

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

In the matter of:)
)
Procedures for Transportation Workplace)
Drug and Alcohol Testing Programs)

Docket: DOT-OST-2003-15245

**COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AND
THE REGIONAL AIRLINE ASSOCIATION**

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The Air Transport Association of America¹ and the Regional Airline Association² on behalf of themselves and their members, submit these comments in response to the Department request for comments concerning amendments to 49 C.F.R. 40.67 on August 26, 2008. We join the comments submitted by the Association of American Railroads supplemented by the comments below.

I. Introduction

The Department of Transportation (DOT) issued a final rule on June 25, 2008 “Procedures for Transportation Workplace Drug and Alcohol Testing Programs” with an effective date of August 25, 2008.³ Among the many regulatory amendments in the final rule were two changes to 49 CFR 40.67 “When and how is a directly observed collection conducted?” First, DOT took away employer discretion in 40.67(b) to conduct direct observation tests for return to duty and follow up tests, after the effective date of the rule, an

¹ ATA airline members are ABX Air, Inc., AirTran Airways, Alaska Airlines, Inc., American Airlines, Inc., ASTAR Air Cargo, Inc., Atlas Air, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, Hawaiian Airlines, JetBlue Airways Corp., Midwest Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., United Airlines, Inc., UPS Airlines, US Airways, Inc.; ATA Airline Associate Members are: Air Canada, Air Jamaica Ltd., and Mexicana.

² RAA Members include: Alma de Mexico, Aerolitoral, Air Canada Jazz, Air Wisconsin Airlines, American Eagle Airlines, Atlantic Southeast Airlines, Cape Air, Chautauqua Airlines, Colgan Air, Comair, Commutair, Compass Airlines, Empire Airlines, Era Aviation, ExpressJet, FedEx, Flight Options, GoJet, Grand Canyon Airlines, Great Lakes Airlines, Gulfstream International Airlines, Horizon Air, IBC Airways, Island Air, Mesa Airlines, Mesaba Airlines, New England Airlines, Piedmont Airlines, Pinnacle Airlines, PSA Airlines, Republic Airlines, Salmon Air, Shuttle America Airlines, SkyWest Airlines, Trans States Airlines, Twin Otter International, USAirways Express.

³ See 73 FR 35961.

employer “must” conduct direct observation collection for these two tests. Second, DOT included explicit instructions for direct observation collection observers in 40.67(i), it states:

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.

73 FR 35970.

At the request of numerous petitions, including a joint petition by ATA and RAA, the DOT delayed the effective date of the new 49 CFR 40.67(b) drug testing rule until November 1, 2008.⁴ Provision 40.67(b) mandates “direct observation” drug testing procedures for all “follow-up” and “return to duty” employees. The DOT requested public comment on this provision but not on an equally controversial provision 40.67(i) which adds a particularly intrusive procedure on how to comply with the “direct observation” rule; nonetheless we plan to submit comments on 40.67(i).

II. The Department Took the Correct Action in Delaying Certain Amendments

We agree with the Department’s decision to delay the effective date of section 40.67(b) until November 1, 2008; it was the right decision. As the Department is aware, ATA and RAA support all reasonable initiatives to identify substance abuse by employees and to implement

⁴ See 73 FR 50222.

drug and alcohol testing policies for the safety of the traveling public. This commitment can be seen in the annually low positive random drug testing rate; a fraction of one percent.

III. The Department Should Have Delayed the Effective Date for All Direct Observation Amendments and Asked for Public Comment

Unfortunately the Department did not extend the deadline for all amendments to section 40.67, despite a lack of notice in the NPRM. As identified in our petition submitted on August 19, 2008,⁵ the first notice of regulatory changes to section 40.67 came on June 25, 2008, when the Department issued a final rule.⁶ The August 26, 2008 Notice stated that the Department “explicitly” sought comments in the NPRM on the content of revised 40.67(i) but acknowledges that the proposal was not in the form of a proposed rule but rather some generalized question within the preamble:⁷

We are interested in your comments as to the appropriateness of having a collector make sure that the employee is not using a prosthetic device during an observed collection.

For example, would it 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? What should be the consequence if a device is found?

70 FR 62281.

These open-ended ANPRM-like questions ask the public *if* such a requirement would be appropriate, it does not state the Department intends to adopt such a requirement, it does not provide an explanation or justification of why it would adopt such a provision, it *asks the*

⁵ See Docket no. DOT-OST-2003-15245-0056.

⁶ See 70 FR 62276, 62281, October 31, 2005.

⁷ We note in the August 26th notice, that the Department cites the history of the direct observation rule along with Congressional hearings and a GAO report to conclude it must take additional steps to combat cheating on drug tests. See 73 FR 50224. However, such support and justification for a rule change is the type of information required by the APA to be included in a NPRM, which fairly apprises the public of the terms and substance of a proposal and allows the public to submit views, data, and arguments.

question whether requiring such procedures during direct observation is a good idea. In addition, the NPRM did not provide any proposed rule text changes to section 40.67.

