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LABOR INJUNCTIONS PENDING ARBITRATION: SHOULD COURTS ENJOIN MANAGEMENTS' UNILATERALLY IMPLEMENTED DRUG-TESTING PROGRAMS?

PAUL KENEALLY

INTRODUCTION

As drug abuse has become more prevalent among the general population,1 many employers have responded by seeking to curtail employee drug use through the implementation of mandatory drug-testing programs.2 Normally, non-unionized employees must comply with these programs or seek work elsewhere. Labor unions, however, can negotiate collective bargaining agreements that offer some unionized employees additional rights and responsibilities with respect to employer-initiated drug-testing programs. A standard clause in such agreements provides that either side may demand arbitration to settle disputes over interpretation of any provision of the agreement.3

When management decides to implement a new drug-testing program or strengthen an existing one, it may be reluctant to wait for the current collective bargaining agreement to expire before doing so.4 Conversely, unions often feel that a new or modified drug-testing program should be subject to collective bargaining negotiation, or that such a serious employment alteration should not be allowed until management's rights are determined by an arbitrator.5 Collective bargaining agreements generally contain arbitration clauses that are broad enough to cover the question of whether management has the unilateral power under the agreement to unilaterally implement a new drug-testing program or to strengthen an existing one.6

When a union objects to management's newly proposed drug-testing program, it will usually submit its grievance to an arbitrator; in the meantime, the union may also seek to enjoin the implementation of the program pending the arbitrator's decision.7 This Note addresses whether management has a right to unilaterally implement its own drug-testing program before an arbitrator has rendered a final decision.

Part I of this Note examines the history of labor injunctions pending

2. See id. at 2.
3. See id. at 19-20.
4. Management may feel that the agreement allows it to institute such a change under the collective bargaining agreement's express drug-testing provision, under the "management rights clause[,] or [under] an implied agreement between the parties." Id. at 20.
5. See id. at 18 n.76.
6. See id. at 19-20.
7. See id. at 18 n.76.
arbitration and demonstrates that the law controlling suits by management to enjoin union activity is equally applicable to cases in which the union seeks the injunction. Part II of the Note discusses the two tests used to determine whether to grant drug-testing injunctions and explains how the federal courts have applied these tests in specific factual contexts. Part III then analyzes the arguments both for and against injunctions staying drug-testing programs pending arbitration of the dispute. Finally, this Note concludes that courts should grant these injunctions because the employee privacy interests implicated in drug testing are irreparably injured if management unilaterally implements a drug-testing program pending arbitration.

I. BACKGROUND

In examining whether a union may obtain an injunction against management’s drug-testing activities, courts are faced with a conflict between two federal statutes: the Norris-LaGuardia Act and the Labor Management Relations [Taft-Hartley] Act. The Norris-LaGuardia Act broadly prohibits federal courts from issuing injunctions in labor disputes. Section 301 of the Taft-Hartley Act, however, gives federal district courts the power to enforce “contracts between an employer and a labor organization representing employees in an industry affecting commerce.”

The Supreme Court addressed this statutory tension three times during the 1970s in cases where management sought to enjoin a union’s violation of a no-strike clause. The Court held generally that “[t]he literal [anti-injunction] terms of the Norris-LaGuardia Act must be accommodated to the subsequently enacted [contract-enforcement] provisions of Section 301(a) of the Labor Management Relations [Taft-Hartley] Act and the purposes of arbitration.”

The Court first resolved the conflict in Boys Markets, Inc. v. Retail Clerks Union by carving out an exception to the Norris-LaGuardia Act. This exception was available, the Court held, if the collective bargaining agreement contained an express or implied undertaking not to

10. See Norris LaGuardia Act, 29 U.S.C. § 101 (1988). “No court of the United States ... shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute.” Id.
strike, if the strike was over an arbitrable dispute, and if "ordinary principles of equity" supported the issuance of the injunction. The equitable principles identified were (1) whether breaches of the no-strike clause were occurring or being threatened; (2) whether the employer would be irreparably injured; and (3) whether the employer would suffer more from the denial of the injunction than the union would from its issuance. Notably missing from this standard, however, was any likelihood-of-success-on-the-merits analysis commonly utilized in rulings on requests for injunctions. Presumably, the Boys Markets standard avoids this analysis because it would usurp the role of the arbitrator, who has exclusive authority to render judgments on the merits in an arbitrated dispute. Since the parties to a collectively bargained arbitration clause have agreed that an arbitrator from their industry should decide the substantive issue at stake, the Court's injunction analysis, as formulated in Boys Markets, focuses only on the interim period before the arbitrator's decision. The Court has had a long history of respect for arbitrators' expertise, based on the superior knowledge arbitrators possess of all the nuances in their particular industry.

In Boys Markets, the Court enjoined the Retail Clerks Union from violating its no-strike clause during a dispute concerning whether non-union members could perform certain jobs. While acknowledging that its holding seemed to defy the anti-injunction mandate of the Norris-LaGuardia Act, the Court noted that "[t]he Norris-LaGuardia Act was

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15. Id. at 254 (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

16. See id. The first prong of this test, whether breaches of the no-strike clause are occurring or being threatened, is inapplicable to drug-testing cases, which involve only the single dispute over the implementation of the drug-testing program. By contrast, a strike is symptomatic of yet another union-management dispute. Cases such as Boys Markets involve two disputes: one over the no-strike clause and the other over the subject of the threatened strike. The second two prongs—irreparable injury and balance of hardships—should be used to show frustration of the arbitral process, and thus justify enjoining management in drug-testing cases. See infra notes 121-49 and accompanying text.


