



*A bold voice for transportation workers*

March 24, 2017

Ms. Patrice M. Kelly  
Acting Director  
Office of Drug and Alcohol Policy and Compliance  
Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, DC 20590

**RE: Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Addition of Certain Schedule II Drugs to the Department of Transportation's Drug-Testing Panel and Certain Minor Amendments  
Docket Number DOT-OST-2016-0189**

Dear Ms. Kelly,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I write to comment on DOT's Notice of Proposed Rulemaking (NPRM) concerning changes to DOT's drug and alcohol testing regulations. By way of background, TTD consists of 32 affiliate unions that represents workers in all modes of transportation, many of whom are required to undergo DOT drug and alcohol testing. We therefore have a vested interested in the rulemaking.<sup>1</sup>

Through this NPRM, DOT proposes to add four semi-synthetic opioids, (hydrocodone, hydromorphone, oxycodone, and oxycodone), which are commonly prescribed painkillers to its testing panel. DOT also proposes several other changes to Part 40, including expanded fatal flaws in sample collection, the elimination of blind specimen testing, and changes to regulations concerning Medical Review Officer (MRO) verification.

TTD has long supported efforts undertaken by DOT to ensure the highest level of safety across the nation's vast transportation network. We understand that this mandate includes ensuring that transportation workers do not use drugs and alcohol in violation of DOT implemented rules which would undermine the safety of our transportation system. At the same time, any changes to drug testing rules must ensure that the program is fair, transparent, and subject to strict quality control procures. By adding the cited opioids to the list of drugs that must be tested, DOT is now adding substances that are commonly and legally prescribed. Given this, TTD has concerns regarding the duties and training of Medical Review Officers (MROs), the elimination of a key quality control program, and the proposed testing processes. We elaborate on these issues below.

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<sup>1</sup> Attached is a complete list of TTD's 32 affiliate unions.

**Transportation Trades Department, AFL-CIO**

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Edward Wytkind, President /Larry I. Willis, Secretary-Treasurer



## **Valid Prescriptions and MRO Verification**

### Valid Prescriptions

Through this NPRM, DOT proposes to vastly increase its categories of tested drugs to include certain prescription medications (opioids). We express our concern on how this may affect transportation employees who have a valid prescription to use these medications. If DOT moves forward with this proposal, MROs will be increasingly asked to determine what constitutes a valid prescription and current regulatory definitions fall short of providing a clear definition through which MROs would be able to make fair and uniform decisions. We note that TTD affiliate unions have reported large variance in how MROs make these decisions. Employees with prescriptions from their doctors have received verified positive test results for issues as minor as having their prescribing physician leave their insurance network, or for taking a legally prescribed medication outside the time period of what an MRO decided was the valid length of the prescription.

As many individuals rely on these medications to be able to work, and also take them responsibly, DOT should provide detailed clarification on this matter to avoid unfair or unjustified verified positive results. Further, DOT should provide this information to both MROs and employees, and opioid testing should not begin until this information becomes available.

Additionally, we believe that DOT should make clear in its regulations that a MRO's receipt of a valid prescription should satisfy the regulatory requirement of a "legitimate medical explanation" sufficient for the MRO to report a "negative" result. TTD does not believe it is the role of the MRO to make decisions about the propriety of treating physicians' prescribed medications or courses of treatment for an employee. Further, we note that even in the case of negative tests, MROs are currently able to return results while stating a "safety concern." This serves only to cause confusion for employers, and results in workers being unfairly pulled off work, and would become increasingly common with expanded testing of prescription medication. As such, DOT should limit the discretion of MROs concerning employees with valid prescriptions.

### Qualification and Training

We note that MROs may not have the specific background or training to manage testing involving opioids but will be asked to make determinations between verified positives (illicit use), and results with legitimate medical explanations. These determinations can be the deciding factor in individuals keeping or losing their livelihoods, and should be executed with the greatest accuracy possible. TTD therefore urges DOT to require additional training for MROs on the subject of opioid use. Similarly, we also do not believe that the requirement for MROs to receive recertification training every five years will remain adequate in light of these additions, and urge DOT to consider more frequent retraining, particularly on the issue of prescription opioid medication. To this point, we support the proposal in comments filed by the Air Line Pilots Association (ALPA), a TTD affiliate, to instead require retraining every three years. By incorporating these changes, DOT can better ensure that employees with valid prescriptions are treated fairly in the drug testing process.

### MRO Review

We also have serious concerns with the lack of oversight and review of MRO decisions. Currently, §40.149(4)(c) gives sole authority to make a determination on the legitimacy of a medical explanation for a positive test to MROs. This prohibits anyone, including an arbitrator, from overturning a decision. Given the ramifications to an employee for a failed drug test, there must be some fair and balanced recourse for an employee who has a valid medical explanation for a positive test. We urge DOT to amend its regulations to allow employees to request a review of a MRO determination, including due process requirement procedures for such a review.