As stated in our petition, this lack of notice created a series of problems in attempting to comply with the new rule. For example, there is and will be an insufficient number of trained male collectors to conduct observed collections. Most airline employees that are tested are male. Most of the individuals used for collection of drug samples are female. This gender divide formerly was of no consequence because observed collections were required in few cases and the employer had discretion in most cases to require observed collections. In addition, all collectors, new or existing, are being trained on the very explicit observer requirements in 40.67(i), which presents a very sensitive training issue that requires a carefully crafted training curriculum and extensive training.⁸ Petitions from the AFL-CIO, the rail industry and initial comments in response to this notice all recognize the intrusiveness of this new requirement, indicating the Department underestimated the impact of this requirement.

Finally, this lack of notice raises serious Administrative Procedure Act concerns, especially with the amendments to 40.67(i), which should have been stayed, while giving the public notice and an opportunity to comment. The APA requires a notice of proposed rulemaking to include, among other things, “either the terms or substance of the proposed rule or a description of the subject and issues involved.”⁹ The purpose of the required notice is to provide interested persons with the opportunity to participate in the rulemaking through

⁸ The changes to section 40.67 may go beyond the privacy limits identified by the Supreme Court, which stated “We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process.” *Skinner et al. v. Railway Labor Executives' Association et al.*, 489 U.S. 602, 627 (1989).

⁹ 5 U.S.C. § 553(b)(3).

submission of written data, views, or arguments.¹⁰ To obtain meaningful participation from the public, courts have consistently held that an NPRM must “fairly apprise interested persons” of the issues in the rulemaking.¹¹ As described above, the NPRM lacked several fundamental details on amendments to section 40.67 and that exclusion deprived the public of a description of the terms and substance of the rule and prevented the public from being fairly apprised of the issues in this rulemaking.

IV. We Request that 40.67(b) be Withdrawn or Revised to Strictly Limit Its Applicability Only to Instances Where Risk of Specimen Tampering for RTW or FU Individuals is Highly Likely.

The assumption that all return to work (RTW) or follow up (FU) individuals who previously had invalid test results are considered increased risks to aviation safety is false. As just one example, it is common that invalid tests can occur on random testing of flight crew members because by the very nature of their work environment they can become dehydrated and consequently affect the PH balance of the test sample; to suggest that such flight crew members are increased risks to aviation safety is insulting.

The Notice acknowledges that direct observation procedures have been and always will be controversial but then takes the position that it is no longer “practicable” to not add countermeasures in light of these “well-publicized cheating techniques and devices.” However, the Notice presented no data to confirm that these prosthetic devices are widely used within the transportation industry; the only data provided indicated that such devices are widely available

¹⁰ See 5 U.S.C. § 553(c).

¹¹ *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir 1980) (*quoting* *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)).

for purchase on the Internet creating a large gap between what may occur and what has actually happened.

We believe the Department has underestimated the privacy concerns over the amended direct observation procedures. Maintaining an atmosphere that recognizes the rights and dignity of all its employees is central to the corporate culture of our members. Several members have expressed concern that they could lose highly qualified individuals due to the intrusive nature of the amended DO procedures; they will simply quit rather than be subjected to a procedure that borders on harassment. DO procedures should be used only where situations clearly warrant its use. We request that in light of these privacy issues, 40.67(b) is revised to narrowly confine its applicability to only situations where it is highly likely the tests were deliberately made invalid. We suggest DO be limited to RTW or FU individuals who previously refuse to test.

V. If Our Request to Withdraw Revised 40.67(b) is Denied, We Request that the Effective Date is Extended For Another Year.

We recognize the differences between and “observer” and “collector” as noted in the August 26, 2008 Notice, but the Department failed to respond to our concern over processing a much greater number of DO tests requested by revised 40.67(b). We estimated the number of DO tests will roughly double among our memberships. One member reported a 30 to one projected increase when RTW and FU individuals are included for DO testing. Given the increase and given the more probable mismatch in gender between the collector and the observer, the need for a full time “observer” becomes more likely.

Several members expressed concern over the appropriateness of having a supervisor or other employee do the observing. Ideally an observer would be a medically trained person but

given the costs that is unlikely to happen. The best solution is to limit a DO procedure only to those instances where the risk of cheating is clearly demonstrated.

VI. We Request that the Department Extend the Comment Period and Consider Additional Comments for Revised 40.67(i).

The August 26, 2008 Notice provided no valid explanation why the Department would only consider comments for revised 40.67(b) and not for revised 40.67(i). As we mentioned above, the public was never given adequate opportunity to comment on the specific wording of either of the two provisions.

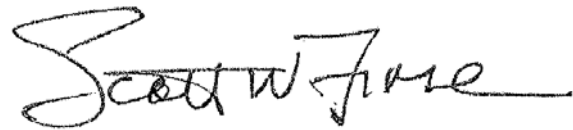
We acknowledge the concerns over trying to catch the “cheaters” but note the Department never explained why the current DO procedures are inadequate. The revised DO procedures are certainly more graphic but do they accomplish anything more than what the current DO procedures accomplish? Again in light of the privacy issues that must be legitimately considered by this rulemaking action we consider the requirements of revised 40.67(i) as not only unnecessary but completely unwarranted. The public should be given the opportunity to adequately comment on its contents.

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Respectfully submitted,



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