



December 21, 2005

**VIA ELECTRONIC SUBMISSION**

Docket Management Facility  
U.S. Department of Transportation  
400 Seventh Street SW, Room PL-401  
Washington, DC 20590-0001

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

Dear Sir or Madam:

The Transportation Trades Department, AFL-CIO (TTD) is pleased to submit this letter in response to the Department of Transportation's (DOT) request for comments on its proposal to amend certain provisions of drug and alcohol testing procedures with respect to adulterated, substituted, diluted, and invalid specimens. As DOT prepares to implement changes to create consistency with requirements established by the U.S Department of Health and Human Services (HHS), we appreciate the opportunity to reiterate transportation labor's positions on specimen validity testing.

TTD, through its 29 affiliated unions<sup>1</sup>, represents millions of workers throughout the transportation industry who will be directly affected by the proposals in this rulemaking. We note that several affiliated unions have submitted separate comments to this Notice – including the Association of Flight Attendants-CWA and the Amalgamated Transit Union. We fully concur with these comments and urge DOT to utilize the collective expertise of transportation labor as it seeks to finalize this rulemaking.

As stated in our prior joint comments filed with the Air Line Pilots Association to the above-referenced docket, we remain opposed to mandatory validity testing due to the continued risk of innocent employees being improperly deemed as rule violators. With that said, we are pleased that in this rulemaking DOT generally intends to harmonize its procedures with the standards set out under the HHS Mandatory Guidelines and has set out to finalize several improvements to the validity testing process. Further, we note that DOT is not proposing to change many of the procedural safeguards put in place in response to past comments by transportation labor in this Notice of Proposed Rulemaking (NPRM).

---

<sup>1</sup>Attached at 1 is a complete list of TTD affiliated unions.

Transportation Trades Department, AFL-CIO

888 16th Street, NW • Suite 650 • Washington, DC 20006 • tel: 202.628.9262 • fax: 202.628.0391 • www.ttd.org  
Edward Wytkind, President • Michael A. Ingrao, Secretary-Treasurer



One of the most important improvements to the validity testing process upheld in this NPRM is the recognition that employees who produce urine specimens with creatinine levels between 2.0 and 5.0 mg/dL have not necessarily substituted their samples. TTD's previous comments have referenced extensive scientific evidence and case data to show that a creatinine cut-off level of 5.0 mg/dL is too high. We reiterate our strong support for this lower threshold, which will certainly help prevent some employees from being falsely accused of wrongdoing.

We remain concerned, however, that this new standard will not ensure that all innocent employees are protected. Data previously provided to DOT and HHS by the Association of Flight Attendants-CWA, and referenced in our previous comments, has demonstrated that individuals can in fact naturally produce ultra-dilute urine with creatinine concentration levels below 2.0 mg/dL in confirmed tests. This evidence, together with the fact that results for creatinine levels on the same specimen can vary significantly between labs - and even within a single lab - causes concern that employees will continue to be wrongfully accused of substituting their samples in the future. There are severe consequences to an employee of being reported as substituting or adulterating a specimen and we therefore continue to insist that validity testing must be carefully crafted to protect innocent individuals. Rigorously adhering to a creatinine standard is in our view an unfair approach as there are various explanations for why an individual could fall below the cut-off level. We once again urge DOT to build in additional safeguards for the admittedly small number of employees who fall into this category as the rulemaking is finalized.

For years, TTD and our unions have called on DOT to make the lower creatinine standard retroactive. Individuals whose specimens were reported as substituted prior to DOT recognition of the inadequacy of this standard in May 2003 have had to bear the cost and burden of proving their innocence, and some have been terminated from their jobs. We appreciate that DOT has finally recognized that these workers deserve a process to remove these erroneous results from their records, and understand there will be a separate Informational Notice issued on this matter. We strongly urge DOT to implement this review and correction process immediately as it has been almost three years since the lowered levels took effect.