In the recent case of Oil, Chem. & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co., 885 F.2d 697 (10th Cir. 1989), the Tenth Circuit found that inquiry into the likelihood of success on the merits would undermine the arbitrator's role, a result prohibited by Boys Markets and Buffalo Forge. See Oil, Chemical, 885 F.2d at 703. Instead, the court only required the union to show "that the position... [it] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." Id. at 704 (quoting Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc., 529 F.2d 1073, 1077-78 (9th Cir. 1976) [hereinafter Greyhound I]); accord Aluminum Workers Int'l Union, Local Union No. 215 v. Consolidated Aluminum Corp., 696 F.2d 437, 442 n.2 (6th Cir. 1982) (minimal inquiry into the likelihood of success on the merits); Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp., 668 F.2d 276, 284-85 (7th Cir. 1981) (same); Lever Bros. Co. v. International Chem. Workers Union, Local 217, 554 F.2d 115, 120 (4th Cir. 1976) (same).

responsive to a situation totally different from that which exists today. ... [T]he federal courts generally were regarded [at the time of the Norris-LaGuardia Act's passage] as allies of management in its attempt to prevent the organization and strengthening of labor unions. As labor unions grew in strength, however, Congress became more interested in encouraging collective bargaining and promoting peaceful resolution of industrial disputes through arbitration. Congress's shift in emphasis, however, as the Boys Markets Court pointed out, is seen only in its more recent enactments, while older provisions including the anti-injunction section of the Norris-LaGuardia Act remain intact. The Boys Markets Court thus noted that failure to enjoin the union's strike would flout this current congressional policy by discouraging employers from entering into arbitration agreements. Thus, after Boys Markets, injunctions were available in the labor-management context, but were limited to management enforcement of a no-strike clause only if management satisfied the specific requirements.

In its next decision involving an injunction sought in a labor dispute, the Supreme Court again found a Boys Markets exception to the anti-injunction rule, but in affirming the grant of management's request to enjoin a union's strike the Court required management to maintain the status quo pending arbitration. In Gateway Coal Co. v. United Mine Workers, the respondent union went on strike to protest the reinstatement of two foremen who were facing criminal charges for certain on-site safety violations. The union refused to arbitrate so Gateway sought to enjoin the strike and compel arbitration. The Court essentially followed its Boys Markets analysis and found the dispute arbitrable under the broad arbitration clause, from which a no-strike obligation could be implied. It also found that traditional equitable principles supported

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19. Id. at 250; see also Norris-LaGuardia Act, 29 U.S.C. § 102 (1988) ("Whereas under prevailing economic conditions ... the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor ... it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing.").

20. See Boys Markets, 398 U.S. at 251; see also Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 432 (1976) (Stevens, J., dissenting) ("[l]ike the decision in Boys Markets, this opinion reflects ... my confidence that experience during the decades since the Norris-LaGuardia Act was passed has dissipated any legitimate concern about the impartiality of federal judges in disputes between labor and management").


22. See id. at 248; see also supra note 11 and accompanying text (Labor Management Relations (Taft-Hartley) Act gave courts jurisdiction over labor disputes without mentioning the Norris-LaGuardia Act).

23. See supra notes 15-16 and accompanying text.


26. See id. at 372.

27. See id.

28. See id. at 374.
granting the injunction. The broad presumption of arbitrability ostensibly supported by the Court, and a major factor in its decision, is irrelevant to typical drug-testing cases, where arbitrability is rarely doubted. Gateway Coal remains particularly applicable to drug-testing cases, however, because the injunction upheld by the Court merely forced management to maintain the status quo pending arbitration. Furthermore, the case did not limit the availability of status quo injunctions to situations where management seeks to enjoin a union’s strike.

In its most recent decision in the area, the Supreme Court refused to grant management’s request to enjoin a union’s strike, where such an injunction would have usurped to role of the arbitrator assigned to decide the pending dispute. In Buffalo Forge Co. v. United Steelworkers, the respondent union held a sympathy strike to show support for a sister union’s battle with the petitioner, Buffalo Forge. The Court clarified the Boys Markets exception and again stressed the importance of protecting the arbitration process. The injunction sought by management was denied for two reasons that support the commitment to arbitration. First, the Court found that the no-strike clause did not clearly bar the sympathy strike at issue, and thus the granting of the injunction would usurp some of the arbitrator’s power. Second, the underlying dispute, which involved a sister union’s disagreement with the common employer, was not arbitrable, and therefore not worthy of injunctive protection. The Buffalo Forge dissent, however, argued that focusing on the non-arbitrability of the underlying dispute clouded the issue and deprived management of its bargained-for no-strike clause, given in exchange for the agreement to arbitrate disputes. The dissent stressed that enforcing no-strike clauses only when the underlying dispute is arbitrable will “frustrate the more basic policy of motivating employers to agree to binding arbitration by giving them an effective ‘assurance of uninterrupted operation during the term of the agreement.’”

The Buffalo Forge Court, in dicta, also distinguished Boys Markets on another ground. It noted that in Boys Markets, “it was also clear that the

29. See id.
30. See Cantor, Buffalo Forge and Injunctions Against Employer Breaches of Collective Bargaining Agreements, 1980 Wis. L. Rev. 247, 258 n.56.
31. Where drug testing is involved, the scope of management’s unilateral rights is usually a question of contractual analysis clearly subject to the standard arbitration clause, thus obviating the need for any presumption. See Note, supra note 1, at 19-20.
34. 428 U.S. 397 (1976).
35. See id. at 401.
36. See id. at 412.
37. See id. at 409-10.
38. See id. at 409. Because of these findings, the Court did not reach the equitable considerations of irreparable harm and balance of hardships. See id.
39. See id. at 423-24 (Stevens, J., dissenting).
40. Id. at 424 (Stevens, J., dissenting) (quoting Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 454 (1957)).
strike violated the no-strike clause accompanying the arbitration provisions.”  

Yet the finding of no clear violation of the no-strike clause in Buffalo Forge seems to contradict the policy of leaving such decisions to the arbitrator. As noted above, disputes over drug-testing programs are usually arbitrable.

