspection of coal mines. Faced with the constitutionality under the Fourth Amendment of federal statutes authorizing warrantless searches of coal mines,[60] the Supreme Court held that the substantial government interest in regulating the safety of the nation's mines would be frustrated by the requirement of a search warrant.[61] The Court also found the warrantless searches reasonable in scope because of the certain limits on the ability of officials to search.[62]

When an industry is not the object of pervasive government regulation, government inspectors are required to obtain a warrant, but the standard of probable cause necessary to justify the issuance of the warrant is lower than the traditional probable cause standard.[63] Using the standard developed in *Camara v. Municipal Court*,[64] inspection warrants can be obtained "if a reasonable legislative or administrative standard"[65] exists.

The closely regulated industry exception to the warrant requirement was used by the Third Circuit in *Shoemaker v. Handel*[66] to justify warrantless breath and urine testing of jockeys in the horse racing industry.[67] The Third Circuit was faced with

58. *Id.* at 316.

59. 452 U.S. 594 (1981).

60. 30 U.S.C. § 813(a) (1986).

61. *Dewey*, 452 U.S. at 603 (citing United States v. Biswell, 406 U.S. 311, 316 (1972)).

62. *Id.*

63. See Marshall v. Barlow's Inc., 436 U.S. 307 (1978). In this case, the Supreme Court held that while traditional probable cause is not required for a warrant to inspect commercial premises, specific neutral criteria are required for the issuance of the search warrant. *Id.* at 323. *See also*, LAFAVE, *supra* note 27, § 10.2(a) (2d ed. 1987).

64. 387 U.S. 523 (1967).

65. *Id.* at 539-40. In this case the Supreme Court held that San Francisco building inspectors were required to obtain a warrant before searching premises for violations of the Housing Code. *Id.* at 540. The Supreme Court noted that such warrants could issue under a reasonable administrative standard. *Id.* at 538.

66. 795 F.2d 1136 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986).

67. *Id.* at 1142.

the question of the constitutionality of regulations promulgated by the New Jersey Racing Commission that permitted an official to require breath and urine testing of any official, jockey, groom or trainer.[68] The court reasoned that for the closely regulated industry exception to apply there must be a strong state interest in conducting an unannounced search, and the pervasive regulation of the industry must have lowered the justifiable expectation of privacy of the subject of the search.[69] The court found that New Jersey's interest in "assuring the public of the integrity of the persons engaged in the horse racing industry"[70] was strong enough to meet the first requirement, and that the second requirement was met because the history of regulation of the industry had lowered the justifiable expectations of privacy of persons working in that industry.[71]

The Eighth Circuit applied the *Shoemaker* court's reasoning to the question of the Fourth Amendment constitutionality of rules requiring the random urinalysis of prison guards.[72] The Eighth Circuit found the institutional interest in security to be a strong state interest[73] and urinalysis to be a reasonable intrusion into the guards' expectations of privacy.[74]

In *Rushton v. Nebraska Public Power District*,[75] a U.S. District Court adopted the two-prong test set out in *Shoemaker v. Handel*.[76] Considering the Fourth Amendment constitutionality of a program of drug and alcohol testing of employees permitted unescorted access to protected areas of a nuclear power plant, the district court concluded that a warrantless testing scheme was justified when "a strong state interest exists in conducting an unannounced search and the pervasive regulation of the industry has reduced the justifiable privacy expectation of the individual searched."[77]

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68. *Id.* at 1138-41.
69. *Id.* at 1142.
70. *Id.*
71. *Id.*
72. McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987). *See supra* note 35 for a discussion of this case.
73. *Id.*
74. *Id.*
75. 653 F.Supp. 1510 (D.Neb. 1987).
76. 795 F.2d 1136 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986).
77. *Rushton*, 653 F.Supp. 1524.

3. The Balancing Test of Reasonableness Under the Fourth Amendment

The standard of reasonableness that applies to a category of searches is determined by balancing the type and level of intrusion on an individual's Fourth Amendment right to privacy against the importance of the government interest that motivates the search.[78] In the case of police searches to gather information for criminal prosecution, the standard of reasonableness is a warrant supported by probable cause, or in certain circumstances, probable cause alone.[79]

In administrative and business contexts, courts apply the balancing test of reasonableness first set out by the Supreme Court in *Camara v. Municipal Court*.[80] In *Camara*, the Court considered whether a warrantless search of housing by city housing inspectors violated the Fourth Amendment.[81] After deciding that such administrative searches did require a warrant to be reasonable,[82] the Court considered the question of the type of probable cause required before such a warrant could be issued.[83]

In order to decide the type of probable cause required, the Supreme Court first considered whether area inspections of housing are reasonable under the Fourth Amendment.[84] The only test of reasonableness that the court found was "balancing the need to search against the invasion that the search entails."[85] The court stressed that three important factors should be considered in determining the reasonableness of such inspections: (1) a strong public interest in maximum effectiveness in combatting the problem at hand . . .; (2) an inability to achieve acceptable results by following the usual probable cause limitation . . .; and (3) the relatively limited invasion of the . . . citizen's privacy.[86]

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78. Railway Labor Executives' Association v. Burnley, 839 F.2d 575, 586 (9th Cir. 1988).

79. *See* LAFAVE, *supra* note 27, §§ 3.1, et seq.

80. *Camara*, 387 U.S. 523, 537 (1967).

81. *Id.* at 525.

82. *Id.* at 534.

83. *Id.*

84. *Id.* at 537.

85. *Id.* at 537.

86. *Id.*

Having concluded that such area inspections are reasonable,[87] the *Camara* court held that " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[88] The Court further noted that such administrative or legislative standards "will not necessarily depend upon specific knowledge of the condition of the particular dwelling."[89]

The *Camara* balancing test has been applied in many contexts. In *Terry v. Ohio*,[90] the Supreme Court determined the reasonableness of a police officer's stop and frisk of a suspect by balancing the need to search against the invasion the search entailed.[91] The *Terry* court stated that for a search to be reasonable under the Fourth Amendment, it must be "justified at its inception,"[92] and "reasonably related in scope to the circumstances which justified the interference in the first place."[93] The court determined that the stop of a robbery suspect could be justified at its inception only when an officer had a reasonable suspicion of criminal intent based on particularized, articulable facts.[94] The court found that an officer's frisk is reasonably related in scope to the circumstances when the frisk is limited to a patdown of the man's outer garments.[95]

The two-prong *Terry* test of reasonableness has been applied by the Supreme Court in various contexts, among which are searches of schoolchildren,[96] and the search of public employees by their public employers.[97] In both cases, the Court

87. *Id.* at 538.

