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Drug Testing: The Experience of the Transportation Industry

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DRUG TESTING: THE EXPERIENCE OF THE TRANSPORTATION INDUSTRY

SUMMARY

In response to safety concerns and the issuance of President Reagan's Executive Order requiring agency heads to establish drug policies, DOT established a drug testing policy for its employees on January 21, 1987.

In addition, on November 21, 1988, final DOT Regulations were published in the Federal Register addressing testing policies for safety-sensitive airline, railroad, motor carrier, maritime and pipeline employees. These regulations resemble the policy instituted for DOT employees and include pre-employment, post-accident, periodic, reasonable suspicion, and random testing. Employers will be required to conduct random drug tests on 50 percent of covered workers each year. Costs of the testing will be incurred by employers. Large employers (those with more than 50 employees) will be required to have a drug testing program in place by December 1989. Small employers will be required to have a drug testing plan in place by December 1990. The DOT regulations do not require employers to pay for rehabilitation for employees who test positive for drugs. Provision of rehabilitation will be left up to labor-management bargaining. Workers covered by the regulations include approximately 3 million truck drivers, 90,000 railroad workers, 538,000 airline employees, 120,000 maritime employees, 116,500 pipeline employees, and 195,500 mass transit employees.

These new rules have elicited both strong support and strong opposition, with the random testing requirements provoking the most controversy. Before the new rules were even published, the Owner Operators Independent Drivers Association, an organization that represents 9,000 truckers, filed suit challenging the new rules on constitutional grounds. Unions representing covered workers, including the Railway Labor Executives Association and the Teamsters, are opposed to the new rules and have challenged the rules in court. Ship owners have also expressed reservations, but most industry associations - the Air Transport Association, the American Trucking Association, and much of the railroad industry - support the new rules.

Several bills addressing transportation industry drug testing were introduced in the 100th Congress. S. 1041 called for DOT to establish five types of drug and alcohol testing, including random tests, for safety-sensitive airline, FAA, and rail employees. It was approved by the Senate Commerce, Science and Transportation Committee (19-1) on March 10, 1987, and reported to the Senate. A similar proposal was added as an amendment to the Senate version of H.R. 3051, the Air Passenger Protection Act of 1987. H.R. 4748, covering only rail workers, was passed by the House, amended, on September 20, 1988.

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DRUG TESTING: THE EXPERIENCE OF THE TRANSPORTATION INDUSTRY

Drug use by employees has become a pressing concern to employers and legislators in recent years. Since President Reagan's issuance of Executive Order 12564 in September 1986, calling for a drug free Federal workplace, workplace policies addressing employee drug use have received extensive press coverage. Particular attention has been focused on drug abuse by employees in the transportation industry due to the unique safety responsibilities of transportation employees, and as a consequence, the potentially serious impact on public safety of drug use by transportation employees. An Amtrak-Conrail crash, which has been linked to alleged employee drug use, and in which several people died, has been one recent incident that heightened public concern.

In response to safety concerns and the issuance of the President's Executive Order requiring agency heads to establish drug policies, the Department of Transportation (DOT) has established a drug testing policy for its employees.¹ In addition, on November 21, 1988, DOT issued final drug testing rules for the industries it regulates. A description of the current status of testing of DOT employees and other transportation workers, as well as relevant legislation follows.

DRUG TESTING: DOT EMPLOYEES

On January 21, 1987, then Secretary of Transportation, Elizabeth Dole, announced a drug testing program for DOT employees. DOT was the first agency to respond to the President's September 1986 Executive Order requiring agency heads to establish employee drug testing policies.

¹ Some employees in all of the following DOT organizational units may be covered by this policy: Office of the Secretary; United States Coast Guard; Federal Aviation Administration; Federal Highway Administration; Federal Railroad Administration; Saint Lawrence Seaway Development Corporation; Urban Mass Transportation Administration; National Highway Traffic Safety Administration; Research and Special Programs Administration; Office of Inspector General; and the Maritime Administration. Drug-Free Departmental Workplace. U.S. Department of Transportation. June 29, 1987. Appendix A, p. 1-6.