Whereas Boys Markets, Gateway Coal, and Buffalo Forge all involved management requests to enjoin unions’ strike activity pending arbitration, the Supreme Court has never considered a case where a labor union sought to enjoin management’s actions pending arbitration. Courts are in general agreement, however, that the Boys Markets exception also applies to litigation maintained by unions. The Supreme Court endorsed such an application when it vacated and remanded the decision in Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc. (“Greyhound I”), which granted an injunction against Greyhound, so that the Ninth Circuit could re-consider its initial decision in light of Buffalo Forge. In Greyhound I, the Ninth Circuit had affirmed an injunction pending arbitration against a bus company attempting to alter its work cycles. On remand, however, the court, in light of Buffalo Forge’s renewed promotion of the arbitration process, formulated the “Status Quo” standard and reversed, finding that the injunction was improperly granted. The lower courts agree that unions seeking injunctive relief must satisfy the

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41. Id. at 406 (emphasis added).
42. See id. It must be remembered, however, that drug testing is normally the sole dispute requiring resolution, unlike a strike, which is merely a union’s protest over the underlying dispute. Even if courts should make some merits determination before issuing a Boys Markets injunction, as some commentators have urged, (see Cantor, supra note 28, at 250) this does not change this Note’s argument that drug testing pending arbitration causes irreparable harm and should be enjoined.
43. See supra note 6 and accompanying text.
46. 529 F.2d 1073 (9th Cir. 1976) [Greyhound I].
48. See id. at 1075.
49. See infra notes 55-66 and accompanying text for a discussion of the "Status Quo" standard.
same standards that the Court established for management. Moreover, although there are different policy considerations involved in union-initiated litigation, such as legitimate employer self-help methods, the goal of promoting the arbitration process is still the primary one to be fulfilled in examining drug-testing suits by unions against their employers.

II. STANDARDS EMPLOYED IN EVALUATING WHETHER A UNION IS ENTITLED TO AN INJUNCTION PENDING ARBITRATION

Although the courts agree that the Boys Markets exception to the Norris-LaGuardia Act applies when unions seek an injunction pending arbitration, they have disagreed on what standard to use in determining whether to grant such an injunction. Upon further analysis, however, this disagreement becomes rather semantic, as both standards turn on the ultimate question of irreparable injury.

A. The "Status Quo" Standard

Under the first standard, the "Status Quo" standard, the employer must have made an express or implied-in-fact promise to maintain the status quo pending arbitration in order for the union to obtain an injunction. This approach was pioneered by the Ninth Circuit in Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc. ("Greyhound II"), after the Supreme Court vacated and remanded the injunction granted in Greyhound I in light of the Court's decision in Buffalo Forge. The union in Greyhound II was seeking to enjoin the bus company's proposed work-schedule changes, and the Ninth Circuit had originally affirmed the District Court's grant of the injunction. On remand, the court found no express status quo promise, and held also that "[w]hile a promise to submit a dispute to arbitration may justify a finding of an implied duty not to strike, . . . such a promise does not imply a duty on the part of the employer to preserve the status quo pending arbitration." Thus, Greyhound was free to unilaterally change its employees' work schedules pending arbitration—although interestingly, the arbitrator had, in the meantime, already ruled in the company's favor.

52. See infra notes 54-91 and accompanying text discussing standards courts have formulated in this area based on their interpretations of Boys Markets, Gateway Coal, and Buffalo Forge.
54. See infra, note 91 and accompanying text.
56. 550 F.2d 1237 (9th Cir.), cert. denied, 434 U.S. 837 (1977).
57. 529 F.2d 1073 (9th Cir. 1976).
58. See Greyhound II, 550 F.2d at 1238.
59. Id. at 1238 (citing Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368 (1974)).
60. See id. at 1238.
The "Status Quo" approach developed in Greyhound II was recently employed again in Utility Workers, Local No. 246 v. Southern California Edison Co.,61 where the Ninth Circuit ruled that a stay of implementation of a drug-testing program pending arbitration should be dissolved.62 The court in Texaco Independent Union v. Texaco, Inc.63 also used this approach, and, finding no implied promise to maintain the status quo, declined to grant the union's request to enjoin the oil company from unilaterally changing work schedules, wages, hours and conditions.64 The court found that "[j]ust as the Supreme Court [in Buffalo Forge] could find no basis for inferring an obligation not to engage in sympathy strikes from the union's agreement to submit disputes between the company and the union to arbitration, so this Court cannot infer from an agreement to arbitrate disputes that the Company necessarily undertook to preserve the status quo ante pending arbitration."65

Despite their holdings, Greyhound II, Utility Workers, and Texaco carry little precedential value for the "Status Quo" approach. The Ninth Circuit is the only appellate court that has applied this standard, and Texaco is a district court opinion that has not been followed since 1978. Moreover, as will be shown more fully below, this test collapses into a tacit application of the "Hollow Formality" approach.66

B. The "Hollow Formality" Standard

The second approach, the "Hollow Formality" standard, focuses on the overall policy and rule of Boys Markets and its progeny—namely, to preserve the integrity of the arbitration process.67 This standard was established in Lever Bros. Co. v. International Chemical Workers Union, Local 217,68 which involved a union that sought to enjoin a chemical company from relocating its plant pending arbitration over what contractual procedures the employer had to follow before relocating. Initially, the District Court granted the injunction and the Fourth Circuit affirmed, relying on the Ninth Circuit's holding in Greyhound I.69 On rehearing, the court reaffirmed its decision in light of Buffalo Forge and Greyhound II, and then established the "Hollow Formality" standard.70 This standard allows a court to grant the injunction if failure to do so would render "the arbitral process a hollow formality in those instances where, as here, the arbitral award when rendered could not return the
parties substantially to the status quo ante." 71 Most other circuits have adopted the Lever Brothers "Hollow Formality" approach. 72

