ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4698 HJUD HB 283 (FILE 1) - HB 283 (FILE 2) 270

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Cmte
committee name

committee on HB283 , dated 10/24/87 .
bill/subject

As an operator in the woods industry, I feel strongly that drug testing must be done for the safety of all people employed in the timber industry.

We would like to have the opportunity to discuss with you, in person, the many problems we are facing in our industry that are direct result of drug use and abuse.

Signed: Jerry Larrabee
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

P.O. Box 139 Sitka, Ak. 99835
Address

907-966-2661 or 788-3531
Phone No.

Alaska State Legislature

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Signed: Michael T. Valentine
Testifier

R.H. Valentine Logging Co.
Representing (Optional) ALASKA Loggers Board of Directors.

111 Stedman Suite 101 Ktn AK.
Address

225-6114
Phone No.

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Signed: Jerry Lawhead
Testifier

LARRABEE LOGGING
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Testifier

LARRABEE LOGGING Co.
Representing (Optional)

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Testifier

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Signed: Jean Lamb
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

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Testifier

R+M Valentine Logging Co.
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Signed: Jerry Lavatta
Testifier

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Testifier

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Address

225-6114
Phone No.

HB 283

Leonard J. Karpinski
3936 Tom White Circle
Anchorage, Alaska 99504-4752
(907) 337-3231
14 October 1987

Rep. John Sund
Pouch V, State Capitol
Juneau, Alaska 99811

Dear Rep. Sund:

I commend you for your introduction of a bill prohibiting drug testing (as noted in the Anchorage Times of 12 October). This testing is reefer madness at its most dangerous and has no place in a truly free society.

I would like to attend the hearings of your committee on this subject on 13 and 14 November in Anchorage. Please send information ASAP regarding times and locations of these hearings.

Thanks,

Leonard J. Karpinski

Leonard J. Karpinski

Ostlund v. Bobb, 825 F.2d 1371, 1374 (9th Cir.1987), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The appellants acted outside that shield.

AFFIRMED.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; United Transportation Union General Committee of Adjustment, the Southern Pacific Company; Brotherhood of Locomotive Engineers General Committee of Adjustment, the Southern Pacific Company; and Brotherhood of Railroad Signalmen, Plaintiffs–Appellants,

v.

James H. BURNLEY *, Secretary, Department of Transportation; John R. Riley, Administrator, Federal Railroad Administration, Defendants–Appellees.

No. 85-2891.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 8, 1986.

Decided Feb. 11, 1988.

Railway labor organizations brought action challenging constitutionality of Federal Railroad Administration regulations mandating blood and urine tests of employees after certain train accidents, fatal incidents, and rule violations. The United States District Court for the Northern District of California, Charles A. Legge, J., upheld constitutionality of regulations, and labor organizations appealed. The Court of Appeals, Tang, Circuit Judge, held that: (1) regulations which mandated testing of railroad employees without requiring individualized suspicion violated employees' Fourth Amendment rights; (2) regulations did not violate Rehabilitation Act by unlawfully discriminating against handicapped by causing dismissal of employees who could perform their jobs despite drug or alcohol use; and (3) statute did not violate equal protection provisions of Fifth Amendment by targeting for testing employees covered by Hours of Service Act and employees performing same services.

Reversed.

Alarcon, Circuit Judge, dissented and filed opinion.

1. Searches and Seizures ⇐78

Fourth Amendment's prohibition of unreasonable searches and seizures applied to drug tests conducted at instigation of railroads pursuant to regulations adopted by Federal Railroad Administration. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐14

Governmental taking of urine specimen constitutes "search and seizure" within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

3. Searches and Seizures ⇐24

Although warrant is generally required to make search reasonable, it is not sine qua non of reasonableness. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐45

Exigencies of testing for presence of alcohol and drugs in blood, urine, or breath require prompt action which precludes obtaining of warrant. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐79

Warrantless inspection of commercial premises of pervasively regulated business will be deemed to be reasonable only if substantial government interest informs

* James H. Burnley is substituted for defendant Elizabeth Dole pursuant to F.R.App.P. 43(c)(1).

regulatory scheme, warrantless inspections are necessary to fulfill regulatory scheme, and inspection program, in terms of certainty and regularity of its application, provides constitutionally adequate substitute for warrant. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐79

As substitute for warrant, regulatory statute must advise owner of premises that search is made pursuant to law and has properly defined scope, and it must limit discretion of inspecting officers. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures ⇐78, 79

Administrative inspection exception—which allowed warrantless searches of premise of pervasively regulated industries—was not applicable to support constitutionality of Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents and fatal incidents, and rule violations. U.S.C.A. Const.Amend. 4; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.; Federal Railroad Safety Act of 1970, § 101 et seq., as amended, 45 U.S.C.A. § 421 et seq.

8. Searches and Seizures ⇐79

Administrative inspection standard—which allows warrantless searches of premises of pervasively regulated industries—is not applicable to searches of persons even when they are employed in those industries, unless employees are principal concern of industry regulation. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures ⇐23

Accommodation of railroad employees' privacy interest with significant safety concerns of government did not require adherence to probable cause requirement. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures ⇐23

Finding search justified at its inception requires determination that there are reasonable grounds for suspecting that search will turn up evidence sought. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures ⇐78

Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents, fatal incidents, and rule violations without finding of particularized suspicion that employees worked while under influence of alcohol or drugs violated railroad employees' Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

12. Searches and Seizures ⇐78

Testing of railroad employees for alcohol and drug use following certain train accidents, fatal incidents, and rule violations was permissible only when there was individualized suspicion, because only combination of observable symptoms of impairment with positive result on drug test would provide sound basis for appropriate disciplinary action. U.S.C.A. Const.Amend. 4.

13. Administrative Law and Procedure ⇐322

United States ⇐40

Secretary of Transportation could delegate testing of railroad employees for drugs and alcohol to railroads. Federal Railroad Safety Act of 1970, § 208(a), as amended, 45 U.S.C.A. § 437(a).

14. Civil Rights ⇐9.16

Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents, fatal incidents, and rule violations did not violate Rehabilitation Act by unlawfully discriminating against handicapped by causing dismissal of employees who could perform their jobs despite drug or alcohol use; disciplinary action was left up to individual employers and was subject for collective bargaining between unions and railroads. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

15. Searches and Seizures ⇐78

Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents, fatal incidents, and rule violations did not unconstitutionally discriminate by targeting for testing employees covered by Hours of Service Act and employees per-

forming same services as covered employees, as supervisory personnel were already subject to testing at discretion of railroads. Hours of Service Act, § 1(b)(2), as amended, 45 U.S.C.A. § 61(b)(2); U.S.C.A. Const. Amend. 4.

Lawrence M. Mann, Washington, D.C., for plaintiffs-appellants.

Marc Richman, Daniel Carey Smith, Washington, D.C., for defendants-appellees.

Alan L. Schlosser, San Francisco, Cal., for amicus curiae.

Appeal from the United States District Court for the Northern District of California.

Before TANG, PREGERSON and ALARCON, Circuit Judges.

TANG, Circuit Judge:

The Railway Labor Executives' Association [1] and various railway labor organizations which are constituent members (collectively "RLEA") appeal the district court's grant of summary judgment for the government. RLEA challenges the constitutionality of Federal Railroad Administration (FRA) regulations mandating blood and urine tests of employees after certain train accidents and fatal incidents, and authorizing breath and urine tests after certain accidents, incidents and rule violations. RLEA also argues that the regulations violate provisions of the Railway Labor Act, the Federal Rehabilitation Act and the Federal Railroad Safety Act. We reverse.

1. The RLEA is an unincorporated association representing all crafts of railroad workers in the country.

2. A reportable injury is one which must be reported under Part 225. 49 C.F.R. § 219.5(s). According to 49 C.F.R. § 225.19(d)(4), a reportable injury is one that requires medical treatment or results in restriction of work or motion for one or more work days, one or more lost work days, termination of employment, transfer to another job or loss of consciousness.

BACKGROUND

The regulations at issue are codified in 49 C.F.R. Part 219 (1986). They were issued by the FRA after a two-year rulemaking process on August 2, 1985 and scheduled to become effective November 1, 1985. RLEA was a party to the administrative proceedings and filed a petition for reconsideration which the Secretary denied on October 28, 1985. It then filed suit in federal district court on October 31, 1985, and received a temporary restraining order prohibiting implementation of the regulations. The TRO remained in effect until the district court granted summary judgment for the government on December 9, 1985. RLEA sought and obtained a stay pending appeal from this court on January 3, 1986 but the Supreme Court vacated the stay on January 27, 1986. *Dole v. RLEA*, 474 U.S. 1099, 106 S.Ct. 876, 88 L.Ed.2d 914 (1986). The regulations thus went into effect February 10, 1986 with mandatory post-accident testing beginning March 10.

The portions of the new regulation which are the subject of this challenge are Subpart C, which requires post-accident testing, and Subpart D, which authorizes testing for "cause." The key provisions are summarized below, and set out in full in the margin.

The provisions of Subpart C mandate alcohol and drug testing for all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or $500,000 damage to railroad property); impact accidents (involving a reportable injury [2] or damage to railroad property of $50,000); and fatal incidents (involving fatality of an on-duty railroad employee). 49 C.F.R. § 219.201.[3] The regulations require that

3. § 219.201 Events for which testing is required.

(a) *List of events.* On and after March 10, 1986, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraph (a)(1) through (3) of this section:

(1) *Major train accident.* Any train accident that involves one or more of the following:

(i) A fatality;

blood and urine samples be taken from all crew members of a train involved in such an accident or incident as soon as possible afterwards. Blood samples are to be taken at independent medical facilities by qualified medical professionals or technicians. 49 C.F.R. § 219.203.[4] Refusal to provide a sample results in a 9 month period of disqualification. 49 C.F.R. § 219.213.[5]

The provisions of Subpart D authorize railroads to require covered employees to submit to breath or urine tests when a supervisor has a reasonable suspicion that an employee is under the influence or impaired by alcohol or drugs. To require a urine test, two supervisors must have reasonable suspicion, and if drug use is suspected, one of them must have been trained in spotting drug use. 49 C.F.R. § 219.301(b)(1),[6] (c)(2)[7]. The railroads may also require testing when an employee is involved in an accident or incident which must be reported under Part 225 and a supervisor has reasonable suspicion that his acts or omissions contributed to the accident. 49 C.F.R. § 219.301(b)(2).[8] The

(ii) Release of a hazardous material accompanied by—

(A) An evaculation; or

(B) A reportable injury resulting from the hazardous material release (*e.g.*, from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of $500,000 or more.

(2) *Impact accident.* An impact accident resulting in—

(i) A reportable injury; or

(ii) Damage to railroad property of $50,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

4. § 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* (1) Following each accident and incident described in § 219.201, the railroad (or railroads) shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by FRA.

. . . . . .

(b) *Timely sample collection.* (1) The railroad shall make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident.

. . . . . .

(c) *Place of sample collection.* (1) Employees shall be transported to an independent medical facility where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

5. § 219.213 Unlawful refusals; consequences.

(a) *Disqualification.* (1) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months.

6. § 219.301 Testing for reasonable cause.

. . . . . .

(b) *Reasonable cause for breath tests.* The following circumstances constitute reasonable cause for the administration of breath tests under this section:

(1) *Reasonable suspicion.* A supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol, or alcohol in combination with a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee.

7. (c) *Reasonable cause for urine test—*

. . . . . .

(2) *Reasonable suspicion.* Reasonable cause also exists where a supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee, subject to the following limitations:

(i) An employee may be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees; and

(ii) If the determination to require urine testing is based upon suspicion that the employee is under the influence of or impaired by a controlled substance at least one supervisory employee responsible for the decision to require urine testing must have received at least three (3) hours of training in the signs of drug intoxication consistent with a program of instruction on file with FRA under Part 217 of this title. Such program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of the major drug groups on the controlled substances list (narcotics, depressants, stimulants, hallucinogens, and marijuana).

8. § 219.301 Testing for reasonable cause.

(b) *Reasonable cause for breath tests.*

railroads may also require testing when an employee violates a railroad operating rule listed in 49 C.F.R. § 219.301(b)(3).[9]

There are no factual disputes in this case except as to the extent of alcohol and drug abuse in the railroad industry and the number of accidents involving either. The record shows that, between 1975 and 1984, of 791 fatalities caused by railroad employees, 37 resulted from accidents or incidents involving alcohol or drug use, or 4.7 percent. The FRA contends the problem is more serious than the 4.7 percent figure would indicate because of underreporting by the railroad industry of alcohol and drug involvement, because of the increased dangers involved in railroad transport of hazardous materials, and because drug and alcohol use has grown more pervasive in recent years.

The district court assumed the seriousness of the problem, and the RLEA concedes that alcohol and drug use are serious hazards to railroad safety. Thus, although there is some difference of opinion about just how pervasive the problem is, the central dispute in this case is not a factual one. Rather, the case involves disputes as to the statutory authority for the rule and its constitutionality.

ANALYSIS

We review a grant of summary judgment de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir.1986). We review questions of law de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

I. FOURTH AMENDMENT

[1] To decide whether the drug tests mandated or authorized by the regulations violate the fourth amendment, we must first determine whether the amendment's prohibition of unreasonable searches and seizures applies to drug tests conducted at the instigation of the railroads pursuant to regulations adopted by the FRA. We hold that it does, both because the tests in question constitute searches within the meaning of the fourth amendment and because the federal government's role in promulgating the regulations in question is sufficient government action to subject the tests to the limitations of the fourth amendment.

A. Drug and Alcohol Tests are Searches

The fourth amendment protects the "right of the people to be secure in their

(1) *Reasonable suspicion* (see note 5)

. . . . .

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

9. (3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other director with respect to movement of a train that involves—

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consist with § 218.37 of this title;

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or

(vii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

persons, houses, papers, and effects, against unreasonable searches and seizures...." These rights are implicated only if the conduct at issue infringes " 'an expectation of privacy that society is prepared to consider reasonable.' " *O'Connor v. Ortega*, — U.S. —, 107 S.Ct. 1492, 1497, 94 L.Ed.2d 714 (1987) (plurality opinion) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984)). The question we must first consider is whether a railroad employee has a reasonable expectation of privacy in the personal information contained in his body fluids.

It has long been clearly settled that blood tests such as those mandated by 49 C.F.R. § 219.203 are searches within the meaning of the fourth amendment. *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966).

[2] Every court that has considered the matter has similarly concluded that urine tests, such as those mandated by 49 C.F.R. § 219.203 and authorized by 49 C.F.R. § 219.301, are searches for fourth amendment purposes. *See, e.g., Everett v. Napper*, 833 F.2d 1507, 1509 (11th Cir.1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir.1987); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C.Cir.1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir.1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir.1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266–67 (7th Cir.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F.Supp. 1560, 1566 (C.D.Cal. 1987); *Feliciano v. City of Cleveland*, 661 F.Supp. 578, 586 (N.D.Ohio 1987); *Lovvorn v. City of Chattanooga*, 647 F.Supp. 875, 879 (E.D.Tenn.1986); *Capua v. City of Plainfield*, 643 F.Supp. 1507, 1513 (D.N.J. 1986); *Allen v. City of Marietta*, 601 F.Supp. 482, 488–89 (N.D.Ga.1985); *Storms v. Coughlin*, 600 F.Supp. 1214, 1217–18 (S.D.N.Y.1984); *Smith v. City of East Point*, 183 Ga.App. 659, 359 S.E.2d 692 (1987). The usual rationale is that urine testing is similar to blood testing because even though urine is routinely discharged from the body it is "normally discharged and disposed of under circumstances that merit protection from arbitrary interference." *Capua*, 643 F.Supp. at 1513. Because people have reasonable expectations of privacy in the personal information body fluids contain, the governmental taking of a urine specimen constitutes a search and seizure within the meaning of the fourth amendment. *Id.*

It has also been held, with less discussion of the rationale, that breath tests are searches within the meaning of the fourth amendment. *See, e.g., Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir.1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3d Cir.) (applying fourth amendment administrative search exception to urine and breath testing without explicitly deciding the testing constitutes a search), *cert. denied*, — U.S. —, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986).

B. Government Action Requirement

The second question we must consider is whether the federal government's role in promulgating this regulatory scheme is sufficient to subject the tests carried out in accordance with these provisions to the limitations of the fourth amendment. FRA argues that Subpart D merely authorizes private railroads to carry out tests under certain circumstances and that there is no government action involved.

The district court rejected this argument, and FRA did not cross-appeal after prevailing in the district court. FRA may nevertheless raise the argument on appeal because it does not seek to expand the relief granted by that court. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8, 98 S.Ct. 364, 369 n. 8, 54 L.Ed.2d 376 (1977). It is well settled that a prevailing party, "though he files no cross-appeal or cross-petition, may offer in support of his judgment any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." 9

Moore's Federal Practice ¶ 204.11[1] (2d ed. 1985) (footnote omitted).