We are concerned, however, with DOT's proposal that to clear their records employees will have to "present proof" that they currently are able to produce specimens with creatinine in the range of 2-5 mg/dL. Many factors can change the creatinine concentration in an individual's urine, including diet and level of hydration. The burden of proof must not fall on the employee to recreate the parameters of the original specimen in order to clear their record. Instead, we believe that if the employees' test results were based upon creatinine levels within the parameters now rejected by scientific evidence, such individuals should not continue to be treated as and suffer the consequences of rule violators. To remedy that situation, DOT should immediately issue a notice stating that all prior test results previously reported as "substituted" based upon creatinine reported in the 2.0 to 5.0 mg/dL range are cancelled and that any such results do not constitute a rule violation. Upon request by an affected individual, DOT should promptly provide an individualized written confirmation of the cancellation of the person's original test and that the prior test results do not constitute a rule violation. As part of the process, DOT should also establish a way to ensure that terminated employees are informed of the opportunity to clear their records. We submit that DOT should also use this opportunity to create a

permanent mechanism to remedy the records of employees who fall prey to future changes in standards as more scientific evidence comes to light. Moreover, given our general premise that 2.0 mg/dL is not a hard and fast number below which individual wrongdoing is proven, we recommend that any employees previously branded with a refusal to test because of a creatinine concentration lower than 5.0 mg/dL should be granted the opportunity to clear their records.

Notably, there are two significant areas in which DOT proposes not to harmonize its standards with the HHS guidelines. First, DOT proposes to maintain its requirement that an employee who produces a negative-dilute specimen with creatinine levels in the range of 2-5 mg/dL must submit to the collection of a subsequent specimen under direct observation. Transportation unions have long urged DOT to reconsider this intrusive and humiliating approach so that individuals who naturally produce specimens with such creatinine levels are not made to undergo heightened scrutiny when they have done no wrong. It is an affront to transportation workers that while HHS recognizes this fact, DOT continues to impose adverse consequences on this group of employees, and we urge DOT to change this requirement as the rulemaking is finalized.

Second, DOT proposes to deviate from the HHS guidelines regarding how to treat a series of invalid specimens from an employee. While HHS directs Medical Review Officers (MROs) to report a negative result on a drug test if the first and second specimens are invalid for the same reason, DOT would consider these to be cancelled tests. For the employee whose test is invalid for reasons that are absent of any wrongdoing – such as for having a creatinine level that is deemed too low – it is not surprising that the results would be invalid for the same reason. Automatically reporting such a test as “cancelled,” rather than treating it as a “negative” is unjustified. Invalid tests fail to demonstrate any wrongdoing by the employee.

DOT does propose to allow the MRO to “determine if there is clinical evidence that the employee is an illicit drug user” – but only if the employee needs a negative results for the purposes of pre-employment, return-to-duty, or follow up testing. Subjecting an employee who has done nothing wrong to an examination far more extensive than a simple drug test – such as a check for tracks on an employee’s body, for instance – is unwarranted and unduly intrusive. Further, it makes little sense for DOT to apply extended procedures to only a subset of testing events.

In addition, we are greatly concerned with DOT’s proposed treatment of individuals with two invalid test results for different reasons. These individuals would be branded as rule violators even though the results fail to support a showing of an “adulterated” or “substituted” sample. Thus, this approach would mar an employee’s record and likely have career-ending consequences without any evidence of employee wrongdoing. As we have stated previously, low creatinine levels, lab error, or sample contamination could account for an “invalid” result. For these reasons, we strongly reject the proposal that the results of such tests be treated as a refusal.

Finally, DOT has requested comments on whether it would be appropriate to require that specimen collectors check for prosthetic devices for male employees during directly observed testing. While we understand DOT’s charge to ensure creditability of the drug and alcohol testing process, we reiterate our position that it is inappropriate to ever directly observe an

employee during a collection. The proposal DOT has put forth, to actually physically check that an employee is not utilizing a prosthetic device, is an infringement on the physical privacy rights of employees and we would oppose such a procedure. We further note that while the NPRM specifically references male employees, we are deeply concerned with what the corollary would be for female employees should DOT embark on this path.

Transportation labor remains committed to a fair drug and alcohol testing process that protects the rights and dignity of individual workers while ensuring the safety of the nation's transportation system. We appreciate that DOT has made many improvements to the testing process in the past several years and propose that the suggestions outlined above would further enhance the testing regime. Thank you in advance for consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward Wytkind", with a stylized flourish at the end.

Edward Wytkind  
President

# ***TTD AFFILIATES***

***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 Federation of Public and Private Employees (NFOPAPE)*  
*Office and Professional Employees International Union (OPEIU)*  
*Professional Airways Systems Specialists (PASS)*  
*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)*

*August 2005*