MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVE

March 18, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on March 18, 1987, at 8:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Grady and Daily who were excused.

EXECUTIVE SESSION:

ACTION ON SENATE BILL NO. 261:

Rep. Cobb moved that SB 261 BE CONCURRED IN. Rep. Hannah moved that SB 261 be amended. He moved that the title be amended, striking "a person 21 years of age or older" and inserting "an adult", and amending page 2, line 20 with the same language. Rep. Darko stated this amendment will not weakened the bill. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Rep. Giacometto proposed to delete 1000 feet. Rep. Darko pointed out that there is too much drug dealing going on near the school and she felt this should be left in. Rep. Brown stated Montana does have a problem with drugs and the more the state grows the larger the problem will get. He said, this kind of statute will have a big impact and this bill should be left alone. Rep. Mercer moved to amend on page 2, line 22-24, striking the language ", which" on line 22 through "school," on line 24. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached).

Rep. Miles pointed out she disagrees with the mandatory prison sentence of a minimum 4-20 years and there will be a fiscal impact on the prison system. She prefers to see a traditional type of penalty clause. Rep. Eudaily requested that section 2 be clarified. Rep. Mercer asked that Mr. MacMaster make a suggestion in regards to this. He stated that on Page 1, lines 20-23, it says that the person shall be imprisoned and fined and it does not refer to the language "or both". On page 2, lines 3-5, it says, shall be imprisoned and fined, and the same thing appears on lines 7-9. The words "or both" are added into the section in the amendment. This wording does not add anything to the bill. He suggested the words be deleted on page 3, lines 9-10, page 3, lines 17-22. Rep. Eudaily moved that this deletion should take place. Question was called and a voice vote was

taken. The motion CARRIED unanimously. (See Amendments Attached). Rep. Brown moved that SB 261 BE CONCURRED IN AS AMENDED. Rep. Mercer moved to amend on page 2, lines 10-14 striking "whenever" on line 10 through the end of line 14. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Question was called on the bill. A voice vote was taken and the motion CARRIED 11-1 with Rep. Miles dissenting. SB 261 BE CONCURRED IN AS AMENDED.

SENATE BILL NO. 361: Senator Halligan, District No. 29, stated this bill is by the request of the Board of Crime Control and deals with requiring the Department of Social and Rehabilitation Services to develop a plan for providing services to emotionally disturbed children and defining "emotionally disturbed child". This bill simply says that the Department is going to study the issue and it is not going to cost any money.

PROPONENTS: JEAN REBICH, Chairwoman of the Committee on Emotionally Disturbed Children and also the Director of Social Services at the Inner Mountain Deaconess Home for Children, stated presently there are no services available for the emotionally disturbed child and she urged support for this bill.

ROBERT RUNKEL, Monitoring Specialist, Department of Educational Services, stated this bill is necessary for schools, communities and the state to work closely together and this bill addresses that plan. He suggested two things that will strengthen the bill and they are: 1) Public Schools in Montana already have in place a procedure for identifying emotionally disturbed children for services in special education. This procedure includes a state and federally adopted definition. The determination of the emotional disturbance is made by a group of people called a "child Study Team". One way of accomplishing this would be to include this wording on page 3, line 15 of the bill. 2) Since the purpose of this bill is to develop a comprehensive and coordinated service plan, the effectiveness of the plan could be enhanced if the plan recognized the populations identified with each classification system. If line 18 on page 3 were to include special education handicapped, emotionally disturbed children, the bill would clearly communicate the intent for interdepartment coordination and the desire to include all children recognized as being emotionally disturbed. He submitted written testimony. (Exhibit A).

EILEEN MORGAN, Montana Association of School Psychologists, stated they applaud the idea of addressing the need of a better definition for emotionally disturbed children. She

stated they would like to see children who are defined as emotionally disturbed under special education laws and who are identified by child study teams to be included in this definition.

JOY MCGRATH, Mental Health Association of Montana, strongly supported this bill.

JOHN MADSEN, Department of SRS, went on record in support of this bill.

CANDACE WIMMER, Montana Board of Crime Control, supported this legislation with the considerations that Mr. Runkel mentioned.

STEVE WALDRON, Mental Health Center, supported this bill.

There were no further proponents and no opponents.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 361: Rep. Cobb asked Senator Halligan if this study committee was like what family services have done. Senator Halligan stated, "no, this is much more low keyed".

Rep. Eudaily asked Mr. Runkel to explain his second proposed amendment in regard to how it would fit into the bill. Mr. Runkel read the amendment and explained that the special education regulations have comprehensive criteria for the determination of children as being emotionally disturbed. The criteria is not always consistent with the categorical system and this amendment will make the needed change.

Rep. Hannah asked Senator Halligan where these kids are now that need help. He stated they are not getting help currently. If the child is emotionally disturbed presently, he is often thrown into a category of a delinquent child.

Rep. Eudaily questioned the title and asked Senator Halligan why the SRS has been put in instead of the Board of Crime Control. He pointed out that the Board provided the grant to fund the Governor's advisory council and then they provided the money for the people to look at the emotionally disturbed area and everyone is working together under the Board. He said, that the SRS is the appropriate agency to be the lead agency. He stated it is a major change but the SRS will still be the lead agency and it is within the title of the bill. There is no fiscal note on the bill, he said.

Senator Halligan closed the hearing on SB 361 by stating that some families simply cannot handle an emotionally disturbed child and there is no need for them to do a

delinquency petition on that child. He further pointed out that he agreed with the proposed amendments.

SENATE BILL NO. 223: Senator Eck, District No. 40, stated this bill extends confidentiality to mediators. Currently in the State of Montana there is a lot of concern for developing alternative methods for dispute resolution. The process of mediation has not come along way in Montana. She stated that a person acting as a mediator in a family law mediation cannot, without the consent of the parties to the mediation be examined in a civil action as to any communication made by a party to him during the course of the mediation.

PROPONENTS: REP. HANNAH went on record in support of this legislation.

There were no further proponents, no opponents and no questions.

Senator Eck closed the hearing on SB 223.

SENATE BILL NO. 338: Senator Boylan, District No. 39, sponsor, stated this is an act regulating the testing of blood and urine of employees and prospective employees. This bill sets the guidelines.

PROPONENTS: STEVEN UNGAR, A.C.L.U., submitted proposed amendments. (Exhibit A). He stated that support for this bill will benefit both employers and employees. He pointed out SB 338 curbs abuse on the part of the employers and it limits the abuse of drugs and the costs in terms of productivity and liability. It attempts to achieve a balance and for that reason it can appropriately be called a fairness in drug testing bill.

JIM MURRAY, Montana AFL-CIO, Executive Secretary, stated the Federation strongly believes the workplace should remain drug and alcohol free. Drug abuse and alcoholism can severely impair a worker's physical and mental performance while on the job. He pointed out that they strongly support the proposed amendments. He believes that SB 338 is a positive step towards creating a safe and productive workplace, while still respecting the rights of employees. He submitted written testimony. (Exhibit B).

EILEEN ROBBINS, Montana Nurses' Association, stated that MNA supports both amendments proposed and believes they make the bill fair to everyone. She pointed out that the bottom line is that employees who do not use drugs, although having nothing to hide, have the right to be left alone. She urged

a do pass recommendation and submitted written testimony. (Exhibit C).

JAMES T. MULAR, appearing on behalf of the joint council of Railway Brotherhoods in the State of Montana, stated that SB 338 addresses random testing for drugs and alcoholic abuses. He stated they support the amendments. He urged support.

ALAN NICHOLSON, Self-employed businessman, Helena, believes this legislation provides appropriate guidelines for drug testing for cause and it prevents arbitrary violations of personal privacy, it also curbs unnecessary abuse of the litigation process which is good for both employees and employers. He urged support but disagreed with the Senate amendment of Section C(a) in regard to the word "believes".

WAYNE C. TURNER, businessman, Big Sandy, favors the bill as amended but does not feel that the amendment on reasonable cause goes far enough. He pointed out that he believes in the presumption of innocence.

JOHN S. FITZPATRICK, Pegasus Gold Corporation, supports SB 338 as it existed in the third reading copy. He stated this bill reflects a reasonable approach to drug testing. He opposed the proposed first amendment because it restricts who can be tested but found no fault with the second amendment.

F. H. BUCK BOLES, Montana Chamber of Commerce, President, stated he disagrees with Mr. Ungar's approach for narrowing down Section 1(b). He believes it should be left up to the employer if he wants to test as condition of employment. He supported SB 338 with the above change.

BILL LEARY, Montana Hospital Association, supports this legislation as it passed the Senate but opposes the proposed amendment of Section 1(b) because the amendment does not cover public safety as envisioned to protect the patients in the hospitals from the illegal use of drugs. In that respect, he preferred the language currently in the bill.

WES HENTHORNE, B BAR Ranch, stated that SB 338 provides protection and he supported this legislation.

SUSAN GREGORY, Billings, pointed out that there is no such thing as 100% positive testing.

DAN C. EDWARDS, International Representative for the Oil, Chemical and Atomic Workers International Union, Billings, also speaking on behalf of the Montana State AFL-CIO, stated prior to his transfer to Billings, he was the Director of Health and Safety for the International Union, located in

Denver, Colorado. In that capacity, one of his areas of responsibility was to assist in the legal department in the development of a just and reasonable position regarding testing of employees for alcohol and drugs by employers. He stated there is a wave of hysteria sweeping the U.S. today surrounding this matter--and small wonder with the President and First lady being the head cheerleaders. OCAW does not support or condone in any way whatsoever, the use of drugs or alcohol on-the-job; however, unless it can be demonstrated by clear, objective evidence that a worker is impaired on the job, or that worker's job performance is affected, we believe that workers have the same rights as any other American against unwarranted employer intrusion into an employee's private life away from the workplace. It is not the role of the employer to be society's policeman. He urged that this modest piece of legislation to be passed. He submitted written testimony. (Exhibit D).

LYNN B. HETLAND, PhD Toxicologist, Billings, stated even though the ability to detect drugs and measure their concentrations in biological specimens has evolved into a highly sophisticated and reliable science and technology, there are intrinsic limitations with drug screening tests and errors are inevitable. Drug screening errors lead to two types of misinformation: false-positive and false-negative test results. He encouraged support for this bill and the modifications which are proposed. He submitted written testimony. (Exhibit E).

JEFF WRENS, Attorney, Billings, Legal Director of the American Civil Liberties Union of Montana, submitted written testimony as (Exhibit F) stating that SB 338 amends existing law on the use of lie detector testing (polygraphs) to include guidelines for the use of blood or urine tests as a condition of employment. It is outrageous to have everyone's privacy violated to catch the 1 or 2 percent who occasionally break the law, he said.

R. R. ROMNEY, Branch Manager, South-West Marketing Division, IBM, Helena, sent in written testimony. (Exhibit G). He stated an essential element in the overall company efforts to ensure a drug free workplace are the restrictions regarding pre-employment screening and should not be limited to narrowly defined job categories. He hoped that this section could be considered for amendment.

OPPONENTS: CHAS DEARDEN, Burlington Northern Railroad, stated he opposed the bill as written but supports the bill itself. His problem is that the treating of railroad employees for alcohol and drug abuse is already regulated by the Federal Government. He submitted 49 CFR Ch.11 (10-1-86 Edition) Section 219.1 from the Federal Railroad

Administration, DOT (Exhibit H). He pointed out that one of the underlined reasons for Federal regulations is to ensure uniformity within the states with regards to specific areas of the law. An amendment was proposed by Mr. Dearden on line 19 of the first page with regard to the exceptions listed. He requested that the word "Railroads" be inserted after the word "in". He further pointed out that this is not strictly a railroad argument, this argument is for any industry that is regulated by the Federal government, which would include airlines and airline pilots.

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 338: Rep. Giacometto asked Mr. Ungar about his comments on the committee taking out the language "illegal" on page 2, so that alcohol and other types of drugs could be covered. Mr. Ungar commented the bill is addressed to illegal drug use and to expand on this could be seen as a conflict between the basic structure of our society that makes a distinction between legal and illegal use of substances.

Senator Boylan closed the hearing on SB 338.

SENATE BILL NO. 121: Senator B. Brown, District No. 2, stated that this is an act establishing criteria determining when firearms or ammunition may not be considered defective in design in products liability actions and providing exceptions. In a products liability action, no firearm or ammunition may be considered defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged. The provisions of this section do no affect a products liability cause of action based upon the improper selection of design alternatives.

PROPONENTS: BRIAN JUDY, NRA legislative Liaison for the Northwest Region and a life member of the National Rifle Association, stated that product liability is an issue of growing concern in a number of industries and recreational activities, but no area is threatened more than the ownership and use of firearms by law-abiding citizens. SB 121 would assure that neither firearms nor ammunition could be deemed defective in design on the basis that the benefits of the product do not outweigh the potential danger. It will in no way, however, affect product liability actions based upon improper design, manufacturing defects, nor negligence on the part of the provider. He submitted written testimony (Exhibit A) and urged support for this legislation.

ROBERT VANDERVERE, stated this is an excellent bill.

ALFRED M. ELWELL, Montana Weapons Coalition, commented that he supports the legislation one hundred percent.

REP. JOHN MERCER, went on record in support of this bill.

OPPONENTS: BILL ROSSBACH, MTLA, (See Visitors' Register Attached).

QUESTIONS (OR DISCUSSION) ON SENATE BILL NO. 121: Rep. Miles asked Senator Brown about where design defects come into play. He explained that it gets into the reasonable manned area, if it presents a hazard in a typical situation and a manufacturer could get nailed for a design problem.

Rep. Eudaily asked Mr. Judy about subsection 3 and wondered what improper design means. He stated it goes back into the manufacturing process and if the safety of the firearm is of poor nature and it does not work effectively but the trigger could still be pulled while the safety was on, that is certainly a cause for action.

Senator Brown closed the hearing on SB 121 by stating that this bill says the gun is defectless and there should not be any liability. The bill does not protect an illegal firearm, or a defective firearm. This bill has been modeled after legislation in effect in other states.

SENATE BILL NO. 363: Senator Jacobson, District No. 36, stated that this bill established the minimum amount that must be deducted from an obligor's income under the child support income deduction act of 1981. She pointed out that in most cases where a provider must deduct 50% from his earnings for child support payments he or she will simply quit the job rather than pay the child support. This bill establishes a minimum of 25% so that a judge will have flexibility in setting the deduction between 25 and 50 percent to avoid that problem of feeling it is more beneficial to just quit their job. This is simply a matter that something is better than nothing.

THERE WERE NO PROPONENTS, OPPONENTS OR QUESTIONS.

Senator Jacobson closed the hearing on SB 363.

SENATE BILL NO. 241: Senator Keating, District No. 44, pointed out that this bill is a drug forfeiture bill and deals with the forfeiture of property that is legal property that may be obtained in a drug bust along with illegal property, that is the drugs itself. He stated at the present time the Federal Government can take onto itself that property belonging to someone who has broken the law and convert it into cash and put it into their account. At

the local level of government, sheriffs and police can do the same thing. The state has no forfeiture claim law on the books at the present time and the drug enforcement task force is instrumental in a number of drug bust enforcement and they have acquired property and yet they cannot move any of that money into a state special fund because there is no provision for it. This bill establishes that the net proceeds from a drug bust must be deposited into an account for the state special revenue fund to the credit of the Department of Justice. The account is to be used only for the purpose of drug enforcement. The money does not revert to the general fund. He stated that there is a provision for innocent persons. The convicted person is the only one that loses.

