



**FROM THE DESK
OF
JOE R. DUNCAN,
PDGC**



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TO: All Members District 19

Under the Department of Transportation regulations, employees in the rail industry, along with employees of aviation, motor carrier, mass transit, maritime and pipeline industries who fail or refuse to take a drug test must successfully complete a drug treatment program. In addition to this program the employee must pass a return-to-duty and a series of urine tests (minimum of six in the 12 months) as a condition of performing any safety-sensitive duties. (Maintain Employment). The Carrier's, under the DOT Regulation, had the option of "direct observation" when conducting return-to-duty and follow-up tests. (*Direct Observation is a procedure that requires a same-gender observer to watch the urine go from the employee's body into the collection container 49 C.F.R. ss 40.67(i)*) In August of 2008 the Department of Transportation (DOT), *to prevent cheating*, modified it's regulations of "direct observation" to require employers to use "direct observation" for all return-to-duty and follow-up testing. This modification also requires that *immediately prior to all direct observation tests, employees must raise their shirts above the waist and lower their lower clothing so as to expose their genitals and allow the observers to verify the absence of any cheating devices.* (49 C.F.R. ss 40.67(i) (2008).

The BNSF Railway along with the IAM-AW and several other labor organizations, along with the support of Association of American Railroads, petition the United States Court of Appeals for review. On August 27, 2008 the Court ordered a stay of the disrobing requirement pending their resolution of the petitions.

The parties argued their perspective position on March 26, 2009 and the Court of Appeals rendered a decision on May 15, 2009. The United States Court of Appeals upheld the DOT's modifications to "direct observation" of return-to-duty and follow-up testing with the requirement of disrobing prior to the test. The court cited on page 2 of their written decision:

"For the reasons set forth in this opinion, we find the Department's (DOT) considered justification for its policy neither arbitrary nor capricious, and although we recognize the highly intrusive nature of direct observation testing, we conclude that the regulation complies with the Fourth Amendment."

This being said, the Carrier's are now required to, and the employee's subject to return-to-duty and follow-up testing must comply with, the DOT modification of the "Direct Observation" testing and the requirement of employee's to lift their shirt above their waist and lower their lower clothing prior to this test, so that observers can look for devices made for cheating on drug test.

Failure, by any employee to comply with the above will result in, under the DOT regulations, a refusal to test and subject that employee to the Carrier's policies on failing a second drug and/or alcohol test. We strongly suggest that employee's who are required to take return-to-work and follow-up test to comply with the DOT regulation 49 C.F.R. ss 40.67(i)(2008)

We are currently evaluating the decision of the court and will advise you of any further action that we may decide to take.

(click here to view the entire court decision)

In Solidarity,

Joe R. Duncan
President Dir. Gen. Chairman

