



Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference—International Brotherhood of Teamsters

25 Louisiana Ave., N.W., Suite 409 • Washington, DC 20001
Phone: (202) 624-8776 • Fax: (202) 624-3086
E-mail: holmes@ble-t.org

RAYMOND A. HOLMES

Vice President &

National Legislative Representative

July 19, 2005

Docket Clerk, DOT Central Docket
Management Facility, Room PL-401
400 7th Street, SW (Plaza Level)
Washington, DC 20590-0001

Re: Docket Number FRA-2005-21241

Dear Docket Clerk:

The Union Pacific Railroad (“UP”) seeks a permanent waiver from compliance with FRA’s random alcohol and drug testing requirements set forth at 49 CFR Sections 219.601(b)(1) and 219.601(b)(2)(ii). More specifically, UP seeks (1) to ignore the regulatory requirement that every covered employee have a substantially equal statistical chance of being subject to random testing within a specified period of time, and (2) to replace its random testing pool with over two dozen smaller pools, which presumably would be based on current craft and operational structures.

The Brotherhood of Locomotive Engineers and Trainmen (“BLET”) represents the craft of locomotive engineer on UP. All UP locomotive engineers, as well as all UP train service employees who belong to BLET, are covered employees as defined in Section 219.5. Additionally, BLET also represents locomotive engineers on all Class I railroads, and, along with train service employees, on numerous Class II and Class III railroads. BLET opposes the permanent waiver sought by UP in FRA-2005-21241 for the reasons set forth below.

At the outset, we are compelled to point out that UP’s petition seeks to revisit — and reverse — past decisional history. At a June 6, 1984 Hearing before the Senate Subcommittee on Surface Transportation, William H. Dempsey, then-President of the Association of American Railroads (“AAR”), testified as follows:

The railroads should be free to use testing devices on a selective basis. A railroad should have the ability to expend its resources in an efficient manner and thus pinpoint specific problem locations on an unannounced spot basis. Unless the railroad has the ability to set the criteria for use of such devices it may be deprived of the ability to use the devices in a manner which effectively deters Rule G violations.

S. Hrg. 98-882 at pp. 31-32.

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Thus, UP's petition does nothing more than reiterate the industry's position, first enunciated by AAR some twenty-one years earlier. As the evolution of Part 219 demonstrates, UP's position has been considered — and rejected — on at least two occasions. At the same 1984 Senate hearing, both the testimony and the record statement submitted by Transportation Secretary Dole verify that FRA's Notice of Proposed Rulemaking published in mid-1984 did not seek to establish a random testing requirement. *Id.* at pp. 4-5, 15-18. FRA's decision to refrain from authorizing or requiring random testing was explained in detail in the preamble to its February 10, 1986 Final Rule. *See* 50 FR 31508.

When FRA published its Notice of Proposed Rulemaking concerning random testing, on May 10, 1988, a significant consideration was the fact that Part 219's reasonable cause testing provisions were discretionary on the part of each railroad, rather than mandatory. FRA pointed to the nature of the industry, noting that to "mandate reasonable cause testing for a broad range of individually unpredictable events would create major logistical problems." 53 FR 16641. It was on this basis that random testing was viewed as a logical adjunct to discretionary reasonable cause testing, because "... in the railroad industry mandatory random testing can be centrally planned and administered on a more cost effective basis" than mandatory reasonable cause testing. *Id.*

FRA also relied upon testing data that was developed during the early years of Part 219's existence:

During the period February 10, 1986, through December 31, 1987, mandatory post-accident testing was conducted after 349 qualifying events. A total of 1508 employees were tested. Of the 1508, 76 employees (5.0%) tested positive for alcohol or a controlled substance used without medical authorization (illicit drug use or self-medication). Of the 76 employees, 10 (.7%) tested positive for alcohol and 66 (4.4%) for a controlled substance. An additional 12 employees (.8%) tested positive for prescription drugs.

The 4.4 percent positive rate for illicit drugs (and non-authorized use of prescription drugs) is encouraging to a degree, since it is below many previous estimates of drug use prevalence However, a 4.4 percent positive figure is not an acceptable figure

Id.

FRA requested comments on three "generic models" of random testing programs: 1) the mandatory testing of each employee, with only the test date being randomized, supplemented by retesting on a strictly random selection basis; 2) a strict random selection program that would result in some employees not being tested at all, while others would be tested more than once, which FRA proposed in the NPRM; and 3) an unweighted random selection, with a statistical bias against reselection and a much greater — or even absolute — bias against a second or third

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reselection. 53 FR 16645. As to the first specific item for which UP seeks relief, it should be noted that the randomization initially proposed by FRA was stricter than the provision from which UP seeks relief: FRA proposed that each covered employee have "an equal statistical chance" of being selected, rather than the current "substantially equal statistical chance." 53 FR 16652.