On the merits, the district court was correct in finding government action in the authorized testing provisions relying on the authority of *United States v. Davis*, 482 F.2d 893, 896–904 (9th Cir.1973). In *Davis* we considered the applicability of the fourth amendment to airport security searches conducted by private airline employees. We began our inquiry with the observation that the fourth amendment applies to a search whenever the government participates in any significant way in a total course of conduct leading to a search. *Id.* at 897. We pointed out that the determining factor "'is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means.'" *Id.* (quoting *Lustig v. United States*, 338 U.S. 74, 79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949)). After reviewing the history of concern with hijacking and the development of a nationwide anti-hijacking program conceived, directed, and implemented by federal officials in cooperation with air carriers, we concluded that the government's role in the airport search program had been a dominant one. *Davis*, 482 F.2d at 897–904. We said that even if it could be characterized accurately as mere encouragement or, in the language of *United States v. Guest*, 383 U.S. 745, 755–56, 86 S.Ct. 1170, 1176–77, 16 L.Ed.2d 239 (1966), as "peripheral, or ... one of several cooperative forces leading to the [alleged] constitutional violation," it was still significant for fourth amendment purposes. *Davis*, 482 F.2d at 904. We expressly noted that it made no difference that the search was conducted by a private airline employee because the search was part of the overall, nationwide anti-hijacking effort and thus constituted "state action" for fourth amendment purposes. *Id.* It also made no difference that the search was conducted prior to the issuance of formal regulations mandating pre-boarding searches. *Id.* at 902–04.

In this case, the government's involvement in developing the rule and in regulating its implementation clearly amounts to significant involvement for fourth amendment purposes. FRA's regulation was issued under the authority of the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421–444, and the Accident Reports Act of 1910, 45 U.S.C. §§ 38–43. The Safety Act invests the Secretary of Transportation with authority to regulate "all areas of railroad safety," 45 U.S.C. § 431, and empowers him to conduct investigations, issue subpoenas, require production of documents, and delegate to qualified persons functions concerning the examination, inspecting, and testing of railroad equipment, operations, and persons, 45 U.S.C. § 437. Authority to administer the Act has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(m).

The Accident Reports Act provides that railroads must make monthly reports to the Secretary of Transportation of all collisions, derailments or other accidents resulting in death, injury or property damage. The Secretary is authorized to investigate all railroad accidents resulting in serious injury or property damage, and, to that end, is granted certain appropriate powers, including the power to require the production of evidence and, when deemed to be in the public interest, to make reports of such investigations stating the cause of the accident. 45 U.S.C. §§ 38–40. That statute also authorizes the issuance of "such rules ... as are necessary." 45 U.S.C. § 42. The Secretary's authority under this Act too has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(c)(11). The FRA has issued detailed accident reporting regulations, found at 49 C.F.R. Part 225.

FRA safety inspectors conduct investigations across the national rail system on a daily basis to promote compliance with safety regulations. As necessary, the FRA may require cooperation of the railroad company to facilitate the examination of facilities or pertinent records. *See United States v. Missouri Pacific R.R.*, 553 F.2d 1156 (8th Cir.1977).

FRA developed the regulations at issue here through a process initiated on June 30, 1983 and concluded August 2, 1985. FRA undertook this rulemaking process in

response to a perception that drug and alcohol abuse is a serious problem in the railroad industry posing unacceptable risks to public and employee safety. The general concern with drug and alcohol abuse and the national goal of eradicating that abuse is a matter of common knowledge. For example, the President's Commission on Organized Crime proposed that to reduce the demand for drugs "[t]he President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs." President's Commission on Organized Crime, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime at 483 (1986). In response, the President, on September 15, 1986, issued an Executive Order for a "Drug-Free Federal Workplace." Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). These expressions of national concern are mirrored in FRA's effort to develop a workable program of drug testing for the railroad industry. We cannot view the testing provisions, even those which authorize testing by private railroads, as anything less than part of an overall, nationwide anti-drug campaign. *Cf. Davis*, 482 F.2d at 897. Thus the government's role in the railroad drug testing program has been a dominant one, sufficiently significant for fourth amendment purposes.

C. Fourth Amendment Standard

Having found that the fourth amendment applies to drug and alcohol tests conducted pursuant to federal regulatory authority " 'is only to begin the inquiry into the standards governing such searches.... [W]hat is reasonable depends on the context within which a search takes place.' " *O'Connor*, 107 S.Ct. at 1499 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 740, 83 L.Ed.2d 720 (1985)). It is generally settled that " 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' " *O'Connor*, 107 S.Ct. at 1499 (quoting *Mancusi v. DeForte*, 392 U.S. 364, 370, 88 S.Ct. 2120, 2125, 20 L.Ed.2d 1154 (1968)).

1. *Warrant Requirement*

[3] It appears clear that this is a case in which a warrant is not required. Although a warrant is generally required to make a search reasonable, it is not the *sine qua non* of reasonableness. For example, a warrantless inspection of commercial enterprises in a closely regulated industry is reasonable within the meaning of the fourth amendment if the inspection meets certain criteria. *New York v. Burger*, — U.S. —, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). In another context the Court has held that public employer intrusions on the constitutionally protected privacy interests of government employees for work-related purposes and for investigations of work-related misconduct should be judged by the standard of reasonableness under all circumstances. *O'Connor*, 107 S.Ct. at 1502. The Court has also held that the warrant requirement is unsuited to the school environment because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985). In general the Court has indicated that the warrant requirement is dispensed with when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court*, 387 U.S. 523, 533, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930 (1967). Such an exception is carved out only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *T.L.O.*, 469 U.S. at 351, 105 S.Ct. at 747 (Blackmun, J., concurring).

In the seminal case on body fluid testing, the Court held that compelled blood tests in a drunk driving case are constitutionally permissible without a search warrant. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The Court stated that even though the warrant requirement could be dispensed with, there still had to be probable cause to initiate such a test. It said

[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear.

Id. at 769–770, 86 S.Ct. at 1835. The *Schmerber* Court found the blood test reasonable without a warrant because the same facts which gave probable cause for the arrest also suggested the relevance of the blood test, and because the blood test was a reasonable test with little risk, trauma or pain and was conducted in a reasonable manner. *Id.* at 770–771, 86 S.Ct. at 1835–36. RLEA concedes that a warrant is not necessary to legitimate body fluid testing under the regulations but argues that the *Schmerber* requirement for something like probable cause [10] must exist to justify the testing of any particular individual.

[4] We can agree that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant. *Schmerber*, 384 U.S. at 770, 86 S.Ct. at 1835. *Compare T.L.O.*, 496 U.S. at 340, 105 S.Ct. at 742 (to require a teacher to obtain a warrant before a search when she suspects an infraction of school rules would unduly interfere with the maintenance of discipline in the schools).

2. *Exceptions to Warrant Requirement*

Although we agree that drug and alcohol testing can be conducted without a warrant, we do not believe the case fits within one of the "carefully defined classes of cases," *Mancusi*, 392 U.S. at 370, 88 S.Ct. at 2125, previously identified by the Supreme Court as reasonable without a warrant.[11] The most relevant prior exception which is applicable in the eyes of FRA and the district court, is the administrative search. The district court specifically found that these regulations should be evaluated under the standards applicable to administrative inspections of pervasively regulated industries. *See New York v. Burger*, — U.S. —, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (automobile junkyard); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (mines); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1978) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor).

The administrative search doctrine applied to closely regulated industries has undergone significant alterations over the years. In the first such case, the Court approved the reasonableness of warrantless searches and seizures in the liquor industry because of the long history of Congressional regulation of the industry.

10. Recently the Supreme Court has explained that the "clear indication" specified in *Schmerber* was not a third standard between probable cause and reasonable suspicion, but was simply another way of stating that police must have a particularized suspicion that the evidence sought might be found within the body of the individual. *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985).

11. Such well-defined exceptions include: (1) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); (2) the "automobile exception," *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); (3) hot pursuit, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); (4) stop and frisk, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); (5) plain view, *Collidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); (6) border searches, *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985); (7) administrative searches of closely regulated industries, *New York v. Burger*, — U.S. —, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); (8) inventory searches, *Illinois v. LaFayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); (9) searches of schoolchildren's possessions at school, *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985); (10) consent, *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). *See* Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Testing*, 11 Nova L.Rev. 307, 331 n. 117 (citing cases).

Colonnade Catering, 397 U.S. at 75–77, 90 S.Ct. at 776–77. In *Biswell*, 406 U.S. at 315–16, 92 S.Ct. at 1596, the Court approved of warrantless searches conducted pursuant to the Gun Control Act not because of a deeply rooted history of federal regulation, but because of the need for flexibility and because the prerequisite of a warrant would frustrate the goals of inspection. The Court found that owners of businesses know they are subject to inspection from the time they choose to engage in a pervasively regulated business, thus there is only a limited threat to expectations of privacy. *Id.* at 316, 92 S.Ct. at 1596. The Court has further explained, in a case treating inspection of mines, that a congressionally established regulatory scheme and a comprehensive and defined federal regulatory presence lets the owner of commercial property know that his property will be periodically inspected. *Dewey*, 452 U.S. at 603, 101 S.Ct. at 2540. Such an inspection program, in terms of certainty and regularity of application provides a constitutionally adequate substitute for a warrant. *Id.* In that case, rather than leaving the frequency and purpose of inspections to the unchecked discretion of government officers, the Act established a predictable and guided federal regulatory presence. *Id.* at 604, 101 S.Ct at 2541. When no such regulatory plan is built into the legislation regulating a specific industry, the Court has required a warrant as a condition of a reasonable search. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (OSHA inspections not directed at a specific regulated industry; warrant necessary to demonstrate an inspection conforms to an established administrative plan).

[5, 6] The most recent articulation of this exception to the warrant requirement emphasizes that warrant and probable cause requirements which fulfill the traditional fourth amendment standard of reasonableness have lessened application in the context of a closely regulated industry because the owner or operator of commercial premises in such an industry has a reduced expectation of privacy. *Burger*, 107 S.Ct. at 2643. A warrantless inspection of the commercial premises of a pervasively regulated business will be deemed to be reasonable only if three criteria are met: (1) a "substantial" government interest informs the regulatory scheme; (2) warrantless inspections must be necessary to fulfill the regulatory scheme; and (3) the inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Id.* at 2643–44. As a substitute for a warrant the regulatory statute must perform the two functions of a warrant: it must advise the owner of the premises that the search is made pursuant to law and has a properly defined scope and it must limit the discretion of inspecting officers. *Id.* at 2644.

[7] We do not believe the administrative inspection exception is applicable to the regulatory scheme before us. All of the decisions in this line of cases have upheld warrantless searches of property, not of persons, and we decline to make such an extension in this case. The Court, in reviewing the closely regulated industry cases, has stressed that no reasonable expectation of privacy could exist "for a *proprietor* over the *stock* of such an enterprise." *Burger*, 107 S.Ct. at 2642 (quoting *Marshall*, 436 U.S. at 313, 98 S.Ct. at 1821) (emphasis added); *accord United States v. Munoz*, 701 F.2d 1293, 1299 (9th Cir.1983). *See, also, Rush v. Obledo*, 756 F.2d 713 (9th Cir.1985) (approving inspections of family day care homes in the areas where and when business is being conducted because day care centers fall within the pervasively regulated business exception); *Balelo v. Baldrige*, 724 F.2d 753, 767 (9th Cir.) (en banc) (approving government inspection of fishing vessels for violations of the Marine Mammal Protection Act, but noting that the regulation does not authorize searches of the persons, personal effects, or living quarters of the Captains and their crews, and that such searches would have to be justified independently under the fourth amendment), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 2536, 82 L.Ed.2d 841 (1984); *United States v. Raub*, 637 F.2d 1205 (9th Cir.1980) (warrantless boarding of vessels

approved as authorized by statute and aspect of historical and pervasive regulation of salmon-fishing industry).

There is no question that the railroad industry has experienced a long history of close regulation. *See supra* at 581. This regulation has diminished the *owners'* and *managers'* expectations of privacy in railroad premises, but we do not believe it has diminished the individual railroad *employee's* expectation of privacy in his person or his body fluids. Although some railroad safety regulations are directed at employees, such as the hazardous materials transportation laws, 49 U.S.C. §§ 1801–1812, the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees. By this we mean that the inspections and investigations to assure compliance with the regulations are directed at the premises, equipment, rolling stock and books and records of the owners and managers, not at their employees. 45 U.S.C. § 437(b). Further, the duty to comply with the regulations and the sanctions and penalties for violations of the regulations fall on the owners and managers, not their employees.[12]

We emphasize this point to distinguish the case before us from the Third Circuit's decision in *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986), which held the administrative search exception applies to warrantless breath and urine testing of jockeys in the heavily regulated horse-racing industry. Critical to the *Shoemaker* court's analysis was the fact that jockeys, as the persons engaged in the regulated activity, are the principal regulatory concern. *Id.* The regulation of horse racing in New Jersey is designed to protect the wagering public and its confidence in the integrity of the industry, and to those ends has always been geared to assuring the integrity of racetrack employees through licensing provisions and restrictions on employing persons convicted of a crime involving moral turpitude. *Id.* at 1141–42. In contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities. Railroad employees are not licensed, nor is their employment conditioned upon the absence of a prior criminal record. The Secretary of Transportation is expressly precluded from setting standards for qualifications of railroad employees, 45 U.S.C. § 431(a), while the New Jersey Racing Commission has always had the authority to prescribe the conditions under which licenses may be issued or revoked. *Shoemaker*, 795 F.2d at 1141. Railroad safety regulations have not put railroad employees on notice that their participation in the industry reduces their legitimate expectations of privacy in the integrity of their bodies. Certainly there are industry requirements of health and fitness, but these have been matters of private negotiation between railroads and employees not matters of federal regulation. *See, e.g., Brotherhood of Locomotive Eng'rs v. Burlington N.R.R. Co.*, 838 F.2d 1087 (9th Cir. 1988).

[8] Thus we conclude that the administrative inspection standard, which allows warrantless searches of the premises of pervasively regulated industries, is not applicable to searches of persons even when they are employed in those industries, unless the employees are the principal concern of the industry regulation.

We note that FRA actually argues for an extension of a broader administrative search doctrine than that developed in the pervasively regulated industry cases. FRA relies principally on *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), which required a warrant based on administrative probable cause to

12. *See, e.g.*, 45 U.S.C. § 438 (penalties for violation of the Federal Railroad Safety Act fall on railroads); 45 U.S.C. § 64a(a)(1) (penalties for violation of the Hours of Service Act fall on railroads); 45 U.S.C. § 13 (penalties for violation of the Safety Appliance Act fall on railroads); 45 U.S.C. § 34 (penalties for violation of the Boiler Inspection Act fall on railroads); 45 U.S.C. § 39 (penalties for violation of the Accident Reports Act fall on railroads); 49 U.S.C. § 26 (penalties for violating the Interstate Commerce Act fall on railroads).

inspect premises to assure compliance with fire, health and safety codes. The Court held that area code-enforcement inspections of municipal housing are reasonable because: (1) such programs have a long history of judicial and public acceptance; (2) there is no other canvassing technique which would achieve acceptable results; and (3) the inspections are neither personal in nature nor aimed at discovery of crime. *Id.* at 537, 87 S.Ct. at 1735. We think the animating principles of this case have little application to the drug testing at issue here. *Camara*, in common with the closely regulated industry cases, only approved inspections of property which are not personal in nature. *Id.*

FRA also argues that the Supreme Court and the Ninth Circuit have frequently approved of searches of persons conducted without probable cause or individualized suspicion. It cites *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (upheld brief vehicle stops at fixed checkpoints to question occupants without individual suspicion); *United States v. Des Jardins*, 747 F.2d 499, 505–06 (9th Cir.1984) (upheld pat-down search of person at border based only on minimal showing of suspicion), *partially vacated*, 772 F.2d 578 (9th Cir.1985); *McMorris v. Alioto*, 567 F.2d 897 (9th Cir.1978) (approved routine metal detector and pat-down searches of attorneys entering courthouse); *Davis*, 482 F.2d at 910–11 (approved preboarding searches of airline passengers).

We do not consider these cases to be in point. Stops for questioning, pat-down searches and magnetometer searches do not approach the degree of intrusiveness involved in toxicological testing of body fluids. The consistent rationale of the cases is that a vital governmental interest in, for example, national self-protection, *Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116, in the safety of judicial officers, *McMorris*, 567 F.2d 897, or in combatting terrorism and hijacking, *Davis*, 482 F.2d at 897, may justify a minimal intrusion. We do not consider breath, blood or urine testing to be similarly minimal intrusions. *See Storms*, 600 F.Supp. at 1220 (urinalysis entitled to same level of scrutiny accorded body cavity searches because both offend human dignity and privacy and both are degrading); *McDonell v. Hunter*, 612 F.Supp. 1122, 1127 (D.Iowa 1985) ("[U]rine is discharged and disposed of under circumstances where the person has a reasonable and legitimate expectation of privacy." Court also found significant the interest in maintaining privacy in personal information contained in body fluids.), *aff'd as modified*, 809 F.2d 1302 (8th Cir.1987); *Tucker v. Dickey*, 613 F.Supp. 1124 (W.D.Wis.1985) (urinalyses and body cavity searches equally degrading).

We still must decide what standard governs inquiry into the reasonableness of such a drug testing program. The Supreme Court has provided some guidance for determining the applicable standard of reasonableness although it has expressly declined to address the proper standard for analyzing employee drug and alcohol testing. *O'Connor*, 107 S.Ct. at 1504 n. **.

3. *Reasonableness*

The Supreme Court has said that determining the "standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *O'Connor*, 107 S.Ct. at 1499 (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983)); *National Fed'n of Fed. Employees*, 818 F.2d at 942.

In this case, on one side of the balance are the railroad employees' reasonable expectations of privacy, *T.L.O.*, 469 U.S. at 338, 105 S.Ct. at 741, *O'Connor*, 107 S.Ct. at 1497–99, and on the other side is the governmental interest in the safe and efficient operation of the railroads for the benefit of railroad employees and the public affected by that operation. *See O'Connor*, 107 S.Ct. at 1501 (government interest in efficient and proper operation of the workplace justifies search of employee's desk and files); *National Fed'n of Fed. Employees*, 818 F.2d at 942 (government inter-

est in efficient operation of the workplace offered as justification for drug testing of federal employees); *McDonell*, 809 F.2d at 1308 (government interest in determining whether prison personnel are using or abusing drugs which would affect their ability to safely perform their work may support the reasonableness determination).