88. *Id.*

89. *Id.*

90. 392 U.S. 1 (1968). In this case, the Supreme Court decided the constitutionality of a police officer's stop and frisk of a suspect without probable cause. *Id.* at 7. The Court concluded, after balancing the government interest in law enforcement against the individual's private expectations of privacy, that police officers have a narrow authority to search for weapons when they have a reasonably articulable suspicion that the suspect presents a danger to the officer or third parties. *Id.* at 27.

91. *Id.* at 21 (quoting *Camara*, 387 U.S. at 534-35).

92. *Id.* at 20.

93. *Id.*

94. *Id.* at 27.

95. *Id.* at 29.

96. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985).

97. O'Connor v. Ortega, 107 S.Ct. 1492 (1987).

tested the balance of competing governmental and individual interests by analyzing whether a search was justified at its inception and reasonably related in scope to the circumstances that justified the intrusion. As the Ninth Circuit summarized it in *Railway Labor Executives' Ass'n v. Burnley*, "finding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought."[98] For a search to be permissible in scope, it must be reasonably related to the objective of the search, and not excessively intrusive.[99]

The Seventh Circuit considered the constitutionality of drug and alcohol testing of bus drivers in *Division 241 Amalgamated Transit Union v. Suscy*[100] In a case whose facts parallel those of *Burnley*, the Seventh Circuit decided that transit authority rules requiring mandatory blood and urine testing of bus drivers involved in serious accident, or drivers suspected of being intoxicated by drugs or alcohol, met the Fourth Amendment's standard of reasonableness.[101] In a brief decision, the court applied the balancing test of *Camara v. Municipal Court*,[102] and balanced the interests of the public in safe bus operation against the privacy interest of the bus drivers regarding the information contained in their blood and urine.[103] The Seventh Circuit found that in light of the public's interest in safety, the drivers could "have no reasonable expectation of privacy with regard to submitting to blood and urine tests."[104]

The Fifth Circuit applied a balancing test of reasonableness in *National Treasury Employees Union v. Von Raab*,[105] which is being considered by the Supreme Court as a companion case to *Burnley*. That case involved a Customs Service program re-

98. 839 F.2d at 587.

99. *Id.*

100. 538 F.2d 1264 (7th Cir. 1976). In this case, the Seventh Circuit decided the constitutionality of transit authority rules requiring bus drivers to submit to blood or urine tests following their involvement in a serious crash. *Id.* at 1266. The court held that in light of the government interest in public safety, the bus drivers had no reasonable expectation of privacy regarding the blood and urine tests. *Id.* at 1267 (citing U.S. v. Cogwell, 486 F.2d 823, 835 (7th Cir. 1973), *cert. denied*, 416 U.S. 959.)

101. *Id.*

102. 387 U.S. at 534-35. *See supra* note 65 and accompanying text.

103. *Suscy*, 538 F.2d at 1267.

104. *Id.*

105. 816 F.2d 170 (1987), *cert. granted*, 108 S.Ct. 1072 (1988).

quiring urine tests for drug use of customs workers seeking promotion into sensitive positions.[106]

The Fifth Circuit weighed such factors as justification for the search, scope and manner, place, voluntariness, and the administrative nature of the search.[107] The court found that the Customs Service, as an agency charged with interdicting the flow of illegal drugs into the United States had a strong interest in ensuring that its employees are not using illegal drugs themselves.[108] While the court found that urinalysis is a search, the court did not find it as intrusive as blood tests, home searches, strip searches, or body cavity searches.[109] Finding that on balance the government's interest in the integrity of its customs workers outweighed the workers' reasonable expectations of privacy, the court upheld the urinalysis program.[110]

The court analogized its balancing analysis to the rationale of the closely regulated industry exception to the warrant requirement.[111] The court noted that in the case of the warrantless search of closely regulated industries, the balance is between the necessity of accomplishing the regulatory scheme, and the reasonable expectation of privacy of those involved in the industry.[112]

The *Von Raab* court specifically analyzed the level of individual suspicion necessary to make the search constitutional.[113] The court noted that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion."[114] The Fifth Circuit further noted that at times the balance of interests makes it imposssible to insist upon "some quantum of individualized suspicion."[115] After

106. *Id.* at 172.
107. *Id.* at 177-81.
108. *Id.* at 178.
109. *Id.* at 177.
110. *Id.* at 180.
111. *Id.* at 179.
112. *Id.* at 180.
113. *Id.* at 176.
114. *Id.* (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).
115. *Id.* at 176-77 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976).

its consideration of all of the circumstances, the court decided that the Customs Service program could proceed without a requirement of individualized suspicion.[116]

4. Express and Implied Consent to Searches

A search may be conducted without a warrant or probable cause if the subject of the search consents to it.[117] The validity of the given consent is measured by whether it was voluntary under the totality of the circumstances.[118] In certain circumstances, consent to a search can be implied from a person's decision to continue certain activities.[119] In the case of participation in closely regulated industries, the Supreme Court has said that "[T]he businessman in a regulated industry in effect consents to the restrictions placed upon him." [120]

But finding that implied consent to a search has been given is limited by the nature of the search consented to.[121] If a search has been determined to be constitutionally unreasonable, consent to it will not make it constitutionally valid.[122] Further, con-

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116. *Id.* at 180.

117. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In *Schneckloth*, the defendant was stopped by a police officer for driving a car with only one headlight and a burned-out license plate light. *Id.* at 220. After five of the six men in the car could not produce identification, the officer asked for permission to search the car, which was granted. *Id.* The court held that the voluntariness of consent given to a search is a fact to be determined from all of the circumstances, and while the subject's knowledge of a right to refuse is a factor in the balance, it is not an element to be proven by the prosecution. *Id.* at 248-49.

118. *Id.* at 248-49.