The facts of Lever Brothers were somewhat unusual since the collective bargaining agreement did not give the arbitrator the power to prevent management from relocating its plant. 73 The arbitrator could, however, order management to follow the procedures outlined in the agreement that would give the union an opportunity to dissuade management from relocating. 74 The court noted that had the injunction not been given, the union would "have had a double burden to satisfy—first, to convince the company that it should not have moved the plant . . . a fait accompli, and then it would have had the burden to convince the company to move the plant back." 75 Therefore, the court said, "had there not been an injunction pending arbitration to preserve the status quo, the [union] employees . . . would have been totally and permanently deprived of their employment." 76

The Lever Brothers court further noted that Buffalo Forge supported the "Hollow Formality" standard with its policy of "judicial non-interference in the arbitral process," since the injunction would only be given if the arbitral process was threatened by management's proposed changes. 77 The Fourth Circuit stated that "the interpretation and application of contractual provisions remain the exclusive province of the arbitrator," and further that "[c]ourts will intervene only when necessary to protect the arbitral jurisdiction and then only in a manner that avoids examination of the merits, and thus respects the process of which it seeks to protect." 78

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71. Id. at 123.
73. See Lever Bros., 554 F.2d at 118.
74. See id.
75. Id. at 122. (emphasis in original).
76. Id. (emphasis in original).
77. Id. at 123.
78. Id. (quoting Note, The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 251 (1976)). This standard also draws support from the Supreme Court's decision in Brotherhood of Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R., 363 U.S. 528 (1960). The Court in that case found that the district judge's decision to grant the status quo injunction "would operate to preserve that jurisdiction [of the arbitrator] by preventing injury so irreparable that a decision of the [arbitrator] in the unions' favor would be but an empty victory." Id. at 534.
C. The Symmetry of the Standards

A closer analysis of the "Status Quo" and "Hollow Formality" standards reveals that, although courts have outwardly chosen one rather than the other, both are premised on the same theoretical grounds—supporting protection of the arbitration process. The two standards do not conflict on the issue of whether to enforce an express promise to maintain the status quo pending arbitral resolution of arbitral disputes. Greyhound II, in its "Status Quo" approach, explicitly says that courts should honor such an agreement,79 and nothing in the Lever Brothers line of "Hollow Formality" cases suggests that a court should ignore the parties' express agreement. In one case following Lever Brothers, the Third Circuit found no such express promise and held that Greyhound II "ultimately depended on the fact that the party seeking equitable relief could be restored to the status quo ante by arbitration, and therefore risked no irreparable injury."80

The "Status Quo" approach recognizes the paramount importance of protecting the arbitration process, as the Ninth Circuit noted even as it was formulating the standard.81 As noted above,82 the Status Quo approach is premised on Gateway Coal's holding that a promise to arbitrate may imply a promise by the union not to strike, but does not imply a promise by the employer to maintain the status quo pending arbitration.83 The Greyhound II court found that "[t]he source of this difference is that a strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not."84 The court further found that, given the specific facts at hand, the arbitration would be unaffected by altering the employees' work schedules since the situation could be "restored substantially to the status quo ante" through reinstitution of the original work schedules.85 Thus, under Greyhound II's "Status Quo" approach the court will imply a status quo promise only when arbitration is frustrated; that is, when it is, in essence, rendered a hollow formality.

The Lever Brothers court noticed this symmetry in formulating the

80. United Steelworkers v. Fort Pitt Steel Casting, 598 F.2d 1273, 1280 n.19 (3d Cir. 1979) (emphasis in original).

One danger, beyond the scope of this Note, of having such an express promise to maintain the status quo pending arbitration would be that the court would have to decide if the status quo had been disturbed. Attempting to find a "clear violation" of such a broad status quo promise might well involve "usurping the function of the arbitrator" forbidden by Boys Mkts, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970). See Niagara Hooker Employees Union v. Occidental Chem. Corp., 935 F.2d 1370, 1377 (2d Cir. 1991).
81. See Greyhound II, 550 F.2d at 1239.
82. See supra note 59 and accompanying text.
84. Id. at 1238-39.
85. Id. at 1239. (emphasis in original).
"Hollow Formality" standard. It found that "[t]he reasonableness of our holding is consonant with the Ninth Circuit decision in Greyhound II wherein that court also recognized that . . . the situation can be restored substantially to the status quo ante."\(^\text{86}\) The court noted that an arbitrator could restore the work schedules that were changed in Greyhound II, but that the relocated plant in Lever Brothers was unlikely to be returned.\(^\text{87}\) Other courts continue to support the Lever Brothers symmetry argument. As the Tenth Circuit recently stated, "[the "Hollow Formality" standard] is ultimately consistent with the Ninth Circuit's ["Status Quo"] approach because 'once it is conceded that a duty to preserve the status quo pending arbitration may be implied,' the dispositive question . . . becomes whether the action will frustrate the arbitral process."\(^\text{88}\)

Moreover, the "Hollow Formality" approach "more accurately embodies the rationale underlying the Boys Markets exception . . . [and is] more straightforward."\(^\text{89}\) Similarly, the Second Circuit has also noted the symmetry between the standards and found that focusing on the effect on the arbitral process is important because implying a status quo promise whenever there is an arbitration clause would "permit unions to embroil the judiciary in day-to-day disputes . . . [and impair management's] . . . ability to run the business."\(^\text{90}\)

Thus, the relevant question for courts today in deciding these cases is whether the implementation of a drug-testing program pending arbitration would render the arbitration process a hollow formality. This inquiry subsumes the considerations of the "Status Quo" approach as well.\(^\text{91}\) The argument is not over what standard to use, but whether drug testing causes the irreparable injury that renders arbitration a hollow formality.

### III. DOES DRUG TESTING RENDER THE ARBITRATION PROCESS A HOLLOW FORMALITY?

In cases where unions seek to enjoin managements' unilateral implementation of drug-testing programs, there are conflicting opinions on whether drug testing causes such irreparable injury as to render arbitration a hollow formality. The Supreme Court has recognized the privacy rights of public employees subject to drug testing, and has allowed test-

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\(^\text{87}\) See id.

