



August 7, 2008

The Honorable Mary Peters
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Docket No. OST-2003-15245; Final Rule

Dear Secretary Peters:

On behalf of the Transportation Trades Department, AFL-CIO (TTD),¹ I am writing to petition the Department of Transportation (DOT) to reconsider a section of the final rule on Procedures for Transportation Workplace Drug and Alcohol Testing Programs (OST-2003-15245) published in the *Federal Register* June 25, 2008. Specifically, we are asking DOT not to implement amendments to Section 40.67 that would expand the circumstances in which direct observation testing is mandated, and impose extremely intrusive new procedures governing the manner in which any direct observation testing is conducted.

As we have stated in the past, drug and alcohol testing procedures must preserve the safety of our nation's transportation system while also respecting the rights and dignity of individual workers. Section 40.67 and the accompanying guidance do not strike this legitimate balance.

Specifically, the regulatory changes and guidance contain new requirements that do not respect the legitimate rights of transportation workers; go beyond reasonable standards of conduct; and put unwarranted burdens on workers and employers. Furthermore, the DOT guidance appears inconsistent with the actual rules and contains serious ambiguities with respect to when direct observation may be required. Finally, DOT did not provide TTD, our member unions, and the millions of transportation workers covered by this rule adequate opportunity to comment on the particular offending provisions now contained in DOT's final rule. Given the impact of these changes and the procedural problems with their promulgation, we strongly urge that these provisions of the final rule not be implemented.

¹ TTD, which consists of 32 affiliated unions, is the transportation labor umbrella of the AFL-CIO. A complete list of TTD affiliated unions is attached.

There are two specific problems with the newly-promulgated rules. First, Section 40.67(i) provides the following new instructions:

As the observer, you must request the employee to raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show you, by turning around, that they do not have a prosthetic device. After you have determined that the employee does not have such a device, you may permit the employee to return clothing to its proper position for observed urination.²

The official guidance issued by the Office of Drug and Alcohol Policy and Compliance adds that “the observer must watch the employee urinate into the collection container. Specifically the observers must personally and directly watch the urine as it goes from the employee’s body into the collection container ... If it is a multi-stall restroom, the observer must enter the stall with the employee.”³ It should also be noted that if an employee fails to follow the observer’s instructions to raise and lower his or her clothing it will be considered a refusal to test.

In the October 31, 2005 Notice of Proposed Rulemaking (NPRM), the agency made no specific proposed changes to Section 40.67. In the preamble, DOT merely asked for general comments as to the “appropriateness of having a collector make sure that the employee is not using a prosthetic device during an observed collection.” The preamble asked whether, for example, it would “be appropriate to require that collectors and observers, as appropriate, check for these devices by having male employees lower their pants and underwear just before observed collections take place?”⁴ The discussion on expanding direct observation constituted five sentences of an extremely comprehensive *Federal Register* notice and proposed no actual changes to the rule with respect to this issue.⁵ DOT offered no studies or evidence of the prevalence of employees using prosthetic devices to cheat on drug and alcohol tests. The mere commercial availability of prosthetic devices or products that may mask the presence of drugs in urine does not justify subjecting numerous transportation workers to the grossly intrusive direct collection testing required by this final rule.

Despite the brief and limited treatment of the issue in the NPRM, DOT nonetheless made far-reaching changes to Section 40.67 that go well beyond what was specifically proposed in the NPRM. We submit that this approach violates the letter and spirit of the Administrative Procedures Act. Moreover, given the extreme sensitivity of this issue and the great burden DOT’s new procedures would impose on both individuals and employers, the failure to provide such notice and an opportunity for public comment is especially disturbing.

² Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 *Fed. Reg.* 35970 (June 25, 2008)

³ Office of Drug and Alcohol Policy and Compliance, Department of Transportation, *Urine Specimen Collection Guidelines Revised –Effective August 25, 2008*, 22 (July 18, 2008)

⁴ Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 70 *Fed. Reg.* 62281 (October 31, 2005)

⁵ TTD did submit comments in response to that NPRM and objected strongly to any suggestion that employees be physically checked in any such manner as an unjustified infringement on individuals’ privacy rights.

In promulgating Section 40.46(b), which now mandates collection under direct observation for return-to-duty or follow-up tests, DOT's failure to provide notice and opportunity for comment is even more blatant. Nowhere in the NPRM or its preamble did DOT even discuss expanding direct observation for these types of tests. As such, DOT failed to put the public on notice that it was considering this regulatory change; failed to offer any rationale for expanding the circumstances in which this most intrusive form of testing will be required; and failed to allow any public comment on the matter. Greatly expanding the number of direct observation collections required, as this new provision will do, is even more onerous in light of the changes DOT has made to the manner in which direct observation testing must now be performed. Additionally, this new requirement will add burdens to employers who, under these provisions, will need to have trained individuals of the appropriate gender available to conduct these collections. By failing to provide the requisite notice and opportunity for comment, DOT deprived interested parties of any opportunity to discuss these issues or the impact expanded direct collections will have on the industry.

Another matter of serious concern is the ambiguity within DOT's Guidance document⁶ as to when an employer is authorized to require an employee to submit to testing under direct observation. Specifically, the guidance states that "an observed collection is required when the employer or DER directs the collector or (collection site) to conduct a collection under direct observation."⁷ This provision appears to give employers, at their sole discretion, the authority to require direct observation tests. Any such broad grant of employer authority is in direct conflict with the regulations that carefully specify the enumerated circumstances in which this most invasive form of testing may be required. If the intent of the guidance is to specify the procedures for direct observation tests required under the regulations, as well as any such testing employers may order under other independent (i.e., non-DOT) authority, that intent should be clarified. We would, of course, have grave concerns if the guidance is intended to expand the scope of direct observation testing beyond the scope of the regulations.

The final rule also appears to violate constitutional and statutory protections limiting the scope of drug and alcohol testing. Specifically, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), the Court upheld the Federal Railroad Administration's testing regulations and found that the rules posed only limited threats to covered employees justifiable expectations of privacy. But at the same time, the Court noted that the "regulations endeavor to reduce the intrusiveness of the collection process. The regulations do not require that samples be furnished under direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample."⁸

The Omnibus Transportation Employee Testing Act of 1991, which grants DOT the authority to conduct its drug and alcohol testing program, requires the use of procedures that promote, to the maximum extent practicable, individual privacy in the collection of specimen samples. We would argue the DOT's final rule goes beyond this statutory limit and that the DOT did not adequately explore nor consider alternative means to ensure the integrity of specimen

⁶ Office of Drug and Alcohol Policy and Compliance, Department of Transportation, *Urine Specimen Collection Guidelines Revised—Effective August 25, 2008*, (July 18, 2008)

⁷ *Id* at 20

⁸ *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989) at 627

collections.

For these reasons, TTD requests DOT to reconsider these provisions of the final rule and suspend their implementation until these concerns are fully addressed.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the bottom.

Edward Wytkind
President

cc: Jim L. Swart

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
*United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers International Union (USW)*
United Transportation Union (UTU)