PROPONENTS: MARK J. MURPHY, Attorney General's Office, submitted a copy of the forfeiture statute from Title 21 of the US Code, 21 Section 881. (Exhibit A). He pointed out that the procedural requirements are good and he urged support for this legislation.

GARY J. CARRELL, Montana Criminal Investigation Bureau, Chief, for the Department of Justice, stated the drug problem in Montana is growing and the victims need protection. He urged support for SB 241.

OPPONENTS: ROBERT SCOTT, stated that Chapter 9 authorizes the forfeiture of the fruits of a life's work of tens of thousands of dollars value, unjustified, it is also counterproductive in that it removes much of the incentive to abandon use of the substance controlled. Also, application of the statute to possessory offenses is almost certainly a violation of the Eighth Amendment to the United States Constitution (prohibiting cruel and unusual punishment). If the intent here is to deprive the wrongdoer of his ill-gotten gains which have been used to finance real or personal property, proposed subsection 44-12-102(1)(i) MCA, as well as proposed subsection 4-12-102(1)(g), are overbroad, unnecessary and should be deleted. He submitted written testimony. (Exhibit B).

There were no further opponents and no questions.

Senator Keating closed the hearing on SB 241 by stating that the State of Montana has been trying to find ways of funding the drug enforcement task force and to say that we have a problem in this state with drugs is an understatement. Drugs is a very serious problem because we lack enforcement, because we lack the means of funding this enforcement. Montana is known as a drop state. We must do something drastic and serious and bring it to the mind of the criminal that drugs is a losing situation, he said. He urged that a

serious consideration be taken on this bill. The forfeiture money can be used to fight the enemy.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 12:18 p.m.

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 18, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)		✓	✓
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)		✓	✓
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

STANDING COMMITTEE REPORT

MARCH 13, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 261

- ☐ do pass
- ☐ do not pass
- ☒ be concurred in
- ☐ be not concurred in
- ☒ as amended
- ☐ statement of intent attached

____
Chairman

1. Title, line 6.
Strike: "A PERSON 21 YEARS OF AGE OR OLDER"
Insert: "AN ADULT"

2. Title, lines 7 and 8.
Strike: "ON OR WITHIN PROXIMITY TO THE REAL PROPERTY COMPRISING A SCHOOL"

3. Page 2, lines 10 through 14.
Strike: "[illegible]" on line 10 through end of line 14

4. Page 2, line 16.
Strike: "[illegible]"
Insert: "[illegible]"
Following: "(2)"
Strike: "[illegible]"
Insert: "[illegible]"
Following: "(3)"
Insert: ", or (5)"

5. Page 2, line [illegible].
Strike: "[illegible] YEARS OF AGE OR OLDER"
Insert: "who [illegible] an adult"

6. Page 2, line 21.
Following: "[illegible]"
Insert: "[illegible]"

7. Page 2, lines 22 through 24.
Strike: ", which" on line 22 through "school," on line 24

8. Page 3, line 3, end of line 9 and beginning of line 10, and [illegible] 17 and [illegible].
Strike: "[illegible],"

SB0261[illegible]/JM/[illegible]

Check microfiche copy

THIRD reading copy (BLUE)
color

REP. BROWN WILL CARRY THE BILL!

A
3-18-87
SB 361

OFFICE OF PUBLIC INSTRUCTION
STATE CAPITOL
HELENA, MONTANA 59620
(406) 444-3095

Ed Argenbright
Superintendent

March 17, 1987

To: Representative Earl Lory, Chairman
House Judiciary Committee

From: Robert Runkel, Monitoring Specialist
Department of Educational Services

Re: Testimony on Senate Bill 361

The Office of Public Instruction supports this bill requiring the Department of Social and Rehabilitation Services to develop a plan for providing services to emotionally disturbed children. Emotionally disturbed children often have extensive educational and treatment needs that can only be addressed through the cooperation of schools, communities, and state agencies. To achieve this cooperation, it is important that the population of emotionally disturbed children be identified and a comprehensive plan for services be developed.

To further strengthen this bill, the Office of Public Instruction has two suggestions that the committee may wish to consider. First, public schools in Montana already have in place a procedure for identifying emotionally disturbed children for services in special education. This procedure includes a state and federally adopted definition. The determination of the emotional disturbance is made by a group of people called a "Child Study Team." The required participants on the team are established in state regulations. We feel that this is a sound process and that the teams' decisions should be recognized in the definition of emotionally disturbed children in Senate Bill 361. One way of accomplishing this would be to include Child Study Teams on page 3, line 15 in the bill.

Second, the bill requires the use of a nationally recognized classification system such as Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM III). It is important to recognize that DSM III and special education regulations are not necessarily compatible. Children identified under one classification system may not fit the other classification system. Since the purpose of this bill is to develop a comprehensive and coordinated service plan, the effectiveness of the plan could be enhanced if the plan recognized the populations identified with each classification system. If line 18 on page 3 were to include special education handicapped, emotionally disturbed children, the bill would clearly communicate the intent for interdepartment coordination and the desire to include all children recognized as being emotionally disturbed.

It is our goal, if this bill passes, to work diligently with other agencies to develop this comprehensive plan of services for all children. Schools are a central component of this plan and can offer effective interventions, both in and out of special education. Community and state agencies are a central component of this plan and are critical to the effectiveness of the services offered in education. Each of us know that we cannot do it alone.

The Office of Public Instruction recognizes this bill as a positive step and does not desire to jeopardize its passage by suggesting the above changes. The suggestions are made in the belief that they would strengthen the bill by ensuring that the comprehensive plan to be developed would be certain to address the coordination of school, community and state agency services for all emotionally disturbed children, including the 616 special education emotionally disturbed children.

mec2

VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 361 DATE March 18, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Lee Walker	Mental Health Ctr. East	X	
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		

check
sent
copy

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

[PROPOSED CHANGES ARE HIGHLIGHTED.]

SENATE BILL NO. 338

INTRODUCED BY BOYLAN, RAPP-SVRCEK, VINCENT, STRIZICH, PINSONEAULT, BRADLEY

A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE TESTING OF BLOOD AND URINE OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; AND AMENDING SECTION 39-2-304, MCA."

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

Section 1. Section 39-2-304, MCA, is amended to read:

"39-2-304. Lie detector tests prohibited -- exception regulation of blood and urine testing. (1) No person, firm, corporation, or other business entity or representative thereof shall require:

(a) as a condition for employment or continuation of employment, any person to take a polygraph test or any form of a mechanical lie detector test;

(b) as a condition for employment, any person to submit to a blood or urine test, EXCEPT FOR EMPLOYMENT ~~IN HAZARDOUS WORK ENVIRONMENTS OR IN JOBS THAT INVOLVE SECURITY, PUBLIC SAFETY, OR FIDUCIARY RESPONSIBILITY,~~ and

(c) as a condition for continuation of employment, any employee to submit to a blood or urine test unless:

(i) the employer has-demonstrable-evidence BELIEVES that the employee's faculties are impaired on the job as a result of illegal drug use;

~~(ii) the employee's impairment presents a clear and present danger to his own safety or the safety of others;~~

(2) PRIOR TO THE ADMINISTRATION OF A DRUG TEST, THE PERSON, FIRM, CORPORATION, OR OTHER BUSINESS ENTITY OR ITS REPRESENTATIVE SHALL ADOPT A WRITTEN DRUG TESTING PROCEDURE AND MAKE IT AVAILABLE TO ALL PERSONS SUBJECT TO DRUG TESTING. A DRUG TESTING PROCEDURE MUST PROVIDE FOR THE:

(A) COLLECTION OF A BLOOD OR URINE SPECIMEN IN A MANNER THAT MINIMIZES INVASION OF PERSONAL PRIVACY WHILE ENSURING THE INTEGRITY OF THE COLLECTION PROCESS;

(B) COLLECTION OF A QUANTITY OF SPECIMEN SUFFICIENT TO ENSURE THE ADMINISTRATION OF SEVERAL TESTS;

(C) COLLECTION, STORAGE, AND TRANSPORTATION OF THE SPECIMEN IN TAMPER-PROOF CONTAINERS;

(D) ADOPTION OF CHAIN-OF-CUSTODY DOCUMENTATION PROCEDURES IDENTIFYING HOW THE SPECIMEN WAS HANDLED AND TESTED;

(E) VERIFICATION OF DRUG TEST RESULTS BY TWO OR MORE DIFFERENT TESTING PROCEDURES BEFORE JUDGING A DRUG TEST POSITIVE; AND

(F) PROHIBITION OF THE RELEASE OF DRUG TEST RESULTS, EXCEPT AS AUTHORIZED BY THE PERSON TESTED OR AS REQUIRED BY A COURT OF LAW.

~~(iii) the employer gives the employee~~ (3) THE PERSON,

HAS REASON TO

AS AN OPERATOR OF MACHINERY OR EQUIPMENT (INCLUDING THAT USED IN TRANSPORTATION), WHEN THE OPERATOR'S IMPAIRMENT WOULD POSE A THREAT TO THE PUBLIC SAFETY.

SB 0338/02

2-18-87 SB # 338

THIRD READING

B
3-18-87
SB 338

MONTANA STATE AFL-CIO
APRIL 29 1956

Box 1176, Helena, Montana

JAMES W. MURRY
EXECUTIVE SECRETARY

ZIP CODE 59624
406 442-1708

TESTIMONY OF JIM MURRY ON SENATE BILL 338 BEFORE THE HOUSE JUDICIARY COMMITTEE, MARCH 18, 1987

Good morning. For the record, my name is Jim Murry and I am the executive secretary of the Montana State AFL-CIO. We are here today to testify in support of Senate Bill 338.

Our labor federation strongly believes that the workplace should remain drug and alcohol free. Drug abuse and alcoholism can severely impair a worker's physical and mental performance while on the job. And the serious consequences caused by drug and alcohol abuse are harmful not only to the person involved, but also to family, friends and co-workers.

However, it is important to understand that alcohol and drug abuse are illnesses and not crimes. Individuals suffering from these addictions deserve treatment, not punishment.

Unfortunately, it has become all to common for employers in both the public and private sectors, to use arbitrary random drug testing as a method to screen all job applicants or as a condition of employment.

We strongly oppose the use of random drug tests because they present an invasion of individual privacy and violate the constitutional guarantee against unreasonable search and seizure. In working towards a drug-free work environment we must also make sure we do not infringe on employees' constitutional rights.

We support the amendment to this bill which eliminates random drug testing of existing employees. Also, we agree with the amendment which requires employers to follow written guidelines that must be made available to employees.

Employers need to be aware that drug testing procedures are not failsafe. False positives can occur at least 25 percent of the time. They can be triggered by such common substances as cold medications, cough syrups, caffeine and asthma medications. Because of this high degree of inaccuracy, we believe that employees might be falsely labeled as substance abusers or discharged without cause.

The Montana State AFL-CIO believes that both workers and employers should continue working together to develop constructive solutions to drug and alcohol abuse. We do not believe that employers, who are increasingly caught in the hysteria surrounding drug use, should use improper or punitive testing procedures.

We believe that Senate Bill 338 is a positive step towards creating a safe, and productive workplace, while still respecting the rights of employees. For these reasons, we ask you to give Senate Bill 338 a "do pass" recommendation.

(2)
3-20-87
SB 338

Montana Nurses' Association

(406) 442-6710

P.O. BOX 5718 • HELENA, MONTANA 59604

SB 338

Mr. Chair, members of the committee, my name is Eileen Robbins, speaking on behalf of the Montana Nurses' Association, a labor organization with over 1400 registered nurse members across the state of Montana.

The Montana Nurses' Association supports SB 338 which, if passed, would regulate the testing of blood and urine of both employees and prospective employees.

Job performance should be the deciding factor in the retention of employees. If an employee cannot perform a given job due to being high, stoned, drunk, or otherwise impaired on the job, the employer has every right and responsibility to insist on appropriate discipline. But testing should only be used after there is evidence through unsatisfactory job performance that an employee may be impaired.

Blood and urine tests are not accurate unless there is evidence of impairment, because urine may test positive for a drug like marijuana days after smoking one joint. It is not the employer's business to hold in judgment an employees' actions during non work time, unless the employee's work performance suffers.

C
3-18-87
SB # 338

The Montana Nurses' Association supports SB 338 because it is both unfair and unreasonable to force workers who are not even suspected of using drugs, and whose job performance is satisfactory, to submit to degrading and intrusive urine tests. Innocent workers should not be treated as "guilty".

MNA also strongly opposes subjecting an applicant to a pre-employment blood or urine test as a condition of employment, because the tests are not an accurate measurement of an individuals ability to perform a given job if hired.

MNA supports both amendments which are being offered here today, and believes that they make the bill FAIR TO EVERYONE

This bill is good for employees and employers because wrongful discharge lawsuits and grievances are increasing in number for alleged unfair or inaccurate drug tests; without guidelines, employers are exposed to great liability, and employees are susceptible to a humiliating and degrading experience. With the passage of SB 338, an employer will reduce liability risks, have a good defense to actions related to drug testing, and will have objective criteria available for use in dealing with workers who have work performance problems linked to use of drugs.

The bottom line is that employees who do not use drugs, although having nothing to hide, have the right to be left alone!

I urge you give this bill a DO PASS recommendation with the inclusion of the amendments offered today.

Respectfully submitted,
Eileen C. Robbins, R.N.
March 18, 1987

D
3-18-87
SB #338

SB-338
(Proposing to Amend 39-2-304)

STATEMENT OF DAN C. EDWARDS
International Representative

Oil, Chemical and Atomic Workers International Union
P.O. Box 21635
Billings, MT 59104
669-3253

Before the HOUSE JUDICIARY COMMITTEE, 9:00 a.m., March 18, 1987, Helena, MT.

Good Morning:

My name is Dan Edwards. I am an International Representative with the Oil, Chemical and Atomic Workers International Union. I live in Billings, but my area of assignment includes the entire State of Montana. I am also speaking on behalf of the Montana State AFL-CIO on this Bill.

The Oil, Chemical and Atomic Workers International Union (OCAW) represents approximately 110,000 workers in the oil, chemical and related industries. As are all of you, OCAW is vitally concerned about the abuse of alcohol and drugs in our society. However, we are also vitally concerned that any policy or program that deals with the testing of workers for alcohol or drugs be based upon a sound "probable cause" basis.

Perhaps before I go any further, I should briefly tell of my background in this field. Prior to my transfer to Billings in the latter part of 1986, I was the Director of Health and Safety for the International Union, located in Denver, Colorado. In that capacity, one of my areas of responsibility was to assist our Legal Department in the development of a just and reasonable position regarding testing of employees for alcohol and drugs by employers. For a period of nearly 18 months I spent about 80% of my time doing research in this area and assisting OCAW Local Unions across the Country in fighting unreasonable, unfair testing programs. This experience makes me qualified to address this most important Bill.