[9] We believe that accommodation of railroad employees' privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement. *Cf. T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 742. In this case, as in *T.L.O.*, the legality of the search for evidence of drug or alcohol impairment depends on the reasonableness, under all the circumstances of the search. To be reasonable, the search must satisfy both prongs of a two-prong test. First, we must determine "whether the [search] was justified at its inception," *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 743 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)). Second, we must determine "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,'" *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 743 (quoting *Terry*, 392 U.S. at 20, 88 S.Ct. at 1879).

a. Justified at Inception

[10] Finding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought. In *O'Connor* this standard meant there had to be reasonable grounds for suspecting the search of an employee's office would turn up evidence that he was guilty of work-related misconduct. 107 S.Ct. at 1503. In *T.L.O.* this standard meant there had to be reasonable grounds for suspecting that the search of a student's purse would turn up evidence that the student had violated or was violating the law or school rules. 469 U.S. at 342, 105 S.Ct. at 743. In our case, this standard means there must be reasonable grounds for suspecting the search will turn up evidence the employee has violated the industry rule and federal regulation, 49 C.F.R. § 219.101, prohibiting possession or use of alcohol and controlled substances on the job and prohibiting working while under the influence of alcohol or drugs.

The Supreme Court has not determined whether "reasonable grounds for suspecting" necessarily means that there must be individualized or particularized suspicion. *O'Connor*, 107 S.Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8. These cases both involved searches of property,[13] not persons, and in both cases individualized suspicion did exist, but the Court refused to say that it was an irreducible minimum of a reasonable search. *O'Connor*, 107 S.Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8.

[11] We hold that particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception. Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew. Broad based testing, without particularized suspicion, such as that mandated by the new regulations, 49 C.F.R. §§ 219.301, 219.301(b)(2) and (3), has been frequently disapproved. *See, e.g., Amalgamated Transit Union*, 663 F.Supp. at 1568 (random testing of bus drivers unreasonable with less than reasonable suspicion); *Feliciano*, 661 F.Supp. at 589 ("a reasonable individualized suspicion that a police officer is using illicit drugs must be required for urinalysis to be reasonable"); *American Fed'n Gov't Employees v. Weinberger*, 651 F.Supp. 726 (S.D. Ga.1986) (federal police officers cannot be tested without reasonable suspicion); *Lovvorn*, 647 F.Supp. 875 (firefighters cannot

13. The holding of *T.L.O.* appears to be broader than the facts required, in that the Court said "[W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority." 469 U.S. at 340, 105 S.Ct. at 742. As we have discussed, dispensing with the warrant requirement does not end the inquiry into the reasonableness of a search, which requires different degrees of suspicion to warrant different degrees of intrusion.

be tested without individualized suspicion); *Capua*, 643 F.Supp. 1507 (random testing of firemen and policemen unconstitutional); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987) (teachers cannot be tested without particularized suspicion). *But see National Treasury Employees Union*, 816 F.2d 170 (customs officials may be required to take test when they apply for certain sensitive jobs); *McDonell*, 809 F.2d 1302 (prison guards may be subjected to uniform or systematic random urine testing); *Shoemaker*, 795 F.2d 1136 (jockeys may be subjected to random urinalysis and uniform breathalyzer tests).

We think when testing is undertaken to detect drug or alcohol abuse as a means of improving the safe operation of a railroad, it poses no insuperable burden on the government to require individualized suspicion. The reasonable suspicion standard currently codified at 49 C.F.R. §§ 219.301(b)(1) and (c)(2) is adequate to safeguard the privacy expectations of railroad employees, and we believe it should be incorporated into the mandatory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3).

Requiring particularized suspicion before testing for drug or alcohol impairment comports with the great weight of authority holding that a warrantless search of a person is unconstitutional without a degree of specific suspicion. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal...." *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8. *See e.g. McMorris v. Alioto*, 567 F.2d 897 (9th Cir.1978) (patdown search of visitor to courthouse more intrusive than magnetometer search and can be performed only with suspicion caused by activation of magnetometer); *Thorne v. Jones*, 765 F.2d 1270, 1277 (5th Cir.1985) (reasonable suspicion standard governs strip searches of visitors to prison), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1198, 1199, 89 L.Ed.2d 313 (1986); *Hunter v. Auger*, 672 F.2d 668 (8th Cir.1982) (same); *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 204–05 (2d Cir.1984) (reasonable suspicion standard governs strip searches of correction officers); *United States v. Ogberaha*, 771 F.2d 655, 658 (2d Cir.1985) (reasonable suspicion governs strip searches at the border), *cert. denied*, 474 U.S. 1103, 106 S.Ct. 887, 88 L.Ed.2d 922 (1986); *Henderson v. United States*, 390 F.2d 805 (9th Cir.1967) (same).

Although we hold that the testing provisions in 49 C.F.R. §§ 219.201 and 219.301(b)(2) and (3) are constitutionally infirm because they do not meet the first prong of the reasonableness test, we turn to a consideration of the second prong.

b. Related in Scope

The second prong of the reasonableness test is whether the search is reasonably related in scope to the circumstances which justified the interference in the first place. *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 742. In *T.L.O.* the Court indicated that a search of a school child which was justified at its inception would also be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *Id.* at 342, 105 S.Ct. at 743. We apply this standard to the regulations as they would stand with particularized suspicion incorporated as a necessary predicate to all testing.

[12] The professed purpose of the testing program is to detect current drug intoxication and impairment and thereby to improve rail safety through the deterrent effect of the testing. We see one flaw in the reasonableness of this approach to the problem. Blood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment. *See Jones v. McKenzie*, 833 F.2d 335, 339 (D.C.Cir.1987); Dubowski, Dr., *Drug-Use Testing: Scientific Perspectives*, 11 Nova L.Rev. 415, 526–29

(1987); Hudner, *Urine Testing for Drugs*, 11 Nova L.Rev. 553, 556–57 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L.Rev. 605, 632 (1987). Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug. Joseph, *supra* at 632. For this reason we think it imperative that drug testing be undertaken only when there is individualized suspicion because the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis for appropriate disciplinary action. The literature on drug testing is replete with references to the unreliability of results. *See Testing for Drug Use in the American Workplace: A Symposium*, 11 Nova L.Rev. (1987) *passim*. Requiring individualized suspicion would help to alleviate some of the harsh consequences of exclusive reliance on test results.

If individualized suspicion becomes a predicate for all testing the regulations should withstand scrutiny under the scope prong of the reasonableness standard. Although body fluid testing is highly intrusive, if it were occasioned only by individualized suspicion, the intrusion would not be excessive in light of the nature of the suspected rule violation. *Cf. T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743.

The manner of conducting the tests is generally reasonable in that they are performed in medical facilities. 49 C.F.R. § 219.203(c). The intrusiveness of the process of urine testing has been reduced as much as is practicable in that only personnel of the medical facility may supervise the sample collection. 49 C.F.R. § 219.305(a).

The implied consent provision, 49 C.F.R. § 219.11 [14] adds little to the reasonableness of the testing program although it does put employees on notice that they may be required to submit to such tests. *See National Treasury Employees Union*, 816 F.2d at 178. The consent feature does not add to the reasonableness in our case as it did in *National Treasury Employees Union* because there an employee could totally forego drug screening with no adverse inferences if he withdrew his application for a job transfer. *Id.* Railroad employees do not have that option.

If individualized suspicion is included in the preconditions for testing, we would conclude that the least intrusive means have been selected to meet the legitimate governmental objectives of the tests. *See id.* at 180. We are less convinced of the effectiveness of the tests in detecting drug impairment, *id.*, but think the program will serve reasonably well as a deterrence to on-the-job use of drugs and alcohol.

D. Consent

FRA argues the rule satisfies the fourth amendment even under the stricter standard of reasonable suspicion because of the implied consent provision in 49 C.F.R. § 219.11. It is clear that valid consent to a search eliminates the need for a warrant of probable cause. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). However, when a search has been determined to be constitutionally unreasonable, the consent feature cannot save it. *National Fed'n of Fed. Employees*, 818 F.2d at 943. As one court expressed it, "advance consent to future *unreasonable* searches is not a reasonable condition of employment." *McDonell*, 612 F.Supp. at 1131 (emphasis in original).

E. Conflicting Authority

We are mindful that our decision may be seen as conflicting with decisions of other circuits. *E.g. National Treasury Employees Union*, 816 F.2d 170; *McDonell*, 809 F.2d 1302; *Shoemaker*, 795 F.2d 1136; *Division 241 Amalgamated Transit Union*

14. § 219.11(a) provides "Any employee who performs covered service for a railroad on or after February 10, 1986, shall be deemed to have consented to testing as required in Subpart C and D of this part; and consent is implied by performance of such service.

v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976).

In *National Treasury Employees Union*, the Fifth Circuit considered a plan for testing customs officials seeking transfer to jobs which involve interdiction of illicit drugs, require carrying of a firearm or involve access to classified information. 816 F.2d at 173. As a voluntary screening test for those applying for transfers, this program is similar to FRA rules for pre-employment drug screens codified at 49 C.F.R. Part 219, Subpart F. These rules are not before us, and of course we express no opinion as to their constitutionality. We do not think the factors the Fifth Circuit considered in analyzing the reasonableness of the testing program, 816 F.2d at 177–82, are precisely the factors we consider relevant, because the court did not consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception, *O'Connor*, 107 S.Ct. at 1503; *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 742.

Likewise, the *McDonell* court did not pose this question in analyzing and upholding the reasonableness of uniform or systematic random testing of prison guards. 809 F.2d at 1308. Rather the court simply weighed the strong interest in prison security against the urinalyses which it held to be relatively less intrusive than body searches and found the intrusion into the guards' expectation of privacy to be reasonable. *Id.* We do not agree that urine testing is a lesser intrusion than body searches.

We have already indicated that *Shoemaker* is distinguishable because the Third Circuit adopted the pervasively regulated industry rationale to uphold testing of jockeys and we do not consider that rationale applicable to the employees in our case. 795 F.2d at 1141–42.

Finally, we do not consider the analysis of the *Suscy* court to be particularly persuasive, even though the case, because it involves bus drivers, is factually similar to the case before us. 538 F.2d 1264. The Seventh Circuit held, without very thorough analysis, that bus operators have no reasonable expectation of privacy and that even if they did, the tests given were reasonable because they were given only to operating employees directly involved in serious accidents or suspected by two supervisory employees of being under the influence. *Id.* at 1267. *See* Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 Am. Business L.J. 309, 324–25 (1986) (criticizing *Suscy* reasoning). Our evaluation of the reasonableness of the tests at issue in this case is that they fail to meet the requirement of being justified at their inception by an expectation the tests will reveal the sought after information. Because the *Suscy* court did not apply that test, its conclusions do not influence the outcome in our case.

II. STATUTORY ARGUMENTS

[13] RLEA raises a number of statutory objections to the regulations which we find unpersuasive.[15] RLEA suggests that the regulations violate the Federal Railroad Safety Act in that the FRA lacks the statutory authority to delegate testing under Subpart D to the railroads, and to permit them to conduct it without particularized suspicion. This argument is without merit. 45 U.S.C. § 437(a) authorizes the Secretary to delegate to any qualified persons functions respecting examination, inspection and testing of persons as necessary to carry out the provisions of that subchapter. Thus, because the Secretary has the power to perform the searches in question here, he has the power to delegate that authority to other qualified persons.

The RLEA argues from *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), which addressed warrantless inspections to enforce OSHA, that any statutory scheme mandating warrantless searches is constitutionally infirm.

15. The district court did not reach any of these questions but because they are legal issues we need not remand for further consideration.

Marshall does not go so far. The Court specifically stated it was concerned only with OSHA, and that the "reasonableness of a warrantless search ... will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321, 98 S.Ct. at 1825. Thus, the scheme at issue in this case need only pass constitutional muster on its own terms.

[14] RLEA also argues that the regulations violate the Federal Rehabilitation Act by unlawfully discriminating against the handicapped by causing dismissal of employees who can perform their jobs despite drug or alcohol use. The Federal Rehabilitation Act prohibits discrimination against otherwise qualified handicapped individuals by any program receiving federal financial assistance. 29 U.S.C. § 794 (1982). Assuming the Act applies to railroads, since they generally receive federal assistance or have federal contracts, it is clear the testing regulations are not violative of the Rehabilitation Act.

The regulations do not mandate any discriminatory treatment of those who are handicapped, or even of those who "flunk" the drug or alcohol tests. Any disciplinary action is left up to the individual employers and is a subject for collective bargaining between the unions and railroads.

Furthermore, the Rehabilitation Act does not cover alcoholics or drug abusers whose employment, by reason of current alcohol or drug abuse, would constitute a threat to property or safety. 29 U.S.C. § 706(7)(B). It appears from the plain language of the statute that only alcoholics or drug abusers whose problems are under control are protected from discriminatory treatment.

Finally, RLEA argues that the regulations violate protections of the Railway Labor Act by denying employees the right to have union representation at the testing procedures. This argument has no merit. It derives the right to have a representative present from the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). In *Weingarten*, the Court held that an employer's refusal of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8(a)(1) of the N.L.R.A., 29 U.S.C. § 158(a)(1), because it interfered with § 7 rights to engage in concerted activity. 29 U.S.C. § 157. 420 U.S. at 252–53, 95 S.Ct. at 961.

Weingarten does not control this case. The Court specified that the right to union representation arises only upon the employee's request. *Id.* at 257, 95 S.Ct. at 963. Here, the regulations are silent as to a person's right to have representation, and the situation has not yet arisen in which an employee has asked for and been refused such representation. Thus, the question is not ripe for review.

III. OTHER CONSTITUTIONAL OBJECTIONS

RLEA contends that, in addition to its constitutional infirmity under the fourth amendment, the rule also impermissibly impinges on the fundamental right of privacy. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The privacy interest protected by *Roe v. Wade* and its progeny has not been fully delineated, *see Carey v. Population Servs. Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), but thus far has been extended to include interests in autonomous decision making in the areas of family planning and contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), marriage, *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and family living arrangements. *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Any right to personal autonomy in choosing to use alcohol or drugs has not yet been protected, although there is a parallel right to keep certain information about drug use private. *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). In *Whalen* the Court found the gathering and storage of data pertaining to prescription drug use did not pose a grievous threat to the privacy interest in avoiding disclosure of personal mat-

ters or the privacy interest in independent decision making.

The Third Circuit held that one aspect of the reasonableness of the jockey testing program was the guarantee of confidentiality incorporated in the statutory scheme. *Shoemaker*, 795 F.2d at 1144. The regulations before us lack this safeguard, but we believe the time to litigate the question is after some inappropriate breach of confidentiality.

[15] RLEA's final constitutional argument is that the regulations are underinclusive and thus offend due process by arbitrarily discriminating among similarly situated classes of persons. Of course the equal protection provisions of the fourteenth amendment have been made applicable to the federal government through the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). But equal protection requires only that there be a rational relationship between a classification scheme and a legitimate government objective. *Plyler v. Doe*, 457 U.S. 202, 216–18, 102 S.Ct. 2382, 2394–95, 72 L.Ed.2d 786 (1982). The objective of railway safety is unquestionably legitimate. The targeting for testing of employees covered by the Hours of Service Act, 45 U.S.C. §§ 61–64b, and employees performing the same services as covered employees, 49 C.F.R. § 219.5(d), is reasonably related to the goals of the testing program. The Hours of Service employees are "individual[s] actually engaged in or connected with the movement of any train." 45 U.S.C. § 61(b)(2). Congress enacted this legislation to enhance railroad safety by regulating the hours of employees most involved in the operation and therefore most responsible for the safe operation of trains. It makes sense to mandate drug and alcohol testing of the same group for the same reasons.

But RLEA argues this does not permit testing of supervisory employees who may also be responsible for railway accidents. However, as FRA points out, supervisory personnel are already subject to testing at the discretion of the railroads, and if they perform any "covered service" they will be subject to testing under the new rule too. Thus, the rule does not offend the equal protection clause.

CONCLUSION

Because the district court applied the wrong legal standard in evaluating the fourth amendment issue in this case, it erroneously granted summary judgment for FRA. Applying the test of reasonableness we conclude that intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment. The judgment of the district court is REVERSED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

The primary issue before this court is whether the district court correctly determined that the Federal Railroad Administration's regulations requiring restraints to conduct blood or urine tests of crew members after serious accidents or incidents and authorizing the conduct of breath or urine tests, upon reasonable suspicion or upon an indication of a deficiency in an employee's safety sensitive functions as a result of an employee's involvement in certain accidents, incidents or rule violations, do not violate the fourth amendment. The district court concluded that, because railroads and railway employees are closely regulated by the government to promote public safety, the balance between this valid governmental interest and the right of an individual to be free from an invasion of privacy must be struck in favor of the regulatory scheme. I would affirm the district court's judgment.

I

The majority has concluded that, notwithstanding that railroads are closely regulated industries, the exception to the requirement of a warrant and probable cause for searches involving closely regulated industries does not apply to the search of the

employees of such enterprises. The majority's decision is in direct conflict with the Third Circuit's opinion in *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 577, 93 L.Ed.2d 580. In *Shoemaker*, the court held that warrantless breathalyzer and urine tests of voluntary participants in the highly regulated horse racing industry are reasonable under the fourth amendment. The majority in the instant matter attempt to distinguish *Shoemaker* on the ground that in the regulation of horse racing, jockeys are "the principal regulatory concern." Majority op. at 585. In further support of its refusal to follow *Shoemaker*, the majority states, "[i]n contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities." *Id.*

Contrary to the majority's argument, the government has a long tradition of regulating the conduct of railway personnel to promote public safety. The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs. As early as 1907, for example, Congress set limits on the number of working hours industry personnel may undertake per day. 45 U.S.C. § 62(a)(1) (1982). This legislation:

> was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions.