DOT's program includes the following types of testing: pre-employment; random; reasonable suspicion; post-accident; and periodic.² All DOT employees will be required to undergo reasonable suspicion and post-accident testing. Only personnel with safety or security related jobs will be required to undergo random drug testing. DOT estimates that approximately 30,000 employees at 800 sites will be covered by random testing. Positions deemed safety-sensitive, and therefore subject to random testing include: air traffic controllers; railroad safety inspectors; aircraft mechanics; firefighters; master ferryboat pilots; nurses; air traffic control specialists; motor vehicle operators; industrial hygienists; and many other positions as well.³

DOT issued a written notice on June 29, 1987 to all employees of its intention to commence testing 60 days thereafter, as required by the Executive Order.⁴ In addition the Executive Order requires that those employees subject to random testing must receive a specific notice to that effect at least 30 days before testing. DOT began issuing notices of its intent to conduct random testing on August 6, 1987. The first random tests were performed in September 1987, on 23 employees.⁵

As of November 30, 1988, 7,895 random tests had been conducted on DOT employees. Out of these tests there were 59 confirmed positive tests. Thirty-nine of these individuals are currently undergoing rehabilitation, 16 have successfully completed rehabilitation and have returned to their positions, and 4 have been discharged.⁶

DOT policy is to give employees with positive test results the opportunity to participate in an Employee Assistance Program. During the course of treatment employees are relieved of safety and/or security related duties. Employees who fail to be rehabilitated or are found to be using drugs after rehabilitation will be dismissed.

² Periodic testing occurs during regularly scheduled physical examinations for those employees required to undergo such exams. (Drug-Free Departmental Workplace. U.S. Department of Transportation. June 29, 1987. p. III-2.)

³ Ibid., Appendix A, p. 1-6.

⁴ The American Federation of Government Employees (AFGE) filed suit to restrain implementation of this program, but its request was denied by the U.S. District Court for the District of Columbia. Instead, Judge Gesell granted the defendant's motion for summary judgment. American Federation of Government Employees v. Dole, 670 F. Supp. 445 (D.D.C. 1987).

⁵ DOT Employee Drug Program Fact Sheet. p. 1-2.

⁶ Department of Transportation. General Counsel's Office.

DRUG TESTING: AIR, RAIL, TRUCKING, AND BUS EMPLOYEES

On November 21, 1988, final DOT Regulations were published in the Federal Register (F.R. Special Supplement Rep. No. 225, Nov. 22, 1988) addressing testing policies for safety-sensitive airline, railroad, motor carrier, maritime and pipeline employees. These regulations resemble the policy instituted for DOT employees and include pre-employment, post-accident, reasonable suspicion, random, and periodic testing.⁷ Employers will be required to conduct random drug tests on 50 percent of covered workers each year. Costs of the testing will be incurred by employers. Large employers (those with more than 50 employees) will be required to have a drug testing program in place by December 1989. Small employers will be required to have a drug testing plan in place by December 1990. Drugs tested for will include: marijuana, cocaine, opiates, amphetamines, and phencyclidine. Alcohol screening is not included. Workers with confirmed positive test results will be removed from their positions and may only return if they successfully complete a rehabilitation program. The rules do not require employers to provide rehabilitation for employees however. Provision of rehabilitation will be left up to labor-management bargaining. Workers covered by the regulations include approximately 3 million truck drivers, 90,000 railroad workers, 538,000 airline employees, 120,000 maritime employees, 116,500 pipeline employees, and 195,500 mass transit employees.⁸

However, the new rules have provoked strong opposition. Before the new rules were even published in the Federal Register, the Owner Operators Independent Drivers Association, an organization with a membership of 9,000 truckers, filed suit challenging the new rules on constitutional grounds. Pursuant to this challenge of the new rules, the U.S. District Court for the Northern District of California issued a preliminary injunction from the bench barring implementation of the DOT regulations requiring employers to conduct drug-testing of truckers and interstate bus drivers. (Owner-Operators Independent Drivers Association v. Burnley, USDC N CA, No. C 88-4547 MHP, December 30, 1988.)⁹

⁷ Periodic testing occurs during regularly scheduled medical examinations for those employees required to undergo such exams. The employer may elect to discontinue periodic testing after he/she has had the DOT mandated drug testing in place for a year, so long as the employer is conducting random testing of employees. (F.R. Special Supplement Rep. No. 225, November 21, 1988. p. S-57.)