D

SB 338

There is a wave of hysteria sweeping the United States today surrounding this matter--and small wonder with the President and First Lady being the Head Cheerleaders. We hear so much about the evils of drugs--and they are evil--that very little is being said about the many problems that are found regarding the adoption of workplace drug testing programs. Problems that deal with the accuracy of the testing, of the accurate reporting of the results of drug testing, of persons exposed to marijuana smoke, but not smoking it themselves, testing positive, of the absolute necessity for reasonable "sensitivity" or "cut off" levels for determining that an employee has tested positive for drugs, and of the stigma that can attach itself to a worker when that worker is required to "pee in the bottle".

First, I want to make it very clear that OCAW does not support or condone in any way whatsoever, the use of drugs or alcohol on-the-job, or coming to work under the influence of any substance. However, unless it can be demonstrated by clear, objective evidence that a worker is impaired on the job, or that a worker's job performance is effected, we believe that workers have the same rights as any other American against unwarranted employer intrusion into an employee's private life away from the workplace. IT IS NOT THE ROLE OF THE EMPLOYER TO BE SOCIETY'S POLICEMAN. That's what this Bill SB-338 is all about.

The abuse of alcohol and drugs is not new. In fact, figures I have seen seem to indicate that in some areas the use (and abuse) of alcohol and drugs is actually declining as people become better informed about the hazards of their use. What is new, is the technology to cheaply detect the metabolites of certain drugs in a persons body fluids. In my sincere opinion, one of the major driving forces behind the rash of drug testing programs are the many company--most of them brand new companies that didn't even exist a few years ago--which see BIG BUCKS to be made by selling industry drug testing programs. Drug testing kits for the initial drug screen can be found for under $5.00 each. Now any reputable drug testing company is going to require that a second test, using a different methodology be done to confirm the results since the tests used for the initial screening can have a high rate of

D

SB# 338

false-positives. But, there are no laws that I'm aware of in any State in the Nation to require confirmation testing to be done. I don't think it takes a real genious to see that many companies, especially smaller companies, are not going to bother to have the confirmation testing done--especially since the confirmation testing is much more expensive ($75-100.00). They are simply going to fire the worker if they can.

I used the word "false-positive" just a minute ago. This term means that a test comes back as "positive" when in fact the drug or substance being tested for is not present in the sample. There are many reasons this can happen. Rather than take your valuable time here today I have attached a copy of a study done by the Center for Disease Control (CDC) which shows false-positive error rates as high as 66% in drugs commonly tested for. This scientific study was published in the Journal of the American Medical Association in April of 1985. If you take the time to read this study you will see why caution is necessary.

A second thing about drug testing that most people aren't aware of is that the drug tests we have been talking about do not detect the psychoactive ingredients in a person's urine--they detect the metabolites of the drugs. In some cases, most notably marijuana, the drug metabolites can remain stored in a persons body fat for many weeks. The metabolites do not cause impaired performance. In fact, all manufacturers of drug testing kits are very careful to point out in their literature that a positive test does not prove impairment, or under the influence.

It is for the above reasons, that even when drug testing is done in "for cause" situations reasonable "sensitivity" or "cut off" levels must be established. The OCAW has spent a great deal of time and effort to determine what constitutes reasonable sensitivity levels for the drugs commonly tested for. Our Legal Department and Health and Safety Department collaborated with David Johnson, M.D., Professor of Internal Medicine and Pharmacology and Chief of the Endocrinology Section at the University Medical Center, University of Arizona College of Medicine, to arrive at reasonable sensitivity levels--these are attached as Appendix A.

D

SBA 338

There are many other pieces that were we here today to talk about the development of reasonable drug testing policies between management and the Union, I would go into. Since, however, my purpose here today is to urge this Committee to pass this modest piece of legislation, I will end my prepared remarks at this point.

I would be pleased to answer any questions that members of the Committee might have.

Thank you.

Respectfully submitted,

Dan C. Edwards

Dan C. Edwards

D

#338

APPENDIX A :

The following levels of toxicity are reasonable and shall be utilized as minimum guidelines:

Amphetamines (dextro-amphetamines, methamphetamine and phentermine);
Between 3 and 10 micrograms per mil

Barbituates (secobarbital, amobarbital, butabarbital, pentobarbital, phenobarbital):
Between 20 and 60 micrograms per mil

Benzodiazepines (diazepam, desmethyldiazepam, chlordiazepoxide, oxazepam):
Between 10 to 30 micrograms per mil

Benzoylecogonine:
Between 6 and 60 micrograms per mil

Cannabinoids:
Between 100 and 150 nanograms per mil

Methadone:
3 to 10 micrograms per mil

Methaqualone:
50 micrograms per mil

Opiates:
Morphine: 3 micrograms per mil
Codeine: 10 micrograms per mil
Phencyclidine: between 0.6 and 6 micrograms per mil

EXHIBIT D

SB 338

Crisis in Drug Testing

Results of CDC Blind Study

Hugh J. Hansen, PhD; Samuel P. Caudill, PhD; D. Joe Boone, PhD

• **In response to questions about the reliability of the results of screening urine for drugs, we evaluated the performance of 13 laboratories, which serve a total of 262 methadone treatment facilities, by submitting prereferenced samples through the treatment facilities as patient samples (blind testing). Error rates for the 13 laboratories on samples containing barbiturates, amphetamines, methadone, cocaine, codeine, and morphine ranged from 11% to 94%, 19% to 100%, 0% to 33%, 0% to 100%, 0% to 100%, and 5% to 100%, respectively. Similarly, error rates on samples not containing these drugs (false-positives) ranged from 0% to 6%, 0% to 37%, 0% to 66%, 0% to 6%, 0% to 7%, and 0% to 10%, respectively. These blind tests indicate that (1) greater care is taken with known evaluation samples than with routine samples, (2) laboratories are often unable to detect drugs at concentrations called for by their contracts, and (3) the observed underreporting of drugs may threaten the treatment process. Drug treatment facilities should monitor the performance of their contract laboratories with quality-control samples, preferably through blind testing.**

(*JAMA* 1985;253:2382-2387)

FROM 1972 through 1981, the Centers for Disease Control (CDC), in conjunction with the National Institute on Drug Abuse, conducted a proficiency testing (PT) program for drugs-of-abuse screening laboratories.[1] In this program, ten drug-spiked urine samples were mailed quarterly to each participating laboratory (each laboratory received 40 "mailed PT" samples per year). The participants in the program tested the samples for the requested drugs and submitted a report for grading on each quarterly survey by the cutoff date. If at least 80% of the responses were correct, the laboratory was classified as "satisfactory"; otherwise, the laboratory was classified as "unsatisfactory."

Early in the program, allegations were made that some laboratories were not subjecting mailed PT samples to the same testing procedures as their routine patient samples. These claims prompted two CDC studies in which data were collected through an alternative mode of PT—the blind test. This mode of testing requires the use of a dedicated surrogate office to introduce the test samples into the laboratory without the laboratory's knowledge (for example, a physician's office or a drug treatment facility). In these studies (one in 1973, with 24 laboratories, and another in 1975, with nine laboratories), results of mailed PT were compared with blind PT laboratory performance.[2] Although the percentage of drugs detected by laboratories in the two studies ranged from 76% to 100% (average, 98%) on mailed PT samples, the percentage on blind PT samples for the same laboratories testing identical samples ranged from 11% to 100% (average, 69%). Additional CDC blind studies (an initial study in 1978 conducted with the assistance of the Federal Bureau of Prisons and another in 1980 with the assistance of two treatment centers) provided results similar to those from the earlier CDC blind studies.[3] The percentage of drugs detected by the six laboratories ranged from 37% to 74% (average, 61%).

Supportive of the CDC blind studies, other investigators have reported on blind studies that showed error rates of a magnitude comparable with those found by the CDC. In one such study, in 1976, Gottheil et al[4] reported blind testing results for a drug-screening laboratory that detected only 65% of the drugs in the samples.

From the Clinical Chemistry and Toxicology Section, Performance Evaluation Branch, Division of Technology Evaluation and Assistance (Drs Hansen and Boone), and Management Development and Consultation Division (Dr Caudill), Laboratory Program Office, Centers for Disease Control, Atlanta. Dr Hansen is now with the National Institute for Occupational Safety and Health, Centers for Disease Control, Atlanta.

Reprint requests to Centers for Disease Control, Bldg 6, Room 316, 1600 Clifton Rd NE, Atlanta, GA 30333 (Dr Boone).

purposes of this report, the acceptance sampling plans used were designed to classify laboratories as acceptable or unacceptable based only on their FNRs. This decision was made because false-negatives tended to occur much more frequently than false-positives and because the results when presented in this form are more amenable to comparison with results in previous studies.

The acceptance sampling plans for each drug or drug class are presented in Table 2, where n represents the number of positive challenges and r represents the maximum number of false-negatives a laboratory could have and still be classified as acceptable. Also presented in Table 2 are the probabilities with which laboratories with the associated FNR would be expected to be classified as acceptable based on the corresponding sampling plan. These probabilities give an indication of how well the various sampling plans should perform in discriminating between laboratories with various FNRs. Inspection of Table 2 will show that these plans can be expected to classify (with $P > .90$) laboratories with an FNR of 0.05 or less as acceptable and to classify (with $P \leq 0.10$) laboratories with an FNR of 0.20 or greater as acceptable. For example, a laboratory with an FNR of 0.05 for barbiturates would have a probability of about .96 of receiving an acceptable classification (ie, four or fewer false-negatives in a set of 38 samples containing barbiturates), whereas a laboratory with an FNR of 0.20 for barbiturates would have a probability of only .10 of receiving an acceptable classification.

In the evaluation process, barbiturates and amphetamines were each treated as a class. The metabolites of methadone and cocaine were added to mimic a patient sample and were not treated separately. Morphine and codeine were treated separately. At the treatment facilities, the blind samples were intermixed among patient samples and thereafter treated exactly as patient samples. The number of blind samples entering the laboratory from any given treatment facility was not greater than 10% of the total number of samples submitted.

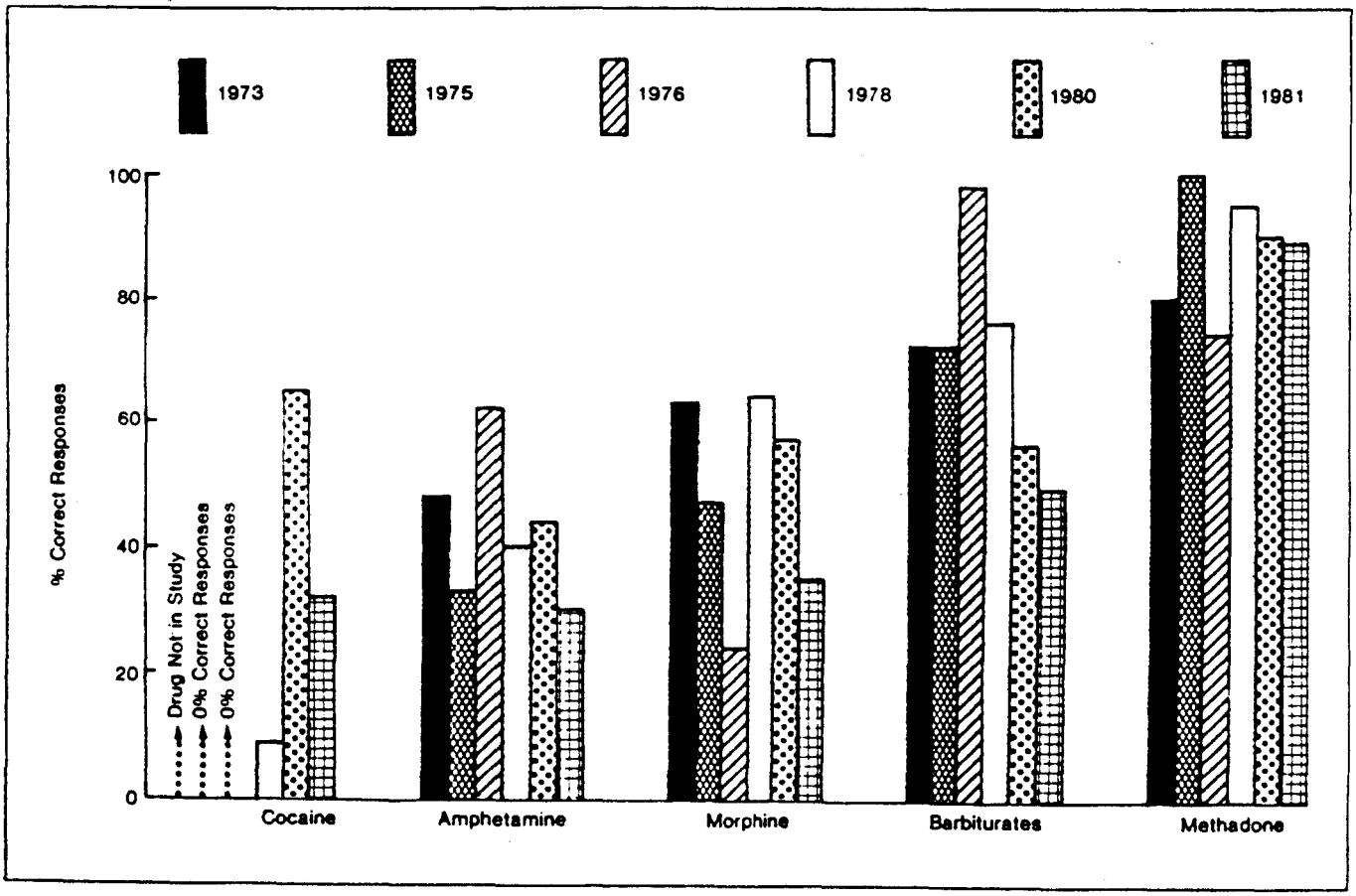
Table 3.—Laboratories With Acceptable Performance*

Drug or Drug Class	Total No. of Laboratories†	No. (%) of Laboratories With Acceptable Performance
Barbiturates	11	1 (9)
Amphetamines	12	0 (0)
Methadone	12	6 (50)
Cocaine	11	1 (9)
Codeine	13	2 (15)
Morphine	13	1 (8)

*Laboratories were considered acceptable for a particular drug based on the statistical design of the 1981 blind study.

†To ensure (with $P \geq .95$) that laboratories with a false-negative rate of 0.25 or more would be classified as unacceptable and to ensure (with $P \geq .90$) that laboratories with a false-negative rate of 0.05 or less would be classified as acceptable, only laboratories subjected to at least 29 positive challenges for a given drug or drug class were included.

Comparison of blind studies, 1973 through 1981, shown as the percentage of correct responses on positive challenges by drug: 1973, Centers for Disease Control (CDC), 24 laboratories; 1975, CDC, nine laboratories; 1976, Jefferson Medical College, one laboratory (see reference 4); 1978, CDC, four laboratories; 1980, CDC, two laboratories; 1981, CDC, 13 laboratories. (Supporting data for this figure contained in Table 4.)



RESULTS

The number and percentage of laboratories whose performance was found acceptable on a particular drug according to the acceptance sampling plan described in Table 2 are shown in Table 3. A graphic comparison by drug or drug class of the overall correct response rates of the 13 laboratories in the 1981 CDC blind study with those obtained in the aforementioned five previous studies is presented in the Figure, with supporting data summarized in Table 4.