### **Cutoff Levels**

In the notice, DOT proposes the cutoff levels for a laboratory reported positive test result for opioids. TTD joins ALPA in urging the Department to take appropriate steps (including urging HHS) to increase these levels. As we have discussed above, DOT should not use the drug testing program to interfere in the medical treatment of employees with valid prescriptions, and it should therefore not be the intent of DOT to test for the purpose of identifying employees who have them. As ALPA states in its comments, the levels as proposed are low enough to generate laboratory-reported positive results for many employees taking medically-prescribed opioids even after appropriate waiting periods. By increasing the cutoff levels, DOT can better isolate those abusing opioids while not unduly burdening law-abiding workers, and we recommend this approach.

Additionally, we note that for certain transportation workers, including pilots, agencies have produced guidance restricting the use of certain medications, including opioids, for set periods of time before going on duty. HHS relied on a study, which shows that a dose of certain opioids can result in a positive test at the proposed level for 36 hours after taking the medication (and up to 52 hours if the individual is not hydrated). This directly conflicts with existing guidance including FAA guidelines which, in reference to the same medication, would allow a pilot to fly 20.5 or 30 hours after the last dose. In this example, if DOT does not adjust cutoff levels, it will cause FAA compliant pilots, taking prescription drugs responsibly, to test positive and risk loss of employment. DOT must ensure this is not the case.

### **Blind Specimen Testing**

In the NPRM, DOT proposes to eliminate the blind specimen testing program, which requires that employers send specimens, for which they know the results, to testing labs alongside employee specimens. If the employer then receives a result from one of the blind specimens which is different from the result expected, this signifies a potential problem with the testing process.

TTD joins several of our affiliates including ALPA, AFA-CWA, and a number of rail unions<sup>2</sup> in strongly opposing the removal of the blind specimen testing program. Currently, the program provides a critical check on drug testing labs, and operates alongside split-sample testing and NCLP certification in ensuring the overall quality and accuracy. While we understand DOT's

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<sup>2</sup> Comments filed jointly by TTD affiliated-unions the American Train Dispatchers Association (ATDA), Brotherhood of Railroad Signalmen (BRS), Brotherhood Railway Carmen Division TCU/IAM, and Sheet Metal, Air, Rail and Transportation, Transportation Division (SMART-TD) as well as the Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees Division (BMWED).

claim that blind specimen testing in recent times have not found evidence of false positives, we believe that DOT has ignored any possibility of causality associated with this finding. The requirement of blind specimen testing offers a clear incentive to a lab to correctly test all specimens, as employers will be informed of errors on the blind samples. Ending blind specimen testing may have the unintended consequence of relaxing standards at testing labs, and creating the false positives the program sought to eliminate.

TTD also believes that eliminating the blind specimen program while simultaneously expanding the testing panel to include frequently prescribed opioid medications is extremely ill-timed. As labs and MROs navigate DOT tests for substances not previously tested, it is critical that testing remains accurate. Going forward, the blind specimen testing program should be one of the indicators of whether or not these drugs are being properly tested, not removed from regulation. To ensure both continued testing accuracy of substances currently on DOT's panel, as well as the ones it proposes to add, blind specimen testing should not be eliminated.

### **Fatal Flaws**

DOT also proposes to amend its list of fatal flaws, or incidents which immediately invalidate a specimen collection. The NPRM includes three new fatal flaws; that 1) There is no Chain of Custody Form (CCF), 2) There is no specimen submitted with the CCF, and 3) two separate collections are performed using one CCF. TTD supports these additional items, as all of these circumstances represent egregious violations of testing procedures, and could result in harmful and incorrect test results for employees.

### **Permitted Drug Tests**

We also express our strong support for DOT's proposal to add a new §40.210 entitled "Are drug tests other than urine permitted under the regulations?" to indicate that only urine specimens are currently authorized for drug testing. Urine is the only current HHS-approved testing method, and barring approval of other methods, DOT should only permit urine testing. TTD notes that in a separate docket, FMCSA has been petitioned to allow for drug testing using hair samples. We hope this addition will further clarify that DOT is not in a position to accept hair testing to satisfy drug testing requirements.

We appreciate the opportunity to comment on the Department's notice, and we hope that our concerns will be taken into serious consideration.

Sincerely,



Edward Wytkind  
President



**Transportation Trades Department, AFL-CIO**  
*A bold voice for transportation workers*

***TTD MEMBER UNIONS***

Air Line Pilots Association (**ALPA**)  
Amalgamated Transit Union (**ATU**)  
American Federation of Government Employees (**AFGE**)  
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, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers (**IBB**)  
International Brotherhood of Electrical Workers (**IBEW**)  
International Longshoremen's Association (**ILA**)  
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, Air, Rail and Transportation Workers (**SMART**)  
SMART-Transportation Division  
Transportation Communications Union/ IAM (**TCU**)  
Transport Workers Union of America (**TWU**)  
**UNITE HERE!**  
United Mine Workers of America (**UMWA**)  
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service  
Workers International Union (**USW**)

*These 32 labor organizations are members of and represented by the TTD*