Atchison, T. & S.F. Ry. Co. v. United States, 244 U.S. 336, 342, 37 S.Ct. 635, 637, 61 L.Ed. 1175 (1917).

The government has promulgated a number of regulations which mandate safe working practices by railroad personnel. *See e.g.*, 49 C.F.R. §§ 218.1–218.30 (1986) (requiring that workers follow certain prescribed safety procedures when co-workers are engaged on rail tracks); 49 C.F.R. § 218.37 (1986) (requiring that workers follow certain prescribed safety procedures when trains are running at reduced speeds); 49 C.F.R. § 220.61 (1986) (requiring certain prescribed safety procedures be followed when transmitting or receiving orders). Additionally, Congress has declared that railroad personnel can be held criminally liable for violating certain safety rules. *See* 49 U.S.C. § 1801 (1982) (providing criminal penalties from the knowing transportation of hazardous materials); *see also* 45 U.S.C. § 438 (1982) (criminal penalties for false entries in accident reports).

The majority also reasons that railroad workers, unlike jockeys, do not have diminished expectations of privacy with respect to their use of drugs or alcohol. Majority op. at 585. This argument ignores the fact that railway employees were subject to safety rules such as the one denominated as Rule G in the companion cases to this matter *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 838 F.2d 1087 (9th Cir.1988) which, for a substantial period of time, have prohibited the use of alcohol and controlled substances by employees subject to duty or while on duty and required railway personnel suspected of use to submit to a blood or urine test to clear themselves of suspicion. *See Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 620 F.Supp. 163, 169–172 (D.Mont.1985).

Because the activities of railway *personnel* are closely regulated to promote safety, I would adopt the well-reasoned opinion in *Shoemaker*, and hold that the closely regulated industry exception to the requirement of a warrant and probable cause applies to blood, breath, and urine tests of railway employees under the specific circumstances prescribed in the regulations challenged in this action.

II

A search of a closely-regulated industry "will be deemed to be reasonable," *New York v. Burger*, — U.S. —, 107 S.Ct.

2636, 2643, 96 L.Ed.2d 601 (1987), if it meets the following three criteria:

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made
>
> ....
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme."
>
> ....
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."

Id. 107 S.Ct. at 2644 (quoting *Donovan v. Dewey*, 452 U.S. 594, 601–03, 101 S.Ct. 2534, 2539–40, 69 L.Ed.2d 262 (1981); *see Balelo v. Baldrige*, 724 F.2d 753, 764–65 (9th Cir.1984) (en banc), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841. The searches mandated by 49 C.F.R. § 219.201 satisfy this three-pronged test.

The government has a "substantial" interest in requiring that tests be conducted to assure that railroad employees avoid drug or alcohol use which might affect their ability to perform their jobs safely. Drug usage among railroad personnel has been implicated as a potential cause of numerous train accidents which resulted in injury and death. Two such accidents are noted in the companion cases to this matter, *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 838 F.2d 1087. These accidents caused seven deaths and over $3 million in property damage. These tragic events were not isolated incidents. They are two examples of a long line of alcohol or drug-related tragedies. *See generally* T. Manello & F. Seaman, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads* (Department of Transportation Report No. DOT-TSC-1375, 1979). The threat posed by alcohol and drug-related railroad accidents is particularly dangerous in light of the fact that extremely hazardous materials are often transported by rail. *See generally* National Transportation Safety Board, Pub. No. NTSB/RAR/83/05, *Railroad Accident Report—Derailment of Illinois Central Gulf Railroad Freight Train Extra 9629 East (GS-2-28) and Release of Hazardous Materials at Livingston, Louisiana, September 28, 1982* (1983) (describing an alcohol- implicated train wreck which resulted in a chemical spill requiring the evacuation of a community of 3000 persons for a period of two weeks).

Second, warrantless inspections are "necessary to further [the] regulatory scheme." *Burger*, 107 S.Ct. at 2644 (quoting *Donovan*, 452 U.S at 600, 101 S.Ct. at 2539). As the majority recognizes, "the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." *Cf. Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966) (sanctioning warrantless blood testing in drunk driving cases).

Finally, the testing procedures set out in the regulatory scheme " 'provid[e] ... constitutionally adequate substitute[s] for a warrant.' " *Burger*, 107 S.Ct. at 2648 (quoting *Donovan*, 452 U.S. at 603, 101 S.Ct. at 2540). 29 C.F.R. 219.201 *mandates* testing upon the occurrence of an accident or rule violation. Thus, railroad employees know "that the inspections to which ... [they are] subject do not constitute discretionary acts by ... official[s] but are conducted pursuant to ..." regulation. *Burger*, 107 S.Ct. at 2648.

The " 'time, place, and scope' of the inspection[s]", *id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972)), are brought within reasonable bounds by other provisions of the regulatory scheme. Under 49 C.F.R. § 219.205(b), testing must take place "as soon as possible" after the occurrence of an event specified in section 219.201. Under 49 C.F.R. §§ 219.205(c) and 215.305(a), tests must be conducted by qualified independent medical personnel at independent medical facilities. Finally, regulations such as 49 C.F.R. § 219.307(2)(b) limit the scope of testing to determining whether drugs or alcohol are present in the subject's blood or urine.

The blood and urine testing program clearly satisfies the three-pronged test established in *Donovan* and *Burger*. Accordingly, I would hold that the contested regulations do not violate the fourth amendment.

III

Reliance on the closely regulated industry exception to the fourth amendment requirement of a warrant and probable cause is *not* necessary to uphold the government's regulations requiring blood and urine tests under carefully prescribed circumstances.

To survive traditional fourth amendment scrutiny, a search must be "reasonable." *O'Connor v. Ortega*, — U.S. —, 107 S.Ct. 1492, 1502–03, 94 L.Ed.2d 714.

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' ...; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,'...."

Id. 107 S.Ct. at 1503 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 742–43, 83 L.Ed.2d 720 (1985), and *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)). The majority's opinion in this matter is also in conflict with decisions of the Fifth Circuit, the Seventh Circuit, the Eighth Circuit, and the District of Columbia Circuit holding that government-compelled drug-testing programs were reasonable under the fourth amendment.

Whether a search is "justified at its inception," involves a careful "'balancing [of] the need to search ... against the invasion which the search ... entails.'" *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–35, 87 S.Ct. 1727, 1733–34, 18 L.Ed.2d 930 (1967)). This balancing test was applied by the Fifth, Seventh, Eighth and District of Columbia Circuits to determine the reasonableness of toxicological drug testing programs in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir.1987), *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), and *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir.1987), and *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.1976), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632.

In *Von Raab*, a union representing employees of the Customs Service mounted a fourth amendment challenge to "a program adopted by the Customs Service requiring employees seeking transfer to certain sensitive jobs to submit to urine testing for drug use." 816 F.2d at 172. The Service initiated the program because its employees "are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use ... as well as [to] illegal substances themselves." *Id.* at 173. Applying the balancing test, the Fifth Circuit determined that the urine tests were intrusive and undertaken without individualized suspicion, and considered these two factors weighed against finding the program reasonable. *Id.* at 175–77. The court held, however, that these factors were more than outweighed by: (1) the Service's compelling need to assure that its employees maintained integrity, *id.* at 177–78; and (2) the diminished privacy expectations of Service employees, who know from the very nature of their profession "that inquiry may be made concerning their off-the-job use of drugs," *id.* at 180. Persons involved in operating trains should also be presumed to know that inquiry concerning their off-duty drug and alcohol use is likely because of the danger to others that would flow from operating a train while under the influence of such substances.

In *McDonell*, the Iowa Department of Corrections required correctional officers to submit to urine, blood and breath testing at the request of Department officials. 809 F.2d at 1304. The Department initiated the testing program "to maintain security and intercept contraband." *Id.* at 1306. Applying the balancing test, the Eighth Circuit noted that prison employees "expectations of privacy are diminished while they are within the confines of the prison." *Id.* It found that the Department

had a compelling need to determine "whether corrections employees are using or abusing drugs which would affect their ability to safely perform their work within the prison." *Id.* at 1308. The court found this necessity outweighed the correctional officers' diminished privacy interests:

> Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, ... and because this limited intrusion into the guards' expectation of privacy is, we believe, one which society will accept as reasonable, we ... hold that urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.

Id. at 1308. Similarly, the government had a compelling need to ensure that railway employees be free of alcohol or controlled substances in propelling locomotives across this nation.

In *Jones*, a transportation worker employed by the District of Columbia school system challenged the District's mandatory urine testing program. The program was initiated in response to "repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty." At 336. Applying the balancing test, the District of Columbia Circuit held that urine tests intrude heavily upon the employees' privacy interests and thus "can be outweighed only by strong governmental concerns." *Id.* at 340. The court held, however, that the government's safety concerns were sufficiently compelling to tip the balance against these interests. *Id.* Thus, it held that the tests were justified at the inception:

> There can be no doubt whatsoever that the School System's mission of safeiy transporting ... children to and from school cannot be ensured if employees ... are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous.... [T]he danger to a young ... child, should she be dropped by an attendant or ignored while crossing the street, is obvious. In light of these safety concerns, we find that the School System acted pursuant to a significant and compelling governmental interest in requiring drug testing for Transportation Branch employees as a part of routine employment-related medical examinations.

Id. at 340 (footnote omitted). The need to prevent injury or death to pedestrians or motorists in the path of a locomotive operated by substance and alcohol abusers is equally compelling.

In *Suscy*, a bus drivers union challenged a Chicago Transit Authority requirement that "bus operators ... submit ... blood and urine tests when they are involved in 'any serious accident.'" 538 F.2d at 1266. Applying the balancing test, the Seventh Circuit held that the clash of interests weighed in favor of holding the tests constitutional: "Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Id.* at 1267.

I would adopt the analysis set forth in these cases to the matter at hand, and hold that the urine and blood examinations mandated by 49 C.F.R. § 219.201 are justified at the inception. I would also recognize that the blood and urine tests required by the regulation are intrusive and hold, nevertheless, that they can be performed in the absence of individualized suspicion. I would hold that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests. As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands. The threat posed by drug or alcohol impaired railroad workers transporting hazardous materials across this nation is *far* graver than the potential danger presented by the customs officers in *Von Rabb*, the prison guards in *McDonell* or the transportation workers in *Jones* and *Suscy*.

The Supreme Court has instructed us to "'balanc[e] the need to search ... against

the invasion which the search ... entails' " in determining whether a search is justified at the inception. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879 (emphasis added) (quoting *Camara*, 387 U.S. at 534–35, 87 S.Ct. at 1733–34). The majority in the instant matter has failed to engage in the balancing of interests required by the Court. Instead, the majority focuses solely on the degree of impairment of the workers' privacy interests. Finding that the blood and urine tests are intrusive, the majority quickly proceeds to the conclusion that the tests are not justified at the inception because they are not initiated as the result of individualized suspicion of drug or alcohol use. Majority op. at 587–588.

The second inquiry under the "reasonableness" test is whether the search is " 'reasonably related in scope to the circumstances which justified the interference in the first place.' " *O'Connor*, 107 S.Ct. at 1503 (quoting *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 743). "[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive...." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743.

As discussed above in relation to the closely-regulated industry test, the searches mandated by 49 C.F.R. § 219.201 are not excessively intrusive. The regulatory scheme provides safeguards which bring the time and place of the testing within reasonable bounds.

The question remains whether the tests "are reasonably related to the objectives of the search." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743. The majority concludes that the urine tests bear no reasonable relationship to the program objective of discovering on-the-job drug or alcohol use because they are overbroad: "[T]he tests cannot measure current drug intoxication or degree of impairment. Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug." Majority op. at 588–589 (citations omitted).

The regulatory scheme contains adequate safeguards to counter the problem of overbreadth. 49 C.F.R. § 219.309 (1986) requires the railroads to inform their workers of the overbreadth problem presented by urine tests, and to counsel them to take a blood test if they have ingested drugs anytime within the previous sixty days. Section 219.309(b)(2) requires that railroads provide their workers with the following notice:

> Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a urine sample after certain accidents and incidents or at any time the company reasonably suspects that you are under the influence of, or impaired by, drugs while on duty. *Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to sixty days before the sample is collected).* As a general matter, the test cannot distinguish between recent use off the job and current impairment. However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken.
>
> You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. *The blood test will provide information pertinent to current impairment.* Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.
>
> *If you have used any drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample.* If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

49 C.F.R. § 219.309(b)(2) (1986) (emphasis added).

The warning required by section 219.309 protects employees from any mistake that might result from the "sensitivity" of the urine testing procedure. The searches mandated by 49 C.F.R. § 219.201 are reasonably related to the objective of determining whether railroad workers are intoxicated on the job.

CONCLUSION

I would affirm the judgment of the district court. The railroad industry is closely regulated because of the serious danger presented by the negligent operation of trains across this nation by alcohol or drug-impaired railway employees. Railroad industry employees have long been restricted by safety rules from ingesting alcohol or controlled substances prior to or during the operation of trains. The government has also imposed safety laws and regulations aimed at protecting the safety of the public and co-workers. Thus, railway employees have a diminished expectation of privacy concerning the detection of their alcohol or drug use.

The closely regulated industry exception to the requirements of the fourth amendment should be applied to these employers who operate the nation's railroads because of the incalculable risk to public safety posed by alcohol or drug impaired train crews. In balancing the intrusion engendered by blood and urine tests against the risk to lives and property posed by intoxicated train crews, we should hold that such searches are reasonable and consistent with the requirements of the fourth amendment.

UNITED STATES of America, Plaintiff-Appellee,

v.

Daniel Michael DALY, Defendant-Appellant.

No. 86-6697.

United States Court of Appeals, Ninth Circuit.

Submitted Dec. 7, 1987 *.

Decided Feb. 12, 1988.

Defendant filed motion to vacate, set aside, or correct his sentence, on grounds that misconduct occurred prior to commencement of probationary period and that his reincarceration extinguished district court's jurisdiction. The United States District Court for the Central District of California, Manuel L. Real, Chief Judge, denied motion, and defendant appealed. The Court of Appeals, Samuel P. King, District Judge, sitting by designation, held that: (1) district court had jurisdiction to revoke probation for preprobation offense, and (2) district court did not lose authority to revoke probation once defendant began serving period of incarceration.

Affirmed.

1. Criminal Law ⇐982.9(1)

District court had jurisdiction to revoke probation for crime committed subsequent to sentencing but prior to commencement of probationary period. 18 U.S.C.(1982 Ed.) § 3653.

2. Criminal Law ⇐982.9(3)

District court had jurisdiction to revoke probation for crime committed subsequent to sentencing but prior to commencement of probation, even though defendant had begun to serve period of incarceration. 18 U.S.C.(1982 Ed.) § 3653.

Daniel Michael Daly, in pro per.

* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

Introduced: 4/17/87
Referred: Labor & Commerce
and Judiciary

IN THE HOUSE

BY SUND, ADAMS, KOPONEN,
WALLIS AND BROWN

HOUSE BILL NO. 283

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act prohibiting certain employers from testing employees for drugs or other substances consumed by employees."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. POLICY. (a) The legislature declares that it is the public policy of the state that all citizens enjoy the full benefits of the rights to privacy and due process of law, and the protection against unreasonable searches and seizures guaranteed by art. I, secs. 7, 14, and 22, Constitution of the State of Alaska.

(b) It is the purpose of this Act to protect employees against unreasonable inquiry and investigation into conduct and activities that happen outside of work and that are not directly related to the actual performance of job responsibilities.

* Sec. 2. AS 23.10 is amended by adding a new section to article 1 to read:

Sec. 23.10.038. TESTS FOR CONSUMED SUBSTANCES. (a) An employer may not request, require, or conduct random or company-wide blood, urine, or encephalographic testing. An employer may not suggest or require that an employee or an applicant for employment submit to a blood, urine, or encephalographic test that tests for the presence of drugs or other consumed substances as a condition of employment. However, an employer may require a specific employee to submit to blood or urine testing if

(1) the employer has reasonable grounds to believe that the

employee's faculties are impaired by a drug or other consumed substance on the job;

(2) the employee is in a position in which an impairment would present a clear danger to the physical safety of the employee or another person;

(3) the employer preserves an adequate sample or portion of a sample so that the employee may conduct an independent test to verify or refute the employer's results; and

(4) the employer provides the employee an opportunity to rebut or explain the test results.

(b) In conducting tests permitted under this section, the employer shall limit the tests to the extent feasible so that only information regarding chemical substances in the body that are likely to affect the employee's ability to work safely is taken or recorded.

(c) In an action alleging that an employer violated this section, the employer has the burden of proving that the requirements of (a) of this section have been satisfied.

(d) This section does not prevent an employer from conducting medical screening to monitor exposure to toxic or other unhealthy substances found in the workplace or encountered in the performance of the employees' job duties if the employer has the express written consent of the employees. The screenings or tests must be limited to the specific substances expressly identified in the employee consent form.

(e) This section does not prohibit an employer from prohibiting the use of intoxicating substances or tobacco during work hours or from disciplining employees for using tobacco or being under the influence of intoxicating substances during work hours.