A summary of results on positive samples by drug for each laboratory in the blind study is provided in Table 5. Similarly, a summary of results on positive samples used in mailed PT surveys 1979 II through 1981 I are listed by drug for each laboratory in Table 6 (quarterly surveys are designated by a number I through IV). Although not listed, there were at least 36 non-drug-containing (negative) samples for each of the drugs per laboratory in both blind and composite mailed PT surveys (except for laboratories B and [illegible] in the mailed surveys). A summary of correct response rates on both positive and negative samples is listed in Tables 7 and 8 for the blind study and for the composite of mailed surveys. All laboratories in the study had satisfactory scores in the mailed PT survey before the blind test was performed.

For the drugs used in the evaluation, an increase in correct response rate on positive samples with increased drug concentration was suggested by a χ^2 goodness-of-fit test for the drugs—barbiturates ($P<.002$), morphine ($P<.008$), and codeine ($P<.009$)—test results were not significant for D-amphetamine and methadone; methamphetamine and cocaine did not have a range of concentrations amenable to analysis.

Table 7.—Comparison of Laboratory Performance on Positive Samples From Blind Study and Mailed Surveys.*

Drug or Drug Class	Blind Study: Average No. of Challenges per Laboratory	Blind Study: Average CRR, %	Blind Study: CRR Range, %	Mailed PT: Average No. of Challenges per Laboratory	Mailed PT: Average CRR, %	Mailed PT: CRR Range, %
Barbiturates	35	41	6-89	36	98	92-100
Amphetamines	44	31	0-81	34	96	92-100
Methadone	41	88	67-100	32	100	97-100
Cocaine	32	36	0-100	28	96	87-100
Codeine†	37	45	0-100	30	91	68-100
Morphine†	36	38	0-86	30	89	69-100

*Correct response rates (CRRs) for 13 laboratories in the Centers for Disease Control test data: 1981 blind study and mailed proficiency testing (PT) surveys 1979 II through 1981 I (quarterly surveys are designated by the numbers I through IV). Laboratory A did not participate in mailed PT survey for 1981 I.
†Service for these drugs was not offered by laboratory F.

Table 8.—Comparison of Laboratory Performance on Negative Samples From Blind Study and Mailed Surveys*

Drug or Drug Class	Blind Study: Average No. of Challenges per Laboratory	Blind Study: Average CRR, %	Blind Study: CRR Range, %	Mailed PT: Average No. of Challenges per Laboratory	Mailed PT: Average CRR, %	Mailed PT: CRR Range, %
Barbiturates	53	100	94-100	38	100	98-100
Amphetamines	49	97	63-100	41	99	97-100
Methadone	51	88	34-100	43	100	98-100
Cocaine	61	99	94-100	46	100	98-100
Codeine†	55	99	93-100	44	99	95-100
Morphine†	56	98	90-100	44	98	92-100

*Correct response rates (CRRs) for 13 laboratories in the Centers for Disease Control test data: 1981 blind study and mailed proficiency testing surveys 1979 II through 1981 I (quarterly surveys are designated by numbers I through IV). Laboratory A did not participate in mailed proficiency testing survey 1981 I.
†Service for these drugs was not offered by laboratory F.

COMMENT

The results presented in this article show that the laboratories in the study missed a substantial number of the drug challenges. While the results reflect serious shortcomings in the laboratories, the laboratories are only a part of a complex picture involving also the treatment centers, the clients, and the local, state, and federal governments. As early as 1972, Finkle[4] mentioned the lack of common standards or operational guides among treatment facilities and the absence of "regulations" for analytical practice in the laboratories. Our observations confirm that little has changed even a decade later; contracts between treatment facilities and laboratories lack uniformity in minimum reporting levels, minimum quality-control requirements, and reporting procedures for results. Some treatment facility directors were knowledgeable about the content of their laboratory contracts, but others appeared to have only superficial knowledge of the contract or had no written contract at all.

A possible factor in laboratory behavior resulting in the high level of false-negative errors reported herein may be laboratory perceptions of the kind of results that substantiate progress in the treatment setting. Specifically, negative results are an indicator of successful treatment and the compliance of the patient as well. In addition, they justify the public expenditures for such types of treatment, decrease laboratory costs, and reduce the likelihood that legal means will need to be pursued.

The laboratory behavior leading to low correct response rates on blind samples and generally higher correct response rates on mailed samples does not appear to be the avoidance of testing ("sink testing") in the blind studies; rather, the data suggest less sensitive testing. For example, methadone has the highest correct response rate for both blind and mailed surveys, whereas amphetamines have the lowest for both surveys. This agreement in both testing modes suggests that the minimum reporting levels are higher (less sensitive) in routine testing than in mailed PT. Less sensitive testing may be the primary factor responsible for the high FNRs and comparatively lower FPRs. Less sensitive testing (which means that more drugs will be missed) may result from methodological design, personnel problems, or the reimbursement process. Because contracts are generally awarded to

E

3-18-89
SB # 338

TESTAMONY OF LYNN B. HETLAND, PhD
BEFORE THE JUDICIARY COMMITTEE OF THE
MONTANA STATE HOUSE OF REPRESENTATIVES

Amendments to Senate Bill 338

March 18, 1987

Mr. Chairman and distinguished committee members I am Dr. Lynn Hetland, a PhD Toxicologist from Billings, Montana. I am testifying on my own behalf as a concerned citizen and as a proponent of SB 338 as ammended in your current draft (which incorporates recent changes proposed by the A.C.L.U.). I have directed medical laboratories in Billings over the last ten years and in that capacity have been intimately involved with drug testing; particularly, drug screening in clinical and forensic cases. My remarks today are focused on technology-related issues and the "state of the art" of drug screening as it currently exists in 1987.

Even though our ability to detect drugs and measure their concentrations in biological specimens has evolved into a highly sophisticated and reliable science and technology, there are intrinsic limitations with drug screening tests and errors are inevitable. Sources of error include the presence of other substances in urine, contaminated specimens, mislabled specimens, and laboratory performance errors, especially in mass screening programs.

Drug screening errors lead to two types of misinformation: false-positive and false-negative test results. A "false-positive" is the reporting of a positive result when the drug sought is not present. False-positive reactions may occur, for example, when "over-the-counter" drugs cross-react in drug screening systems (RIA & EMIT) that are designed to detect stimulants, or sedatives, or narcotics. The active ingredients

in commonly used, non-prescription, nasal decongestants and other cold and flu remedies, or minor pain medications may be misidentified as amphetamines, or marijuana, respectively. A "false-negative" occurs when the drug of interest is present but not detected. False-negative reactions may be due to faulty specimen collection, storage and handling, or analytical error, or specimen adulteration.

Because of increased drug screening activity across our country, many existing laboratories are being flooded with samples, and new laboratories are springing up overnight to take advantage of this lucrative market in which millions of specimens will be tested. Data from quality assurance programs suggests that drug screening performance ranges from very poor to very good. In one such study, conducted by the Center For Disease Control, in which known drugs were added to urine and submitted for analysis as "routine specimens", the error rate in laboratories ranged from 11 to 100%. Most errors were false-negatives, but false-positives were present at significant rates as well.

In view of the problems associated with drug screening procedures, the issue of independent confirmation of "positive" drug screen results is critical! All "positive" tests should be confirmed by an alternative analytic method.

Technology traps people and they begin to serve the technology more committedly than it serves them. Such entrapment is aided by a refusal to be critical in the face of flawed technological approaches. I encourage you to support SB 338 and the modifications which are before you.

Mr. Chairman, this concludes my prepared testimony.

E
3-18-87
SB # 338

Legislative Fact Sheet

SENATE BILL 338

"F A I R N E S S I N D R U G T E S T I N G"

SB. 338 amends existing law on the use of lie detector testing (polygraphs) to include guidelines for the use of blood or urine tests as a condition of employment (Section 39-2-304 M.C.A.).

The new section states that in order to require a blood or urine test, an employer must have reason to believe, ~~and demonstrable evidence~~, that the employee was impaired on the job due to illegal drug use, and that his/her impairment presented a safety risk.

If this threshold is satisfied, and the employee tests positive for drugs, he/she must be allowed a "confirmatory" test and the opportunity to explain the results.

Drug testing guidelines are needed in Montana, by employees and employers alike, for the following reasons:

A. VIOLATION OF CONSTITUTIONAL STANDARDS

-blood and urine tests are considered "bodily searches" under the Fourth Amendment's prohibition against unreasonable searches and seizures.

-tests should be limited to workers who are reasonably suspected of illegal drug use on the job.

-indiscriminate testing is un-American: it is unfair to treat the innocent and guilty alike.

-Although the U.S. Constitution does not apply to private employers, the Montana Constitution guarantees a much broader protection of personal privacy and should protect our citizens against the abuses of unrestricted drug testing.

-numerous drug testing programs of public employees (firefighters, customs agents, school teachers, prison guards) have been invalidated as unconstitutional.

B. UNRELIABILITY

-the most commonly used urine test (EMIT) results in a "false positive" as much as 30% of the time.

-urine tests commonly confuse cold medications, headache remedies and even some foods for illegal drugs.

F
3-18-88
SB #338

-dirty specimen bottles, poor lab techniques, and mix-ups in the "chain of custody" can all result in faulty tests.

-follow-up "confirmatory" tests are rarely done, despite the fact that the employee's job is on the line.

C. UNFAIR TO EMPLOYEES

-giving a urine sample can be a humiliating and degrading experience -- the employee must urinate while being closely observed by another person -- and yet failure to take the urine test results in dismissal.

-long-time employees with good work records are being fired on the basis of a single and often inaccurate test.

-dismissals due to a "false positive" result can plague an employee for the test of his/her working life.

-even if the result is <u>negative</u>, suspicion itself can cause the employee irreparable harm.

D. EMPLOYERS NEED GUIDELINES

-wrongful discharge and bad faith lawsuits are assaulting employers in increasing numbers; a growing number of these suits are filed by employees fired for what they contend were unfair or inaccurate drug tests.

-without guidelines, the employer is exposed to great liability.

-the proposed amendment will provide guidelines and reduce this risk: an employer who has followed the proposed procedures will have a good defense to these actions.

E. ISSUE OF PRIVACY

-urine tests don't measure current impairment -- job performance should be the bottom line.

-urinalysis cannot determine <u>when</u> a drug was ingested -- what happens on Saturday night is not the employer's business.

-people who don't use drugs may have "nothing to hide," but under our system of government they have the right to be left alone.

G
3-18-87
SB# 338

International Business Machines Corporation

100 North Park Ave.
Helena, Montana 59601
406/444-5000

March 18, 1987

House Judiciary Committee
Chairman, Rep. Earl Lory
Montana State Legislature
Helena, Montana 59601

Subject: Drug Testing Legislature

Re: SB 338/02

Dear Mr. Chairman:

IBM appreciates and supports your efforts to legislate standards for administration and use of drug testing by employers in the State of Montana. We are supporting efforts of a similar nature in other states at this same time. We believe that legislation such as you are considering serves a crucial role in balancing the needs of the state employers for a drug free workplace and citizen concerns over due process and individual rights.

We respectfully wanted to express our concern and reservations however over the restrictions you may be considering regarding pre-employment screening of future employees. This is an essential element in our overall company efforts to ensure a drug free workplace, and should not be limited to narrowly defined job categories. In addition, we have discovered applicant screening by employers can have a major positive effect in encouraging young applicants who are now entering the workforce to appreciate and possibly reevaluate their use of drugs in the future.

We hope you would consider amending this part of the bill. We would be willing to discuss our views directly with you if you think this would be helpful to the Committee, even though we were unable to attend your hearing today. Thank you for your consideration.

Respectfully yours,

R.R. Romney
Branch Manager
South-West Marketing Division

RRR/01HV5.31887.3

APPENDIX A—SCHEDULE OF CIVIL PENALTIES—Continued

Section	Violation	Intentional violation[1]
(b) Rule compliance	750	2,000

[1] For the purposes of this schedule, an intentional violation is the knowing and willful failure of a carrier, its officers or agent to comply with the provisions of this part. The Administrator reserves the authority to assess the maximum penalty of $2,500 for a violation of any section contained in Part 218.

(Sec. 202, 84 Stat. 971 (45 U.S.C. 431); sec. 1.49(m) of the regulations of the Secretary of Transportation (49 CFR 1.49(m))

[49 FR 6497, Feb. 22, 1984]

PART 219—CONTROL OF ALCOHOL AND DRUG USE

Subpart A—General

Sec.
219.1 Purpose and scope.
219.3 Applications.
219.5 Definitions.
219.7 Waivers.
219.9 Responsibility for compliance.
219.11 Consent required; implied.
219.13 Preemptive effect.
219.15 Alcohol concentrations in blood and breath.
219.17 Construction.
219.19 Field Manual.
219.21 Information collection.

Subpart B—Prohibition

219.101 Alcohol and drug use prohibited.
219.103 Prescribed and over-the-counter drugs.

Subpart C—Post-Accident Toxicological Testing

219.201 Events for which testing is required.
219.203 Responsibilities of railroads and employees.
219.205 Sample collection and handling.
219.207 Fatality.
219.209 Reports of tests and refusals.
219.211 Analysis and follow-up.
219.213 Unlawful refusals; consequences.

Subpart D—Authorization to Test for Cause

219.301 Testing for reasonable cause.
219.303 Breath test procedures and safeguards.
219.305 Urine test procedures and safeguards.
219.307 Standards for urine assays.
219.309 Presumption of impairment; notice.

Subpart E—Identification of Troubled Employees

219.401 Requirement for policies.
219.403 Voluntary referral policy.
219.405 Co-worker report policy.
219.407 Alternate policies.

Subpart F—Pre-Employment Drug Screens

219.501 Pre-employment drug screens.
219.503 Notification; records.
219.505 Refusals.

APPENDIX A—SCHEDULE OF CIVIL PENALTIES

AUTHORITY: Secs. 202 and 209, Pub. L. 91-458, 84 Stat. 971 and 975, as amended (45 U.S.C. 431, 438) and 49 CFR 1.49. Subpart C also issued under sec. 208, Pub. L. 91-458, 84 Stat. 974, as amended (45 U.S.C. 437).

SOURCE: 50 FR 31568, Aug. 2, 1985, unless otherwise noted.

Subpart A—General

§ 219.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.

(b) This part prescribes minimum Federal safety standards for control of alcohol and drug use. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

§ 219.3 Applications.

(a) Except as provided in paragraph (b) of this section, this part applies to--

(1) Railroads that operate rolling equipment on standard gage track which is part of the general railroad system of transportation; and

(2) Railroads that provide commuter or other short-haul rail passenger service in a metropolitan or suburban area (as described by Section 202(k) of the Federal Railroad Safety Act of 1970, as amended), specifically including any entity providing such service as a common carrier engaged in interstate or foreign commerce.

(b) Subparts D, E, and F do not apply to a railroad that employs not more than 15 employees covered by the Hours of Service Act (45 U.S.C. 61-64b).

§ 219.5 Definitions.

