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<PREAMB>

<AGENCY TYPE='S'>DEPARTMENT OF TRANSPORTATION

<SUBAGY>Office of the Secretary

<CFR>49 CFR Part 40

<DEPDOC>[Docket OST-2003-15245]

<RIN>RIN 2105-AD89

<SUBJECT>Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This amendment reinstates the requirement for direct observation collections for all return-to-duty and follow- up tests. This provision was stayed by the United States Court of Appeals for the District of Columbia Circuit effective November 1, 2008, but that stay was lifted on July 1, 2009. This amendment, therefore, restores language to the version that became a final rule on June 25, 2008.

DATES: Effective Date: August 31, 2009.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Director, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366-3784 (voice), (202) 366-3897 (fax), or jim.swart@dot.gov; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, same address, (202) 366-9310 (voice), (202) 366-9313 (fax), or bob.ashby@dot.gov.

SUPPLEMENTARY INFORMATION:

<HD1>Background

The Department issued a final rule on June 25, 2008 (73 FR 35961) that, among other changes, modified 49 CFR 40.67 (b) and added a new paragraph (i) concerning the use of direct observation collections, a very significant tool the Department employs to combat attempts by employees to cheat on their drug tests. The amendment to 49 CFR 40.67(b) required direct observation collections for all return-to-duty and follow-up tests. Section 40.67(i) required that direct observations be conducted so as to allow the observer to check the individual for prosthetic or other cheating devices.

Several petitioners asked the Department to delay the effective date of these two provisions, seek further comment on them, and reconsider them. In response, the Department issued a notice delaying the effective date of 49 CFR 40.67(b) – the provision for making direct observation collections mandatory for all return-to-duty and follow-up tests – until November 1, 2008 (73 FR 50222; August 26, 2008). We opened a comment period on 49 CFR 40.67(b), which closed on September 25, 2008. The Department did not delay the effective date of 49 CFR 40.67(i), and that provision went into effect, as scheduled, on August 25, 2008.

The Department fully considered the comments filed in the public docket regarding the amendment to 49 CFR 40.67(b). On October 22, 2008, at 73 FR 62910, the Department issued a notice responding to the comments and stated "the Department remains convinced that conducting all return-to-duty and follow-up tests under direct observation is the most prudent course from the viewpoint of safety." (73 FR 62918)

The Department decided not to change the amendment and announced that the revised 49 CFR 40.67(b) would go into effect, as scheduled, on November 1, 2008.

On October 24, 2008, several of the petitioners again requested that the Department further postpone the revised 49 CFR 40.67(b). On October 30, 2008, the Department denied that petition. Several of the petitioners then filed a motion for stay with the United States Court of Appeals for the District of Columbia Circuit. On October 31, 2008, the Court issued a temporary administrative stay to allow more time for the court to consider the request for stay. On November 12, 2008, the court issued a further order to stay the effectiveness of section 40.67(b) (*BNSF Railway Company v. Department of Transportation*, U.S. Court of Appeals for the D.C. Circuit, September Term 2008, No. 08-1265, November 12, 2008). This stay remained in effect until the court issued a decision on the merits of petitioners' challenge to the provisions of 40.67(b). On November 20, 2008, at 73 FR 70283, in response to the stay, the Department issued a final rule to return to the language of section 40.67(b) that existed prior to June 25 final rule "pending further order of the Court."

Therefore, direct observation collections for return-to-duty and follow-up testing remained an employer option, rather than mandatory. All other requirements of the June 25, 2008 final rule that went into effect on August 25, 2008, including the direct observation provision at 40.67(i) [directing observers to check for prosthetic and other devices used to carry "clean" urine and urine substitutes] were not affected and have continued in effect.

On May 15, 2009, the United States Court of Appeals for the District of Columbia Circuit unanimously upheld DOT's direct observation drug testing rules applicable

to return-to-duty, safety-sensitive transportation industry employees who have already failed or refused to take a prior drug test. (*BNSF Railway Company v. Department of Transportation*, 566 F.3d 200 (DC Cir. 2009). Because there was an opportunity for the parties to seek rehearing of the Court's ruling, the Court's stay of the direct observation rule continued in effect. The Court issued a Mandate on July 1, 2009, which finalized the decision, thereby lifting the stay. This document, therefore, reinstates the language of 49 CFR 40.67(b) that the Department originally issued on June 25, 2008, and that would have gone into effect on November 1, 2008, but for the court's stay.