\(^\text{88}\) Oil, Chem. & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil, 885 F.2d 697, 702 (10th Cir. 1989) (quoting Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp., 668 F.2d 276, 282 (7th Cir. 1981)).

\(^\text{89}\) Id.

\(^\text{90}\) See id.

\(^\text{91}\) See Oil, Chemical, 885 F.2d at 704 (overlap with "Hollow Formality" standard "elevates the assessment of irreparable injury into the central inquiry in status quo injunction cases").
ing under the Constitution only where the government has a compelling interest. The various courts agree that the privacy rights of the union employees are implicated, but disagree as to the import and degree of this violation, both as a matter of law and fact. Because private employers are not state actors, they are not constitutionally bound by the privacy rights of their employees. They are, however, bound by their contracts, and thus the dispositive question is whether the arbitrator will be able to give the union the benefit of its bargain should the union prevail on the merits. Part A of this section discusses those approaches that have found no irreparable injury and that would deny injunctions pending arbitration of drug-testing disputes. This Note asserts that these approaches are misguided because they underestimate the stigma associated with a positive test result and the privacy violation implicit in drug testing. Part B of this section discusses approaches that correctly emphasize the potential for irreparable injury in management’s interim drug-testing policies and that would grant the injunctions pending arbitration because of the risk of a false positive test result and the invasion of privacy.

A. Faith in Arbitral Remedies: the Theory that the Magnitude of the Privacy Invasion is not Sufficient to Render Arbitration a Hollow Formality

In general, the argument against enjoining management-initiated drug testing pending arbitration rejects the notion that the privacy invasion occasioned by drug testing is sufficient to amount to irreparable injury for injunction purposes. The recent case of Niagara Hooker Employees Union v. Occidental Chemical Corp. is the seminal case representing this view. The facts of Niagara Hooker are similar to those of most drug-testing cases brought under Boys Markets with the exception that management

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93. See Note, supra note 1, at 25; see also Note, Employee Drug Testing—Issues Facing Private Sector Employers, 65 N.C.L. Rev. 832, 836 (1987) (absent employment contract or union contract, private sector employers’ freedom to test employees is “mostly unfettered”). Cf. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (noted separation in fourteenth amendment between discrimination by the state, which is subject to scrutiny under the amendment, and private conduct against which the amendment offers no protection no matter how invidious the conduct).

94. 935 F.2d 1370 (2d Cir. 1991).

95. See id. at 1379; see also Local Union No. 733 of the Int’l Bhd. of Elec. Workers v. Ingalls Shipbuilding Div., Litton Sys., 906 F.2d 149, 153 (5th Cir. 1990) (denied injunctive relief because privacy invasion only minimal); Utility Workers Local No. 246 v. Southern Cal. Edison Co., 852 F.2d 1083, 1088 (9th Cir. 1988) (same), cert. denied, 489 U.S. 1078 (1989).

96. Namely, the issue for the arbitrator will turn on the interpretation of the management’s rights clause, which management contends justifies unilateral implementation of a drug-testing program. See generally Note, supra note 1, at 13-18 (discussing conflict over whether management’s rights clause provides for unilateral drug testing). One such clause gave management the right, inter alia, “to hire and assign employees, apply disci-
in *Niagara Hooker* wanted to expand its testing for cause program to include random testing. However, the *Niagara Hooker* court held that "[w]e do not believe that the arbitrator is so unable to grant effective relief as to render the arbitral process a 'hollow formality,' if drug testing proceeds pending arbitration."98

The *Niagara Hooker* court based its conclusion mainly on the theory that the arbitrator could grant effective relief to an employee who is disciplined as a result of a false positive test result.99 Reinstatement and backpay under this theory can address the interim humiliation and harm to reputation associated with such disciplinary action because such harm is "no different than (sic) that sustained by an employee who has been discharged in violation of any provision of a collective bargaining contract."100

The notion that the stigma of being fired for drug use is no different than being fired for some other reason seems debatable, however, in light of President Bush's emphasis on our nation's "war on drugs."101 Furthermore, the comparison of a failed drug test to other possible stigmatizing reasons for discharge—breaking work rules, embezzlement, or incompetence102—raises an entirely separate issue. The argument over those charges is whether the employee violated legitimate collectively bargained rule provisions. The underlying argument in drug-testing cases, however, is whether the employer lacked the power to implement the drug-testing program that the employee violated.

The anti-injunction theory also rejects the argument that the privacy invasion inherent in the compelled production of urine alone justifies the injunction.103 The *Niagara Hooker* court, for example, argued that the procedures used in management's proposed drug tests would be identical to those used under the existing cause-testing program and that therefore they would not constitute a "grievous invasion of privacy."104 This is misguided, however, because an employee would be subject to the existing procedures only if the employer had cause to test him. The union may justifiably seek additional confidentiality provisions or other changes

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97. See *Niagara Hooker*, 935 F.2d at 1373.
98. Id. at 1379.
99. See id.
100. Id.
103. See id.
104. Id.
in the random testing program if drug testing is found to be subject to collective bargaining. But even if the union prevails in arbitration, those employees who were randomly tested without cause will have had their privacy irreparably invaded. Therefore, the Niagara Hooker court's insistence that "the likelihood of invasion of privacy of the employees is [not] so great as to render the arbitral process 'meaningless'" is dubious at best.

Because of the anti-injunction theory adopted by the Second Circuit, unions have traditionally been unsuccessful in enjoining management in that forum. Yet practical factors certainly shade courts' decisions as well. Collateral facts in Niagara Hooker, for instance, suggest that the court thought the addition of random testing would not be overly burdensome on the union and therefore the court was less sympathetic towards it. In addition, an extensive cause-testing program existed at Occidental, federal regulations required random testing for some workers, and there was a certain risk that drug use might be particularly dangerous at a chemical company. However, these factors are not germane to the issue of what rights management has under the collective bargaining agreement. Indeed, fourteen days before the Second Circuit's decision, the arbitrator ruled in favor of the union. That decision obviously ended the testing, but the union has not sought certiorari, presumably because it would accomplish nothing for its members. The arbitrator's award merely sustained the union's grievance and ended the testing; nothing could be done for the employees whose privacy had been invaded.