As used in this part—

(a) "Alcohol" means ethyl alcohol (ethanol). References to use or possession of alcohol include use or possession of any beverage, mixture or preparation containing ethyl alcohol.

(b) "CAMI" means the Civil Aeromedical Institute of the Federal Aviation Administration. References to CAMI are to that organization's Toxicology Research Laboratory.

(c) "Controlled substance" has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR Parts 1301-1316).

(d) "Covered employee" means a person who has been assigned to perform service subject to the House of Service Act (45 U.S.C. 61-64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service.

(e) "Covered service" means service for a railroad that is subject to the Hours of Service Act (45 U.S.C. 61-64b), but does not include any period the employee is relieved of all responsibilities and is free to come and go without restriction.

(f) "Co-worker" means another employee of the railroad, including a working supervisor directly associated with a yard or train crew, such as a conductor or yard foreman, but not including any other railroad supervisor, special agent or officer.

(g) "Drug" means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

(h) "EAP Counselor" means a person or persons qualified by experience, education, or training to counsel persons affected by substance abuse problems and to evaluate their progress in recovering from or controlling such problems. An "EAP counselor" may be a qualified full time salaried employee of the railroad, a qualified practitioner who contracts with the railroad on a fee for service or other basis, or a qualified physician designated by the railroad to perform functions in connection with alcohol or drug abuse evaluation or counseling. As used in these rules, an EAP Counselor owes a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of the employee.

(i) "Field Manual" refers to the document described in § 219.19 of this part.

(j) "FRA" means the Federal Railroad Administration, U.S. Department of Transportation.

(k) "FRA representative" means the Associate Administrator for Safety, FRA, the Associate Administrator's delegate (including a qualified State inspector acting under Part 212 of this chapter), the Chief Counsel, FRA, or the Chief Counsel's delegate.

(l) "Hazardous material" means a commodity designated as a hazardous material by Part 172 of this title.

(m) "Impact accident" means a train accident consisting of a head-on collision, a rear-end collision, a side collision (including a collision at a railroad crossing at grade), a switching collision, or impact with a deliberately-placed obstruction such as a bumping post. The following are not impact accidents:

(1) An accident in which the derailment of equipment causes an impact with other rail equipment; and

(2) Impact of rail equipment with obstructions such as fallen trees, rock or snow slides, livestock, etc.

(n) "Independent" means not under the ownership or control of the railroad and not operated or staffed by a salaried officer or employee of the railroad. The fact that the railroad pays for services rendered by a medical facility or laboratory, selects that entity for performing tests under this part, or has a standing contractual relationship with that entity to perform tests under this part or perform other medical examinations or tests of railroad employees does not, by itself,

remove the facility from this definition.

(o) "Medical facility" means a hospital, clinic, physician's office, or laboratory where toxicological samples can be collected according to recognized professional standards.

(p) "Medical practitioner" means a physician or dentist licensed or otherwise authorized to practice by the state.

(q) "NTSB" means the National Transportation Safety Board.

(r) "Possess" means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this part does not include control by virtue of presence in the employee's personal residence or other similar location off of railroad property.

(s) "Reportable injury" means an injury reportable under Part 225 of this title.

(t) "Reporting threshold" means an amount specified in § 225.19(c) of this title, as adjusted from time to time in accordance with Appendix A to Part 225 of this title.

(u) "Supervisory employee" means an officer, special agent, or other employee of the railroad who is not a coworker and who is responsible for supervising or monitoring the conduct or performance of one or more employees.

(v) "Train," except as context requires, means a locomotive coupled, with or without cars. (A locomotive is a self-propelled unit of equipment which can be used in train service.)

(w) "Train accident" means a passenger, freight, or work train accident described in § 225.19(c) of this title ("Rail equipment accident"), including an accident involving a switching movement.

(x) "Train incident" means an event involving the movement of railroad on-track equipment that results in a casualty but in which railroad property damage does not exceed the reporting threshold.

[50 FR 31568, Aug. 2, 1985; 50 FR 38660, Sept. 24, 1985]

§ 219.7 Waivers.

(a) A person subject to a requirement of this part may petition the Federal Railroad Administration for a waiver of compliance with such requirement.

(b) Each petition for waiver under this section must be filed in the manner and contain the information required by Part 211 of this chapter.

(c) If the Administrator finds that waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any necessary conditions.

§ 219.9 Responsibility for compliance.

(a) A railroad that—

(1) Having actual knowledge, requires or permits an employee to go or remain on duty in covered service while in violation of § 219.101;

(2) Fails to exercise due diligence to assure compliance with § 219.101 by a covered employee;

(3) Willfully and with actual knowledge, requires an employee to submit to testing in reliance on § 219.301 without observance of the conditions and safeguards contained in Subpart D of this part;

(4) Fails to adopt or publish, or willfully and with actual knowledge fails to implement, a policy required by Subpart E of this part; or

(5) Fails to comply with any other requirement of this part; shall be deemed to have violated this part and shall be subject to a civil penalty as provided in Appendix A.

(b) For purposes of paragraph (a)(1) of this section, the knowledge imputed to the railroad shall be limited to that of a railroad management employee (such as a supervisor deemed an "officer," whether or not such person is a corporate officer) or a supervisory employee in the offending employee's chain of command.

(c) The "knowledge" referred to in this section and the penalty schedule (Appendix A) is knowledge of the applicable facts. Knowledge of this part, like other provisions of Federal law, is conclusively presumed.

[50 FR 31568, Aug. 2, 1985; 50 FR 38660, Sept. 24, 1985]

G

58 FR 338

§ 219.11 Consent required; implied.

(a) 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.

(b) Each such employee shall participate in such testing, as required under the conditions set forth in this part by a representative of the railroad or FRA.

(c) A covered employee who is required to be tested under Subpart C or D and who is taken to a medical facility for observation or treatment after an accident or incident shall be deemed to have consented to the release to FRA of the following:

(1) The remaining portion of any body fluid sample taken by the treating facility within 12 hours of the accident or incident that is not required for medical purposes, together with any normal medical facility record(s) pertaining to the taking of such sample;

(2) The results of any laboratory tests for alcohol or any drug conducted by or for the treating facility on such sample; and

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time samples were taken by the treating facility or prior to the time samples were taken in compliance with this part.

(d) An employee required to participate in body fluid testing under Subpart C (post-accident toxicological testing) shall, if requested by the representative of the railroad, FRA, or the medical facility, evidence consent to taking of samples and their release for toxicological analysis under Subpart C by promptly executing a consent form, if required by the medical facility.

(e) Nothing in this part shall be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel breath or body fluid testing.

(f) Any railroad employee who performs service for a railroad on or after February 10, 1986, shall be deemed to have consented to removal of body fluid and/or tissue samples necessary for toxicological analysis from the remains of such employee, if such employee dies within 12 hours of an accident or incident described in Subpart C as a result of such event. This consent is specifically required of employees not in covered service, as well as employees in covered service.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 45407, Oct. 31, 1985; 51 FR 3975, Jan. 31, 1986]

§ 219.13 Preemptive effect.

(a) Under Section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434), issuance of these regulations preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of these regulations to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

§ 219.15 Alcohol concentrations in blood and breath.

(a) In this part, blood alcohol concentration (BAC) is expressed as a "percentage" weight to volume. For example, a BAC of ".04 percent" means that there is .04 gram (four hundredths of one gram) of alcohol in 100 milliliters of whole blood. This is the same quantity as "40 milligrams percent" (40 milligrams in 100 milliliters).

(b) For the purpose of determining blood alcohol concentration through an analysis of the breath, the amount of alcohol in one part of blood shall be presumed to equal the amount of alcohol in 2100 parts of an expired breath sample (by volume).

§ 219.17 Construction.

Nothing in this part—

(a) Restricts the power of FRA to conduct investigations under Section

208 of the Federal Railroad Safety Act of 1970, as amended; or

(b) Creates a private right of action on the part of any person for enforcement of the provisions of this part or for damages resulting from noncompliance with this part.

§ 219.19 Field Manual.

(a) Technical procedures for post-accident testing required by Subpart C of this part, recommended practice standards for breath and urine testing under Subpart D of this part, and related materials designed to assist the railroads in establishing programs for control of alcohol and drug use are contained in the FRA Alcohol and Drug Field Manual which is revised from time to time by the Office of Safety, FRA.

(b) The Field Manual may be inspected at the Office of the Associate Administrator for Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590. The Field Manual may be purchased the National Technical Information Service, Order Department, 5285 Port Royal Road, Springfield, Virginia 22161.

§ 219.21 Information collection.

(a) The information collection requirements of this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB control number 2130-0526.

(b) The information collection requirements are found in the following sections:

(1) Section 219.203.
(2) Section 219.205.
(3) Section 219.207.
(4) Section 219.209.
(5) Section 219.211.
(6) Section 219.213.
(7) Section 219.301.
(8) Section 219.303.
(9) Section 219.305.
(10) Section 219.307.
(11) Section 219.309.
(12) Section 219.401.
(13) Section 219.405.
(14) Section 219.407.
(15) Section 219.501.
(17) Section 219.503.

[50 FR 38660, Sept. 24, 1985]

Subpart B—Prohibitions

§ 219.101 Alcohol and drug use prohibited.

(a) *Prohibitions.* Except as provided in § 219.103—

(1) No employee may use or possess alcohol or any controlled substance while assigned by a railroad to perform covered service;

(2) No employee may report for covered service, or go or remain on duty in covered service while—

(i) Under the influence of or impaired by alcohol;

(ii) Having .04 percent or more alcohol in the blood; or

(iii) Under the influence of or impaired by any controlled substance.

(b) *Controlled substance.* "Controlled substance" is defined by § 219.5 of this part. Controlled substances are grouped as follows: marijuana, narcotics (such as heroin and codeine) stimulants (such as cocaine and amphetamines), depressants (such as barbiturates and minor tranquilizers), and hallucinogens (such as the drugs known as PCP and LSD). Controlled substances include illicit drugs (Schedule I), drugs that are required to be distributed only by a medical practitioner's prescription or other authorization (Schedules II through IV, and some drugs on Schedule V), and certain preparations for which distribution is through documented over the counter sales (Schedule V only).

(c) *Railroad rules.* Nothing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.

(d) *Construction.* This section shall not be construed to prohibit the presence of an unopened container of an alcoholic beverage in a private motor vehicle that is not subject to use in the business of the railroad; nor shall it be construed to restrict a railroad from prohibiting such presence under its own rules.

§ 219.103 Prescribed and over-the-counter drugs.

(a) This subpart does not prohibit the use of a controlled substance (on

Schedule II through V of the controlled substance list) prescribed or authorized by a medical practitioner, or possession incident to such use, if—

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties; and

(2) The substance is used at the dosage prescribed or authorized.

(b) This subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use.

Subpart C—Post-Accident Toxicological Testing

§ 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 paragraphs (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;

(ii) Release of a hazardous material accompanied by—

(A) An evacuation; 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.

(b) *Exception.* No test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing.

(c) *Good faith determinations.* (1) The railroad representative responding to the scene of the accident/incident shall determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative shall consider the need to obtain samples as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgment in making the required determinations.

(2) A railroad is not in violation of this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment but nevertheless errs in determining that post-accident testing is not required.

(3) A railroad does not act in excess of its authority under this subpart if its representative has made such reasonable inquiry and exercised such good faith judgment, but its later determined, after investigation, that one or more of the conditions thought to have required testing were not, in fact, present.

[50 FR 31568, Aug. 2, 1985, as amended at 51 FR 3975, Jan. 31, 1986]

§ 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.

(2) Such employees shall specifically include each and every operating em-

ployee assigned as a crew member of any train involved in the accident or incident. In any case where an operator, dispatcher, signal maintainer or other covered employee is directly and contemporaneously involved in the circumstances of the accident/incident, those employees shall also be required to provide samples.

(3) An employee is excluded from testing under the following circumstances:

(i) In any case of an accident/incident for which testing is mandated only under § 219.201(a)(2) of this subpart (an "impact accident") or § 219.201(a)(3) ("fatal train incident"), if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident.

(ii) The following provisions govern accidents/incidents involving non-covered employees:

(A) Surviving non-covered employees are not subject to testing under this subpart.

(B) Testing of the remains of non-covered employees who are fatally injured in train accidents and incidents is required.

(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.

(2) This paragraph shall not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad shall utilize other employees to perform such duties.

(3) In the case of a revenue passenger train which is in proper condition to continue to the next station or its destination after an accident or incident, the railroad shall consider the safety and convenience of passengers in determining whether the crew is immediately available for testing. A relief crew shall be called to relieve the train crew as soon as possible.

(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.

(2) In the case of an injured employee, the railroad shall request the treating medical facility to obtain the samples.

(d) *Obtaining cooperation of facility.* (1) In seeking the cooperation of a medical facility in obtaining a sample under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain a blood sample after having been acquainted with the requirements of this subpart, the railroad shall immediately notify FRA by toll free telephone, Area Code 800-424-0201, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. FRA will then take appropriate measures to assist in obtaining the required sample.

(e) *Discretion of physican.* Nothing in this subpart shall be construed to limit the discretion of a physician to determine whether drawing a blood sample is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

§ 219.205 Sample collection and handling.

(a) *General.* Samples shall be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this section and the Field Manual.

(b) *Information requirements.* In order to process samples, analyze the significance of laboratory findings, and notify the railroads and employees of test results, it is necessary to obtain basic information concerning the accident/incident and any treatment administered after the accident/incident. Accordingly, the railroad representative shall complete the information required by FRA Form 6180.73 for shipping with the samples. Each employee subject to testing shall cooperate in completion of the required information on FRA Form 6180.74 for inclusion in the shipping kit and processing of the samples. The railroad representative shall request an appropriate representative of the medical facility to complete the remaining portion of the information on each Form 6180.74. One Form 6180.73 shall be forwarded in the shipping kit with each group of samples. One Form 6180.74 shall be forwarded in the shipping kit for each employee who provides samples.

(c) *Shipping kit.* (1) FRA and CAMI prepare and make available for purchase a limited number of standard shipping kits for the purpose of routine handling of toxicological samples under this subpart. Whenever possible, samples shall be placed in the shipping kit prepared for shipment according to the instructions provided in the kit and the Field Manual. Specifications for kits are contained in the Field Manual.

(2) Kits may be ordered directly from CAMI. The address is Forensic Toxicology Laboratory (AAC-114), Civil Aeromedical Institute, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 S. MacArthur Blvd., Oklahoma City, Oklahoma 73125.

(3) FRA maintains a limited number of kits at its field offices. A Class III railroad may utilize kits in FRA possession, rather than maintaining such kits on its property.

(d) *Shipment.* Samples shall be shipped by pre-paid air freight (or other means adequate to ensure delivery within twenty-four (24) hours) to the Toxicology Laboratory, Civil Aeromedical Institute, Oklahoma City, Oklahoma 73125. If courier pickup is not available at the medical facility where the samples are collected, the railroad shall promptly transport the shipping kit holding the samples to the nearest point of shipment via air freight or equivalent means.

§ 219.207 Fatality.