119. See LAFAVE, *supra* note 27, § 8.2(l).

120. Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973). In this case, the defendant was stopped by the Border Patrol 25 air miles north of the Mexican border. *Id.* at 268. The government argued that the stop was justified without probable cause under the administrative search rationale of *Camara*. *Id.* at 270. The Supreme Court distinguished the Border Patrol's stop from the administrative inspection cases on the ground that in the latter cases, "[t]he businessman in a regulated industry in effect consents to the restrictions placed on him." *Id.* at 271. The Court held that the warrantless search of the defendant's car without probable cause could not be justified as a border search Id. at 273.

121. *See* LAFAVE, *supra* note 27, at § 8.2(1).

122. National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 943 (D.C. Cir. 1987). Federal employees' unions sued to enjoin the implementation of a mandatory urinalysis drug-testing program for certain civilian employees. *Id.* at 937. The court held that "a search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment." *Id.* at 943. *See also*: Pickering v. Board of Education, 391 U.S. 563 (1968); and McDonell v. Hunter, 809 F.2d

sent to unreasonable searches "is not a reasonable condition of employment."[123]

IV. THE COURT'S ANALYSIS

A. The Majority

1. Blood, Urine and Breath Tests Are Searches

The Ninth Circuit began its Fourth Amendment analysis of the regulations at issue with the threshhold questions of whether the blood, urine and breath tests mandated were searches for Fourth Amendment purposes, and whether the government action requirement was met.[124]

In asking whether or not a railroad worker has a reasonable expectation of privacy in the "personal information contained in his body fluids,"[125] the court first noted that *Schmerber v. California*[126] had clearly decided that blood tests are searches for purposes of the Fourth Amendment.[127] The court further pointed out that every court that had considered the issue had decided that urine tests for the purpose of discovering drug or alcohol use were searches under the Fourth Amendment.[128] On the issue of breath testing, the court cited *Shoemaker v. Handel*[129] for the rule that breath tests qualify as searches.

Having determined that the Fourth Amendment applied to the blood, urine and breath tests that would be implemented by the private railroad industry,[130] the court began its inquiry into

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1302, 1310 (8th Cir. 1987).

123. McDonell v. Hunter, 612 F. Supp. 1122, 1131 (S.D. Iowa. 1985).

124. Railway Labor Executives' Association v. Burnley, 839 F.2d 575, 579-80 (9th Cir. 1988).

125. *Id.* at 580.

126. 384 U.S. 757, 767 (1966). *See* discussion in note 44, *supra.*

127. *Burnley*, 839 F.2d at 580.

128. Id. *See, e.g.*: Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987); National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 176 (5th Cir. 1987); and McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987).

129. 795 F.2d 1136, 1141 (3d Cir.), *cert. denied*, 107 S.Ct. 577 (1986).

130. *Burnley*, 839 F.2d at 580-81. In deciding the question of whether there was sufficient government involvement in the drug and alcohol testing contemplated to bring the private railroads' actions under the Fourth Amendment, the Ninth Circuit relied on United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973) In *Davis*, the court evaluated

the correct standard of reasonableness to apply to the searches.[131]

Noting that as a general rule warrants are required to make searches reasonable,[132] the court analyzed whether a warrant should be required in the case at hand.[133] The court began its analysis by noting that while a warrant is generally required to make searches reasonable, "it is not the *sine qua non* of reasonableness."[134] In situations of "special need" warrants may be dispensed with.[135] The court noted that in the case of administrative searches of closely regulated industries, searches of public employers, searches of schoolchildren by school administrators, and blood tests incident to drunk driving arrests, the warrant requirement has clearly been eliminated.[136] Deciding that the rationale of "special need"[137] applied because of "the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath,"[138] the court concluded that the drug and alcohol tests called for by the regulations would not require a warrant in order to be constitutional.[139]

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the government action requirement with respect to airport security searches conducted by private airline workers. *Id.* at 896. Finding that federal officials had "conceived, directed, and implemented" the airport search program *Id.* at 897, the court decided that the government's involvement was significant enough to involve the Fourth Amendement. *Id.* at 904.

Applying the significant involvement test of *Davis* to the railroads' actions, the court found that the Federal Railroad Administration's involvement in creating the rules and overseeing their implementation "clearly amounts to significant involvement for Fourth amendment purposes." *Burnley*, 839 F.2d at 581. The court further noted that in the context of President Reagan's Executive Order for a "Drug-Free Federal Workplace," Exec. Order No. 12,564, 561 Fed.Reg. 32,889 (1986). the FRA regulations could not be viewed "as anything less than part of an overall, nationwide anti-drug campaign." *Burnley*, 839 F.2d at 582.

131. *Burnley*, 839 F.2d at 582.

132. *Id.*

133. *Id.*

134. *Id.*

135. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). *See supra*, note 47 for discussion of the case.

136. *Burnley*, 839 F.2d at 583, citing New York v. Burger, 107 S.Ct. 2636 (1987); (administrative searches); O'Connor v. Ortega, 107 S.Ct. 1492 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985) (Blackmun, J., concurring) (*see supra* note 47 for a discussion of the case); and Schmerber v. California, 384 U.S. 757 (1966) (*see supra* note 44 for a discussion of the case).

137. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

138. *Burnley*, 839 F.2d at 583.

139. *Id.* at 582-83.

Despite the court's conclusion that the tests would not require a warrant, the Ninth Circuit did not agree with the district court that the closely regulated industry exception to the warrant requirement applied in this case, or that the case fell within any of the exceptions to the warrant requirement previously set out by the Supreme Court.[140]

2. Applicability of the Closely Regulated Industry Exception to the Warrant Requirement

In the most recent case to discuss the closely regulated industry exception,[141] the Supreme Court emphasized that the "warrant and probable cause requirements which fulfill the traditional Fourth Amendment standard of reasonableness have lessened application in the context of a closely regulated industry because the owner or operator . . . has a reduced expectation of privacy."[142]

The critical fact for the Ninth Circuit in deciding the applicability of the closely regulated industry exception to the regulations at issue was the reasonable expectation of privacy of the workers that were to be the object of the testing.[143]