⁸ F.R. Special Supplement Rep. No. 225, November 22, 1988.

⁹ Daily Labor Report. January 5, 1989. p. A-2.

Ship owners have also expressed reservations about the new rules. However the Air Transport Association, the American Trucking Association, and much of the railroad industry are supporting the new rules.¹⁰

Unions representing covered workers have challenged the new rules. Both the Teamsters and the Railway Labor Executives Association have filed suits in the U.S. District Court for the Northern District of California. The unions allege that the rules are unconstitutional.¹¹

In addition to the new industry-wide testing mandated by DOT, both the Federal Aviation Administration (FAA) and the Federal Railway Administration (FRA) have policies already in place requiring drug testing of FAA personnel and rail employees in certain situations. Additionally, some private air carriers conduct pre-employment and reasonable suspicion testing of employees; and, some private rail carriers have extensive drug and alcohol programs in place.

DRUG TESTING: AIRLINES

Effective February 15, 1987, the FAA began incorporating drug testing into the annual physicals conducted on safety-sensitive personnel. Affected personnel include: inspection/flight test pilots; air traffic control specialists; aviation safety inspectors; civil aviation security specialists; firefighters; mobile lounge operators; police; pilots who fly agency aircraft; and applicants for all of the aforementioned positions.¹² This program was challenged unsuccessfully in two separate cases brought before Federal district courts in Alaska and Virginia. One was brought by the union representing air traffic specialists (the National Association of Air Traffic Specialists or NAATS). The second was brought by a group of civilian aircraft mechanics at Fort Belvoir, VA. In the NAATS case the judge concluded that:

The national interests in air safety and the public's perception of safety justifies the intrusion into the legitimate expectation of privacy of flight service specialists resulting from the FAA drug testing program. On balance, I conclude that while the taking of a

¹⁰ Abruzzese, Leo. Unions React Angrily to Drug Testing Rules. The Journal of Commerce, November 16, 1988. p. 2-B.

¹¹ Abruzzese, Leo. Labor Unions Challenge Drug Testing Rules. The Journal of Commerce, December 14, 1988. p. 2-B.

¹² Action Notice, U.S. Dept. of Transportation, FAA. February 1987. p. 2.

urine specimen for drug testing is a search, in these circumstances the search is reasonable under the fourth amendment.¹³

In June of 1987, four months after implementation of the FAA policy on periodic drug testing, the DOT implemented an extensive drug testing program covering all its employees. Since the FAA is part of DOT, FAA employees are covered by this program. As a consequence the DOT policy supersedes prior FAA policy and FAA employees are now covered by the testing specified in the DOT program. These include: reasonable suspicion; periodic; pre-employment; post-accident; and, random testing.

In addition, the rules issued by DOT on November 21, 1988 will require establishment of a drug-testing program for all safety related airline personnel who are not DOT personnel and hence not covered by the DOT program. These programs are to include the following types of tests: pre-employment; post-accident; periodic; reasonable suspicion; and random testing.

DRUG TESTING: RAILROADS

The Federal Railroad Administration's (FRA) rule regarding drug testing of railroad workers took effect in February of 1986. The FRA established a program for pre-employment, post-accident, and probable cause drug testing. The Administrator of the FRA, John Riley, argued the testing is necessary as evidenced by the large number of employees testing positive following accidents. In testimony before the Senate Commerce Committee on February 25, 1988, Riley argued that:

Over the past 13 months we have experienced 41 accidents in which one or more employees have tested positive for alcohol or illegal drugs. 29 people died in those accidents. 341 innocent people were injured. Property damage alone exceeded \$28 million. All of that since we last met in January...¹⁴

However, in testimony before the Senate Judiciary Committee, Lawrence Mann, an attorney representing the Railway Labor Executives' Association, argued that the FRA rule is unconstitutional since it allows for testing without probable cause to suspect drug use. (For example an employee may be tested merely for being present on a train when an accident occurs.) The union does not oppose pre-employment testing however. In addition,

¹³ National Association of Air Traffic Specialists v. Dole; USDC Alaska, No. A87-073 Civil, March 27, 1987. Daily Labor Report, May 6, 1987. p. A-5.