(a) In the case of an employee fatality in an accident or incident described in § 219.201, body fluid and/or tissue samples shall be obtained from the remains of the employee for toxicological testing. To ensure that samples are timely collected, the railroad shall immediately notify the appropriate local authority (such as a coroner or medical examiner) of the fatality and the requirements of this subpart, making available the shipping kit and requesting the local authority to assist in obtaining the necessary body fluid or tissue samples. The railroad shall also seek the assistance of the custodian of the remains, if a person other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the railroad shall immediately notify FRA by toll free telephone, Area Code 800 424-0201, providing the following information:

(1) Date and location of the accident or incident;

(2) Railroad;

(3) Name of the deceased;

(4) Name and telephone number of custodian of the remains; and

(5) Name and telephone number of local authority contacted.

(c) A coroner, medical examiner, pathologist, Aviation Medical Examiner, or other qualified professional is authorized to remove the required body fluid and/or tissue samples from the remains on request of the railroad or FRA pursuant to this part; and, in so acting, such person is the delegate of the Administrator under Section 208 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 437) (but not the agent of the Secretary for purposes of the Federal Tort Claims Act). Such qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under these rules.

(d) The Field Manual specifies body fluid and/or tissue samples required for toxicological analysis in the case of a fatality.

samples were ...

prompt telephonic notification sum... ing ... events. Notification shall be provided to ... Offic... Safety FRA, at (202) 426-0897 (8:30 a.m. to 5:00 p.m. EST or EDT) during the Federal work week.

(2) Each telephonic report shall contain:

(i) Name of railroad;

(ii) Name, title and telephone number of person making the report;

(iii) Time, date and location of the accident/incident;

(iv) Brief summary of the circumstances of the accident/incident, including basis for testing; and

(v) Number, names and occupations of employees tested.

(b) If the railroad is unable, as a result ... non-cooperation of an employe... or for any other reason, to obtain a sample and cause it to be provided to FRA as required by this section, the railroad shall make a concise narrative report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. This report shall be appended to the report of the accident/incident required to be submitted under Part 225 of this subchapter.

§ 219.211 Analysis and follow-up.

(a)(1) CAMI undertakes prompt analysis of samples provided under this subpart, consistent with the need to develop all relevant information and produce a complete report.

(2) FRA notifies the railroad and the tested employee of the results of the toxicological analysis and permits the employee to respond in writing to the results of the test prior to preparing any final investigation report concerning the accident or incident. Results of the toxicological analysis and any response from the employee are also promptly made available to the National Transportation Safety Board on request.

(b)(1) The toxicology report may contain a statement of pharmacological significance to assist FRA and other parties in understanding the data reported. No such statement may ... of Section 4 of the Accident Reports Act (45 U.S.C. 41) (prohibiting use of the ... t fo... purp... any action for damages).

(c)(1) It is in the public ... rest to ensure that any railroad disciplinary actions that may result from accidents and incidents for which testing is required under this subpart are disposed of on the basis of the most complete and reliable information available so that responsive action will be appropriate. Therefore, during the interval between an accident or incident and the date that the railroad receives notification of the results of the toxicological analysis, any provisions of collective bargaining agreements establishing maximum periods for charging employees with rule violations, or for holding an investigation, shall not be deemed to run as to any offense involving the accident or incident (i.e., such periods shall be tolled).

(2) This provision shall not be construed to excuse the railroad from any obligation to timely charge an employee (or provide other actual notice) where the railroad obtains sufficient information relating to alcohol or drug use, impairment or possession or other rule violations prior to receipt of toxicological analysis.

(3) This provision does not authorize holding any employee out of service pending receipt of toxicological analysis; nor does it restrict a railroad from taking such action in an appropriate case.

(d) Each sample provided under this subpart is retained for not less than six months following the date of the accident or incident and may be made available to the National Transportation Safety Board (on request) or to a party in litigation upon service of appropriate compulsory process on the custodian of the sample at least ten (10) days prior to the return date of such process. It is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation unless a copy of the subpoena, order, or other process is

ee who ... ing a blood or urine sample following an ... ident or incident specified in this section sh... with... fro... covered service and shall be deemed disqualified for covered service for a period of nine (9) months.

(2) The disqualification required by this paragraph shall apply with respect to employment in covered service by any railroad with notice of such disqualification.

(3) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(b) *Procedures.* (1) Prior to or upon withdrawing the employee from covered service under this section, the railroad shall provide notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. This hearing may be consolidated with any other disciplinary hearing arising from the same accident or incident (or conduct directly related thereto), but the presiding officer shall make separate findings as to the disqualification required by this section.

(2) The hearing shall be convened within the period specified in the applicable collective bargaining agreement. In the absence of an agreement provision, the employee may demand that the hearing be convened within 10 calendar days of the suspension or, in the case of an employee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the charged employee becomes available for hearing.

(3) A post-suspension proceeding conforming to the requirements of an applicable collective bargaining agreement, together with the provisions for adjustment of disputes under Section 3 of the Railway Labor Act, shall be deemed to satisfy the procedural requirements of this paragraph.

(c) *Subject of hearing.* The hearing required by this section shall determine whether the employee refused to ... shall, as appropriate, ... following:

(1) W... r the railroad made a good faith deteri... n reasonable inquiry, that ... accident or incident was within the mandatory testing requirements of this subpart; and

(2) In a case where a blood test was refused on the ground it would be inconsistent with the employee's health, whether such refusal was made in good faith and based on medical advice.

Subpart D—Authorization to Test for Cause

§ 219.301 Testing for reasonable cause.

(a) *Authorization.* A railroad may, under the conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or urine testing, or both, to determine compliance with § 219.101 of this part or a railroad rule implementing the requirements of § 219.101. This authority is limited to testing after observations or events that occur during duty hours (including any period of overtime or emergency service). The provisions of this subpart apply only when, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section.

(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;

(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

(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 direction 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.

(c) *Reasonable cause for urine test—*

(1) *Accident/incident and rule violation.* Except as provided in paragraph (c)(2) of this section, each of the conditions set forth in paragraphs (b)(2) ("accident/incident") and (b)(3) ("rule violation") of this section as constituting reasonable cause for breath testing also constitutes reasonable cause with respect to urine testing.

(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).

(d) *Preference for breath test where alcohol suspected.* If an employee is specifically suspected only of being under the influence of or impaired by alcohol, breath testing is the preferred means of confirmation. The railroad shall conduct a breath test before requiring a urine test unless to do so would not be feasible because of unavailability of a testing device or other considerations of safety or efficiency.

(e) *Limitation for Subpart C events.* The compulsory urine testing authority conferred by this section does not apply with respect to any event subject to post-accident toxicological testing as required by § 219.201 of this part. However, use of compulsory breath test authority is authorized in any case where breath test results can be obtained in a timely manner at the scene of the accident and conduct of such tests does not materially impede the collection of samples under Subpart C.

(f) *Time limitation.* Nothing in this section shall authorize testing of an employee after the expiration of an 8-hour period from the time of the observations or other events described in this section.

(g) *Construction.* Nothing in this subpart requires a railroad to undertake breath testing as a requisite to any disciplinary action or restricts the discretion of a railroad to proceed based solely on evidence of behavior, personal observations, or other evidence customarily relied upon in such investigations or hearings.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 50889, Dec. 12, 1985]

§ 219.303 Breath test procedures and safeguards.

(a) Except as provided in paragraph (d) of this section, the following conditions apply to breath testing authorized by this subpart.

(1) Testing devices shall be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published in the FEDERAL REGISTER from time to time by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation. This listing is also contained in the current Field Manual.

(2) Each device shall be properly maintained and shall be calibrated by use of a calibrating unit listed on the NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers (as amended and published and contained in the current Field Manual) with sufficient frequency to ensure the accuracy of the device (within plus or minus .01 percent), but not less frequently than provided in the manufacturer's instructions.

(3) Tests shall be conducted by a trained and qualified operator. The operator shall have received training on the operational principles of the particular instrument employed and practical experience in the operation of the device and use of the breath alcohol calibrating unit (reference standard). A copy of the training program shall be filed with FRA in conjunction with the filing required by § 217.11 of this title.

(4) Tests shall be conducted in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature.

(5) If an initial test is positive, the employee shall be tested again after the expiration of a period of not less than 15 minutes, in order to confirm that the test has properly measured the alcohol content of deep lung air.

(b) Because of the inherent limitations of the instrumentation, any indicated breath test result of less than .02 percent shall be deemed a negative test.

(c) In any case where a breath test is intended for use in the railroad disciplinary process and the result is positive, the employee shall be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by a competent independent laboratory. The railroad shall provide the required transportation to facilitate the blood test.

(d)(1) Under the circumstances set forth in § 219.301, a railroad may require an employee to participate in a screening test solely for the purpose of determining whether the conduct of a test meeting the criteria of paragraph (a) of this section is indicated. If the screening test is negative within the meaning of paragraph (b) of this section, the employee shall not be required to submit to further breath testing under this subpart. If the screening test is positive, no consequence shall attach except that the employee may be removed from covered service for the period necessary to conduct a breath test meeting the criteria of paragraph (a) of this section or a urine test meeting the requirements of §§ 219.305 and 219.307 of this subpart (consistent with § 219.301(d) of this subpart).

(2) Except as provided in paragraph (d)(2)(ii) of this section, the conduct of a screening test under paragraph (d)(1) of this section does not excuse

full compliance with paragraph (a) of this section with respect to any breath test procedure which is then undertaken. If a screening test is positive, the following procedures govern:

(i) An initial breath test shall be conducted meeting the criteria of paragraph (a) of this section.

(ii) If that test is positive, a second breath test shall be conducted meeting the criteria of paragraph (a) of this section.

(iii) The second test meeting the criteria of paragraph (a) of this section must be conducted at least 15 minutes after the positive screening test conducted under paragraph (d)(1) of this section. However, since a waiting period of 15 minutes is sufficient to permit the dissipation of any alcohol in the mouth, the requirement of paragraph (a)(5) of this section that there be a period of at least 15 minutes between the two tests meeting the criteria of paragraph (a) of this section does not apply.

[50 FR 31568, Aug. 2, 1985, as amended at 50 FR 38661, Sept. 24, 1985; 50 FR 45407, Oct. 31, 1985]

§ 219.305 Urine test procedures and safeguards.

(a) Urine shall be collected at an independent medical facility. Personnel of the medical facility shall supervise the collection procedure.

(b) The railroad shall establish procedures with the medical facility and the laboratory selected for testing to ensure positive identification of each sample and accurate reporting of laboratory results.

(c) A urine test procedure may include the provision of not more than two samples from the same employee.

(d) In any case where a urine test is intended for use in the railroad disciplinary process, the employee shall be given the opportunity to provide a blood sample at the independent medical facility for analysis by a competent independent laboratory.

(e) Nothing in this subpart restricts any discretion available to the railroad to request or require that an employee cooperate in additional body fluid testing.

§ 219.307 Standards for urine assays.

(a) *Laboratory standards.* A railroad employing the urine testing authority conferred by this subpart shall ensure that—

(1) Urine testing authorized by this part shall be undertaken only by an independent laboratory (or laboratories) proficient in the testing of urine for alcohol and drugs of abuse.

(2) Each such laboratory that performs a confirmatory procedure under paragraph (b) of this section shall regularly participate in an external quality control program that involves the analysis of samples submitted by a reference laboratory. Quality control samples should include actual body fluid samples previously analyzed by the reference laboratory, and should not be limited to spiked samples. Where practicable, known samples shall be submitted to the laboratory on a blind basis (so that the source of the sample is believed to be a customer of the laboratory).

(b) *Screening and confirmation.* Each sample shall be analyzed by a method that is reliable within known tolerances. If the screening test is positive for a substance other than alcohol, a remaining portion of the same sample shall be retested by another method. The confirmation test shall utilize a scientifically-recognized method capable of providing quantitative data specific to the drug (or metabolite(s)) detected. An immunoassay (including a radio immunoassay) is not an acceptable confirmatory test for this purpose.

(c) *Laboratory reports.* (1) Reports of positive urine tests shall, at minimum, state:

(i) The type of test conducted, both for screening and confirmation;

(ii) The results of each test; and

(iii) The sensitivity (cut-off point) of the methodology employed for confirmation, and (iv) any available information concerning the margin of accuracy and precision of the quantitative data reported for the confirmation test (or, in the case of alcohol, for the single test procedure). However, in the case of a negative test (either for screening or confirmation), the report shall specify only that the test was negative for the particular substance.

(2) A legible copy of the laboratory report shall promptly be made available to the employee tested.

§ 219.309 Presumption of impairment; notice.

(a) If an employee's urine sample has tested positive for a controlled substance (or its metabolite(s)) in a test authorized by this subpart and the employee was afforded and declined the opportunity to provide a blood sample, the railroad (or a board of arbitration) may, in the absence of persuasive evidence to the contrary, presume from the presence of the identified controlled substance that the employee was impaired by that controlled substance within the meaning of § 219.101 of this subpart.

(b)(1) Each railroad that utilizes the urine testing authority conferred by this subpart shall provide effective notice of the presumption created by this section to each of its covered employees. A railroad is deemed to have provided such notice if it includes a statement similar in substance to the statement set forth in paragraph (b)(2) of this section in its book of rules, timetable, special instructions, or other publication that is made available to each covered employee and with which each such employee is required to be familiar.

(2) The following statement provides the required 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.
>
> You are not required to provide a blood sample at any time except in the case of certain accidents and incidents subject to Federal post-accident testing requirements (49 CFR Part 219, Subpart C).
>
> A complete copy of the Federal regulations is available for your review at _____.

(3) A railroad that has a policy that forbids off-the-job use of drugs (not involving a specific proof that the employee is under the influence of the substance or impaired by it on the job) must include in such a notice a statement concerning any additional consequences of a positive urine test.

Subpart E—Identification of Troubled Employees

§ 219.401 Requirement for policies.

(a) The purpose of this subpart is to prevent the use of alcohol and drugs in connection with covered service.

(b) Each railroad shall adopt, publish and implement—

(1) A policy designed to encourage and facilitate the identification of those covered employees who abuse alcohol or drugs as a part of a treatable condition and to ensure that such employees are provided the opportunity to obtain counseling or treatment before those problems manifest themselves in detected violations of this part (hereafter "voluntary referral policy"); and

(2) A policy designed to foster employee participation in preventing violations of this subpart and encourage co-worker participation in the direct enforcement of this part (hereafter "co-worker report policy").

(c) A railroad may comply with this subpart by adopting, publishing and implementing policies meeting the

specific requirements of §§ 219.403 and 219.405 of this subpart or by complying with § 219.407.

(d) If a railroad complies with this part by adopting, publishing and implementing policies consistent with §§ 219.403 and 219.405, the railroad shall make such policies, and publications announcing such policies, available for inspection and copying by FRA.

(e) Nothing in this subpart shall be construed to—

(1) Require payment of compensation for any period an employee is out of service under a voluntary referral or co-worker report policy;

(2) Require a railroad to adhere to a voluntary referral or co-worker report policy in a case where the referral or report is made for the purpose, or with the effect, of anticipating the imminent and probable detection of a rule violation by a supervisory employee; or

(3) Limit the discretion of a railroad to dismiss or otherwise discipline an employee for specific rule violations or criminal offenses, except as specifically provided by this subpart.

§ 219.403 Voluntary referral policy.