Faced with the question of the applicability of the administrative search exception to the search of persons as opposed to the property of a closely regulated business, the Ninth Circuit declined to extend the exception to cover the search of persons employed in the business.[144] The court reasoned that while the history of close regulation of the railroad industry had diminished the reasonable expectations of privacy of the owners and managers of railroads with respect to the railroad premises, the railroad workers' reasonable expectations of privacy with regard to their bodily fluids has not been diminished by the regulations on the industry.[145] The Ninth Circuit pointed out that the vast bulk of safety legislation has been directed at the owners and managers of the railroads. By this, the court meant that the in-

140. *Id.* at 583-84.
141. New York v. Burger, 107 S.Ct. 2636 (1987)
142. *Burnley*, 839 F.2d at 584 (citing *Burger*, 107 S.Ct. at 2643).
143. *Id.* at 584-85.
144. *Id.* at 585.
145. *Id.*

spections up to the date of the drug and alcohol testing regulations in this case have been directed at the physical premises and stock of the railroads.[146]

In order to further distinguish its decision from the Third Circuit's decision in *Shoemaker v. Handel*,[147] the court emphasized that in the case of the railroad industry, as opposed to the horse-racing industry, the "sanctions and penalties for violations of the regulations fall on the owners and managers, not their employees."[148]

The court noted that in *Shoemaker*, a critical fact for the Third Circuit was that the jockeys and other race-track employees were the principal concern of the industry regulations.[149] As the *Shoemaker* court pointed out, the New Jersey Racing Commission had "exercised its rulemaking authority in ways that have reduced the justifiable privacy expectations of persons engaged in the horse-racing industry."[150]

Railroad safety regulations, in the eyes of the Ninth Circuit, have not put the railroad workers on notice that "their participation in the industry reduces their legitimate expections of privacy in the integrity of their bodies."[151] The court concluded that the warrantless searches under the closely regulated industry exception could not take place when employees are not the "principal concern of the industry regulation."[152]

3. The Balancing Test of Reasonableness

To determine the standard of reasonableness applicable to

146. *Id.*

147. 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986). *See supra* note 66 and accompanying text for a discussion of this case.

148. *Burnley*, 839 F.2d at 585.

149. *Id.*

150. *Shoemaker*, 795 F.2d at 1142. The Ninth Circuit contrasted the *Shoemaker* facts with those of the railroad industry: jockeys are licensed, but railroad workers are not; jockeys' job qualifications are determined by government regulation, but the government is precluded from setting railroad workers' job qualifications; other governmental regulations in the field of horseracing are directed at the condition of employees, but in the railroad industry other government regulations apply only to the maintenance of equipment and facilities. *Burnley*, 839 F.2d at 585.

151. *Burnley*, 839 F.2d at 585.

152. *Id.*

the drug and alcohol tests at issue, the Ninth Circuit used the *Camara*[153] balancing test, which balances the government's interest in the search against the level of intrusion into the individuals reasonable expectation of privacy.[154]

As the court analyzed it, on one side of the balance was the employees' reasonable expectations of privacy, and on the other side, the government's interest in safe railroad operation.[155] The court decided that probable cause was not necessary for the search to be constitutional,[156] but that the search must be reasonable "under all of the circumstances of the search."[157]

4. The Two-Pronged Test of Reasonable Searches

To apply the resonableness standard, the court adopted the two-prong test set out in *Terry v. Ohio*:[158] (1) that the search was justified at its inception; and (2) that the search was reasonably related in scope to the facts justifying the intrusion into the individual's privacy.[159] To find a search justified at its inception, a court must determine that there are reasonable grounds for suspecting that the search will yield the evidence sought.[160]

The Federal Railroad Administration argued that the Supreme Court and the Ninth Circuit had previously found searches justified at their inception where there was neither probable cause nor individualized suspicion.[161] The Ninth Cir-

153. *Camara v. Municipal Court*, 387 U.S. 523 (1967). The Ninth Circuit cited *O'Connor v. Ortega*, 107 S.Ct. at 1499, which is a later statement of the *Camara* balancing test. *Burnley*, 839 F.2d at 586. *See supra* note 65, and accompanying text for a discussion of the *Camara* balancing test.

154. *Burnley* 839 F.2d at 587.

155. *Id.* at 586.

156. *Id.* at 587.

157. *Id.*

158. 392 U.S. 1, 20 (1968). *See supra* notes 90-95, and accompanying text.

159. *Id.*

160. *Burnley*, 839 F.2d at 587.

161. *Id.* at 586. The Supreme Court and the Ninth Circuit have previously approved searches of persons without probable cause or individualized suspicion. *Id.* The Federal Railroad Administration discussed United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (which upheld brief vehicle stops at checkpoints); United States v. Des Jardins, 747 F.2d 499 (9th Cir. 1984) (which upheld pat-down searches at a border crossing with only minimal suspicion), *partially vacated* 772 F.2d 578 (9th Cir. 1985) ; and McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978) (which legitimized routine metal detector and pat-down searches of attorneys and others entering courthouses in San Francisco).

cuit distinguished those cases from *Burnley* by noting that while a vital government interest has been held to justify minimal intrusions into the privacy of individuals without probable cause or individualized suspicion,[162] the tests in issue could not be considered minimal intrusions.[163]

The Ninth Circuit noted that the Supreme Court has not yet determined whether individualized or particularized suspicion is necessarily required for there to be reasonable grounds of suspecting that a search will produce the evidence sought.[164] The Ninth Circuit found it significant that in the cases of school searches and public employee searches, property, not persons, was the object of the search and individualized suspicion did exist.[165]

The Ninth Circuit held that particularized suspicion is necessary to find the search of railroad workers for drug or alcohol intoxication justified at its inception.[166] The court decided that accidents or rule violations in themselves, do not create "reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew."[167] The court buttressed its holding by pointing to the Supreme Court's decision in *New Jersey v. T.L.O.*,[168] which noted that "[E]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal. . . ."[169] Because blood and urine tests are more than minimal intrusions, the court held that the testing provisions are unreasonable searches for purposes of the Fourth Amendment.[170]

Despite its decision that the tests were not justified at their inception, the court went on to analyze whether the tests were reasonably related in scope to the interests that justified the

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162. *Burnley*, 839 F.2d at 586.
163. *Id.*
164. *Id.* at 587.
165. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985); *see also* O'Connor v. Ortega, 107 S.Ct. at 1503 (1987).
166. *Burnley*, 839 F.2d at 587.
167. *Id.*
168. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
169. *Id.* at 342 n.8.
170. *Burnley*, 839 F.2d at 588.