The Fifth Circuit had also been hesitant to find irreparable injury in the earlier case of Local Union No. 733 of the International Brotherhood of Electrical Workers v. Ingalls Shipbuilding Division, Litton Systems, where it declined to enjoin management's inaugural drug-testing program. In fact, the Niagara Hooker court's analogy between a false result on a drug test and a false accusation of embezzlement, theft, or incompetence came directly from Ingalls. As discussed below, this analysis is misleading where the drug-testing program itself may be invalid. Therefore, while an inaccurate test result may be a "speculative possibility of irreparable harm" and thus "not of a magnitude sufficient

105. See infra notes 125-50 and accompanying text.
106. Niagara Hooker, 935 F.2d at 1379.
108. See Niagara Hooker, 935 F.2d at 1372-73.
109. See infra note 140 and accompanying text.
111. 906 F.2d 149 (5th Cir. 1990).
112. See id. at 153.
113. See id.
114. See infra notes 125-50 and accompanying text.
enough to conclude that traditional arbitral awards would be rendered meaningless," the test itself will irremediably invade the employee's privacy. A finding that the invasion is wrongful, however, is meaningless if the arbitrator cannot remedy the wrong. The Ingalls court did not go through this analysis, however, as it merely applied its prior decision in International Brotherhood of Teamsters v. Southwest Airlines Co. In that case, concerning the Railway Labor Act, the Fifth Circuit found that drug testing was a “minor dispute” and that the threat of irreparable harm was insufficient to support an injunction under its “extremely narrow” grounds for granting such an injunction.

Finally, an approach that is reluctant to recognize the irreparable injury inherent in drug testing would also tend to deny an injunction under the similar “Status Quo” standard described above. The Ninth Circuit’s consideration of the issue in Utility Workers, Local No. 216 v. Southern California Edison Co., although extremely brief and conclusory, represents such an application. As noted above, a promise to maintain the status quo—the prerequisite, under this standard, to enjoining management’s drug-testing program pending arbitration—will be implied only where the arbitral process is threatened. The Utility Workers court correctly quoted Greyhound II’s rationale for this: “an employer’s altering [of] the status quo generally will not interfere with the arbitral process.” While this is undoubtedly true, the court then made quite a leap in logic to conclude that, “[h]ence, arbitration of the dispute will be unaffected by the implementation of the drug-testing program, and there therefore is no need for the issuance of an injunction in aid of arbitration.” The court similarly stated, without any explanation, that “the situation can be restored substantially to the status quo ante.” Thus, because it presumed from the beginning that drug testing posed no threat of irreparable harm, the Utility Workers court could easily conclude that the arbitration process was not harmed, that no promise to maintain the status quo should be implied, and that therefore the injunction should be denied. Clearly, however, drug-testing cases are examples

116. See infra notes 125-50 and accompanying text. Furthermore, even if the positive test result was accurate and the employee was disciplined, the union's arbitration victory would indeed be “hollow.” The employee's records could be re-adjusted but the stigma surrounding him or her would remain on the minds of co-workers and supervisors. If management did not have the right to unilaterally implement its drug-testing program, then this irreparable injury seems unjustified regardless of our opposition to drug use.
118. Id. at 1136.
119. See supra notes 55-66 and accompanying text.
120. 852 F.2d 1083 (9th Cir. 1988), cert. denied, 489 U.S. 1078 (1989).
121. See supra notes 79-91 and accompanying text.
122. Utility Workers, 852 F.2d at 1088 (citing Greyhound II, 550 F.2d 1237, 1238 (9th Cir.), cert. denied, 434 U.S. 837 (1977)) (emphasis added).
123. Id. (citation omitted).
124. Id. (quoting Greyhound II, 550 F.2d at 1239).
of those rare instances where arbitration will be affected if the injunction is not given; the privacy invasions implicit in drug testing are irreparable and the status quo ante cannot be restored.

B. Truly Irreparable Injury: the Theory that the Privacy Invasion Does Render Arbitration a Hollow Formality

Ultimately, the argument that unilaterally imposed drug testing renders pending arbitration a hollow formality must hinge on the judgment that unjustified drug testing does indeed cause irreparable harm. *Oil, Chemical & Atomic Workers International Union, Local 2-286 v. Amoco Oil Co.*\(^{125}\) is the seminal case advancing this theory, and it must therefore be analyzed in detail to flesh out this position's practical application.

In *Oil, Chemical*, the Tenth Circuit faced a typical *Boys Markets* drug-testing case.\(^{126}\) Amoco's management had decided to begin testing its unionized employees, and, after only preliminary discussion with the union, unilaterally implemented its own version of the drug-testing program.\(^{127}\) The ensuing dispute over whether management could unilaterally implement such a program was clearly arbitrable, as it involved interpretation of the collective bargaining agreement's management's rights clause.\(^{128}\)

The Tenth Circuit fully adopted the "Hollow Formality" standard to determine whether to grant the injunction.\(^{129}\) The court found that under *Boys Markets*, the "ordinary principles of equity" must support the issuance of the injunction.\(^{130}\) The court also noted that deciding the issue raised by one of these principles—irreparable harm—was no different than deciding whether arbitration would be a hollow formality; thus the court decided them together.\(^{131}\)

The court first considered the likelihood of success on the merits, and found that the union need only show "that the position [it] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor."\(^{132}\) This was a fairly low standard that most unions