(a) *Scope.* This section prescribes minimum standards for voluntary referral policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a voluntary referral policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad's responsibility to prevent violations of § 219.101.

(b) *Required provisions.* A voluntary referral policy shall include the following provisions:

(1) A covered employee who is affected by an alcohol or drug use problem may maintain an employment relationship with the railroad if, before the employee is charged with conduct deemed by the railroad sufficient to warrant dismissal, the employee seeks assistance through the railroad for the employee's alcohol or drug use problem or is referred for such assistance by another employee or by a representative of the employee's collective bargaining unit. The railroad shall specify whether, and under what circumstances, its policy provides for the acceptance of referrals from other sources, including (at the option of the railroad) supervisory employees.

(2) Except as may be provided under paragraph (c) of this section, the railroad treats the referral and subsequent handling, including counseling and treatment, as confidential.

(3) The railroad will, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee's alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(4) Except as may be provided under paragraph (c)(2) of this section, the employee will be returned to service on the recommendation of the EAP Counselor. Approval to return to service may not be unreasonably withheld.

(c) *Optional provisions.* A voluntary referral policy may include any of the following provisions, at the option of the railroad:

(1) The policy may provide that the rule of confidentiality is waived if:

(i) The employee at any time refuses to cooperate in a recommended course of counseling or treatment and/or;

(ii) The employee is later determined, after investigation, to have been involved in an alcohol or drug-related disciplinary offense growing out of subsequent conduct.

(2) The policy may require successful completion of a return-to-service medical examination as a further condition on reinstatement in covered service.

(3) The policy may provide that it does not apply to an employee who has previously been assisted by the railroad under a policy or program substantially consistent with this section or who has previously elected to waive investigation under § 219.405 of this part (co-worker report policy).

(4) The policy may provide that, in order to invoke its benefits, the employee must report to the contact designated by the railroad either (i) during non-duty hours (*i.e.*, at a time when the employee is off duty) or (ii) while unimpaired and otherwise in compliance with the railroad's alcohol and drug rules consistent with this subpart.

§ 219.405 Co-worker report policy.

(a) *Scope.* This section prescribes minimum standards for co-worker report policies. Nothing in this section restricts a railroad from adopting, publishing and implementing a policy that affords more favorable conditions to employees troubled by alcohol or drug abuse problems, consistent with the railroad's responsibility to prevent violations of § 219.101.

(b) *Employment relationship.* A co-worker report policy shall provide that a covered employee may maintain an employment relationship with the railroad following an alleged first offense under these rules or the railroad's alcohol and drug rules, subject to the conditions and procedures contained in this section.

(c) *General conditions and procedures.* (1) The alleged violation must come to the attention of the railroad as a result of a report by a co-worker that the employee was apparently unsafe to work with or was, or appeared to be, in violation of this part or the railroad's alcohol and drug rules.

(2) If the railroad representative determines that the employee is in violation, the railroad may immediately remove the employee from service in accordance with its existing policies and procedures.

(3) The employee must elect to waive investigation on the rule charge and must contact the EAP Counselor within a reasonable period specified by the policy.

(4) The EAP Counselor must schedule necessary interviews with the employee and complete an evaluation within 10 calendar days of the date on which the employee contacts the counselor with a request for evaluation under the policy, unless it becomes necessary to refer the employee for further evaluation. In each case, all necessary evaluations must be completed within 20 days of the date on which the employee contacts the counselor.

(d) *When treatment is required.* If the EAP Counselor determines that the employee is affected by psychological or chemical dependence on alcohol or a drug or by another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation, the following conditions and procedures shall apply:

(1) The railroad must, to the extent necessary for treatment and rehabilitation, grant the employee a leave of absence from the railroad for the period necessary to complete primary treatment and establish control over the employee's alcohol or drug problem. The policy must allow a leave of absence of not less than 45 days, if necessary for the purpose of meeting initial treatment needs.

(2) The employee must agree to undertake and successfully complete a course of treatment deemed acceptable by the EAP Counselor.

(3) The railroad must promptly return the employee to service, on recommendation of the EAP Counselor, when the employee has established control over the substance abuse problem. Return to service may also be conditioned on successful completion of a return-to-service medical examination. Approval to return to service may not be unreasonably withheld.

(4) Following return to service, the employee, as a further condition on withholding of discipline, may, as necessary, be required to participate in a reasonable program of follow-up treatment for a period not to exceed two years form the date the employee was originally withdrawn from service.

(e) *When treatment is not required.* If the EAP Counselor determines that the employee is not affected by an identifiable and treatable mental or physical disorder—

(1) The railroad shall return the employee to service within 5 days after completion of the evaluation.

(2) During or following the out-of-service period, the railroad may require the employee to participate in a program of education and training concerning the effects of alcohol and drugs on occupational or transportation safety.

§ 219.407 Alternate policies.

(a) In lieu of a policy under § 219.403 (voluntary referral) or § 219.405 (co-worker report), or both, a railroad may adopt, publish and implement, with respect to a particular class or craft of covered employees, an alternate policy or policies having as their purpose the prevention of alcohol or drug use in railroad operations, if such policy or policies has the written concurrence of the recognized representatives of such employees.

(b) The concurrence of recognized employee representatives in an alternate policy may be evidenced by a collective bargaining agreement or any other document describing the class or craft of employees to which the alternate policy applies. The agreement or other document must make express reference to this part and to the intention of the railroad and employee representatives that the alternate policy shall apply in lieu of the policy required by §§ 219.403, 219.405, or both.

(c) The railroad shall file the agreement or other document described in paragraph (b) of this section with the Associate Administrator for Safety, FRA. If the alternate policy is amended or revoked, the railroad shall file a notice of such amendment or revocation at least 30 days prior to the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing and implementing the policies required by §§ 219.403 and 219.405 with respect to any group of covered employees not within the coverage of an appropriate alternate policy.

Subpart F—Pre-employment Drug Screens

§ 219.501 Pre-employment drug screens.

(a) On and after May 1, 1986, each applicant who is given favorable consideration for a position with a railroad that involves the performance of covered service shall be tested for the presence of drugs. The test shall be accomplished through analysis of a urine sample. Whenever feasible, the sample shall be obtained in connection with a pre-employment medical examination.

(b) Prior to collection of the urine sample, the applicant shall be notified that the sample will be tested for the presence of drugs. In the case of an applicant who declines to be tested and withdraws the application for employment, no record shall be maintained of the declination.

(c) The railroad shall cause the samples obtained under this section to be identified, preserved, and tested by a competent laboratory for the presence of drugs, including, at a minimum, the following substances: opiates (narcotics), cocaine, barbiturates, amphetamines, cannabis, phencyclidine (PCP), and any other drug of abuse identified by the railroad medical officer as in frequent use in the locality (for which a reliable screening method is available). The railroad may also test the sample for the presence of alcohol.

(d) If the first test of a sample is positive for any drug (or metabolite(s)), the sample shall be tested a second time by another, reliable method that is specific for the substance detected.

[50 FR 31568, Aug. 2, 1985, as amended at 51 FR 3975, Jan. 31, 1986]

§ 219.503 Notification; records.

(a) The railroad shall notify the applicant of the results of any test that is positive for any substance included in the procedure. In the case of a positive result, the railroad shall provide the applicant with an opportunity to explain the presence of the identified substance prior to taking any action on the application for employment. This requirement is satisfied if the railroad has, in connection with the medical examination or sample collection procedure, requested that the applicant provide information concerning all drugs or medications used within the previous 60 days.

(b) Each railroad shall retain records of tests conducted under this section for at least 2 years and make them available to FRA for review. Such records need not reflect the identity of any applicant whose application for employment in covered service was denied.

§ 219.505 Refusals.

An applicant who has refused to submit to pre-employment testing under this section shall not be employed in covered service based upon the application and examination with respect to which such refusal was made. This section does not create any right on the part of the applicant to have a subsequent application considered; nor does it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

APPENDIX A—SCHEDULE OF CIVIL PENALTIES [1]

Section		Violation	Intentional violations [2]
Subpart B—Prohibition			
219.101	Employee required or permitted to use or possess alcohol or controlled substance while on duty, or to go or remain on duty while under the influence of, impaired by, or with BAC of .04 percent or more		$2,500
	With actual knowledge of facts constituting violation	$2,000	
	Failure to exercise due diligence to assure compliance	1,750	2,500
Subpart C—Part-Accident Testing			
219.201	Failure to facilitate conduct of required post-accident toxicological test by making reasonable inquiry and good faith judgments with respect to circumstances of accident/incident, by failing to take all practicable steps to require employee participation, or by otherwise failing to comply with Subpart C such that test cannot be conducted	1,000	2,500
	Required employee to provide samples in reliance on Subpart C where not required (including failure to make reasonable inquiry or good faith judgment)	750	1,250
219.203(b)	Delay in obtaining samples account failure to make every reasonable effort	1,000	2,000
219.203(c)	Place of sample collection, by whom	750	1,250
219.203(d)	Failure to notify FRA of employee injury, refusal and FRA intervention	1,000	2,000
219.205	Failure to promptly test and samples	1,000	2,000
	Failure to [illegible] with [illegible]	500	1,000
	Failure to comply with requirements with respect to sample collection, marking and handling	750	1,250
219.207	Failure to contact consultant and request assistance	1,000	2,000
	Failure to notify FRA where FRA intervention required	1,000	2,000
219.209	Failure to provide telephonic report	250	500
	Failure to provide written report (sample not provided)	750	1,500
219.213	Failure to take action against employee who refuses to provide samples	1,000	2,000
	Failure to provide timely notice and proper hearing	1,000	2,000
Subpart D—Authorization to Test for Cause			
219.301	Required employee to submit to testing without reasonable cause or without observance of procedures and safeguards		2,000
219.309	Failure to provide effective notice of preemption from positive urine test	500	2,000
Subpart E—Identification of Troubled Employees			
219.401	Failure to adopt or publish policy required by Subpart E	500	2,500
	Wholesale failure to implement policy required by subpart E		2,500
	Failure to implement as to individual employee		2,000
219.407	Failure to file agreement or other document or provide timely notice of revocation	500	1,250

APPENDIX A—SCHEDULE OF CIVIL PENALTIES [1]—Continued

Section		Violation	International violations [2]
Subpart F—Pre Employment Drug Screen			
219.501 ..... 219.505	Failure to perform pre-employment drug screen, applicant employed in covered service	500	1,000
219.501	Failure to provide past notice of drug screen	500	1,000
219.503	Failure to provide notice of positive test result and opportunity for re-sponse	250	750
	Failure to comply with other Subpart F requirement.	250	750

[1] Section 209 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 438) requires the Secretary of Transportation to "include in, or make applicable to, any railroad safety rule, regulation, order or standard issued under this title a civil penalty for violation thereof ... in such amount, not less than $250 nor more than $2,500, as he deems reasonable." Each day of violation constitutes a separate offense.

Section 219.9(a) sets forth the standards of liability applicable to the various requirements of this part.

[2] For purposes of this schedule, an intentional violation is a failure to comply in which the railroad has acted willfully and with actual knowledge of the facts constituting the violation. Knowledge of the regulations is presumed by law.

PART 220—RADIO STANDARDS AND PROCEDURES

Subpart A—General

Sec.

220.1 Scope.
220.3 Application.
220.5 Definitions.
220.7 Penalty.

Subpart B—Radio Procedures

220.21 Railroad operating rules; radio communications.
220.23 Publication of radio information.
220.25 Instruction of employees.
220.27 Identification.
220.29 Statement of letters and numbers.
220.31 Initiating a transmission.
220.33 Receiving a transmission.
220.35 Ending a transmission.
220.37 Voice test.
220.39 Continuous monitoring.
220.41 Notification on failure of train radio.
220.43 Communication consistent with rules.
220.45 Communication must be complete.
220.47 Emergencies.
220.49 Switching, backing or pushing.
220.51 Signal indications.

Sec.

Subpart C—Train Orders

220.61 Transmission of train orders by radio.

APPENDIX A—RECOMMENDED PHONETIC ALPHABET

APPENDIX B—RECOMMENDED PRONUNCIATION OF NUMERALS

APPENDIX C—SCHEDULE OF CIVIL PENALTIES

AUTHORITY: Secs. 202 and 209, 84 Stat. 971, 975 (45 U.S.C. 431, 438), and 49 CFR 1.49(m).

SOURCE: 42 FR 5065, Jan. 27, 1977, unless otherwise noted.

Subpart A—General

§ 220.1 Scope.

This part prescribes minimum requirements governing the use of radio communications in connection with railroad operations. The term "radio communications" refers to the transmission and reception of voice communications by radio. So long as these minimum requirements are met, railroads may adopt additional or more stringent requirements.

§ 220.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation.

(b) This part does not apply to:

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) A rapid transit railroad that operates only on track used exclusively for rapid transit, commuter, or other short-haul passenger service in a metropolitan or suburban area.

§ 220.5 Definitions.

As used in this part, the term:

(a) "Employee" means any person who is authorized by a railroad to use its radio facilities in connection with railroad operations.

(b) "Railroad operation" means any movement of a train, engine, on-track equipment, or track motor car, single or in combination with other equipment, on the track of a railroad.

(c) "Train Order" means any mandatory directive issued as authority for the conduct of a railroad operation which is transmitted by radio.

§ 220.7 Penalty.

Each railroad to which this part applies that violates any requirement prescribed in this part is liable to a civil penalty of at least $250 but no more than $2,500.

Subpart B—Radio Procedures

§ 220.21 Railroad operating rules; radio communications.

(a) After August 1, 1977, the operating rules of each railroad with respect to radio communications shall conform with the requirements of this part.

(b) Before November 1, 1977 or 30 days before it commences to use radio communications in connection with railroad operations, whichever is later, each railroad shall file with the Federal Railroad Administrator, Washington, D.C. 20590, one copy of its operating rules with respect to radio communications. Each amendment to these rules shall be filed with the Federal Railroad Administrator within 30 days after it is issued.

§ 220.23 Publication of radio information.

Each railroad shall designate its territory where radio base stations are installed, where wayside stations may be contacted, and designate appropriate radio channels by publishing them in a timetable or special instruction. The publication shall indicate the periods during which base and wayside radio stations are attended or in operation.

§ 220.25 Instruction of employees.

Each employee who is authorized to use a radio in connection with a railroad operation, shall be:

(a) Provided with a copy of the railroad's operating rules governing the use of radio communication in a railroad operation.

(b) Instructed in the proper use of radio communication as part of the program of instruction prescribed in § 217.11 of this chapter.

§ 220.27 Identification.

(a) Except as provided in paragraph (c) of this section, the identification of each wayside, base or yard station shall include at least the following minimum elements, stated in the order listed:

(1) Name of railroad. An abbreviated name or initial letters of the railroad may be used where the name or initials are in general usage and are understood in the railroad industry;

(2) Name of office or other unique designation of the station; and

(3) Location of the station.

(b) Except as provided in paragraph (c) of this section, the identification of each mobile station shall consist of the following elements, stated in the order listed:

(1) Name of the railroad. An abbreviated name or initial letters of the railroad may be used where the name or initial letters are in general usage and are understood in the railroad industry;

(2) Train name (number), if one has been assigned, or other appropriate unit designation; and

(3) The word "engine", "caboose", "motorcar", "pakset" or other word which indicates to the listener the precise mobile transmitting station, unless identical to the requirement of paragraph (b)(2) of this section.