FRA's Final Rule with respect to random testing was published on November 21, 1988. See 53 FR 47102, *et seq.* Significantly, both the National Transportation Safety Board and CSX Transportation filed comments that FRA's proposal was unnecessary, in view of other alternatives that were available to the industry. AAR reiterated its request that the regulation be structured in such a way that "each employee need not have the exact same chance of selection." Similarly, some carriers "requested permission to use experience-rating techniques to target segments of the workforce where drug use is more prevalent[, which] segments would then be tested at a higher level than others." "Targeting on the basis of location, age and craft was suggested" by some carriers, as well.

FRA considered, and, in the end, rejected all these proposals, stating that it was "cognizant of the burdens imposed on employees and railroads by any random testing program and seeks to limit those burdens to the extent possible consistent with safety." Thus, the portion of the railroad workforce subject to Part 219 would remain limited to "covered employees," as defined in Section 219.5, because of the safety-sensitive nature of their work. In FRA's words, "Congressional attention to these functions through the Hours of Service Act has ... established a strong precedent for focusing the alcohol/drug control program on persons performing these functions."

In promulgating Subpart G, FRA expressly "endeavored to craft the final rule in a manner ensuring that random testing programs meet **objective criteria that protect against any exercise of discretion by the railroad** in selecting a particular employee for testing." (emphasis added) Indeed, the only "dilution" from the strict and narrow language contained in the NPRM that is relevant to the instant matter was a modification of the phrase "an equal statistical chance" in Section 219.601(b)(1) to read "a substantially equal statistical chance." FRA explained that this change was necessary in "order to allow for rounding errors associated with multi-stage selection processes." Again, however, FRA reasserted that "**any exercise of discretion in selection is specifically prohibited.**" (emphasis added)

The current language contained in Section 219.601(b)(2)(ii), which is the second target of UP's petition, was promulgated on December 31, 2003. The driving force was DOT's adoption of a Final Rule establishing a single Management Information System form for use by all five DOT agencies, which altered the method by which calculation of the size of the testing population was performed. Accordingly, the language promulgated by FRA was required "to conform

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with the Department's new directions on how to calculate the number of covered employees eligible for random testing." 68 FR 75463.

Twice, during the 1980s, the industry specifically requested the broad subjective and discretionary powers sought in the instant petition by UP. Each time, FRA considered such requests and, each time, FRA denied such requests. Indeed, in promulgating Subpart G, FRA explicitly stated that railroads should have no discretion whatsoever in determining test rates in any manner than across-the-board. The rationales cited by UP have been specifically considered and rejected, as well. In considering UP's petition, then, FRA must first examine whether UP has provided compelling evidence warranting granting it the broad discretion that has twice been denied the industry as a whole. We submit that no such evidence has been provided.

That the Part 219 testing requirements have succeeded is beyond dispute. With respect to reasonable cause testing, positive alcohol tests declined by 91% and positive drug tests by over 86% between 1987 and 1998. 66 FR 63945. As for post-accident testing, and comparing the four-year periods of 1987-1990 and 1995-1998, the positive alcohol test rate declined, by over 51%, to less than 0.25%, while the positive drug test rate dropped by more than 77%, to less than one percent. 66 FR 64004. FRA concedes that the lion's share of the credit for these improvements should be accorded Subpart G:

The deterrent effect of random drug testing, which was implemented in 1988-1989, most certainly influenced the dramatic reduction in post-accident positives from 41 in 1988 to only 17 in 1990. Additionally, in the eight years from 1987 through 1994, there were 20 post-accident alcohol positives, but only two post-accident alcohol positives in the succeeding four years after implementation of random alcohol testing in 1994.

Id. This success is underscored by the fact that both FRA's 2005 random alcohol testing rate and the random drug testing rate continue to be at the lowest levels permissible. By contrast, employees covered by testing programs promulgated by the Federal Motor Carrier Safety Administration, the Federal Transit Administration, and the United States Coast Guard are subject to a random drug testing rate twice that of the railroad industry. See <http://www.dot.gov/ost/dapc/rates.html?prog>.

In addition to attempting to, again, revisit issues twice considered and resolved by FRA, UP's position is unsupportable for several other reasons. First, UP's proposal to create twenty separate pools for operating employees is arbitrary on three counts. Insofar as structure is concerned, mere managerial convenience drives the proposed testing structure, which is based on UP's current operational structure; in fact, UP's petition provides no information whatsoever concerning how long these twenty "Service Units" have been in existence, or the likelihood of future changes thereto.