¹⁴ U.S. Congress. Committee on Commerce, Science, and Transportation. Developments in Drug and Alcohol Testing. Hearings, 100th Cong., 2d Sess., February 25, 1988. Washington, U.S. Govt. Print. Off., 1988. p. 22.

Lawrence Mann has argued that the testing has not served as a deterrent as evidenced by the increase in the percentage of employees testing positive. In 1986, 3.7 percent of the employees who were tested had positive test results compared to 6.5 percent between January and June of 1988.¹⁶

Rail unions challenged the FRA rule in Court and on February 11, 1988, the U.S. Court of Appeals for the 9th Circuit ruled that the FRA testing program violated the constitutional protection against unreasonable searches and seizures because it does not require that there be a particular reason to suspect crew members of drug use before testing. DOT appealed the ruling to the Supreme Court which accepted the appeal and heard the case on November 2, 1988. [Burnley v. Railway Labor Executives' Association, 839 F.2d. 1507 (9th Cir.), cert. gr. No. 87-1555, 108 S. Ct. 2033 (1988)]. The Supreme Court is not expected to rule on this case until sometime in the spring of 1989.

In addition to the agency policy discussed above, some railroads have instituted their own drug programs. Two examples are the programs that have been implemented by the Southern Pacific Railroad and CSX Transportation. The Southern Pacific Railroad began a program of pre-employment, reasonable suspicion, and post-accident drug and alcohol testing in August of 1984. A Southern Pacific spokesperson noted that since the implementation of drug testing the number of employees testing positive for drugs or alcohol has declined from 23 percent to 6 percent a month. In addition, accidents linked to human error have declined 70 percent, falling from 1,582 in 1984 to 481 in 1985. Southern Pacific sees drug testing as a successful deterrent to employee drug use.¹⁶

In August of 1987 two rail unions (the Brotherhood of Locomotive Engineers and the United Transportation Union) signed an agreement with CSX Transportation on drug and alcohol testing covering 19,000 employees. This agreement specifies testing when an employee is injured or involved in an accident causing at least \$5,200 in damages. FRA regulations only require testing in accidents resulting in a fatality, damage of \$500,000 or more to railroad property, release of hazardous materials, or in impact accidents resulting in injury or \$50,000 in railroad property damage.¹⁷

The president of the United Transportation Union, Fred Hardin, characterized the agreement as a significant breakthrough, and added that negotiations are underway with other railroads on similar proposals. The

¹⁶ Government Employees Relations Report. November 7, 1988. p. 1568.

¹⁶ Lancaster, John. U.S. May Toughen Train Safety Rules. The Washington Post, January 19, 1987. p.A-1, A-12.

¹⁷ Daily Labor Report. August 7, 1987. p. A-1.

unions continue to oppose random drug testing however. Hardin argued: "Random testing has legal and moral problems. With a program like this, there's no need for it."¹⁸ He also expressed his belief that this agreement should help diminish support on Capitol Hill for random testing of transportation workers. Both management and the union have argued that the money that would be required to conduct random testing (estimated at about \$100 per employee for the 20,000 safety-sensitive employees) would be better spent on providing employee assistance programs.¹⁹

In addition, the Brotherhood of Railway Signalmen (BRS) signed an agreement on June 27, 1988 with the Southeastern Pennsylvania Transportation Authority (SEPTA) allowing random drug and alcohol testing of the 60 members of BRS. This is the first rail industry agreement which includes random testing. Management is trying to reach a similar agreement with the 8 other unions representing 1,100 other SEPTA rail employees.²⁰

DRUG TESTING: TRUCKING, BUSES, MASS TRANSIT

The Federal Highway Administration (FHWA), has regulations under the Commercial Motor Vehicle Act of 1986, which prohibit drivers of interstate and intrastate commercial motor vehicles from driving under the influence of alcohol or controlled substances. The first violation results in a one year disqualification from operating a commercial motor vehicle; a second violation results in permanent disqualification. In addition, on September 30, 1988, as required by the Commercial Motor Vehicle Safety Act of 1986, FHWA published new lower blood alcohol concentration levels (0.04) at which interstate and intrastate truck and bus drivers would be disqualified from operating a commercial motor vehicle. The new rule will be enforced by the States; failure to enforce the new rule will result in loss of Federal-Aid Highway Funds.

¹⁸ Ibid., p. A-1.