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125. 885 F.2d 697 (10th Cir. 1989).
126. *See supra* note 93.
127. *See Oil, Chemical*, 885 F.2d at 699.
128. *See id.; Note, supra note 1, at 19-20.
130. *Id. at 703.*
132. *Oil, Chem. & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co.*, 885 F.2d 697, 704 (10th Cir. 1989) (quoting *Greyhound I*, 529 F.2d 1073, 1078 (9th Cir. 1976)).
could easily satisfy in similar cases.\textsuperscript{133} Even if the court were to look more closely at the merits, however, as some commentators have suggested,\textsuperscript{134} the position taken in this Note would be unaffected.\textsuperscript{135}

The court also considered whether the balance of hardships favored issuance of the injunction. Since the court accepted the union's position that the testing would do irreparable harm and that management would not be adversely affected, the balance was tipped in the union's favor.\textsuperscript{136} Thus, the \textit{Oil, Chemical} holding suggests that whenever a court accepts a union's initial claim of irreparable injury, management can avoid the injunction only if it can show strong evidence of a drug abuse problem in the workplace that could cause serious damage before an arbitrator can rule.\textsuperscript{137} Clearly, management will have a more difficult time proving this potential serious damage in cases where management wants to shift from cause-testing to random testing. Yet the union would still have a valid claim even if employees are already tested for cause, given the Supreme Court's acknowledgement of the difference between testing for cause and random testing.\textsuperscript{138}

Thus, the dispositive equitable inquiry will be the union's claim of irreparable injury, which is analogous to the overall "Hollow Formality"

\textsuperscript{133} See id.

\textsuperscript{134} See Cantor, \textit{supra} note 30, at 279-82.

\textsuperscript{135} Professor Cantor supported his theory, in part, because enjoining employers interferes with their legitimate right to make business decisions. See id. at 279-80. The Second Circuit has also acknowledged that injunctions may impair management's ability to run its business. See Niagara Hooker Employees Union v. Occidental Chem. Corp., 935 F.2d 1370, 1377 (2d Cir. 1991). That concern is clearly less warranted in drug-testing cases, where management's decisions on how to use its resources are unaffected. Furthermore, the National Labor Relations Board has found that under the National Labor Relations Act, management's unilateral implementation of a drug-testing program was a mandatory subject of collective bargaining and not covered by the broad management's rights clause. See Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1399 (June 15, 1989). \textit{But cf.} International Bhd. of Teamsters v. Southwest Airlines Co., 875 F.2d 1129, 1135 (5th Cir. 1989), \textit{cert. denied}, 493 U.S. 1043 (1990) (court held that drug testing was a minor dispute under the Railway Labor Act, and thus, the broad management's rights clause "arguably justified" unilateral implementation of the drug-testing program even though the program was a subject of mandatory collective bargaining).

\textsuperscript{136} Oil, Chem. & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co., 885 F.2d 697, 709 (10th Cir. 1989).

\textsuperscript{137} None of the \textit{Boys Markets} drug-testing cases have mentioned this argument, since the courts denying the injunction pending arbitration have instead found no irreparable injury. See, e.g., Niagara Hooker Employees Union v. Occidental Chem. Corp., 935 F.2d 1370, 1379 (2d Cir. 1991) ("We do not believe that the arbitrator is so unable to grant effective relief as to render the arbitral process a 'hollow formality,' if drug testing proceeds pending arbitration."); \textit{Local Union No. 733 of the Int'l Bhd. of Elec. Workers v. Ingalls Shipbuilding Div., Litton Sys.,} 906 F.2d 149, 152 (5th Cir. 1990) ("implementation of the drug testing program prior to the completion of arbitration has not frustrated the arbitration process or rendered it meaningless").

\textsuperscript{138} See Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299, 318 (1989). The Court stated that "we do not doubt that there is a difference between Conrail's past regime of... [cause-testing] and Conrail's present policy of including drug tests in all routine physical examinations." \textit{Id.}
As is common, the union in *Oil, Chemical* was more concerned with random testing and detection levels than with cause testing, which it conceded was within the management's rights clause.  

The crux of the union's successful argument in *Oil, Chemical* was that the "potential intrusion into the employees' private lives threatens to cause them stigmatization, humiliation, and damage to reputation" if using management's drug-detection levels would result in a wrongful determination of impairment.  

The union maintained that such personal injuries could not be "redressed by an arbitral award." The union could not have based a successful irreparable injury claim on wrongful termination or suspension, because reinstatement and back pay are adequate remedies for such violations.  

Implicit in any union's argument is the notion of the invasion of privacy resulting from being tested at all without the union having agreed to the applicable procedures. As noted above, the Supreme Court has recognized the privacy rights of workers subject to drug testing and has found testing constitutional only when the government had a compelling interest. Although these standards do not apply to private employers, it is clear that the Court has considered these privacy invasions serious and has set a very high standard for the government to meet.  

139. See supra note 131 and accompanying text.  
140. See *Oil, Chemical & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co.*, 885 F.2d 697, 705 (10th Cir. 1989). Indeed, unions are usually more interested in securing their rights to negotiate the terms of drug-testing programs than in trying to ban testing altogether. See generally Note, supra note 1 (discussing employee drug testing under collective bargaining agreements).  
141. *Oil, Chemical*, 885 F.2d at 705; see also supra notes 98-102 and accompanying text (arguing that the *Niagara Hooker* court incorrectly rejected similar claims).  
142. *Oil, Chemical*, 885 F.2d at 705; see also supra notes 98-102 and accompanying text (arguing that the *Niagara Hooker* court incorrectly rejected similar claims).  
143. *See Oil, Chemical*, 885 F.2d at 705 (citing Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp., 668 F.2d 276, 286 (7th Cir. 1981)).  
144. See supra note 92 and accompanying text.  

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom. *Id.* at 617 (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987); see also National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (in case decided on the same day as *Skinner*, Court found that ensuring the fitness, integrity and judgment of front-line drug interdiction personnel, who carried guns or handled classified materials, was essential to national security and therefore justified the drug testing of certain Customs officials); *Fried, Privacy*, 77 Yale L.J. 475, 487 (1968) (excretory function shielded by absolute privacy and to the extent this privacy is violated it "detract[s] from one's dignity and self esteem").  