searches in the first place.[171] The standard applied by the court was whether or not the tests were excessively intrusive in light of the objectives of the search.[172] The court applied this standard to the regulations "as they would stand with particularized suspicion incorporated as a necessary predicate to all testing."[173]

The *Burnley* court noted that the purpose of the regulations was to detect current drug intoxication. Through the deterrent effect of testing the regulations would improve railroad safety.[174] According to the court, the one flaw in the approach taken is the "[B]lood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose . . . because the tests cannot measure current drug intoxication or degree of impairment."[175] The court noted that drug tests of the type to be administered by the railroads cannot distinguish current intoxication from the physiological after-effects of drug use weeks or months prior to the testing.[176]

However, in light of the great government interest in railroad safety, the court decided that if individualized suspicion was a prerequisite for such drug testing, the regulations would be reasonably related in scope because "the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis for appropriate disciplinary action."[177]

5. The Court's Analysis of Other Circuit Courts' Decisions

The *Burnley* court concluded its Fourth Amendment analysis by distinguishing its reasoning and conclusion from recent decisions in other circuits upholding drug and alcohol testing.[178]

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 589.
177. *Id.* The court briefly analyzed whether the government's argument that the implied consent provision in DOT Control of Alcohol and Drug Use, 49 C.F.R. § 219.11 (1987), satisfied the Fourth Amendment even under the test of reasonable suspicion, and found that when a search is constitutionally unreasonable, consent to it cannot validate it. *Id.*
178. *Id.* at 589-90.

The court distinguished the Fifth Circuit's decision in *National Treasury Employees Union v. Von Raab*[179] by noting that the *Von Raab* court had failed to consider whether drug tests of customs workers were justified at their inception.[180] The court distinguished the Eighth Circuit's decision to uphold random urinalysis of prison employees in *McDonell v. Hunter*[181] on two grounds. First, that the Eighth Circuit failed to find the tests justified at their inception,[182] and second, that Eighth Circuit's view that urinalysis was a minor intrusion was incorrect.[183]

The court reiterated its criticism of the *Shoemaker*[184] court's reliance on the closely regulated industry exception to the warrant requirement.[185] The court distinguished the factually similar *Division 241 Amalgamated Transit Union v. Suscy*[186] by noting that the Seventh Circuit's decision was not based on an analysis of whether the tests were justified at their inception.[187]

The court concluded its analysis by briefly considering and rejecting RLEA's statutory and other constitutional arguments.[188]

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179. 816 F.2d 170 (5th Cir. 1987).

180. *Burnley*, 839 F.2d at 590.

181. 809 F.2d 1302 (8th Cir. 1987).

182. *Burnley*, 839 F.2d at 590. *See supra* note 35 for a discussion of this case.

183. *Burnley*, 839 F.2d at 590.

184. Shoemaker v. Handel, 795 F.2d 1136, 1141 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986).

185. *Burnley*, 839 F.2d at 590. *See supra* notes 100-104, and accompanying text for a discussion of *Suscy*.

186. 538 F.2d 1264 (7th Cir. 1976).

187. *Burnley*, 839 F.2d at 587.

188. *Id.* at 590-92. The first statutory argument raised by RLEA was that the regulations violated the Federal Railroad Safety Act of 1970 (45 U.S.C. §§ 431-440 (1982)) because the FRA lacked the authority to delegate testing to the railroads, and to permit testing without individualized suspicion. *Id.* at 590-91. The court concluded that the argument was meritless because 45 U.S.C. § 437(a) authorizes the Secretary of Transportation to delegate functions respecting examination, inspection and testing of employees to qualified individuals. *Id.* at 590.

RLEA also argued that under Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (a case that held that OSHA inspections must be conducted pursuant to a warrant), any statutory scheme mandating warrantless searches was unconstitutional. *Burnley*, 839 F.2d at 590. The court dismissed this argument because the *Marshall* court had been specifically concerned with OSHA searches, and because the decision in that case had stated that the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 591 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978)).

B. THE DISSENT

Circuit Judge Alarcon's dissent first focused on the applicability of the closely regulated industry exception.[189] He disagreed with the majority's conclusion that the laws regulating the railroad industry were not aimed in large part at railroad workers.[190] The dissent noted that Congress set limits on working hours,[191] mandated safe working practices by railroad personnel,[192] and set out criminal sanctions for certain rule viola-

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RLEA's argument that the regulations violate the Federal Rehabilitation Act of 1973, 29 U.S.C. §§ 791-94 (1982), by discrimination against the handicapped was dismissed by the court because the FRA regulations do not mandate discriminatory treatment of workers handicapped by drug or alcohol addictions. *Id.* The court also pointed out that the rehabilitation act does not cover alcoholics or drug abusers whose use of the substances endangers public safety 29 U.S.C. § 706(7)(B) (1982). *Burnley*, 839 F.2d at 591.

The last statutory argument by RLEA was that the regulations violated the Railway Labor Act (45 U.S.C. §§ 151 (1982)) by denying employees the right to union representation at the testing procedures. *Id.* Because the regulations are silent regarding the employee's right to representation, the court concluded that the question was not ripe for review. *Id.*

RLEA also argued that the regulations infringed on the railroad workers' fundamental rights of privacy guaranteed by Roe v. Wade, 410 U.S. 113 (1973). *Burnley*, 839 F.2d at 591. The Ninth Circuit did not find that *Roe* had been extended far enough by the Supreme Court to cover any right to choose use of drugs or alcohol. *Burnley*, 839 F.2d at 591. However, the court pointed out that in Whalen v. Roe, 429 U.S. 589 (1977), the Supreme Court discussed the right to keep information about drug use private. *Burnley*, 839 F.2d at 591. Pointing to Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied* 107 S.Ct. 577 (1986), the Ninth Circuit noted that one factor concerning the reasonableness of the drug tests in that case was the guaranteee of confidentiality within the statutory scheme. *Burnley*, 839 F.2d at 592. Although the FRA regulations contained no such guarantee of confidentiality, the court concluded that the issue should be litigated and decided after a breach of confidentiality. *Id.*

RLEA also argued that the regulations violated the Equal Protection Clause of the Fifth Amendment by mandating the testing of covered employees but not supervisory employees. *Id.* Noting that the Equal Protection Clause in this situation required only a rational relationship between the classification scheme and a legitimate government objective, the court concluded that because the covered workers were those actually operating the trains, the regulation's provisions were reasonably related to the government goal of safe railroad operation. *Id.*

189. *Burnley*, 839 F.2d at 590-92 (Alarcon, J., dissenting).