¹⁹ Daily Labor Report. October 28, 1988. p. A-11.

²⁰ In a December 1988 decision, the U.S. Court of Appeals for the Third Circuit upheld SEPTA's plan to conduct random drug and alcohol testing of 4,400 SEPTA train, trolley and bus drivers covered only by Pennsylvania labor law. However the Court also held that SEPTA could not implement random testing of its regional rail division employees, including the signalmen, without first bargaining with the unions representing the employees, because these employees are covered under the Railway Labor Act which requires management to negotiate with employee unions over changes in contract terms. (Transport Workers' Union Local 234 v. SEPTA; CA 3, Nos. 88-1160, 88-1206, 88-1161, 88-1162, 88-1207, 88-1163, and 88-1208, December 28, 1988.)

Unlike these preexisting rules, the new DOT rules will require certain motor carriers to begin pre-employment, periodic, random, post-accident, and reasonable suspicion testing to determine whether or not drivers are using controlled substances. The new rules will apply to those motor carriers operating in interstate commerce that weigh over 26,000 pounds, or carry 15 or more passengers, or transport hazardous materials.²¹ Most of the controversy regarding the mandated drug testing of commercial motor vehicle operators has concerned how DOT will effectively enforce random testing of independent truckers. DOT has said that independent truckers may form voluntary testing pools with other truckers for testing purposes; critics argue random testing of independent truckers will be difficult to enforce.

There are currently several local transit authorities that have workplace drug abuse policies in place. Some of these transit authorities conduct drug testing under certain circumstances (examples of transit authorities that drug test are the Chicago Transit Authority and the York Area Transportation Authority). However, there is currently no national policy on workplace drug abuse covering all transit authorities. The new DOT rules establish a national policy which will require all recipients of Urban Mass Transit Authority funds to adopt a drug abuse policy which includes pre-employment, reasonable suspicion, post-accident, periodic, and random drug testing.²²

LEGISLATION

Drug testing of transportation workers was addressed in several bills introduced in the 100th Congress. S. 1041 would have required the Secretary of Transportation to establish five types of drug and alcohol testing for safety sensitive airline, FAA, and rail employees. The five types of tests would include: random; pre-employment; post-accident; periodic; and reasonable suspicion testing. The bill would have also set up pilot testing programs for the trucking and bus industries.

The Congressional Budget Office (CBO) estimated that the cost of S. 1041 would be about \$3 to \$4 million annually for the Federal Government, and about \$50 million a year to State and local governments. This does not include costs incurred by the transportation industry.²³ S. 1041 was passed by the Senate Commerce, Science and Transportation Committee by a vote of 19-1 on March 10, 1987 and reported to the Senate.

In addition, a very similar proposal was added as an amendment to S. 1485, the Air Passenger Protection Act of 1987. This bill was passed by the

²¹ F.R. Special Supplement Rep. No. 225, November 22, 1988. p. S-127.

²² Ibid., p. S-148-149.

²³ Daily Labor Report, November 12, 1987. p. A-3.

Senate as H.R. 3051, in lieu of S. 1485. The only significant difference between S. 1041 and the drug testing amendment attached to S. 1485, was that the latter would have required testing laboratories to meet technical guidelines established by the Department of Health and Human Services. The drug testing amendment was adopted by the full Senate, but was not included in the version of the bill passed earlier by the House. Conferees failed to reach agreement on these drug testing provisions before the conclusion of the 100th Congress.

A provision requiring drug testing (including random testing) of safety-sensitive transportation workers was also included in the Senate's Omnibus Drug Bill, but was not accepted by House negotiators because it did not include rehabilitation or reinstatement rights for employees. The final Omnibus Drug Bill, therefore, did not include provisions requiring drug testing of transportation workers. This bill, P.L. 100-690, was signed into law by President Reagan on November 18, 1988.

A bill covering only rail workers, H.R. 4748, would have required the Secretary of Transportation to issue regulations establishing drug and alcohol testing of railroad employees. H.R. 4748 was passed by the House (amended) on September 20, 1988. Unlike S. 1041 and H.R. 3051, however, this bill would have required employers to refer employees with positive test results to a rehabilitation program. Employees who failed to be rehabilitated could be dismissed.