The Court's Decision

In its May 15, 2008 decision on the merits of section 40.67, the Court determined that direct observation drug testing for return-to-duty employees was not arbitrary and capricious because the Department had chosen a reasonable way of responding to the compelling governmental interest in transportation safety. The circumstances the Court took into account included the recent development of a wide array of available cheating devices, and the substantial incentive for these return-to-duty employees to use such devices to cheat on required return-to-duty and follow-up drug tests. The Court's unanimous decision also held that the rules did not violate the Fourth Amendment constitutional prohibition on unreasonable searches and seizures, taking into account, among other factors, the diminished expectation of privacy of employees who have failed or refused a prior drug test.

Administrative Procedure Act Analysis

The Court determined that the Department's issuance of the revised regulation was not arbitrary and capricious. In reaching this determination, the court noted that the

"Department marshaled and carefully considered voluminous evidence of the increasing availability of a variety of products designed to defeat drug tests." *BNSF Railway Company v. Department of Transportation*, 566 F.3d at 203. Since any successful use of cheating devices would not show up in statistics, the Court agreed with the Department's reasoning that it was "illogical" to require statistical evidence of cheating. *Id.* In this regard, the Court cited a recent Supreme Court decision, which said that 'It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable.' *FCC v. Fox Television Stations, Inc.*, No. 07–582, 2009 WL 1118715, at *11 (U.S. Apr. 28, 2009)(citation omitted)" *Id*. at 203 – 204

The Court stated "the Department's approach was sound. Acknowledging the intrusiveness of direct observation testing, the Department sought to limit it to situations posing a high risk of cheating….and then concluded – reasonably in our view – that returning employees have a heightened incentive to cheat, and that this incentive, coupled with the increased availability of cheating devices, creates such a high risk, ….." *Id*. at 204. In reaching its determination that "[s]ubstantial additional evidence supports the Department's conclusion that returning employees are particularly likely to cheat." *Id.*, the court relied heavily upon the expertise of the Substance Abuse Professionals (SAPs) who commented upon 49 CFR 40.67(b). "Given the experience possessed by these substance abuse professionals, such assessments provide substantial evidence supporting the Department's conclusion that returning employees are particularly likely to cheat on drug tests." *Id*.

In addition to the SAP comments and other evidence it referenced, the Court noted with interest that return-to-duty employees pose a high risk to transportation safety. Specifically, the Court noted with interest that "the Department supplemented its conclusion about returning employees' motivations with evidence of their actual behavior. To rebut the argument – offered by several commenters and echoed here by petitioners – that returning employees are lower risk because they have successfully completed drug treatment programs, the Department emphasized data showing that 'the violation rate for return-to-duty and follow-up testing is two to four times higher than that of random testing.'" *Id.* at 205. The Court stated "[w]e can hardly fault the Department for inferring that the reason for higher failure rates is not that returning employees are more honest, but that they are more likely to use drugs. And given that employees who never use drugs are – to say the least – much less likely to cheat on drug tests than those who do, we think it quite reasonable for the Department to see a higher underlying rate of drug use as evidence of a higher risk of cheating." *Id*.

The Court considered and rejected alternatives proposed by the petitioners, including maintaining the status quo of continuing to allow employers the option of conducting direct observation collections on return-to-duty employees. The Court supported the Department's determination that employers, concerned about the effects on "labor management agreements" and fearing "upsetting employees," rarely exercise this option." The Court referred to a statement in the amicus brief from the Association of American Railroads that direct observation tests "generate resentment and ill will towards management," as further supporting the Department's conclusion that the status quo was untenable." *Id.*

The Court concluded "the Department acted neither arbitrarily nor capriciously in concluding that the growth of an industry devoted to circumventing drug tests, coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the mandatory use of direct observation." *Id*.

Fourth Amendment Analysis

The Court carefully considered whether the Department's final rule struck the appropriate Fourth Amendment balancing of the needs of transportation safety with the reasonableness of the search. The Court stated that the Department's "interest in transportation safety is 'compelling' to say the least." Citing *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. *BNSF* at 206. Further, the Court recognized that "[g]iven the proliferation of cheating devices, we have little difficulty concluding that direct observation furthers the government's interest in effective drug testing." *Id*. Since employees returning-to-duty can anticipate that they will be subject to more frequent testing, "[a]rmed with such foreknowledge, returning employees can easily obtain and conceal cheating devices, keeping them handy even for unannounced follow-up tests." *Id.* The Court concluded that the Department "has a strong interest in conducting direct observation testing to ensure transportation safety." *Id*.