(f) This section does not apply to

(1) the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ or persons applying to be employed as peace officers or firefighters; or

(2) an employer as to an employee operating emergency service vehicles for the state or a political subdivision of the state.

(g) A person who violates or assists in a violation of this section is liable to the person aggrieved for special and general damages, together with attorney's fees and the costs of the action as provided in the Alaska Rules of Court.

(h) A person who violates or proposes to violate this section may be enjoined by a court of competent jurisdiction. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief.

(i) In this section

(1) "employer" means a person who retains by personal services contract or employs at least one other person and includes the state and a political subdivision of the state;

(2) "peace officer" means a public servant vested by law with a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders.

(7)

HOUSE COMMITTEE REPORT

Date referred: 4/17/87 FURTHER REFERRALS: Judiciary

DATE: 5/13/87

The Labor & Commerce Committee has considered HB 283

"An Act prohibiting certain employers from testing employees for drugs or other substances consumed by employees."

RECOMMENDS:

[ ] replace with CS HB283 (L+C) [ ] the same title

[ ] attached amendment(s) [ ] a new title

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

J. Ellis

Chris Davidson

Nick Kopan

SIGNING OTHER RECOMMENDATIONS:

Scott Manning NO RE

David Dudley NOKE

Chairman's signature

POSITION PAPER
HB 283

House Bill 283 insures that Alaska employers, including the State of Alaska, cannot conduct random testing for the use of drugs or other substances. Policy guidelines are outlined in Section 1 of the legislation. It also stipulates in Section 2 that testing can only be conducted for cause and lists those various circumstances.

The issue of drug testing in the workplace has gained national attention. There is little question of the serious nature of substance abuse in this country. The problems of the health and safety of the public, decreased productivity, and increased medical costs resulting from that abuse are real, both in the workplace and in society as a whole. Balancing out these concerns is the concern that employers, both public and private, conduct themselves in a business-like manner in relationship to their employees, with full regard for the individual and constitutional rights of those individuals. For many employers, the process of finding an approach that is both effective and legally defensible has been difficult without clear guidelines. Employers who have instituted drug testing programs without considering both aspects of the issue have frequently found themselves the object of lawsuits filed by employees who believe that their constitutional rights to privacy had been violated.

During the past year, the courts have been providing some guidance as more employers have been sued by employee groups subjected to drug testing procedures. It is becoming clear that an acceptable basis for a drug testing plan is that it be "job related" or "for cause." Recent court decisions have favored individual rights over employers' rights to institute drug testing carte blanche. In the case of Murray v. Brooklyn Gas Co., 122LRRM 2057 (N.Y. Sup Ct, 1986), the company's decision to implement a urinalysis testing program for all of its employees was successfully challenged. In its decision the court stated, ". . . to arbitrarily test without reason whatsoever; . . . is an impingement on the rights of individuals." However, the court further held that its ruling did not preclude testing for cause.

In the case of Amalgamated Transit Union v. Suscy (538 Fed Rprt 2d 1264), the Seventh Court of Appeals supported the Chicago Transit Authority's drug and alcohol testing plan for bus drivers who were involved in a serious accident or who exhibited suspicious behavior. The court held that such testing does not invade the privacy or violate the rights of these types of employees. Furthermore, the court held that even without specific situations that indicate a reasonable suspicion, a public employer may require its employees to undergo medical tests to determine fitness for work, and to discipline employees based upon the results of the test. In this situation, "bus drivers" can be seen to be directly responsible for the safety of others.

The legislature may wish to clarify the definition of "peace officer" in Sec 23.10.038(i)(2). As currently written it may exclude positions in such classes as Correctional Officer, Court Services Officer, and Fish and Wildlife Enforcement Officer.

POSITION PAPER
HB 283

It is clear that drug and alcohol abuse can negatively affect an employee's work performance and behavior. Work and performance problems that are related to substance abuse must be confronted and combated in the work place, but it must be done in such a way that individual rights are protected. Again, it appears this legislation meets these concerns and is consistent with recent court rulings on this matter. The Department of Administration supports HB 283.

Diana DeSimone

Diana DeSimone, Director
Division of Personnel

5/5/87
Date

Garrey Peska

Commissioner Garrey Peska
Department of Administration

5/8/87
Date

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 283
REQUEST
Publish Date:

Revision Date:
Agency Affected: All
Title: An act prohibiting certain employers from testing employees for drugs or other other substances consumed by employees.
BRU: All
Components: All
Sponsor: Suna, Adams, Koponen, Wallis and Brown
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0
POSITIONS:	0	0	0	0	0	0
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: Attach a separate page if necessary

There will be no fiscal impact to the Division of Personnel

Prepared By: Diana DeSimone
Phone: 465-4430
Division: Personnel
Date: 5/5/87

Approved by Commissioner: Garrey Peska
Date: 5/8/87
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Rev. 9/16/86

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HB 283
Publish Date:

Revision Date:
Title: "An Act prohibiting certain employers from testing employees for drugs..."
Sponsor: Representative Sund
Requestor: House Labor & Commerce

Agency Affected: Department of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: May 11, 1987

Richard I. Pegues /FOR/

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Date: May 11, 1987
Agency: Department of Law

Distribution (by preparer):
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- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 283

This bill amends AS 23.10 by adding a new section that prohibits certain employers from testing employees for drugs or other substances consumed by employees. This testing prohibition would also extend to applicants for employment. The bill would permit an employer to require a specific employee to submit to testing, if the employer had reasonable grounds to believe the employee's faculties are impaired by a drug or other consumed substance on the job. The new section does not apply to the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ, or persons applying to be employed as peace officers or firefighters.

The bill provides that a person who violates the new section may be enjoined be a court of competent jurisdiction. And it further provides that a person who violates or assists in the violation of the section is liable to the aggreived person for special and general damages, together with attorney's fees and costs. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief. It is not anticipated that the attorney general will often become involved in seeking injunctive relief, because of the private right of action that the bill provides to individuals, including an individual's right to seek damages against violators.

BILL NO: HB 283

DATE: May 6, 1987

TITLE: "An Act prohibiting certain employers from testing employees for drugs or other substances..."

CONTACT: Maj. Walter J. Gilmour
Acting Director
Alaska State Troopers

DEPARTMENT OF PUBLIC SAFETY

To protect the right of privacy and unreasonable search and seizure of employees by employers.

This proposed legislation would protect employees from random or company-wide testing for drugs, or other substances consumed, without just cause. The legislation excepts peace officers, firefighters, or applicants thereof, or persons who operate emergency services vehicles.

Perhaps consideration should be given to include aircraft pilots who fall under the jurisdiction of the state.

The Department of Public Safety is neutral on this legislation.

ARTHUR ENGLISH
Commissioner

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 283
Publish Date:

REQUEST
Revision Date:
Title: "An Act prohibiting certain employers from testing employees..."
Sponsor: Judicial Committee
Requestor: House Labor & Commerce

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments & CIB

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING:: (Thousands of Dollars)

GENERAL FUNDS		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JAH 5/8/87

Prepared by: Francis C. Allan S.C.A. Phone: 269-5691
Division: Alaska State Troopers Date: 5/6/87

Approved by Commissioner: Arthur English Date: 5/3/87
Agency: Public Safety

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

page ____ of ____

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 283
Publish Date:

REQUEST:

Revision Date:
Title: "An Act prohibiting...testing employees for drugs..."
Sponsor: Sund, et al
Requestor: House Labor and Commerce

Agency Affected: Labor
BRU: Labor Standards and Safety
Components: Wage and Hour

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Richard Raab for Tom Stuart, Director
Phone: 465-4870
Division: Labor Standards and Safety
Date: 5/11/87

Approved by Commissioner: Jim Sampson
Date: 5/11/87
Agency: Labor

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

HB

283

file 2

WHO USES OUR URINE TESTING PROGRAM?

- Individuals
- Parents
- Employers
- Spouses
- Social Workers
- Parole/Probation Officers
- School Personnel
- Health Professionals

We provide results within 48 hours. All information is provided under guidelines of special consent forms to satisfy legal requirements.

CLINIC ADDRESSES AND PHONE NUMBERS

General Medical Clinics

☐ 354 E. Ervilla St., Pomona, CA 91767	(714) 623-0535
☐ 1050 N. Garey, Pomona, CA 91767	(714) 623-6391
☐ 26 N. Raymond Ave., Pasadena, CA 91103	(818) 795-8088
☐ 425 N. Lake Ave., Pasadena, CA 91101	(818) 796-8888
☐ 324 N. Laurel St., Ontario, CA 91762	(714) 986-4550
☐ 756 N. Euclid Ave., Ste. B-C, Ontario, CA 91764	(714) 391-1568 (714) 988-6541
☐ 14418 E. Pacific Ave., Baldwin Pk., CA 91706	(818) 962-8797
☐ 11041 Valley Blvd., El Monte, CA 91731	(818) 442-4177
☐ 1175 Unruh, La Puente, CA 91744	(818) 917-0676
☐ 11738 Valley View, Ste. A-B, Whittier, CA 90604	(213) 946-1587
☐ 336½ S. Glendora Ave., W. Covina, CA 91790	(818) 919-5807
☐ 116-120 N. Lang Ave., W. Covina, CA 91790	(818) 962-6697 960-3064
☐ 620 S. "D" St., Oxnard, CA 93030	(805) 486-4876 1-(800) 441-4897
☐ 3777 Phelan Road, Phelan, CA 92371	(619) 868 4418
☐ 4313 E. Tulare Ave., Fresno, CA 93702	(209) 453-1751

Substance Abuse Clinics

☐ 1825 E. Thelborn St., W. Covina CA 91791	(818) 915-3844
☐ 152 W. Artesia, Pomona, CA 91768	(714) 629-1959
☐ 34 E. Minarets Ave., Pinedale, CA 93650	(209) 431-6070
☐ 217 Camino del Remedio, Santa Barbara, CA 93110	(805) 964-4795
☐ 500 W. Foster Rd., Santa Maria, CA 93455	(805) 937-8461
☐ 2055 Saviers Rd., Suite 10, Oxnard, CA 93030	(805) 483-2253

Counseling Centers

☐ 330 S. Glendora Ave., W. Covina, CA 91790	(818) 919-5800
☐ 427 N. Lake Ave., Pasadena, CA 91101	(818) 796-8888
☐ 122 N. Lang Ave., W. Covina, CA 91790	(818) 960-2895

Physical Therapy and Sports Medicine

☐ 750 W. Alosta Ave., Ste. W, Glendora, CA 91740	(818) 335-4077

URINE TESTING PROGRAM

Community Health Projects Inc.

For Further Information Contact:

WHAT IS URINE TESTING FOR DRUGS OF ABUSE?

This involves specific laboratory procedures which are carried out by specially trained technicians for the purpose of detecting drugs of abuse in the urine.

WHO CAN BE URINE TESTED?

Any client who requests testing.

Anyone who is referred from their employer, school, social welfare, or other organization.

All clients must sign a urine test consent form which allows the results to be forwarded to the referring party.

WHY URINE TEST?

There are many reasons to urine test. Some of these reasons are:

1. To identify drug use in the early stages
2. To determine need for treatment
3. To monitor treatment results
4. To prevent continued drug use
5. To monitor aftercare
6. To monotor compliance with court orders, conditions of probation
7. To screen for employment
8. To assure save/secure working/school environment
9. Assists counseling and helps change behavior
10. To help achieve recovery

KINDS OF TESTS?

There are basically two kinds of urine tests, general and specific. General tests test for many drugs at one time. Specific tests test for a specific drug. Both types of tests have their advantages in a urine testing program. Our clinic staff will help you decide which type of test will be most appropriate in any given situation.

WHAT IS THE RELIABILITY OF THE TESTS?

The reliability of urine testing is very high when done by technicians who specialize in urine testing. Equipment used to test has become much more sophisticated in the past several years. Further, all positive tests are confirmed by a second, different method of testing. This results in the error factor being almost non-existent.

WHAT IS THE PROCEDURE FOR REQUESTING A URINE TEST?

A client can call our clinic during business hours and the staff will explain the process for collecting urine samples. It is a simple process and results are available within 48 hours of our receiving the sample.

COSTS

A test for one drug costs about $15.00. A general screen, which tests for several drugs simultaneously, is more expensive.

SHOULD URINE TESTING BE REPEATED? IF SO, HOW OFTEN AND FOR HOW LONG?

Yes, urine testing should be repeated in the majority of cases. Depending on the result and the drug(s) being used, repeated testing is usually warranted.

As a general rule, if a person has been known to abuse drugs, they should be tested weekly for 90-120 days. In some cases, testing should be continued for a full year.

HOW LONG DRUGS STAY IN THE URINE

Drug	Approximate Length of Time in the Urine
Heroin	48 to 72 hours
Cocaine	24 to 36 hours
Amphetamines	48 to 72 hours
Benzodiazepines +	48 to 96 hours
Phencyclidine (PCP)	48 to 78 hours
Marijuana	10 to 35 days
Phenylpropanolamine*	24 to 48 hours
Nicotine	24 to 48 hours

+ Includes Valium®, Librium®, Ativan®, Dalmane®, Xanax®, Halcion®

*This is the most common over-the-counter drug which is abused. It is found in may weight-reducing, pain, and decongestent medicines.

Identifying Drug Users in the Workplace

Fitness-For-Duty Examination and Urine Testing

by
Forest S. Tennant, Jr., M.D., Dr. P.H.

Veract, Inc.

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1ST EDITION OF THIS MANUAL – OCTOBER, 1986

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NOTE FROM THE AUTHOR

This is one of a series of manuals on drug abuse. Much of it is based on observations made on my patients who have drug problems and from personal research studies. Since research on drug abuse is a relatively new field of endeavor, one can expect future changes in some of the information presented here. I have attempted to give the reader the most current information. As new information becomes available these manuals will be updated.

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INDEX

NEED TO IDENTIFY DRUG USE IN THE WORKPLACE

There are multiple reasons for a company to identify drug-abusing employees. Some are directly related to the economic viability of the organization, and some are primarily directed at helping an employee to overcome the serious health problem of drug abuse. Today, drug abuse can be so widespread in an organization that it has the potential to be the difference between profit and loss. Data collected by the author between 1984 and 1986 from various private companies clearly reveals the need to identify employees who use drugs.

- Pre-employment urine testing shows 15 to 25% positive on the average. Some companies may run as high as 50 to 75%.
- Unscheduled and unannounced urine testing or eye screening examinations of employees in most companies usually show 10 to 40% positive for illegal drug use.

ADVERSE ECONOMIC IMPACT ON COMPANIES

Drug abuse in the workplace will affect many companies' profits in a variety of ways. Each company should review how drugs can hurt profits and specifically how they might be affecting them. I recommend that a company's drug control program be directed at one or more of the below-listed, specific effects of drug abuse among workers.

- High absenteeism
- Tardiness
- High injury and accident rate
- High health costs
- Thefts of equipment, money, merchandise
- Poor workmanship
- Low productivity
- High workers' compensation rate
- High unemployment insurance rate
- Low morale of workers
- Errors and mistakes

REASONS TO IDENTIFY DRUG USERS IN THE WORKPLACE

- Identify impaired workers
- Identify persons who are tolerant and dependent on drugs and who need treatment
- Protect other workers and general public from accidents and injuries that drug users may cause
- Reduce absenteeism, health costs, thefts, workers' compensation and unemployment claims, accidents, and injuries
- Raise productivity of workers
- Maintain a safe, healthful work environment free of illegal activities
- Deterrent

MAJOR DRUGS OF ABUSE WHICH CAUSE IMPAIRMENT IN THE WORKPLACE

Although caffeine, nicotine, and non-prescription drugs such as aspirin are the most used drugs during working hours, they rarely cause direct impairment to a person's job. Long-term nicotine dependence will likely produce the greatest health costs to most companies, but it does not usually produce the type of impairment that will produce accidents, injuries, or interfere with a worker's mental capability.

The three drugs that most commonly cause impairment on the job are:

Marijuana
Cocaine
Alcohol

Heroin ranks fourth. It can be a particular problem in organizations that employ unskilled labor. In some locales in the U.S.A., phencyclidine (PCP) and amphetamines may pose a significant problem.

PATTERNS OF DRUG USE BY WORKERS

There are three basic patterns of drug use which may produce varying types of impairment on the job and which may require different approaches to detect. The three patterns may overlap.

Pattern	Characteristic	Frequency	Impairment On the Job
1.	Occasional Use: "Social," "Casual" "Low Dose"	Infrequent	Variable
2.	Binge - Uses high dosages in short time periods	Daily to few times per week	Accidents, injuries, intoxication, reduction in mental capacity
3.	Dependence or Addiction	Daily to several times per day	May be tolerant and show little or no signs until late stages

ADVERSE EFFECTS AND IMPAIRMENTS ON THE JOB

Adverse effects and impairments are usually classified as acute or short-term and chronic or long-term. The acute or short-term effects result from a drug being in the blood stream and exerting a direct effect on the nervous system. There may be effects that persist after the drug leaves the bloodstream, because it may produce biochemical changes which take the nervous system several hours to a few days to correct, e.g., a hang-over. Long-term or chronic effects are produced by repetitive use of a drug which produces biochemical changes in the nervous system and/or alteration in receptor sites which are the spots in the nervous tissue where drugs attach. The more potent a drug, the more likely there will be impairment. For example, cocaine will likely cause more impairment than alcohol and marijuana. High dosages of the drug will produce more impairment than low dosages. Potency of a given drug as well as route of administration will affect impairment. For example, smoking or injecting a drug as opposed to sniffing or orally ingesting it will usually cause more impairment.