190. *Id.* at 593 (Alarcon, J., dissenting).

191. 45 U.S.C. § 62(a)(1) (1982).

192. *Burnley*, 839 F.2d at 593 (Alarcon, J., dissenting). Judge Alarcon noted 49 C.F.R. § 218.1-218.30 (1986) (requiring certain safety procedures); 49 C.F.R. § 218.37 (1986) (requiring certain safety procedures when trains were running at reduced speeds); and 49 C.F.R. § 220.61 (1986) (requiring certain safety practices when orders were given or received).

tions.[193] The dissent concluded that railroad workers have a diminished expectation of privacy with respect to their use of drugs or alcohol.[194] Judge Alarcon pointed to the fact that for a considerable period of time railroad workers have been subject to Rule G,[195] a rule adopted by the railroad industry which prohibits the use of alcoholic or controlled substances by employees "subject to duty or while on duty,"[196] and which requires urine or blood tests to clear workers of suspicion of drug or alcohol use.[197]

Because railroad workers themselves have a history of close regulation, Judge Alarcon concluded that the closely regulated industry exception applied to the disputed drug and alcohol testing.[198]

Having concluded that the exception applied in this case, the dissent then applied the three-prong test of reasonableness for searches of closely regulated industries set out by the Supreme Court in *New York v. Burger*.[199]

Judge Alarcon concluded that the first prong of *Burger* was met because there was a substantial government interest informing the regulatory scheme because fatal accidents have been recorded that occurred due to drug or alcohol use by railroad personnel.[200] The government also has a substantial interest in protecting citizens from accidents involving toxic chemicals and the other hazardous materials carried by train.[201]

The dissent concluded that the second prong of *Burger* was met because warrantless inspections are necessary to accomplish the regulatory purpose. Prompt action is required to gather sam-

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193. *Burnley*, 839 F.2d at 593. (Alarcon, J., dissenting). Judge Alarcon cited 49 U.S.C. § 1801 (1982) (providing criminal penalties for knowing transportation of hazardous material); and 45 U.S.C. § 438 (1982) (setting out criminal penalties for false entries in accident reports.) *Burnley*, 839 F.2d at 593.

194. *Burnley*, 839 F.2d at 593 (Alarcon, J., dissenting).

195. Rule G was adopted on April 17, 1897, by the Association of American Railroads into its Standard Code of Operating Rules.

196. *See infra* note 225, for the text of Rule G.

197. *Burnley*, 839 F.2d at 593 (Alarcon, J., dissenting).

198. *Id.* at 598 (Alarcon, J., dissenting).

199. 107 S.Ct. 2636 (1987). *See supra* note 45, for a discussion of *Burger*.

200. *Burnley*, 839 F.2d at 596 (Alarcon, J., dissenting).

201. *Id.* at 594 (Alarcon, J., dissenting).

ples before the body breaks down the drugs or alcohol in the bloodstream.[202]

The dissent concluded that the third prong of the *Burger* test was met because the testing procedures set out in the regulations were triggered by objective circumstances (major accidents or fatal incidents) and therefore the tests were not being given at the discretion of any one official.[203]

Stating that the blood and urine testing program satisfied the *Burger* test of reasonableness, Judge Alarcon concluded that the regulations were constitutional under the Fourth Amendment.[204]

Judge Alarcon found an alternative ground of constitutionality in the balancing test of reasonableness that originated in *Camara v. Municipal Court*[205] and which became a two-fold test in *Terry v. Ohio*.[206]

The first part of the *Terry* test requires a court to determine whether the search is "justified at its inception,"[207] by balancing "the need to search against the invasion that the search entails."[208] On the government side of the scale the dissent placed the government's "compelling need to ensure that railway employees be free of alcohol or controlled substances in propelling locomotives across this nation,"[209] and on the workers' side of the scale the intrusion caused by the blood, urine and breath tests.[210] The dissent concluded that the government's need outweighed the invasion of the railroad workers' privacy interests.[211] Judge Alarcon pointed to the conclusions drawn by the other Circuits whose decisions were discussed by the majority.[212]

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202. *Id.*

203. *Id.* (Alarcon, J., dissenting).

204. *Id.* at 595 (Alarcon, J., dissenting).

205. 387 U.S. 523 (1967). *See supra* note 64, and accompanying text.

206. 392 U.S. 1 (1968). *See supra* note 90, and accompanying text.

207. Finding a search "justified at its inception" is the first prong of the two-prong test of reasonableness set out in *Terry v. Ohio*, *Id.* at 20.

208. *Burnley*, 839 F.2d at 595 (Alarcon, J., dissenting), (quoting *Terry*, 392 U.S. at 21.)

209. *Id.* at 596 (Alarcon, J., dissenting).

210. *Id.*

211. *Id.*

212. *Id.* at 595-97 (Alarcon, J., dissenting).

The dissent also stated that it could be presumed that the workers were aware that they would be subject to inquiry regarding their use of controlled substances and alcohol because of the existence of Rule G.[213]

Satisfaction of the second-prong of the *Terry* test requires that the tests are reasonably related to the search objectives.[214] The dissent concluded that the tests were reasonably related to the search objectives. This conclusion was based on the fact that safeguards built into the regulations address the overbreadth problem presented by urine tests revealing past as well as current intoxication.[215]

V. CRITIQUE

The Ninth Circuit's decision in *Railway Labor Executives' Ass'n v. Burnley* rests upon the court's analysis of the applicability of the closely regulated industry exception to the warrant and probable cause requirement for searches, and on the court's holding that individualized suspicion is required to find a search justified at its inception.[216]

A. Closely Regulated Industry Exception

The Ninth Circuit held that the closely regulated industry exception does not apply to the searches of workers in closely regulated industries unless the workers have been the "principal concern"[217] of the regulatory scheme. This holding makes it necessary for courts to make factual analyses of whether an industry's regulations are principally concerned with the premises, stock, and machinery of the industry, or the workers in the industry. But reasonable minds may interpret the "object" of a

213. *Id.* at 595.

214. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

215. *Burnley*, 839 F.2d at 597 (Alarcon, J., dissenting). Judge Alarcon noted that 49 C.F.R. § 219.309(b)(2) (1987) requires the railroads to inform tested workers of the overbreadth problem presented by urine tests, and to counsel them to take a blood test that will accurately determine whether the drugs detected in their blood were taken recently or not. *Burnley*, 839 F.2d at 597.

216. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 587 (9th Cir.1988), *cert. granted*, 108 S.Ct. 2033 (1988).

217. *Id.* at 585.

regulatory scheme in various ways. Here, for example, the majority contends that the object of the railroad industry's regulations are the premises, management and rolling stock,[218] while the dissent forcefully argues that railroad workers have been important objects of regulations diminishing their reasonable expectations of privacy.[219]

The court's effort to distinguish its decision from *Shoemaker*[220] serves to undermine the strength of its argument that the closely regulated industry exception applies to property not persons. The Ninth Circuit's holding implicitly adopts the *Shoemaker* court's ruling that in certain cases the workers in closely regulated industries can be searched under the closely regulated industry warrant exception.[221] The court did not decide that the closely regulated industry exception has no application at all to the search of persons working in a closely regulated industry. The court simply held that such workers can be searched without a warrant under that exception only where, as in *Shoemaker*, they have been the principal object of the industry regulations.

An analysis of the applicability of the closely regulated industry exception to the search of persons as well as business premises must focus on the rationale and limits of the foundation case of the administrative search doctrine, *Camara v. Municipal Court*.[222]

The Supreme Court in *Camara* noted three critical factors that justified administrative searches without particularized suspicion or probable cause.[223] The first factor was that "such programs have a long history of judicial and public acceptance."[224] As applied to *Burnley*, the argument can be made that while the particular drug testing program in issue was only recently enacted, the railroad industry and its workers have been subject to

218. *Id.*

219. *Id.* at 593-94 (Alarcon, J., dissenting).

220. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

221. *Shoemaker*, 795 F.2d at 1142.

222. 387 U.S. 523 (1967).

223. *Id.* at 537.

224. *Id.*

rules regarding alcohol and drug use for a long period of time.[225] The second *Camara* factor required the existence of a strong public interest.[226] Applied to the railroad's testing scheme, a strong argument can be made that the public interest in safety demands that trains be operated by sober workers. Today's trains carry potentially dangerous cargo such as toxic chemicals and radioactive wastes, as well as hundreds of passengers. The nature of society's drug and alcohol problem is such that testing may be the best means available to protect the public.

The critical element is the *Camara* court's third factor; that "because the inspections are neither personal in nature nor aimed at the discovery of crime, they involve a relatively limited invasion of the . . . citizen's privacy."[227] The application of the closely regulated industry exception to the searches of the workers in an industry must be seen in light of the fact that the *Camara* court's authorization of the search of housing based on only generalized suspicion was founded on the rationale that the invasion involved was only minimal.[228]

One issue the Supreme Court may resolve is whether limits set by the *Camara* court's third factor preclude the type of application of the closely regulated industry exception that has been made in *Shoemaker v. Handel*.[229] In that case, the Third Circuit held that a warrantless administrative search of jockeys for drug or alcohol use was justified when there was a strong state interest in searching and when pervasive regulation of an industry has reduced the justifiable expectations of privacy of the workers in that industry.[230] The *Shoemaker* court's require-

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225. For over 40 years, the railroad workers represented by RLEA have been subject to Rule G, which presently states:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

226. *Camara*, 387 U.S. at 537.

227. *Id. Emphasis added.*

228. *Id.* at 535.

229. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

230. *Id.* at 1142.

ments for drug and alcohol testing under the closely regulated industry exception has been recently applied in *Rushton v. Nebraska Public Power District*,[231] a case involving the drug and alcohol testing of workers at a nuclear power plant.

Both the *Shoemaker* and *Rushton* courts emphasized that the workers had diminished expectations of privacy given the nature of their employment. It is this reduced expectation of privacy that is critical in evaluating whether the searches of persons under the administrative search exception is a "limited invasion"[232] for the purpose of the third *Camara* factor.

The majority of the Ninth Circuit held that "[R]ailroad safety regulations have not put railroad employees on notice that their participation in the industry reduces their legitimate expectations of privacy in the integrity of their bodies."[233] But Judge Alarcon in dissent concluded that train operators "should . . . be presumed to know that inquiry concerning their off-duty drug and alcohol use is likely because of the danger to others that would flow from operating a train while under the influence of such substances."[234]

In the context of prior regulation of drug and alcohol use by the railroads,[235] the dissent's position is persuasive. It is reasonable to conclude that the railroad workers' expectations of privacy have been lowered by their work in the heavily regulated railroad industry. There is a strong case for the Supreme Court to conclude that the invasion caused by the drug and alcohol testing is minimal and in keeping with the limits and rationale of *Camara*.

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231. 653 F.Supp. 1510 (D.Neb. 1987). In this case, the federal district court was faced with a Fourth Amendment challenge to the Nebraska Public Power District's regulation implementing a fitness-for-duty scheme of drug and alcohol testing. *Id.* at 1512 The court applied the test set out in Shoemaker v. Handel, 795 F.2d at 1142. The court decided that the rules were constitutional because the Nebraska Public Power District's compelling interest in safety outweighed the privacy interest of the nuclear power plant workers. *Rushton*, 653 F.Supp. at 1525.

232. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

233. Railway Labor Executives' Association v. Burnley, 839 F.2d 575, 585 (9th Cir.), *cert. granted* 108 S.Ct. 2033 (1988).Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 585 (9th Cir.), *cert. granted* 108 S.Ct. 2033 (1988).

234. *Id.* at 595 (Alarcon, J., dissenting). *See supra* note 225 for the text of Rule G.

235. *See supra* note 225.

