



September 25, 2008

Mr. Jim Swart  
Director  
Office of Drug and Alcohol Policy and Compliance  
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 Director Swart:

On behalf of the Transportation Trades Department, AFL-CIO (TTD),<sup>1</sup> I request the Department of Transportation (DOT) withdraw its proposal to mandate the direct observation of urine collections for all follow-up and return-to-duty testing as described in the proposed amendments to 40.67(b). The proposed mandate would expand the circumstances in which extremely intrusive new direct observation procedures would be required without any evidence justifying this significant change. We agree with DOT's stated premise that the integrity of transportation workplace drug and alcohol testing programs must be preserved. However, making direct observation mandatory for all follow-up and return-to-duty testing does not strike the proper balance between the integrity of transportation workplace drug and alcohol testing programs and the rights and dignity of individual workers.

The proposed expansion of direct observation to follow-up and return-to-duty tests is not occurring in a vacuum. The Department recently amended its direct observation procedures to specifically require workers to remove clothing, expose their genitals and buttocks, and to turn around before a required "observer" prior to proceeding with urination in front of that observer. DOT correctly notes that direct observation is indeed "intrusive," and has always been controversial. Mandating direct observation of urine collection for *all* follow-up and return-to-duty testing would now greatly expand the number of employees required to submit to this extremely invasive procedure, further intrude into the privacy rights of employees, and impose unnecessary costs. We strongly urge DOT *not to* expand the circumstances in which direct observation testing is required to this larger pool of workers.

DOT attempts to justify its proposal primarily on the basis that prosthetic devices are commercially available on the Internet. While this may be true, DOT has shown no data or studies that indicate widespread use of these devices by transportation safety-sensitive workers.

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<sup>1</sup> 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.

**Transportation Trades Department, AFL-CIO**

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Edward Wytkind, President • Patricia Friend, Secretary-Treasurer

Essentially, DOT is implementing intrusive, costly and widespread workplace procedures based on what the agency has seen on the Internet.

Existing DOT regulations already allow employers to utilize direct observation for follow-up and return-to-duty testing.<sup>2</sup> This authority enables employers to rely on fact-specific findings and the medical history of the employee involved in determining whether or not to require a test under direct observation. Notwithstanding this authority, we are unaware of any transportation employer who has found it necessary to utilize direct observation collection for *all* follow-up and return-to-duty testing. This further confirms the lack of evidence justifying the imposition of such intrusive testing in this broad scale manner.

Moreover, DOT states that mandatory direct observation testing is appropriate where “there is a heightened incentive to cheat or circumstances demonstrating the likelihood of cheating.”<sup>3</sup> This requirement already exists under current regulations -- employers are required to utilize direct observation for all testing that demonstrates a likelihood of tampering.<sup>4</sup>

The simple fact that an employee is undergoing follow-up or return-to-duty testing is not, by itself, evidence of an incentive to tamper with a test. DOT has approximately two decades of testing employees who have been rehabilitated and returned to work and has not offered any evidence to establish a need to expand direct observation to follow-up or return-to-duty testing. DOT’s longstanding regulatory safeguards are built into the return-to-duty process. Prior to returning to duty, drug test violators must complete a substance abuse evaluation by a trained substance abuse professional who meets DOT’s qualification standards, and then comply with that professional’s recommendation for any mandatory education and/or treatment.

The regulations require that employees who return to duty under those provisions must minimally submit to one return-to-duty drug test followed by at least six follow-up tests in the first year they return to work.<sup>5</sup> During the second to fifth year an unlimited and unspecified number of follow-up tests are required.<sup>6</sup> If direct observation collections are required for the return-to-duty process then all of these tests will be directly observed. DOT requires every employee who has a verified positive test result on any type of drug or alcohol test to be subject to return-to-duty and follow-up drug testing based on the above mentioned formula.

There are roughly twelve million DOT safety-sensitive employees.<sup>7</sup> If DOT requires direct observation for *all* follow-up and return to duty testing, the number of these tests will expand dramatically, and individuals of the appropriate gender must be available to observe each

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<sup>2</sup> 49 CFR §40.67(b) states that “as an employer, you may direct a collection under direct observation of an employee if the drug test is a return-to-duty or a follow-up test.”

<sup>3</sup> Procedures for Transportation Workplace Drug Testing Programs 73 Fed. Reg. 50223. (August 26, 2008)

<sup>4</sup> 49 CFR §40.63(e) and 49 CFR §40.65(c) require direct observation if a collector detects an indication of tampering. 49 CFR §40.67(a) requires direct observation when a laboratory has reported a specimen is invalid and there is no adequate medical explanation for the invalid result; when the original positive, adulterated or substituted result had to be cancelled because a test on a split specimen could not be performed; or in certain circumstances where a specimen was negative dilute.

<sup>5</sup> One negative return-to-duty test is required by 49 CFR. §40.305 and at least six follow-up tests are required in the first year of return-to-duty under 49 CFR. §40.307

<sup>6</sup> 49 CFR. §40.307

<sup>7</sup> The Department of Transportation claims there are roughly 12.1 million transportation employers, safety-sensitive transportation employees and service agents subject to the testing requirements of The Omnibus Transportation Employee Testing Act of 1991.

collection. This process will be time consuming, result in a loss of productivity, and may force employers to be reluctant to offer employment, reemployment, or continuing employment to rehabilitated workers.

DOT claims that a Government Accountability Office (GAO) report “noted that transportation employees are ‘successfully adulterating or substituting their urine specimens with products widely available’....”<sup>8</sup> The GAO report noted that several hundred products designed to dilute, cleanse, or substitute urine specimens can be obtained over the Internet.<sup>9</sup> However, GAO identified no data or studies to show the extent to which these devices are used to cheat on drug tests. The GAO report instead found that the potential for drug users to avoid detection by tampering with a test was largely due to the failure of collection sites to comply with existing testing procedures.<sup>10</sup>

Moreover, GAO made several recommendations to address this problem, none of which involved expanding direct observation testing. GAO, instead recommended other, less intrusive options for preventing the subversion of drug tests including banning or limiting the effectiveness of products that can be used to alter a urine specimen, testing alternative specimens, and changing protocols at collection sites to verify workers’ identification.<sup>11</sup> The implementation of this proposal without data to establish a need for expansion and without consideration of other, less intrusive alternatives raises serious questions as to whether DOT’s current proposal would withstand a challenge under the Omnibus Transportation Employee Testing Act of 1991 and the Fourth Amendment of the United States Constitution. Accordingly, DOT’s decision to require direct observation for *all* follow-up and return-to-duty testing does not strike a proper balance between demonstrated need and employee privacy.

For these reasons, TTD requests DOT to withdraw this proposal to mandate the direct observation of urine collections for all follow-up and return-to-duty testing.

Sincerely,



Edward Wytkind  
President

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<sup>8</sup>Procedures for Transportation Workplace Drug Testing Programs 73 Fed. Reg. 50224. (August 26, 2008)

<sup>9</sup>“Motor Carrier Safety: Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them Off the Road” United States Government Accountability Office. GAO-08-600. 20

<sup>10</sup> Id at 17-18.

<sup>11</sup> Id at 19-21

## **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)*