

Office of the Secretary

49 CFR Part 40

[Docket OST-2003-15245]

RIN 2105-AD55

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: On June 25, 2008, the Department issued a Final Rule amending, among other provisions, paragraph (b) of our section pertaining to urine specimen collections. This amendment required direct observation collections for all return-to-duty and follow-up tests. We sought additional comments to this provision on August 25, 2008. On October 22, 2008, the Department issued a notice responding to those comments. The Department did not change the amendment, and determined that the revised paragraph would go into effect, as scheduled, on November 1, 2008. On November 12, 2008, the

United States Court of Appeals for the District of Columbia Circuit issued a stay of the revised paragraph (b). This document, therefore, returns the language of 49 CFR 40.67(b) that existed prior to the November 1, 2008, effective date pending further order of the Court.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

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:

Background

The Department issued a final rule on June 25, 2008 (73 FR 35961), which included, among other things, two provisions (49 CFR 40.67 (b) and (i)) concerning the use of direct observation (DO) collections, a very significant tool the Department uses to combat attempts by employees to cheat on their drug tests.

Several petitioners, including the Association of American Railroads (AAR), joined by the American Short Line and Regional Railroad Association; the Transportation Trades Department (TTD) of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); the International Brotherhood of

Teamsters; and the Air Transport Association (ATA), joined by the Regional Airline Association (RAA), 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 DO collections mandatory for all return-to-duty and follow-up tests – until November 1, 2008 (73 FR 50222; August 26, 2008). The Department opened a comment period on that provision, 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 DO 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 described above again petitioned the Department for further postponement of the final rule regarding 49 CFR 40.67(b). On October 30, 2008, the Department denied the petition. Several of the petitioners also 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, D.C. Circuit, September Term 2008, No. 08-1265, November 12, 2008). This stay will remain in effect until the court issues a decision on the merits of petitioners' challenge to the provisions of 40.67(b).

Therefore, DO collections for return-to-duty and follow-up testing will continue to be an employer option, rather than mandatory. All other requirements of 49 CFR Part 40 that went into effect on August 25, 2008, including the DO provision at 40.67(i) [checking for prosthetic and other devices used to carry "clean" urine and urine substitutes] will remain in effect.

Therefore, the revised section 40.67(b), as issued in the Department's final rule on June 25, 2008, is removed from the CFR in order to comply with the court's stay, and the prior version of 49 CFR 40.67(b), which the department reinstates with this document, will remain in effect until further notice.

ISSUED THIS 17th DAY OF NOVEMBER, 2008, AT WASHINGTON D.C.

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 TESTING 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 may 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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[FR Doc. 2008-27617 Filed 11/17/2008 at 4:15 pm; Publication Date: 11/20/2008]