A third category of impairment which may affect a worker is the toxic reaction. This usually results from taking a very high dosage or suddenly becoming sensitized, i.e., an allergy type reaction, even though a person has previously used the drug. Toxic reactions may be particularly dangerous to a worker as well as to co-workers and the general public who may be close to the individual. A severe reaction may result in sudden death. A most serious and common category of long-term impairment relative to business and industry is a condition called, "Post-Drug Impairment Syndrome" (PDIS). This condiditon usually results from multiple drug use over a period of time, and it may be particularly detrimental to workers with extraordinary talents. The symptoms may persist and be permanent even if all drug use has ceased.

COMMON ACUTE EFFECTS AND IMPAIRMENTS

- Decreased vision, hearing, pain and reflex ability
- Causes accidents, injuries, and errors on the job

COMMON CHRONIC EFFECTS AND IMPAIRMENTS

- Frequent absences from school or work
- Time distortion, including tardiness, unusual meal times
- Frequent missed appointments
- Abnormal sleep pattern such as staying up after midnight or daytime sleeping
- Repetitive forgetfulness or broken promises
- Frequent accidents, injuries, and/or traffic violations
- Loss of interest or motivation towards job
- Deterioration of work performance
- Careless hygiene and grooming habits, e.g., females stop polishing their nails, wearing lipstick and make-up; males skip shaving, fail to brush teeth
- Recurrent respiratory infections
- Poor pain and stress tolerance
- Hygiene deteriorates, acne worsens
- Personality changes, e.g., becomes dull, bland, and humorless
- Binge eating of sweets and snacks between meals

COMMON TOXIC REACTIONS

- Hallucinations
- Violence
- Disorientation
- Heart Arrythmia
- Seizure
- Loss of mental ability
- Fainting
- Amnesia
- Death

POST-DRUG IMPAIRMENT SYNDROME (PDIS)

Common symptoms are:

- Inability to cope with much stress
- Can't do complex reasoning which requires assimilation of more than two or three facts
- Poor motivation and lack of energy
- Can't complete complex tasks
- Bland personality
- Limited attention span

ABILITY OF COMPANIES TO IDENTIFY DRUG ABUSE ON THE JOB

The average manager or supervisor who does not have special training, will only be able to identify drug use in an employee who has acute, gross impairments such as staggering, slurred speech, or toxic reaction. Impairment by drugs in the workplace doesn't usually produce grossly overt signs. The common impairments on the job are related to vision, hearing, attention span, muscle coordination, alertness, and mental acuity. Some persons who are tolerant and dependent on drugs such as marijuana, alcohol and cocaine may show little or no overt evidence of impairment with the possible exception of eye signs which require a trained person to detect. Unfortunately, the usual impairments, while not obvious to an untrained supervisor or fellow employee, easily and frequently lead to accidents, injuries, and mental lapses while on duty.

Due to the relative lack of obvious signs, special testing is required to identify drug use among employees. There are two effective, practical ways to do this.

1. Urine testing
2. Physical examination, principally by a "Rapid Eye Exam."

TYPES OF URINE TESTING AND THEIR CAPABILITIES

Urine testing is now the most common method to test for drugs in the workplace. It is used in several different ways with different, fundamental capabilities.

Type	Capability
1. Pre-employment	Will detect drug use prior to employment.
2. Scheduled/Periodic	Will detect dependent persons since they can't quit even with a warning. Particularly useful with regular physical examinations.
3. Unscheduled/Random	Will detect intermittent and binge users. Acts as a deterrent. Usually restricted to occupations in which a worker can hurt someone else, e.g. vehicle driver, nuclear plant workers, contact sports, airplane personnel, etc.
4. Confirmatory or "For Cause"	Will confirm suspicions of drug use when suggested by physical signs, behavior, accident, injury, or indications of impairment.
5. Monitoring	Will detect an employee who is being regularly tested after previous identification or post-treatment.

URINE TESTING METHODS

There are six common, technological methods to detect drug use today:

Radioimmunoassay (RIA)
Immunoassay (EMIT)
Thin Layer Chromatography (TLC)
Gas Chromatography (GC)
Gas Chromatography/Mass Spectrometry (GC/MS)
High Performance Liquid Chromatography (HPLC)

Today the EMIT, RIA, or TLC are usually used as initial detection methods and, if the test result is positive, results are confirmed by one of the other methods. When urine is tested by two different technological methods, an experienced and proficient laboratory will have less than 1% error.

HOW LONG DRUGS STAY IN THE URINE

Drug	Approximate Length of Time in the Urine
Heroin	48 to 72 hours
Cocaine	24 to 48 hours
Amphetamines	48 to 72 hours
Benzodiazepines +	48 to 96 hours
Phencyclidine (PCP)	48 to 96 hours
Phenylpropanolamine*	24 to 48 hours
Nicotine	24 to 48 hours
Alcohol**	12 to 24 hours

+ Includes Valium®, Librium®, Ativan®, Dalmane®, and Xanax®

* This is the most commonly abused over-the-counter drug. It is found in many weight-reducing, pain, and decongestant medicines.

** At a level of about .05mg% which approximates 50% of the legal level.

LENGTH OF TIME THAT MARIJUANA CAN BE DETECTED IN URINE

A great deal of publicity has been generated as to how long marijuana metabolites may remain in urine. Metabolites remain detectable in plasma and urine for many days due to the fact they are fat-soluble. When smoked, marijuana metabolites enter the fat, lodge there, and then leak slowly out over a period of time. It is important to point out that it is only the regular, chronic user or addict that keeps marijuana in urine for more than a few days. The length of time that marijuana metabolites can usually be detected in blood is much shorter than in urine because the kidney concentrates drugs in the urine about 100 to 1000 times than that found in plasma. In other words, marijuana can be detected in urine much longer than blood due to the kidney's ability to concentrate drugs.

APPROXIMATE URINE RETENTION FOR MARIJUANA

Approximate Frequency of Use	Approximate Length of Time in Urine
Once per week	2 to 20 days
Twice per week	5 to 30 days
Daily	15 to 45 days

FITNESS-FOR-DUTY EXAMINATION AS AN ALTERNATIVE TO URINE TESTING

There are some objections to urine testing due to its cost and perceived invasion of privacy. As an alternative, some organizations and companies, particularly in California, are beginning to use Rapid, Fitness-For-Duty examination of which the major component is a "Rapid Eye Examination" to screen for possible drug/alcohol impairment. A trained "Drug Identification Specialist" (DIS) who is usually a licensed medical person (physician or nurse) can perform a one-minute exam of the mouth and eye since these organs are very sensitive to drug effects. If eye or mouth abnormalities are found, they are considered adequate to meet the medical and legal definition of "reasonable cause or suspicion," and a urine test is then taken to confirm drug use. Of paramount importance is the fact that abnormal eye function is the impairment that probably causes most of the accidents and injuries on the job.

SUMMARY OF ADVANTAGES OF RAPID, FITNESS-FOR-DUTY EXAMINATION

- Great acceptance by employees
- Avoids litigation
- Less expensive than urine testing all employees
- Can be unscheduled and/or randomized
- Focuses attention on how drugs and alcohol produce impairment, and reduce job performance.

ROLE OF EDUCATION

Education and training on substance abuse in business and industry has not been systematically studied and evaluated. It probably will not be because business and industry normally set specific goals, e.g., decrease accidents; health costs; etc. to accomplish relative to substance abuse. When these goals are accomplished there is no need for further evaluation. In the experience of the author, education and training of management, supervisors, and employees can be a very effective tool in accomplishing specific company goals relative to drug use. In particular, education has been most effective when it is accompanied by a drug identification program, because a combined program gives employees the clear message that the company is serious about accomplishing its goals.

OTHER BOOKS AND MONOGRAPHS AUTHORED BY

FOREST S. TENNANT, JR., M.D., Dr. PH

Primer on Neurochemistry of Drug Dependence

Identifying the Heroin User

Identifying the Marijuana User

Ide ıtifying the Cocaine User

Identifying the PCP User
(Phencyclidine)

Parents' Guide to Urine Testing
For Drugs of Abuse

Post-Drug Impairment Syndrome (PDIS)

How To Identify, Prevent and Guide Treatment
of Drug Abuse by Youth

Phencyclidine (PCP) Addiction

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DRUG TESTING IN THE WORKPLACE

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"Drug tests? --- Sure, I guess they're OK for people in critical jobs, but I work on an assembly line."

"Why should I be forced to take a drug test? I don't use dope, and I object to my employer suspecting me!"

"Drug tests are an invasion of my privacy! What I do on my own time is my own business!"

"Drug testing violates my constitutional guarantees against unreasonable search!"

"Drug tests are inaccurate. If my test shows a false positive, I'll be fired without cause!"

I'm sure you've heard these comments and many others like them, time and time again. Our employers have begun to use new, sophisticated tools to deal with the absenteeism, accidents, lowered product quality and diminished productivity that result from drug use. Drug use is a problem that costs our economy an estimated 60 billion dollars per year!

One of the sophisticated methods of dealing with the problem is the use of urinalysis to detect illicit drug use by both new applicants for employment, and by those already in the workforce. Confusion regarding the need for urinalysis, its legality and the accuracy of the tests has resulted in a great deal of controversy about its use. In this newsletter we hope to clear up some of tha confusion, and help you to become mor comfortable with this new, effectiv weapon in our nation's war against drugs.

First, let's look at the need. Do w really need drug testing in th workplace? To understand the need, w first have to understand a few items tha are basic to making a free-enterprise so ciety tick. Those basic ingredients ar PRODUCTIVITY, WORKMANSHIP & COMPETITION PRODUCTIVITY is simply the quantity o goods or services produced by an employe paid a given wage during a given period The QUALITY of those goods or service --- the thing that makes them desirabl to customers --- we call WORKMANSHIP. I is the combination of high PRODUCTIVIT and excellent WORKMANSHIP that allows product or service to b COMPETITIVE.

Anything that negatively affects produc tivity and workmanship also negatively af fects the competitive edge, s profitability suffers. When profitabil ity suffers, wages decline, resulting i decreased incentive. That, in tur causes productivity and workmanship t suffer even more. Your industry get trapped in a downward spiral that contir ues to worsen unless you take strong, pos itive action to pull it out of th nosedive.

Drug use by workers negatively affect both productivity and workmanship. Dru

users have higher accident rates than non-users. This results in higher liability insurance costs for the employer. They make more medical insurance claims, resulting in higher medical insurance costs. They are absent from work more often than non-users, and get into disciplinary problems more often. Additionally, drug users produce more inferior products, and are more likely to steal from their employers. All of these factors negatively affect productivity and workmanship, and, as we mentioned earlier, they affect it to the tune of about 60 billion dollars per year.

If we do nothing to reverse this trend, our downward spiral will become tighter and steeper, and our economy will continue to get poorer and poorer. As Dr. Carlton Turner, Director of the White House Office of Drug Abuse states:

> "America is the most drug-pervaded nation in the developed world. No area of the workplace can consider itself immune. If our country does not wake up and address the disastrous and wide-ranging effects of drugs in the workplace, the United States is doomed to become a second-rate power."

People in the age group of 18-25 years of age represent prime candidates for hire by our nation's employers. However, over 27% of this age group regularly use drugs! Employers need efficient tools to prevent those drug-using applicants from destroying the competitive edge. Additionally, they need an efficient method to prevent employees from beginning drug use. Urinalysis can answer both of these needs. Its value as a deterrent is perhaps best displayed by the experience of the United States Armed Forces. In 1980, 48% of enlisted personnel were using drugs on a monthly basis. Widespread urinalysis was implemented, and in 1986, the figure was down to 4%! In a U.S. Navy survey, urinalysis was identified as the single most effective deterrent to drug use. Do we need drug testing in the workplace? YOU BET WE DO!!

But, what about those employees who aren't on "critical" jobs? And, what about employees who have never (and would never) use drugs? Isn't it unfair to require urinalysis of these people? ---- No, it really isn't! You see, in a free enterprise economy such as we enjoy in the United States, EVERY employee is critical. Every employee is in a position to add to or detract from the success and safety of the workplace. The janitor is as critical as the assembly line worker or floor supervisor --- The baggage handler is as critical as the flight mechanic or pilot. Truth of the matter is --- we're all in this economy together --- employer and employee alike. We all have the right to expect a safe and drug-free workplace. We all have the responsibility of contributing to a successful workplace. We all have the responsibility of contributing to a successful economy. Encouraging and participating in workplace drug testing is just another way for drug-free workers to display a high degree of responsibility and concern. It's another vote for a safe and productive workplace.

A few words about privacy --- What you do in your own home, or on your own time is indeed your business, and nobody else's --- PROVIDED, THAT IS, IT'S LEGAL, AND DOESN'T ADVERSELY AFFECT THE LIVES, SAFETY, OR RIGHTS OF OTHERS! Drug use has those negative effects. You see, drugs (and their effects) aren't necessarily gone from the body just because the user no longer feels "high." For example, THC, the psychoactive ingredient in marijuana, is stored in fatty tissues and is released over long periods of time. Its metabolites are detectable for days --- even weeks after use. A 1986 study at the VA medical center in Palo Alto, California, was carried out to determine the effects of marijuana after the "high" was gone. Eight experienced pilots volunteered to use marijuana, and were tested twenty-four hours later on flight simulators. Results showed that certain important components of standard landing maneuvers were seriously impaired, even though all eight pilots thought they had done well. If this hadn't been a test, what those pilots smoked "privately" the day before, could have affected --- even destroyed --- the lives of HUNDREDS of other people!

And, by the way, drug testing DOESN'T violate your constitutional rights. Your constitution guarantees you against unreasonable search and seizure by the GOVERNMENT. Drug testing in a private workplace, however, is a matter between employer and employee. The government isn't involved. Your employer does, however, have the responsibility to provide you with a safe workplace and safe working conditions. The use of urinalysis to ensure a drug-free workplace is just one more way your employer will help ensure safer working conditions for all employees. Since maintaining a safe workplace is REQUIRED of your employer, it's really not a negotiable item.

We need to talk at some length about accuracy, because this seems to be the most controversial question surrounding urinalysis. Let us assure you --- right up front --- that urine testing for drugs IS accurate. Matter of fact, it's EXTREMELY accurate, and we hope to help you better understand why it has such a high degree of reliability.

First, let's understand that there isn't a SINGLE urinalysis test used in any responsible testing program. There are several tests, each of which uses a different, reliable scientific procedure to reinforce the information received from the test that preceded it. A urine specimen that tests positive for drug metabolites on the first screening test, must also show positive on the tests that follow in order to be used as evidence of drug use. This procedure effectively eliminates the possibility for "false positives" and unwarranted incrimination.

The first test that is usually performed on a urine specimen is a IMMUNOASSAY. Syva Company developed an immunoassay which they call EMIT) Enzyme Multiplied Immunoassay Technique), and the Biomedical Division of Hoffman-La Roche developed one which they call ABUSCREEN. Although each of these tests uses a slightly different method to measure results, they both depend upon the same technology to detect drug metabolites. That technology is the use of antibodies. Antibodies are VERY specific detectors of compounds or classes of compounds. A particular antibody will only react with and bind to a compound or class of compounds for which that antibody is specifically designed. It's a lot like a lock and key arrangement. Once the antibody is "locked on" to the drug metabolite, its presence is detected and measured by very accurate and precise scientific methods using either enzymes or radioisotopes. With these techniques, one can reliably screen for the presence of cocaine, the cannabinoids (from marijuana), amphetamines, the hallucinogens, barbiturates, opiates, PCP, benzodiazepines (such as Valium), etc. You'll notice that we said SCREEN.

That's exactly what this first test does, and it does it extremely well. It can detect the presence of drug metabolites at from 97% to 99% accuracy when set up to produce detection limits normally used for workplace drug testing. If a specimen tests "clean" by this method, no additional testing is required --- the employee is assumed to be drug-free. But what happens if the presence of drugs IS detected in the specimen? If that's the case, the specimen goes on to:

STEP TWO

As we mentioned earlier, the immunoassay is an excellent detector for the presence of drugs, and it can be very specific for drugs like marijuana and cocaine. And, although it will detect the presence of barbiturates, amphetamines, benzodiazepines, etc., it can't properly determine which SPECIFIC barbiturate, etc. might have been used. Thats where GC (Gas Chromatography) comes into play. In GC, the sample is injected into a machine that contains a very narrow, very long, hollow column. The inside of the column is coated with special materials that help to separate chemical mixtures into their individual components. As the sample is swept along this column by a gas such as helium (the carrier gas), the individual chemicals in the mixture separate, and exit the column at specific times called the ELUTION time. The presence of these individual chemicals is detected by a special detector which notes both their elution time and concentration on a recorder. When the result is compared to a standardized GC record containing known drug metabolites, individual

drugs in the urine specimen can be accurately identified and measured. You might be interested to know that GC is one of the techniques used to measure water quality, and it can reliably measure and identify some pollutants in levels as low as one part per billion parts of water!

Satisfied? Well, many drug-testing companies still aren't at this point! Even though there is virtually NO chance for error when a specimen tests positive by both immunoassay and GC (and in most reputable urine testing programs it MUST show positive in both tests to be considered "dirty"), there is one final test that can be used to confirm the results.

STEP THREE

The step three test is called Mass Spectrometry (MS). Remember the pure compounds that exited from the GC machine in step two? Well, those compounds can be individually and automatically fed into a mass spectrometer for a final identity check.

Inside the mass spectrometer, the compounds are broken down into charged particles called IONS. The machine then sorts and identifies those ions according to their mass. The MASS SPECTRUM that is produced is a record of the numbers of different kinds of ions -- the relative numbers of which are characteristic and specific for each compound. The mass spectrum is essentially another identifying "fingerprint" of the compound.