Two of the unions that have spoken out in regard to the testing that was proposed in S. 1041 and S. 1485 are the International Brotherhood of Teamsters and the Airlines Pilots Association. Both registered their opposition to the random testing provisions in the legislation. The Teamsters' national contract already contains three of the five types of testing covered in the legislation: pre-employment; reasonable cause; and periodic. In addition, the Teamsters have expressed a willingness to support post-accident testing if some reasonable cause is evident.²⁴ The Airline Pilots Association has argued that random tests are an "unreasonable search and seizure", in violation of the fourth amendment to the Constitution.²⁵

In addition, some industry representatives have taken a position on random testing, including the American Truckers Association and the Air Transport Association. Although both organizations initially opposed random testing, they have since expressed support for such a program. The American Truckers Association's initial opposition was due to the great costs random testing would impose on the trucking industry; however, it has since said it would support random testing if all truckers, not just those employed by large

²⁴ Abruzzese, Leo. ATA Drops Objection to Random Drug Testing. The Journal of Commerce, March 26, 1987. p. 8-A.

²⁵ Aviation Week and Space Technology, March 2, 1987. p. 32-33.

firms, will be covered. The Air Transport Association also initially opposed random testing, arguing that whether or not to implement random testing should be left up to individual carriers. The Air Transport Association subsequently reevaluated its position based on evidence that most of its members support random testing.²⁸

POLICY CONSIDERATIONS

Random drug testing of transportation workers raises several important policy considerations. What follows is a list of some of the most significant.

- How should policymakers weigh the relative importance of employee privacy rights versus the need to ensure public safety in transportation? Are the privacy rights of transportation workers diminished because of their safety responsibilities with many lives often reliant upon an employee's performance of his/her job? On the other hand, potential invasion of privacy concerns are heightened because drug tests only indicate the presence of a proscribed substance and not impairment. The nexus between a positive test result and job performance often is hard to demonstrate. These unique factors must be considered by policymakers in weighing the risk to public safety that might be averted by random testing against the potential invasion of privacy such a program could entail.
- How can the accuracy of test results be ensured? There are two issues that must be considered in this regard — the accuracy of existing drug tests, and the adequacy of laboratory procedures for processing tests. Most experts agree that drug tests properly administered, using the best technology and with effective chain of custody controls are highly accurate. However, some commonly used drug tests may mistake a common substance or prescription drug for a prohibited drug — thus an individual might test positive without having used an illegal drug. In order to minimize this possibility, more accurate follow-up tests are available, but at an increased cost. Inaccurate drug test results may also be due to improper laboratory procedures. CAMI, a DOT laboratory that conducted many drug tests on Federal Railway Administration employees, was found to have reported positive drug test results in several cases in which tests were never actually performed.

²⁸ Preble, Cecilia. Air Traffic Controllers Sue To Block FAA Drug Testing. Aviation Week and Space Technology, March 26, 1987. p. 32-33. Abruzzese, ATA Drops Objections, p. 8-A.

- How cost-effective is random testing for reducing drug use in the transportation industry? The CBO has estimated the cost to the Federal Government of S. 1041 at about \$3 to \$4 million annually (mainly for random tests). In addition, there would be costs born by State and local governments and the transportation industry. Other forms of testing, such as reasonable suspicion testing, for example, are less expensive than random testing since fewer employees are tested. However, many argue that only random drug testing can effectively deter drug use, and therefore the high costs are justified. For example, the Coast Guard has stated that since it instituted random drug testing in 1983, positive drug tests have declined from 10 percent to 4 percent in 1986.

- How would random testing affect employee morale and labor relations in the transportation industry? Unions have argued that random testing is an unnecessary intrusion into employee privacy and most unions are strongly opposed to random testing. Imposition of random testing may cause a deterioration in the relationship that has been established over time between labor and management. William Wick, Director of Labor Relations for CSX Transportation, which has a joint labor-management testing and rehabilitation program, has stated that mandatory random testing will hurt "the trust and mutual respect" that has developed between labor and management at CSX.²⁷ This potential impact on labor relations must be weighed against random testings' potential to achieve a diminution in employee drug use and an improvement in safety.

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²⁷ Abramson, Howard. CSX Supports Voluntary Programs. The Journal of Commerce, December 14, 1988. p. 2-B.

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