If the Supreme Court decides that the closely regulated industry exception does apply, the reasonableness of the regulations will be evaluated by the three-prong test set out in *New York v. Burger*.[236] As the dissent in *Burnley* argued,[237] the "substantial government interest"[238] prong is met because of the great need for safe rail operation.[239] The requirement that the warrantless inspections are necessary to further the regulatory scheme is met because of the exigencies involved with toxicological testing.[240] The final requirement that the certainty and regularity of the inspection program prevents overreaching by officials is met because the regulations require either an objective triggering event like a major accident, or the reasonable suspicion of two trained supervisors.[241]

B. Balancing Test of Reasonableness

1. Is the Search "Justified at Its Inception"?

The central issue in an analysis of whether the drug and alcohol tests are reasonable under a balancing test is whether individualized suspicion should be required to find that the search is justified at its inception.

To find a search justified at its inception, there must be reasonable grounds for suspecting that the search will turn up the evidence sought.[242] The Ninth Circuit held that "[A]ccidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting . . ."[243] and held that particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception.[244]

The Supreme Court has stated that while "individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible re-

236. 107 S.Ct. 2636 (1987).
237. *Burnley*, 839 F.2d at 594 (Alarcon, J., dissenting).
238. *Burger*, 107 S.Ct. at 2644. *See, Burnley*, 839 F.2d at 594.
239. *Burnley*, 839 F.2d at 594 (Alarcon, J., dissenting).
240. *Id.*
241. *Id.*
242. *Id.* at 587.
243. *Id.*
244. *Id.*

quirement of such suspicion."[245] The Court has noted, however, that "[E]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." ' "[246]

In view of this qualification by the Supreme Court regarding the appropriateness of searches without individualized suspicion, the level of intrusion caused by the drug and alcohol testing becomes a critical factor. As discussed above, there is a strong argument that railroad workers have a diminished expectation of privacy. If the workers do have a diminished expectation of privacy, it is possible to conclude that the required blood, breath and urine tests are minimal intrusions. As minimal intrusions, it is arguable that individualized suspicion is not necessary to make the search justified at its inception.[247]

2. Scope of the Search

A factor that was not considered by the Ninth Circuit regarding the intrusiveness of the tests called for by the regulations is the possibility that the information gleaned from the tests will be used as evidence in the criminal prosecution of the

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245. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976).

246. New Jersey v. T.L.O., 469 U.S. 325, 342 n. 8. (1985) (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

247. Some commentators who have considered this balance have concluded that workers in closely regulated industries whose jobs impact on the public good are subject to drug and alcohol testing under a lesser standard than individualized suspicion. Bookspan, *Behind Open Doors, Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L.REV. 307, 342-43, note 177 (1987).

Professor LaFave has written the following on this subject:

> [s]uch a testing program will most likely pass muster if it serves the interest of protecting public safety, or where the nature of the private employee's job is such that inadequate performance of it because of drug use would present such a danger of property or personal damage to some member of the public. . .

LAFAVE, *supra* note 27 at 32 (Supp. 1988).

See Miller, *Mandatory Urinalysis Testing*, 48 U. PITT. L. REV. 201 (1986). Regarding the FRA regulations at issue in *Burnley*, Miller wrote that the "FRA regulations are examples of ways in which the protection afforded public employers through the Fourth Amendment can be extended to private sector employees. . . ." *Id.* at 240

railroad workers who test positive following a major accident.[248] This possibility of criminal sanction may constitute a severe enough invasion of privacy to warrant the requirement of individualized suspicion.[249]

C. Conflict With the Other Circuits

The Ninth Circuit has boldly made individualized suspicion the precondition for constitutional drug and alcohol testing.[250] The other circuits that have considered the issue have held that particularized suspicion is not a prerequisite to a constitutional drug and alcohol testing scheme.[251]

The Ninth Circuit's analysis of the reasonableness of such toxicological testing differs from the analysis done by these other circuits because of the Ninth Circuit's insistence that for a search to be reasonable, it must be "justified at its inception."[252] As set out in *O'Connor v. Ortega*,[253] for a search to be justified at its inception, there must be "reasonable grounds for suspecting that the search will turn up the evidence sought."[254] The Ninth Circuit concluded that an accident or incident alone would not create a reasonable suspicion that drugs or alcohol would be found in the railroad workers' bloodstreams.[255]

Alcohol and drug use is prevalent in American society. The

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248. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, (1986) mandates up to five years imprisonment and/or up to $10,000 fine for those operating a common carrier while under the influence of alcohol or drugs.

249. *See* Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Georgia 1985). In considering the invasion of privacy caused by an urinalysis screening for marijuana use, the district court wrote: "Added to this balancing . . . is the fact that government investigations of employee misconduct always carry the potential to become criminal investigations." *Id.* at 491.

250. Railway Labor Executives' Association v. Burnley, 839 F.2d 575, 587 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988).

251. *See*: National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); and Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

252. *Burnley*, 839 F.2d at 587, (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

253. O'Connor v. Ortega, 107 S.Ct. 1492 (1987).

254. *Id.* at 1503.

255. *Burnley*, 839 F.2d at 587.

undisputed facts adopted by the court showed that drug and alcohol use by railroad workers is a serious concern of the railroad. Faced with a train accident, a reasonable person may very well expect to find evidence of drug or alcohol use by the workers responsible for the train.

The other circuit courts that have considered similar testing schemes analyzed the justification for the searches by balancing the government need to search against the privacy interests of the individuals searched.[256] By focusing on the initial justification of the toxicological tests, the Ninth Circuit may have failed to fairly balance the interests at stake. It is certainly arguable that the government has a compelling interest in safeguarding the public from locomotives piloted by men and women impaired by drugs or alcohol. And as Judge Alarcon stated, workers on the railroads can be presumed to know the danger, and to have a lesser expectation of privacy based on that presumption.

VI. CONCLUSION

In *Railway Labor Executives' Ass'n v. Burnley*,[257] the Ninth Circuit held that drug and alcohol testing of railroad workers following certain accidents or incidents may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment.[258]

By refusing to apply the closely regulated industry exception to the warrant to the case and by finding the search unreasonable under the balancing test of reasonableness,[259] the Ninth Circuit has put itself in opposition to the other circuits that have analyzed drug and alcohol testing.

By requiring that drug and alcohol testing regulations incorporate a requirement of individualized suspicion, the Ninth Cir-

256. *See supra* note 248.
257. 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988).
258. *Id.* at 592.
259. *Id.* at 588.

cuit has made it more difficult for railroads to protect their workers and the public from drug or alcohol induced disasters.

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