You can certainly see that with a series of sophisticated tests like this in the hands of highly qualified analytical scientists, the chance for error and erroneous incrimination are essentially nil! The myth of drug test inaccuracy is just that -- A MYTH!

One important factor to keep in mind when you are asked to submit a sample for urinalysis. Although urinalysis tests are very accurate, they can't tell the difference between a particular drug obtained by prescription, and that same drug taken illegally. So, it you have taken ANY medication within a reasonable period prior to submitting the sample, be sure to let your employer know what you have taken. Your employer will make note of the medications, and may ask to see prescriptions. Your employer will appreciate and respect your honesty and cooperation.

We certainly hope that this newsletter has helped you to better understand the need for drug testing in the workplace, and to better appreciate the reliability of those tests. Please don't consider urinalysis an accusation, it isn't! Instead, consider it a minor inconvenience -- your contribution to a safer, more productive workplace. We undergo such inconveniences daily for the good of our society and our way of life. We happily submit to baggage searches in airports to ensure safe air travel. We take blood tests before marriage to confirm that we are free of venereal disease. We are tested for, and vaccinated against many dangerous diseases. The blood that we donate is screened to ensure that it is safe and free from the deadly AIDS virus.

We submit to these tests, searches and screens without serious complaint because we know that they benefit us and benefit our society as well. Drug testing in the workplace is another contribution to a safe and productive society. Cooperate with your employer and encourage participation in an accurate, comprehensive drug testing program for YOUR workplace. It's another positive contribution to safety, productivity and workmanship.

U.S. SEEKS DRUG TESTS FOR RAILROAD EMPLOYEES

Taken from the INTERNATIONAL DRUG REPORT Volume 28, No. 4 - April, 1987.

Following confirmation that two crew members involved in Conrail freight locomotive crash near Baltimore tested positive for drugs Elizabeth Dole, Secretary of the U.S. Department of Transportation announced that she will ask Congress for legislation to allow random drug testing of railroad employees. The locomotive crashed into a passenger train resulting in the death of 16 passengers and injury to 175 others. "Our responsibility to

the traveling public is unequivocal," she said in a prepared statement. "We must insure there is no room for drugs in the transportation workplace."

In addition as part of a sweeping new program that would lead to the testing in the aviation industry Mrs. Dole said she will order pre-employment, post-accident and random testing of commercial airline pilots, crews and others involved in flight operations through the Federal Aviation Administration, which has the authority to require those tests. She said she will also require drug and alcohol tests as part of annual physical examinations.

In the crash which occurred on January 4 a string of three Conrail locomotives barreled through two signals telling it to slow down and stop before the engineer three on the emergency brake. The locomotive then jumped a closed switch where the tracks narrowed from four to two and skidded in front of an oncoming passenger train. Traces of marijuana showed up in the blood and urine samples of the crew.

Current Federal Railroad Administration regulations call for drug tests of crews involved in an accident and of crew members who supervisors have "probable cause" to believe may be abusing drugs or alcohol. Airlines also may test for drugs or alcohol if impairment is suspected, but the FAA has issued no specific drug-testing regulations.

The chairman of Amtrak W. Graham Clayton supported the drug-testing program for railroad employees urging random drug tests to be administered on an annual basis. In his statement of support he said that current testing practices are inadequate because they only allow testing after an accident or if an employee's behavior raises suspicion. "With many drugs you can't tell that someone is impaired." Labor unions traditionally have opposed random testing, calling instead for drug counseling and prevention programs. Don Lindsey,vice-president of the Brotherhood of Railroad Engineers, told a Senate subcommittee the union opposes random testing "on constitutional grounds" arguing that it violates privacy rights.

Henry Duffy, president of Air Line Pilots Association that represents 34,000 commercial pilots, announced new efforts to head off drug use among pilots but said the union would fight attempts to impose a random-testing requirement. Random testing requirements for certain safety-related occupation were included initially in the comprehensive drug bill enacted by congress last year, but the testing provisions were dropped before the bill was finally approved. The Transportation Department program would cover about 26,500 department employees involved in safety or security, including FAA inspectors, air traffic controllers, aviation security specialists, firefighters, railroad safety inspectors, motor carrier safety specialists and hazardous materials inspectors.

Drug Testing

Legal Challenges Clarify Policies

by Mark S. Gold, M.D.

Drug testing is the legal, medical, economic, and political issue of the next decade. Random, periodic, or other testing programs to assess compliance with company anti-drug policies have generated much debate.

While controversial, drug testing is not unpopular. Polls have shown that more than eighty percent of all Americans favor drug testing for certain industries (but not necessarily for themselves). Politically, it's also a popular idea.

Despite the popularity, however, court challenges to drug testing have centered around five areas: the right to privacy; the right to be free from unreasonable searches; the right to due process, negligence law; and labor law. In addition, some workers have claimed that testing is a violation of federal or state rehabilitation acts that protect handicapped individuals.

The Right to Privacy: There is a common belief that we all have a "right to privacy" that protects all aspects of our private life from being involuntarily subjected to outside intrusion. "It's not my boss' business what I do on Saturday night" is a statement made by many people who object to drug testing. In reality, there is no specific provision in the federal Constitution guaranteeing a right to privacy.

Freedom from Unreasonable Searchee: The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Plaintiffs are asserting that urine testing intrudes so far into an employee's privacy that it constitutes an unreasonable search in violation of the Fourth Amendment.

Workers raise this argument not only against government employers, but also against private employers. Once again, however, the Fourth Amendment protection against unreasonable searches protects only against unreasonable governmental actions. A private-business screening against drugs involves no governmental action, therefore no violation of the Fourth Amendment occurs.

> Americans favor drug testing for certain industries, but not necessarily for themselves.

The issue of random drug testing of governmental employees has been settled clearly by the courts. In 1985 a federal court, while allowing pre-employment and "for cause" testing, rejected a random screening program for state correctional officers. Another federal court has ruled that random drug testing may be reasonable in situations where public employees, such as school bus drivers and mechanics, directly affect public safety.

Due Process: The Fifth and Fourteenth Amendments of the Constitution require the government to provide a person with due process before depriving that person "of life, liberty, or property." This is a requirement that the government engage in a fair decision-making process before taking measures that affect an individual's basic rights.

The courts have held that the actions a government takes towards its employees must be reasonably related to their jobs. When the government plans to penalize employees, it generally must notify them in advance and provide them with an opportunity to defend themselves.

Accuracy and Reliability: Several courts that have passed on government employees' challenges to urine testing have confirmed the accuracy and reliability of the tests. Mobil's clinical toxicologist, David Logan, M.P.H., Ph.D., states that a single EMIT test is 95 percent accurate. A second EMIT test is then 97 percent accurate. And using the GC/MS test over and above the two EMIT tests is 99 percent valid.

Court cases have also upheld the validity of the GC/MS test. The GC/MS confirmatory test "was recognized by all authorities as 100 percent reliable" in Higgins v. Wilson (616 F. Supp. 226, D.C. KY., 1985).

And in Peranzo v. Coughlin (608 F. Supp. 1504 S.D.N.Y., 1985), the court accepted the results of two independent studies in which the Centers for Disease Control found the double EMIT test to have a four percent error rate, and the Substance Abuse Service Testing and Research Laboratory found it to have a 2.3 percent error rate. The court then declared the double EMIT test to be accurate "beyond reasonable doubt."

Opportunity to Contest Results: The due process guarantee of fair decision making also means that a government employer must provide an employee with a reasonable op-

portunity to contest charges against him before he is punished. For example, a federal court has held that it is a violation of a government employee's right to due process of law to terminate that person's employment on the basis of a positive urine test without allowing the employee the opportunity to have an independent analysis of the sample.

Negligence Law: Unlike the constitutional claims just discussed, negligence claims can be brought against the private employer as well as government entities. Employee-negligence actions against employers are generally of three types.

First, an employer may be liable for negligence in hiring a substance abuser who harms another employee.

Second, an employer may be liable for negligence if he or she fails to conduct the drug-screening procedure with due care.

Third, while an employer has a qualified privilege to communicate test results to those in the company who need to know about them, an employer who maliciously spreads untrue or exaggerated reports of positive test results will not be protected from an employee's charges of libel and slander.

Labor Law: An employer who plans to institute a drug-screening program, or other means of detecting illegal drug use, should determine whether the plan complies with employment or union contracts, and, if it does not, first renegotiate those contracts.

Rehabilitation Act: The Drug Abuse Prevention, Treatment and Rehabilitation Act of 1972 prohibits denial of federal civilian employment, except for certain sensitive positions, to anyone on the basis of prior drug use, unless that person cannot properly function in his or her employment. It is clear that the Rehabilitation Act protects alcoholics and drug users from discrimination in employment.

Mark S. Gold, M.D., and Peter B. Bensinger are the editors of "The Complete Guide to Drug Testing," a Random House Professional Book, New York, 1987.

Assault on Smoking

Newsweek Editorial Uses Kid Gloves

by Bob Hammond

"The assault on smoking: It's become a moral crusade that may distort health risks and lead to bad public policies."

With this provocative lead-in, Robert Samuelson began his editorial in a recent issue of *Newsweek* magazine.

While admitting that cigarette smoking kills and that even he has been guilty of an occasional "obnoxious" attack on those puffing in his presence, Samuelson argues that society's sanctions against smokers and tobacco companies have gone too far.

He first questions the validity of various studies that have associated passive smoking with a variety of health problems. Indeed, the Marlboro man may be playing Russian Roulette, but to say his smoke endangers the health of others is going a bit too far, according to Samuelson.

By banning cigarette advertising, Congressman Henry Waxman of California says we could dramatically reduce the incidence of smoking among our children. Not so, says Samuelson as he points to the growth of marijuana use between 1960 and 1979, all without the benefit of any advertising whatsoever. And, in spite of all the cigarette advertising, smoking among adults has actually decreased since 1965 from 43 percent to 30 percent.

There should be no ad restrictions on legal products and services, according to Samuelson. Since cigarettes are still legal, there should be no advertising limitations. If we ever got to restricting the advertising of "harmful" products and services that are legal, one could only guess where this might lead.

Samuelson wondered aloud: "Abolishing cigarette ads would loosen this self-restraint. Would alcohol be next? High cholesterol foods? Salt? Who knows?"

The *Newsweek* editor holds that cigarette advertising mainly affects brand competition. For example, Marlboro's brand share has risen from 9.8 percent to 22.6 percent over the last decade.

But Samuelson's argument needs to be challenged. All advertising has three purposes, and market share (brand selection) is one. But, in addition, advertising serves to recruit new users and encourage current users to increase the number of occasions they may use a particular product or service.

No question that the main thrust of some cigarette ads is brand selection. For example, notice the Carlton ad on the outside back cover of that issue of *Newsweek:* "If you smoke, please try Carlton."

Mr. Samuelson's editorial needs to be challenged on the basis of his limited perception of the nature and effect of the $2 billion worth of cigarette advertising that appeared in the print media last year.

Also, it wouldn't hurt to get *Newsweek's* dependence on advertising in perspective. As it is with most major magazines today, subscriptions fall far short of paying for the publication. Advertising revenue is important to the survival of *Newsweek*, and in the first three months of 1987, the magazine ran 41 full pages of cigarette ads worth an estimated $3.8 million in revenue.

Bob Hammond is the executive director of the Alcohol Research Information Service.

Ketchikan Daily News Friday October 23 19

Outboard maker prob products power Irania

WAUKEGAN, Ill.. (AP) – The leading U.S. outboard motor manufacturer is under investigation for possible export violations over reports that armed Iranian speedboats are powered by its products, federal and company officials said Thursday.

"If the engines made it to Iran, they made it without our knowledge or without our condoning it," Outboard Marine Corp. spokesman Laurin Baker said from the company's suburban Chicago headquarters. "We do not make shipments to Iran, we do not allow them to be re-directed to Iran.

"We have a strong interest in any investigation which may reveal our products improperly have been sent to prohibited destinations. At this point, we have no indication that OMC or any third party connected to the company helped facilitate ... these engines' making their way to Iran," he added.

Possible export violations

Baker said the company was notified by Customs agents Wednesday it was being investigated for possible violations of the Export Administration Act.

Customs Service spokesman Edward Kittredge confirmed Thursday that agents had taken doc from Outboard Marine, but c to discuss the investigation fur

Under the Export Admini Act, the shipment of o motors of 45 horsepower or Iran would be illegal, Baker s the company does not shi smaller motors to Iran.

"The motors being discuss are at the top end of the size and we make them up horsepower," he said.

Baker said Outboard Mari number of f reign subsidia purchasers of the engi required to certify they intended for distribution to where sales of U.S. prod restricted by the export act.

Video, photo eviden

Federal authorities n learned the American-mad were being used in the Per from Iranian television fo that nation's forces.

National highlights

Alleged computer plot foiled

SAN JOSE, Calif. (AP) – An alleged plot to sell supercomputer technology with military applications to the Soviet Union was broken up Thursday when U.S. Customs officials arrested three men and recovered stolen computer designs.

The designs stolen from Sunnyvale's Saxpy Computer Corp. and recovered by the FBI could be used to build one of the most powerful supercomputers in the world, capable of 1 billion computations per second, company officials said.

Ivan Batinic, 29, of Fremont, a former Saxpy engineer, his brother, Stevan, and Kevin E. Anderson, 36, a software designer also from Fremont, were arrested.

Greenpeace protesters nabbed

MOUNT RUSHMORE NATIONAL MEMORIAL, S.D. (AP) – Five protesters with the environmental group Greenpeace were arrested Thursday as they tried to display a giant banner across Mount Rushmore opposing acid rain, authorities said.

The 160- by 50-foot white banner said, "We the people say no to acid rain," in blue letters and "Greenpeace" in green letters. But authorities arrested the climbers before the two-section banner could be put in place on the granite carvings.

The environmental group has been frustrated because Congressional bills to regulate industrial emissions that contribute to acid rain have been blocked consistently by auto and coal interests, Eileen Price of Greenpeace said.

...ndy, of Far Hills, N.J., was named by the president Thursday to a three-member task force called in response to Monday's devastating decline in stock prices.

The panel will have 30 to 60 days to "examine the stock market procedures and make recommendations on any necessary changes," Reagan said.

Engineer's doping alleged

BALTIMORE (AP) – A former Conrail brakeman told a grand jury that he and an engineer smoked marijuana before their locomotives slid into the path of an Amtrak passenger train in January, caus the worst crash in Amtrak histor according to published reports.

Sixteen people were killed and 175 others were injured when the Conrail train skidded through a closed switch and into the path of the high-speed passenger train.

The engineer, Ricky L. Gates, was indicted in May on 16 counts of manslaughter by locomotive stemming from the crash near Chase. His trial is scheduled to begin in February.

Gutenberg Bible gets record

NEW YORK (AP) – A Gutenberg Bible was sold at auction Thursday for $5.39 million, more than double the previous record for a printed book, Christie's auction house said.

The Bible, printed in 1455 in Mainz, Germany, is one of 48 surviving of the 185 believed to have been printed at least in part by Johann Gutenberg. The Bibles, the first books printed by movable type,

...an, first lady Nancy ... a jazzy, joyful return ... five days after breast ... very, very happy to ... in a wavering voice ... her side. The first ... led and lifted her left ... of White House staff ... drug programs and ... been invited to the ... ine Band's jazz music

Photo by The Associated Press

...seek to ...-CIO

...l AFL-CIO officials on the ... earlier. "It's my understand... ...at there has been a dialogue ... on for some time, extending ... several ... months," he sa... ...er and ... other ... issons ...

Dioxin v

BELLEVILLE, Ill. (AP) ... has determined that Mon... failed to warn a Missouri to... the risks of a 1979 spill ... less than a teaspoon of d... ordered the giant chemical ... to pay $16.2 million in ... damages.

Monsanto said it wou... Thursday's verdict, which ... one of the nation's longest ju...

The finding of miscon... resulted in compensator... awards of $14,500 each to ... and son who owned land ... Sturgeon, Mo., spill site, a... for the remaining 63 plai... punitive damages were to ... equally among all plantiffs.

The lawsuit in St. Cl... Circuit Court accused St. ... Monsanto in the Jan. 10, ... of a 19,000-gallon rail sl...

Colo. gu...

BRIGHTON, Colo. (A... 34-year-old gunman who ... shot three neighbors in ... was acquitted Thursday o... of second-dgree murde... counts of assault.

David Guenther, 34, of ... had once based his ...

POLICY REGARDING DRUG AND ALCOHOL ABUSE

Ketchikan Pulp Company prohibits the use, sale, possession, purchase or transfer of illegal and/or illicit drugs on Company premises or while on Company business. It also prohibits employees from being under the influence of drugs, alcohol or other substances during working time where such substances can impair the fitness of an employee to perform his or her work. Commission of these actions will subject the employee to disciplinary action up to and including discharge. For purposes of applying this policy, being under the influence of drugs or alcohol means being impaired in any way from fully and proficiently performing job duties and/or having a detectible amount of illicit drugs in one's body.

The prohibition concerning drug and alcohol abuse is based upon a number of concerns including the physical safety of all employees, potential damage to plant and equipment, mental and physical health of employees, productivity and product quality, medical insurance costs, and the harm done to employees and their families by drug and alcohol abuse.

Employees who acknowledge that they have a drug or alcohol addiction or dependency, and who seek to overcome such addiction or dependency, will be afforded guidance and cooperation by Ketchikan Pulp Company in dealing with their problem. Voluntary acknowledgment of such addiction or dependency revealed prior to a detected use on the job will be held confidential and will not be used as a basis for disciplinary action or termination. Such acknowledgment will not, however, relieve an employee of the obligation to remain free from the influence and involvement with drugs and alcohol during working hours.