The Court then turned to the second prong of the Fourth Amendment analysis – the reasonableness of the actual search. "Individuals ordinarily have extremely strong interests in freedom from searches as intrusive as direct observation urine testing. In this case, however, those interests are diminished because the airline, railroad, and other transportation employees subject to direct observation perform safety-sensitive duties in

an industry that is 'regulated pervasively to ensure safety.'" *Id*. However, the Court noted that the Department's direct observation provisions were not structured to apply to all safety-sensitive employees. Only violators and suspected cheaters are affected. "By choosing to violate the Department's perfectly legitimate – and hardly onerous – drug regulations, returning employees have placed themselves in a very different position from their coworkers." *Id*. at 207. Thus, the court stated, "we have little trouble concluding that employees who have intentionally violated a valid drug regulation . . . [would] have less of a legitimate interest in resisting a search intended to prevent future violations of that regulation than do employees who never violated the rule." *Id.* The Court explained, "we think that the employees' prior misconduct is particularly salient, especially compared to their choice to work in a pervasively regulated industry. It's one thing to ask individuals seeking to avoid intrusive testing to forgo a certain career entirely; it's a rather lesser thing to ask them to comply with regulations forbidding drug use." *Id*. at 208. The Court acknowledged that "direct observation is extremely invasive, but that intrusion is mitigated by the fact that employees can avoid it altogether by simply complying with the drug regulations." *Id*.

The Court also took into account that the provision making direct observation optional in return-to-duty and follow up situations came into effect well before present threats to the integrity of urine testing became known. "[T]hat was before the Whizzinator and its like. Given the proliferation of such cheating devices, here we have a very different record, one that fully supports the Department's finding that standard monitoring procedures are inadequate. We thus conclude that here . . . direct observation testing will 'significantly improve testing accuracy.'" *Id*.

In finding that circumstances necessitated the Department's increased requirements for the scope and nature of direct observation collections, the Court stated, "we recognize the intrusiveness of the partial disrobing requirement, but find it only somewhat more invasive than direct observation, which already requires employees to expose their genitals to some degree. Because of this, and because the Department has permissibly found the requirement necessary to detect certain widely-available prosthetic devices, we conclude that it represents a reasonable procedure for situations posing such a heightened risk of cheating as to justify direct observation in the first place." *Id*.

"[T]he Department has reasonably concluded that the proliferation of cheating devices makes direct observation necessary to render these drug tests – needed to protect the traveling public from lethal hazards – effective. Weighing these factors, we strike the balance in favor of permitting direct observation testing in these circumstances." *Id*. The court concluded, "[g]iven the combination of the vital importance of transportation safety, the employees' participation in a pervasively regulated industry, their prior violations of the drug regulations, and the ease of obtaining cheating devices capable of defeating standard testing procedures, we find the challenged regulations facially valid under the Fourth Amendment." *Id*.

Collective Bargaining Agreements

We are aware that some employers and labor organizations may have entered into collective bargaining agreements (CBAs) that prohibit or limit the use of direct observation collections in return-to-duty and follow-up testing situations. Employers and employees, of course, do not have the authority to agree to avoid compliance with the requirements of Federal law. When this final rule goes into effect, conducting all follow-

up and return-to-duty testing using direct observation collections will be a requirement of Federal law. Employers *must* use direct observation collections for such tests that take place after the effective date of this rule and any contrary provisions of CBAs in the present or in the future will be not be effective.

Conclusion

The Department wants to ensure that employers, employees, collection sites, collectors, Third-Party Administrators and other service agents know about and are fully prepared for mandatory direct observation for follow-up and return-to-duty testing. We view this to be important in light of the fact that there has been a good deal of conflicting information in the transportation and drug testing industries about the requirements and because of the complexities of the various petitions, court actions, and rule changes on the matter.

REGULATORY ANALYSES AND NOTICES

This document simply reinstates, without change, following the dissolution of a court stay, a provision issued as part of a final rule on June 25, 2009. The regulatory analyses and notices set forth in that document (73 FR 35968-69) apply to today's rule.

List of Subjects in 49 CFR Part 40

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

ISSUED THIS 24TH DAY OF July, 2009, AT WASHINGTON D.C.

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Jim L. Swart

Director, Office of Drug and Alcohol Policy Compliance

49 CFR subtitle A - Authority and Issuance

For reasons discussed in the preamble, the Department of Transportation is amending part 40 of Title 49 Code of Federal Regulations as follows:

PART 40 – PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESING PROGRAMS

1. The authority citation for 49 CFR Part 40 continues to read as follows:

Authority: 40 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq*.

2. Section 40.67 is amended to by revising paragraph (b) to read as follows:

§ 40.67 When and how is a directly observed collection conducted?

* * * * *

(b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

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