(c) If positive identification is achieved in connection with switching, classification, and similar operations wholly within a yard, fixed and mobile units may use short identification after the initial transmission and acknowledgement consistent with applicable Federal Communications Commission regulations governing "Station Identification".

§ 220.29 Statement of letters and numbers.

(a) If necessary for clarity, a phonetic alphabet shall be used to pronounce any letter used as an initial, except initial letters of railroads. See Appendix "A", of this part for the recommended phonetic alphabet.

(b) A word which needs to be spelled for precision or clarity shall first be pronounced, and the word shall then be spelled. If necessary, the word shall

A
3-18-87
SB# 121

TESTIMONY FOR H.B. 121

DEFECTLESS PRODUCT LIABILITY LEGISLATION

SUBMITTED BY BRIAN A. JUDY, NRA NW STATE LIAISON

MY NAME IS BRIAN JUDY. I AM THE NRA LEGISLATIVE LIAISON FOR THE NORTHWEST REGION AS WELL AS A LIFE MEMBER OF THE NATIONAL RIFLE ASSOCIATION. ON BEHALF OF THE 25,000 NRA MEMBERS IN THE STATE OF MONTANA, I WOULD LIKE TO THANK THE CHAIRMAN AND MEMBERS OF THIS COMMITTEE FOR THE OPPORTUNITY TO SPEAK IN SUPPORT OF SENATE BILL 121, THE FIREARMS DEFECTLESS PRODUCT LIABILITY BILL.

PRODUCT LIABILITY IS AN ISSUE OF GROWING CONCERN IN A NUMBER OF INDUSTRIES AND RECEATIONAL ACTIVITIES, BUT NO AREA IS THREATENED MORE THAN THE OWNERSHIP AND USE OF FIREARMS BY LAW-ABIDING CITIZENS. BECAUSE GUN PROHIBITIONISTS HAVE BEEN LARGELY UNSUCCESSFUL IN THEIR LEGISLATIVE ATTEMPT TO EFFECT GUN CONTROL, THEIR LATEST TACTIC IS TO IMPLEMENT VIRTUAL GUN BANS THROUGH THE COURTS.

IN A NUMBER OF STAES, ANTI-GUN LAWYERS HAVE FILED LAWSUITS AGAINST HANDGUN MANUFACTURERS, ALLEGING THAT HANDGUNS ARE UNREASONABLY DANGEROUS PER SE, AND THAT, AS A CONSEQUENCE, A MANUFACTURER SHOULD BE HELD LIABLE WHEN A HANDGUN IT PRODUCED IS USED IN THE COMMISSION OF A CRIME. ABOUT 25 TO 30 OF THESE CASES HAVE BEEN FILED TO DATE.

THE BASIS FOR THESE "DEFECTLESS PRODUCT" CASES IS AN ASSERTION THAT TRADITIONAL PRODUCT LIABILITY LAW--WHICH ALLOWS SUITS AGAINST FIREARM

MANUFACTURERS OF THOSE INJURED BY FIREARMS WHICH ARE DEFECTIVE IN DESIGN OR MANUFACTURE CAN BE EXTENDED TO INCLUDE THE NOTION THAT A HANDGUN IS DEFECTIVE IN DESIGN SIMPLY BECAUSE IT COULD POTENTIALLY BE USED TO CAUSE INJURY OR DEATH.

TO PROVE THAT THE DESIGN OF A HANDGUN IS THE PROXIMATE CAUSE OF INJURY OR DEATH, PLAINTIFF'S COUNSEL WILL RELY UPON THE TESTIMONY OF CRIMINOLOGISTS AND SOCIOLOGISTS TO PRESENT DATA ON THE NUMBER OF INJURIES AND DEATHS RESULTING FROM THE USE OF HANDGUNS. THIS IS THE SAME DATA THAT GUN CONTROL ADVOCATES USE IN THEIR ATTEMPTS TO CONVINCE LEGISLATURES THAT GUN CONTROL LEGISLATION SHOULD BE ENACTED. IT IS CLEAR THAT THE MOTIVE OF PLAINTIFF'S LAWYERS IN BRINGING "DEFECTLESS PRODUCE" LITIGATION AGAINST HANDGUN MANUFACTURERS IS TO ACHIEVE IN THE COURTS WHAT THEY HAVE FAILED TO ACHIEVE IN THE LEGISLATURES.

THIS OVERT ATTEMPT TO JUDICIALLY "ENACT" GUN CONTROL LEGISLATION CAUSED COURTS TO REGULARLY DISPENSE WITH THE "DEFECTLESS PRODUCT" CASES. ON OCTOBER 3, 1985, HOWEVER, IN THE CASE OF KELLEY v. R. G. INDUSTRIES, THE MARYLAND COURT OF APPEALS RULED THAT LAWSUITS BY CRIME VICTIMS COULD BE BROUGHT AGAINST MANUFACTURERS OF SATURDAY NIGHT SPECIALS. THEIR DECISION WAS BASED UPON THE THEORY THAT HANDGUNS ARE "DEFECTIVE" SINCE THEY ARE PRIMARILY USED TO COMMIT CRIMES AND THAT THE DISTRIBUTION OF HANDGUNS IS AN "ULTRAHAZARDOUS ACTIVITY."

THE KELLEY CASE HAS BEEN APPLAUDED BY ANTI-GUN ORGANIZATION. A SPOKESMAN FOR THE NATIONAL COALITION TO BAN HANDGUNS HAS STATED THAT THEY CAN NOW FIGHT A TWO-FRONT BATTLE IN THEIR ATTEMPT TO BAN HANDGUNS. THEY PREDICT THAT NUMBEROUS CASES WILL COME UP ACROSS THE COUNTRY WITH COURTS LOOKING TO THE MARYLAND DECISION FOR DIRECTION.

THE RAMIFICATIONS OF THE KELLEY DECISION HAVE ALREADY BEEN SEEN AS DEFENDENT N. G. INDUSTRIES WAS FORCED TO FILE BANKRUPTCY AND IS NOT OUT OF BUSINESS. IN AN EFFORT TO NIP THIS STRANGE TWIST OF TORT LAW IN THE BUD, AND PROTECT THE FUTURE OF THE SHOOTING SPORTS, THE NATIONAL RIFLE ASSOCIATION WOULD LIKE TO SEE DEFECTLESS PRODUCT LIABILITY LEGISLATION PASSED IN EVERY STATE LEGISLATURE ACROSS THE COUNTRY. MANY STATES HAVE ALREADY ENACTED THESE BILLS, INCLUDING IDAHO, NEVADA, AND CALIFORNIA IS THE WESTERN UNITED STATES.

SENATE BILL 121 WOULD ASSURE THAT NEITHER FIREARMS NOR AMMUNITION COULD BE DEEMED DEFECTIVE IN DESIGN ON THE BASIS THAT THE BENEFITS OF THE PRODUCT DO NOT OUTWEIGH THE POTENTIAL DANGER. SB 121 WILL IN NO WAY, HOWEVER, AFFECT PODUCT LIABILITY ACTIONS BASED UPON IMPROPER DESIGN, MANUFACTURING DEFECTS, NOR NEGLIGENCE ON THE PART OF THE PROVIDER.

IN CLOSING I WOULD LIKE TO NOTE THAT WE HAVE RECEIVED NUMEROUS LETTERS AND TELEPHONE CALLS FROM OUR MEMBERS IN MONTANA ASKING THAT WE ASSIST IN SECURING PASSAGE OF SB 121.

ON BEHALF OF THE NRA MEMBERS AND GUN OWNERS IN MONTANA, I WOULD LIKE TO THANK THE COMMITTEE FOR THE OPPORTUNITY TO DISCUSS SB 121 WITH YOU TODAY, AND ENCOURAGE YOUR SUPPORT OF THIS IMPORTANT LEGISLATION.

Note 10

10. Suppression of evidence

Where inspection of defendant's premises was conducted following issuance of inspection warrant under this section, inspection was limited to administrative inspection and was conducted in accordance with this section, any matters revealed by such inspection were not subject to suppression in criminal proceeding. U. S. v. Prendergast, D.C.Pa.1977, 436 F.Supp. 931, affirmed 585 F.2d 69.

Where subsequent statements made by defendant were directly related to information gathered by Drug Enforcement Agency compliance officers as result of illegal search of defendant's pharmacy, defendant was entitled to suppression of such statements. U. S. v. Enserro, D.C. N.Y.1975, 401 F.Supp. 460.

§ 881. Forfeitures

Property subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any

A
3-18-87
SB# 241

person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims

(b) Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of

SB #241

Notes of Decisions

2. Scope of inspections

Administrative inspection warrants authorized by this section may not be used for any and all purposes listed in this subchapter including investigations designed solely to result in criminal prosecutions; while statutory scheme in this subchapter includes both regulatory and criminal enforcement functions, the reason for such inclusion was to bring together, in one comprehensive statute, functions previously assigned to a variety of agencies under several statutes, not to blur the distinctions between regulatory and criminal functions. U.S. v. Lawson, D.C.Md.1980, 502 F.Supp. 158.

5. Probable cause—Generally

Administrative inspection warrant issued under this section in order to uncover evidence in support of criminal investigation, was valid, inasmuch as it was based on an administrative showing of probable cause and the search was conducted in accordance with this section. U.S. v. Acklen, C.A.Tenn.1982, 690 F.2d 70.

Issuing magistrate could have inferred reasonably from facts before him that substantial period of time had passed since last inspection of pharmacy where one fact sworn to before the magistrate was that the pharmacy had been inspected "* * * approximately three years ago * * *," and thus predicate existed for finding of probable cause required for search warrant issued under this section. U.S. v. Osborne, D.C.Tenn.1980, 512 F.Supp. 413.

7. Statements authorizing inspections

Warrant authorizing search and seizure of physician's patient medication cards based on government's representation in application for warrant that premises to be searched had never before been inspected was valid. U.S. v. Voorhies, C.A. Tenn.1981, 663 F.2d 30, certiorari denied 102 S.Ct. 1997, 456 U.S. 939, 72 L.Ed.2d 415

10. Suppression of evidence

Even though landlord thought that premises could be repossessed for nonpayment of rent due, neither defendant nor anyone else had been seen entering or leaving apartment for some time prior to search, and there was no evidence that defendant ever returned after search, where evidence failed to establish that defendant had abandoned premises, search of premises and seizure of evidence was improper and all evidence seized was required to be suppressed as to defendant in defendant's prosecution for violation of this chapter. U.S. v. Hossbach, D.C.Pa.1980, 518 F.Supp. 759.

Where defendants left miscellaneous cartons of chemicals, pieces of equipment and trash at public rental warehouse, with door open, and contents in plain view of others who might happen by, and later returned key to landlord with no request to secure remaining contents, defendants manifested lack of any legitimate expectation of privacy in property seized and such property was not required to be suppressed in defendant's prosecution for violations of this chapter. Id.

Alleged deficiency of search warrant issued pursuant to this section, that it did not state adequately grounds for its issuance, did not justify application of rule excluding evidence discovered in execution of the warrant. U.S. v. Osborne, D.C.Tenn.1980, 512 F.Supp. 413.

Although government's use of administrative warrants to seize pharmacy records violated pharmacists' rights under U.S.C.A. Const. Amend. 4, indictment based on filling of fictitious prescriptions was not thereby rendered defective; however, evidence seized during subject searches was to be excluded from any criminal trial. U.S. v. Lawson, D.C.Md.1980, 502 F.Supp. 158.

§ 881. Forfeitures

(a) Property subject

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

[See main volume of text of (1) to (6)]

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims

Any property subject to civil or criminal forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

[See main volume for text of (1) to (3)]

SUMMARY OF ARGUMENT IN OPPOSITION TO SB 241 AMENDING (inter alia)

SECTION 44-12-102 MCA

B
3-18-87
SB #241

Robert Scott -- 18 March, 1987

I. THE PRESENT EFFECT OF TITLE 44, CHAPTER 12, MCA.

Section 44-12-102 MCA authorizes civil forfeiture of controlled substances, paraphernalia for their use, proceeds connected with their sale, records of sales and manufacture, as well as items of personal property specified in that Section which are closely connected with the manufacture, transportation or sale of such substances.

In civil forfeiture, suspect property is seized on discovery, the owner thus being deprived of its use. See Section 44-12-103 MCA. At the hearing, it is presumed that the property is already forfeit (44-12-203 MCA), therefore the owner of the seized property, in order to prevent forfeiture, has the burden of either (1) proving that the property was not used for the purpose charged; or (2) proving that the property was so used without his knowledge or consent. See Section 44-12-204 MCA. In other words, in a civil proceeding the person's property is presumed forfeit (guilty of being used for unlawful activity) and that person must then prove its 'innocence' the exact opposite of a criminal proceeding where the person is innocent until proven guilty. Often, the practical result of this dichotomy is that, though a person be found not guilty o the criminal charges against him (relating to the seized property), he is nonetheless deprived of the seized property due to the greater difficulty of overcoming the presumption that the property is forfeit.

II. THE EFFECT OF SB 241 ON TITLE 44, CHAPTER 12, MCA,

With the amendments proposed in SB 241, deleting present subsection 44-12-102 (1)(g) and adding new subsections 44-12-102 (1)(g) through (i), the

B
3-18-87
SB #241

categories of property subject to seizure and forfeiture would be expanded to include any real or personal property bearing virtually any connection with the violation of any provision of Title 45, Chapter 9.

As Chapter 9 includes the offense of simple possession (see 45-9-102) of a controlled substance as well as sales related offenses, these proposed amendments would in fact authorize the forfeiture of a home or other real property (entire farm or ranch) for mere possession of a controlled substance (including a misdemeanor quantity of marijuana). Not only is such a sweeping law, which authorizes the forfeiture of the fruits of a life's work of tens of thousands of dollars value, unjustified, it is also counterproductive in that it removes much of the incentive to abandon use of the substance controlled. Also, application of the statute to possessory offenses is almost certainly a violation of the Eighth Amendment to the United States Constitution (prohibiting cruel and unusual punishment).

In Summary: If the intent here is to deprive the wrongdoer of his ill-gotten gains which have been used to finance real or personal property, proposed subsection 44-12-102 (1)(i) MCA, as well as proposed subsection 44-12-102 (1)(g), are overbroad, unnecessary and should be deleted.

VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE
BILL NO. 241 DATE March 18, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]	X	
A.W. Ewart	~~Wildlife Federation~~		
[illegible]	[illegible]	X	
Robert Scott	[illegible]		X
Richard DeKleyke	SELF	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FOR

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE
BILL NO. 121 DATE March 18, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
[illegible]	[illegible]	X	
[illegible]	[illegible]	X	
H. M. Elwell	Mont Weapons Coll. Society	X	
[illegible]	[illegible]	X	
[illegible]	MTLA		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY COMMITTEE

SENATE BILL NO. 338 DATE March 18, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Steven Lingafelt			
		X	
		✓	
			X
		X	
		X	
		X	
		X	
		✓	
		✓	
		X	
Lynn Hettand, PhD	self	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33