In order to assure that prohibitions against drug and alcohol involvement are not violated, various means of detection and investigation may be employed by Ketchikan Pulp Company including testing when reasonable suspicion exists, searches, covert investigations, surveillance, employee interviews and other forms of fact gathering. All employees are required, as a condition of employment, to cooperate fully in the carrying out of these detection and investigation procedures.

June 1, 1987

POLICY REGARDING DRUG AND ALCOHOL ABUSE

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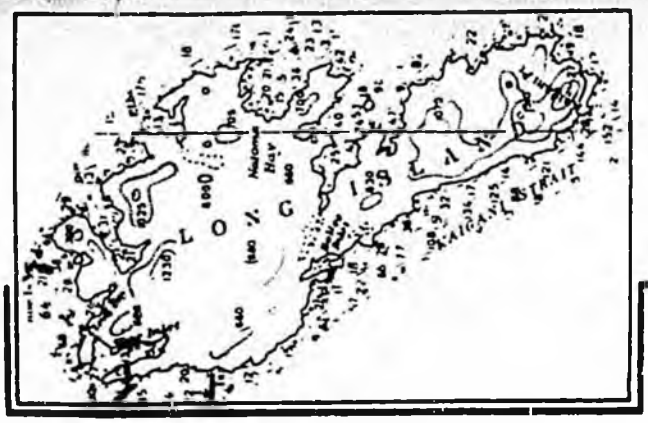
In order to assure employees of a drug and alcohol free environment, and to assure that prohibition against drugs and alcohol involvement are not violated, various means of detection and investigation may be employed by Ketchikan Pulp Company, including testing when reasonable suspicion exists, searches, undercover investigations, surveillance, employee interviews and other forms of fact gathering. All employees are required, as a condition of employment, to cooperate fully in the carrying out of these detection and investigation procedures.

Revised 3/25/87/IBEW



LONG ISLAND DEVELOPMENT, INC.

P.O. Box 5960 • Ketchikan, Alaska 99901 • 907-225-2675

October 20, 1987

To Whom it May Concern:

During the early part of 1987, representatives from Klukwan, Inc. and Long Island Development, Inc. presented testimony relating to House Bill #283 while the Senate Committee on Labor and Commerce was in session. At that time it was indicated that Klukwan, Inc. and it's subsidiaries opposed House Bill #283.

First, we wish to reiterate our active opposition to House Bill #283. Second, we would like to explain in some detail why we oppose this piece of legislation. During 1984 and 1985, it became obvious to us that our company had a serious drug problem at our isolated camp locations. In one instance, we had an employee overdose on cocaine and nearly die. We knew that we had to implement some kind of comprehensive program to protect our employees. After a considerable amount of research on the topic, we drew up and implemented a comprehensive program for the 1986 season.

The Drug and Alcohol Policy for Klukwan, Inc. and it's subsidiaries has several key elements. First, prohibited items under the policy include illegal drugs, controlled substances, marijuana, and all mood or mind altering substances. Second, our employees have been tested for drugs as part of the pre-employment procedure, after returning to active employment while on seasonal lay-off, and following an on-the-job accident requiring transport to a medical facility. Third, all urine samples are sent to the American Institute for Drug Detection, Inc. in Rosemont, Illinois. This institute is one of the most respected laboratories in the country. We wish to emphasize that this lab performs sophisticated confirmation tests on all initially positive drug tests. In particular, it goes through an elaborate procedure involving gas chromoatography, and mass spectrometry. This laboratory

claims that through this process it can detect drugs or controlled substances with virtually absolute certainty. Fourth, our drug program contains a procedure whereby an employee testing positive on a drug test can retest after thirty days. If he/she tests negative this time around, he will once again be eligible for employment. If an employee tests positive again on his second test, he must wait ninety days before taking a third test. During the last two years, we have rehired many employees who have tested positive for drugs, cleaned up their acts and then subsequently tested negative on future tests. Fifth, the results of our comprehensive Drug and Alcohol Policy have been extremely successful. Serious on-the-job injuries have been reduced drastically. In 1987 alone, the company may save over one million dollars in reduced workers' compensation claim costs.

In short, Klukwan, Inc. and its subsidiaries work in one of the most hazardous industries. We feel that each of our employees has the right to work alongside other employees who are not under the influence of drugs or alcohol. For these reasons, we feel that House Bill #283 is a step backward, and we oppose it as presently drafted.

The management of Klukwan, Inc. and its subsidiaries would be more than willing to sit down with the drafters of House Bill #283 and re-write the bill so that the concerns of the committee are addressed as well as the concerns of the Timber Industry.

Sincerely,

Donald I. Mellison
President/General Manager
Long Island Development, Inc.

DIM/sf

Ketchikan Pulp Company
A subsidiary of Louisiana-Pacific Corporation

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Ketchikan, Alaska 99901, U. S. A.
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Answer back: KAYPULCO KET

Ketchikan Pulp Company's testimony on House Bill #283

Past Governors have tried, and the present Governor is trying to broaden the business base of the State by attracting new business. This would be good for everyone.

One of the things that we Alaskans can do to help the Governor in his quest is to be able to give comfort to these prospective employers that we will be able to provide a workforce that will be at work, fit for work and able to work safely. The employer will want to know that he (or she) will not have to have a larger than normal supervisory force to look for "loss of performance". He will want to know that he will not face undue losses because of absent employees. He will want to know that theft losses will be controllable. He will want to know that his product will be a quality product. He will want to know that his productivity will be good. He will need to know that he can compete in the market place.

Assistant Attorney General Richard Willard has said: "Illegal drug use drains our nation's productivity, strangles the economy and hinders our ability to compete internationally against an ever more disciplined foreign workforce.

Drug users in the workforce are three times more likely to be involved in on-the-job accidents, are absent from work twice as often, incur three times the average level of sickness costs, and are only two thirds as productive. On the average, compared with their non-addicted counterparts, substance abusers consume three times the medical benefits, are five times as likely to file Workers' Compensation Claims, experience seven times as many garnishments and are repeatedly involved in grievance procedures."

Mr. Willard is not alone in his alarm. Charles R. Schuster, Ph.D., Director of the National Institute on Drug Abuse in a letter to business leaders states: "Drug abuse is a significant public health problem. Approximately 19 percent of Americans over age 12 have used illicit drugs sometime during the last year. Among 18 to 25 year olds, representing young adults just entering the work force, 65 percent have experience with illicit drugs, 42 percent within the last year. The abuse of alcohol and drugs costs society nearly 100 billion dollars in lost productivity each year. Clearly, the human costs to society and the social, economic, and legal costs to business have created a

new awareness of the multifaceted problems that result from substance abuse. This awareness has resulted in consensus among Government and business that action must be taken to reduce these costs."

From the American Legislative Exchange Council May 1987: "Drug abuse is a present and growing threat to American society -- its families, communities, and economy. Twenty years ago, 96% of Americans had never used any illegal drug and drug use on the job was virtually unheard of. By contrast today, in the age group currently entering the workforce, the numbers are staggering -- a 1985 survey revealed that 65% of 18 to 25 year-olds had used illicit drugs, and 42% had used illicit drugs within the previous month. Overall, 70.4 million Americans age 12 and over (37% of the population) have used marijuana, cocaine or other illicit drugs at least once in their lifetime; 36.8 million (19% of the population) were users at least once in the past year. Between 1964 and 1984 marijuana use alone has increased thirty fold. In the workplace today, one in six Americans is using marijuana monthly and one in twenty is using cocaine monthly.

Powerfully addictive drugs have never been more accessible to such a cross section of American society than they are today. While the national infatuation with drugs seems to have waned since the 1960's, drug experts warn that "exposure to addictive substances now begins earlier in life and cuts across a more diverse slice of the population than ever before." A 1986

study by Straight, Inc. showed that almost half of the nation's teen drug abusers got involved before the age of 12. As Edward Kayfman, Chairman of the American Psychiatric Association's drug abuse panel said, "(t)he kid who used to have to spend $250. for a gram of coke can now buy a vial of crack for 10 bucks. Two kids can go to a movie or they can split a vial of crack." Since NIDA began monitoring marijuana potency in 1975, the potency of TCH, the psychoactive ingredient in marijuana, has increased, on average, 900%. Sensimilla, a type of marijuana, is ten times more potent than marijuana was just ten years ago."

Alaskan businesses will not stay competitive if they are unable to control their costs, their quality and their productivity. Present employers in Alaska will constantly reassess their positions here. It is only good business practice to do so.

Ketchikan Pulp Company made such a re-evaluation. We determined that there were drugs and the effect of drugs in our work environment. Our employees also began to show concern about drugs in the work environment. Drug use affected the safety of our employees, it affected the quality of our product and our productivity. We became aware of the concern about drugs being shown by others in our industry.

We knew that we had to do something. We formulated a policy regarding drug and alcohol abuse. We decided to start a prehire screen of new applicants. We started an education program for our supervisors. Supervisors are ill equipped to handle drug problems

along with all their other responsibilities. The sophisticated drug user can fool a lot of people. Even though we had employees that were concerned about drug use they were reluctant to step forward, sometimes because of fear of relatiation.

We wanted employees who had drug or alcohol problems to come forward and get treatment. None of these were done lightly or without prior thought. The question of drug testing accuracy came up. Certainly there were concerns. It was found that drug testing today is suffering from a reputation of yesterday. To quote from one source, Alcoholism and Addiction -September/October 1987 - article by Mark G. Gold -articles: Legal Challenges Clarify Policies:

"Accuracy and Reliability: Several courts that have passed on government employees' challenges to urine testing have confirmed the accuracy and reliability of the tests. Mobil's clinical Toxicologist, David Logan, M.P.H., Ph.D., states that a single EMIT test is 95% accurate. A second EMIT test is then 97% accurate. And using the GC/MS test over and above the two EMIT tests is 99% valid."

"Court cases have also upheld the validity of the GC/MS test. The GC/MS confirmatory test "was recognized as 100% reliable in Higgins vs. Wilson (616 F. Supp. 226, D.C. KY, 1985.)

All of Ketchikan Pulp Company's positive tests have a confirmation test, and by another method. This assures that people are not falsely denied job

opportunities. We do not test for substances that are not work related. We do not share these test results with others so that confidentiality is assured. We code names so that the laboratory does not know the name of the person being tested.

What did our efforts gain for us? We know that our efforts made a significant contribution to a better safety record. We know that our absenteeism is down. We know that our product quality is up. We know that our productivity is up.

Our company has equipment that, if handled improperly, can be dangerous. We have chemicals that need to be handled properly. Each of us depends upon another for our safety as he depends on us for his.

If the State wishes to help in these times House Bill #283 is not the vehicle to do it. As a company that pays taxes and provides employment for persons that pay taxes and live here we fail to understand a bill that gives comfort to an industry that doesn't even have a business license in this state. The industry that I speak of is the illicit drug industry, an industry that pays no taxes but causes this state to spend an ever increasing amount of an ever decreasing state budget.

COCAINE IN THE WORKPLACE:

THE TICKING TIME BOMB

Chapter in COCAINE ABUSE
Edited by Arnold M. Washton and Mark S. Gold
Published by the Guilford Press, 1986.

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Adapted from Presentation
November 19, 1985 at the
First National Conference on Cocaine:
The Clinical Challenge
New York, New York

Cocaine is a bomb ticking in the American workplace. Roughly one in five American workers have tried cocaine, the most compulsively reinforcing drug in widespread use. Drugs in general pose a grave threat in the workplace -- to health, productivity, safety, morale, costs, and to quality of work experience -- for both users and for non-users. In this dismal context, cocaine is uniquely dangerous.

The first step to defusing the cocaine bomb is to see it clearly. This exploration of cocaine at work, while still preliminary, has three parts. The first is a general context of the problem based on my 20 years of clinical experience. The second part, the heart of the matter, outlines nine ways in which cocaine is different as a drug problem in the workplace. The final part describes four steps to deal with the cocaine problem in the workplace.

The cocaine problem is part of the drug abuse epidemic that began in the early 1960s and became a national threat during the 1970s. This epidemic, although no longer limited to the United States, involves all of American society and continues today. In looking at the drug epidemic from the mid-1960s to the present, three drugs are unique: alcohol, marijuana, and cocaine. These drugs are called the Gateway Drugs (1). While drug use typically begins with alcohol and proceeds through marijuana to cocaine, the drug abuse treatment field initially emphasized the "end of the line" -- the heroin problem. The incidence of heroin use in the United States peaked in 1971. There are still people

newly addicted to heroin, but the epidemic rise of heroin use came in the late 1960s and early 1970s. This heroin problem catalyzed the federal government's involvement in drug abuse, particularly in drug abuse treatment. It had a significant effect on our national response to the Vietnam War. Of course, it was also intimately connected with the problems of inner-city life, and particularly the problems of crime, which were, and still are, important political issues. One unexplained paradox of drug epidemiology is why the heroin problem peaked so early in the overall national drug abuse epidemic.

While heroin played an initiating role in governmental response to drug abuse, it was alcohol, the most commonly used intoxicant in the U.S., that created the foundation for the drug epidemic itself. The lowering of the drinking age from 21 to 18 in the early 1970s contributed to the massive increase of exposure of especially vulnerable teenagers to the use of a chemical to feel good -- to "get by by getting high." Unlike the more visible, but much smaller heroin problem, alcohol use by youth during the 1970s was all but overlooked. After rising steadily from the time of the repeal of Prohibition in 1933, per capita alcohol consumption in the U.S. peaked in the 1980s. That was the good news. The bad news is that adolescent alcohol use continues at unprecedentedly high levels.

Most of us think about the drug epidemic as all but synonymous with the marijuana problem. Marijuana incidence rose rapidly after 1965 and appeared to peak in about 1978 in the

United States. It is surprising to many Americans that the marijuana epidemic was primarily a phenomenon of the '70s, not the '60s, even though the "pot" image was a '60s issue. The marijuana epidemic both reflected and caused the rise of non-traditioal values, the "youth culture." It was in part a middle class drop-out phenomenon, a rebellious rejection of adult, traditional values. Marijuana use is associated with the people who listened to the Pied Piper of this cult, Timothy Leary, with his "Tune In, Turn On, Drop Out" mentality.

The third step in the typical drug pattern, after alcohol and marijuana, was cocaine. Cocaine has an epidemiology different from heroin, alcohol, or marijuana. The peak of cocaine use in the U.S. has apparently not yet occurred. In this cocaine stands in clear contrast to both alcohol and marijuana. Cocaine use is unique because it is not involved with the ghetto, as is heroin, and it is not particularly involved with youth, at least not primarily with teenage drop-outs, the way marijuana is. All of these characteristics distinguish the cocaine epidemic and make comparisons with other drugs perilous.

Here are my estimates based on the best available data, a national survey completed in 1982 (2). Later this year new survey data will be available. I estimate that about 30 million Americans have tried cocaine and about six million have used it within the last month. Ninety percent of these people are between the ages of 18 and 35 and 50% are between the ages of 18 and 25. Cocaine use, while concentrated in the under-35 age group, is not

limited to any geographic area, race, or social class. In the workforce today about 20 million workers have tried cocaine and about four million have used it at least once within the last month. That 20 million is about one in every five workers in the United States. Those numbers do not begin to tell the cocaine story because of the unique age gender concentration of cocaine use. If we look at males between the ages of 18 and 25, we see that about 50% in the workforce has used cocaine. Thirty percent of females at work, aged 18 to 25, have used cocaine. The numbers in the 26-34 age group are only slightly lower -- about 35% for males and 25% for females. Within this age group of 18 to 35 in the workforce, there is an enormous number of people who have experimented with cocaine. For millions of these people the experimentation has gone on to, or will go on to, severe problems. Because of the powerful, seductive nature of cocaine use, every one of these 20 million workers is at risk of a serious problem with cocaine. The more they use the drug the more they like it, and the greater the risk to them, their coworkers, their employers, their families, and their communities.

That is by way of background about the drug epidemic with a special focus on cocaine. This leads to a review of the Drug Dependence Syndrome. There are two related myths that create serious handicaps in dealing with the cocaine problem. The first myth is the concept of "controlled" or "responsible" use. We are used to this idea from the experience of alcohol use. It has a devastating impact on our ability to understand and respond to

all drug problems, particularly cocaine. Another myth is the concept that there are "non-addictive" drugs. Labeling cocaine as non-addictive, which is the way most young people have been educated about cocaine, has contributed to the epidemic of cocaine use. "Responsible" cocaine use makes as much sense, based on scientific understanding of cocaine's pharmacology, as does "responsible" Russian Roulette: if you do not pull the trigger too often some who play the game will survive! To call cocaine "non-addictive" flies in the face of modern pharmacology. One hundred percent of monkeys allowed to self-administer cocaine die of the drug's effect within five days. Is that a "non-addictive" drug?

There are three stages of the Drug Dependence Syndrome. The first stage is <u>experimentation</u>. This is the most important stage. It involves going from never using the drug to trying out the drug. The second stage is the stage I call <u>fooling around</u> with -- dabbling in -- the drug. This is often the honeymoon stage when the user may have the confident feeling that he can control the experience and that it is a harmless "fun" part of his "lifestyle." The third stage is the stage of dependence or being <u>hooked</u>. The best way to understand this stage is to see it as falling in love with the drug and the drug experience.

Several features of this syndrome need to be highlighted in the workplace context. All drug users <u>deny</u> both the extent and consequences of their drug use, especially to anyone who might come between them and their "lover" -- their drug. Other people