A further privacy interest implicated by drug testing is one's "reasonable and legitimate expectation of privacy in such personal information contained in his body fluids" that may be discovered upon analysis. *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); see also Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48
Therefore, if an arbitrator decides that the collective bargaining agreement does not authorize drug testing, any completed testing has violated the privacy rights of those employees without justification. The union will have been denied the opportunity to protect the rights of its members, and the union employees will have suffered irreparable injury. No amount of money can fully address the personal injury occasioned when privacy rights are invaded. Indeed, it is difficult to imagine that the Constitution requires a compelling justification before the Government can violate privacy rights, but a private employer can violate such rights by a unilateral interpretation of a silent collective bargaining agreement. It would be even more surprising for the employer to have this much discretion given that labor is such a heavily regulated field on the federal level. Unionized employees in the private sector deserve to be free from such serious privacy invasions until an arbitrator has rendered a decision.

The Oil, Chemical court concluded that "[i]n light of the invasion of privacy threatened by Amoco's testing program, and the potential for stigmatization and humiliation of its employees, we do not believe that an arbitral award of reinstatement and back-pay could make affected employees whole." The court therefore held that the drug-testing program could cause "irreparable injuries that threaten the integrity of the arbitral process and adequately support the issuance of a status quo injunction." As the Oil, Chemical court reasoned, and as many district courts have since agreed, the invasion of privacy and the possibility of humiliation and damage to reputation associated with drug testing con-

U. Pitt. L. Rev. 201, 206-07 (1986) ("if allowed free reign over an employee's urine specimen, the employer can learn physiological secrets... which go far beyond the existence of drugs. A urine specimen can... reveal whether an employee is pregnant, is using licit medications, or is being treated for a heart condition, manic-depression, epilepsy, diabetes or schizophrenia.").

146. The Oil, Chemical court was persuaded on this point by the Supreme Court's finding of irreparable injury to support a status quo injunction where management's actions involved "the discharge of employees from positions long held and the dislocation of others from their homes." Oil, Chem. & Atomic Workers Int'l Union, Local 2-286 v. Amoco Oil Co., 885 F.2d 697, 708 (10th Cir. 1989) (quoting Brotherhood of Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R., 363 U.S. 528, 534 (1960)) (emphasis omitted). The Oil, Chemical court thought that this decision supported a "wide focus in assessing the nature of the threatened injury," since reinstatement and backpay are usually considered adequate remedies for wrongful discharge. Id. at 709. Thus, the court could analogize the dislocation in Missouri-Kan.-Tex. R.R. with the privacy violation at issue, finding that it would be "impossible [for the arbitrator] to make [the employees] whole in any realistic sense." Id. at 708 (quoting Missouri-Kan.-Tex. R.R., 363 U.S. at 534) (emphasis omitted).


149. Id.
Drug testing of employees is an invasion of their privacy which courts cannot take lightly. Just as the Government needs a compelling interest to drug test its employees, collective bargaining ensures that unionized private sector workers are not indiscriminately tested. If an arbitrator ultimately finds a drug-testing program to be unjustified, the harm done constitutes irreparable injury.150

CONCLUSION

The other circuits have considered cases where unions involved in different disputes have sought Boys Markets injunctions, but many if not all of these cases have been rather clear-cut and difficult to compare to the drug-testing cases. The question of irreparable injury is more complex in these latter cases.

The first group of cases involved management decisions to alter the general policies of the workplace. The courts have unanimously declined to enjoin these decisions pending arbitration. See Independent Oil & Chem. Workers v. Proctor & Gamble Mfg. Co., 864 F.2d 927, 931 (1st Cir. 1988) (work schedules and dress requirements); Aluminum Workers Int'l Union, Local No. 215 v. Consolidated Aluminum Corp., 696 F.2d 437, 443 (6th Cir. 1982) (job classification); Columbia Local, Am. Postal Workers Union v. Bolger, 621 F.2d 615, 618 (4th Cir. 1980) (shift schedules); see also Greyhound II, 550 F.2d 1237, 1239 (9th Cir.), cert. denied, 434 U.S. 837 (1977) (work schedules). If the union prevailed at arbitration, it is clear that the harm caused could be remedied through reinstatement of the old policies.

The second group of cases involved instances where management sought to relocate its factory or sell its assets. In these cases, the courts have issued injunctions pending arbitration. See Lever Bros. Co. v. International Chem. Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976) (relocation); Nursing Home & Hosp. Union No. 434 v. Sky Vue Terrace, Inc., 759 F.2d 1094, 1095 (3d Cir. 1985) (sale of business assets); Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp., 668 F.2d 276, 277 (7th Cir. 1981) (sale of corporate assets); Drivers, Chauffeurs, Warehousemen & Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc., 582 F.2d 1336, 1338 (4th Cir. 1978), cert. denied, 440 U.S. 929 (1979) (liquidation of business). Because arbitrators do not normally have the power to force an employer to stay in business, the only method of enforcing the contractual provisions breached by such a move is the status quo injunction.

In one case, a court enjoined management's attempt to terminate the hospital and insurance benefits enjoyed by the union members, because the threat of death would clearly be irreparable. See United Steelworkers v. Fort Pitt Steel Casting, Div. of Conval.-Penn, 598 F.2d 1237, 1280 (3d Cir. 1979). Overall, these cases are distinguishable to such an extent that their relevance to drug-testing cases is limited.

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to the tested employees is irreparable and indeed renders the entire arbitration process a hollow formality. Therefore, although courts and employers routinely articulate the valid management concerns for workplace safety and efficiency, the emphasis on individual liberty in the American legal system requires that a union be able to obtain an injunction pending arbitration of the validity of a new drug-testing program.