Further, no information at all was provided by UP concerning positive alcohol testing rates, and only minimal information is provided concerning positive drug testing rates; UP briefly mentions only seven of the twenty Service Units, all of which had positive drug testing rates in 2004 that were more than 57% lower than the industry average for 2003.¹ See 69 FR 72133. Also, UP's acknowledgement that it "increased the random testing rate from the current FRA minimum 25% to 50% for all covered employees" indicates that — if the petition is granted — UP is prepared to commit resources to its "target" areas that would produce a testing rate significantly higher than 50%. In other words, UP essentially requests permission to arbitrarily test where it wishes at any unspecified rate it chooses to apply at a particular point in time.

Second, UP's petition ignores the impact of follow-up testing of covered employees that is conducted after a positive test, whether that test was random or by operation of other Subparts. Since these follow-up tests are unannounced, UP already has significant discretion in increasing "random" testing rates in those areas it deems to be "problem areas," albeit outside Subpart G, strictly speaking. UP's claimed need for a "greater deterrent effect" likewise ignores the fact that locomotive engineers and remote control operators already are subject to one of the stiffest sanctions available under FRA regulation: the nine-month revocation of certification for an initial violation of Section 219.101 and even more harsh subsequent sanctions.

Third, UP's petition would undermine FRA's carefully crafted random testing scheme. Industry-wide random testing rates would be increasingly skewed by the disproportionality of UP's testing program, which would, in turn, distort future national testing rates. If granted, UP's petition also will trigger a plethora of similar petitions from various railroads of all sizes and would ultimately require reopening of Subpart G, because the assumptions and conclusions underlying the present regulation would no longer have viability.

Fourth, implicit in UP's "deterrence" argument is the assumption that increased testing will produce a higher level of detection; *i.e.*, that there are a significant number of undetected drug users in those areas with the highest rates of positive test results. If this assumption is incorrect, then the positive test result rates in these areas will move downward; however, UP has not represented that it will reduce testing rates in those areas. On the other hand, if this assumption is correct, UP has a rationale for targeted increased testing rates at any location where the positive test result rate is greater than zero. In either event, UP's petition plainly seeks to estab-

¹ UP also attempts to bootstrap purported "data" with respect to reportable personal injury rates and human-factor caused accidents/incidents into support for its petition. However, not only has FRA not relied upon such data in promulgating random testing regulations, UP also has made no attempt to show a correlation between crafts or geographical locations with higher reportable personal injury rates and/or higher numbers of human-factor caused accidents/incidents and higher random drug testing rates. Accordingly, this "data" cannot serve to support UP's petition.

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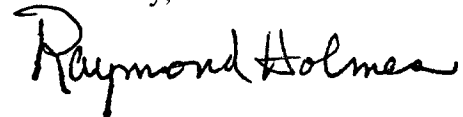
lish precisely the sort of subjective and arbitrary random testing program that FRA has expressly prohibited.

The gravamen of UP's petition is that Sections 219.601(b)(1) and 219.601(b)(2)(ii) are too administratively burdensome, given UP's current operational structure and its own view of how a random testing program should be structured. However, FRA did not promulgate a regulation granting railroads unfettered discretion. In order to balance the interests of railroads and railroad workers with safety concerns, Subpart G was specifically designed to address an industry-wide problem with an industry-wide solution.

The cornerstone of Subpart G is substantially equal statistical exposure to random testing that is spread across the entire covered service population, which is memorialized in Sections 219.601(b)(1) and 219.601(b)(2)(ii). This cornerstone applies industry-wide, and may only be breached if an individual railroad is prepared to devote sufficient resources to raise the bar for its entire covered service workforce. UP claims these requirements are administratively inconvenient and cause inefficient expenditures.

At the same time, however, these safeguards provide the only reasonable method for ensuring that no subgroup of railroad employees — whether members of a particular craft or class, or working at a particular location — are singled out for arbitrary or disproportionate scrutiny. For this reason FRA has consistently rejected requests such as the ones renewed by UP in this matter. Accordingly, and for all of the reasons set forth herein, BLET respectfully requests that the Federal Railroad Administration deny the petition in its entirety.

Sincerely,



Raymond A. Holmes

cc: D. M. Hahs, National Division President
E. W. Rodzwick, First Vice President
W. C. Walpert, General Secretary-Treasurer
All Union Pacific Railroad General Chairmen
All Affected State Legislative Board Chairmen