

13949 PLM-1  
Mr. Goldman



**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-195442

**DATE:** June 5, 1980

**MATTER OF:** Bureau of Reclamation - Overtime and  
Penalty Pay

Claim For

AGC000076

- DIGEST:**
1. Prevailing rate employees of the Western Area Power Administration, Department of Energy, have their rates of pay and working conditions determined by collective-bargaining. Their contract provisions are covered by the savings provisions in section 9(b) of Pub. L. No. 92-392, August 19, 1972, and in section 704 of Pub. L. No. 95-454, October 13, 1978, the Civil Service Reform Act of 1978. Accordingly, the employees' contract provisions which may be inconsistent with 5 U.S.C. § 5544 and our decisions thereunder, are protected by law and may be implemented.
  2. Prevailing rate employees whose negotiated labor-management agreement is covered by section 9(b) of Pub. L. No. 92-392, August 19, 1972, and by section 704 of Pub. L. No. 95-454, October 13, 1978, were sent from Casper to Rawlins, Wyoming, to remove a snowdrift. Because of wind and snow they got stuck in a small town without motels, spent the night in a pickup and a diesel truck, and were required to keep the engines running for warmth, monitor fuel levels, and check to see if the road was clear. They are entitled to overtime for such activity during normal non-work hours since it appears to be substantial, their opportunity for sleep was minimal, and the activity was an integral part of their assignment.
  3. Prevailing rate employees whose negotiated labor-management agreement is covered by section 9(b) of Pub. L. No. 92-392, August 19, 1972, and by section 704 of Pub. L. No. 95-454, October 13, 1978, may be paid at overtime rates for work during their normal duty hours because their agreement called for overtime when they were called to duty more than 5 hours prior to their regular duty shift and they were required to remain on duty during their regular shift.

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This matter comes before us as a joint submission from the Western Area Power Administration (WAPA), Department of Energy (DOE), and the International Brotherhood of Electrical Workers (IBEW). It involves an overtime compensation claim of three WAPA employees who were delayed overnight in their work vehicles on their way to a duty assignment because of a snow storm.

#### FACTS

The facts as agreed on by both parties are as follows:

"On February 5, 1979, two linemen, R. Dockins and S. McDonald, and equipment operator, R. Cameron, all stationed at Casper, Wyoming, were sent from Casper to Rawlins, Wyoming, to remove a snowdrift along the fence at Medicine Bow Substation. The men left Casper at 8:30 a.m. traveling in two vehicles, a pickup truck and a truck with a loader. When they arrived in Lamont, Wyoming, 80 miles from Casper, at 11:00 a.m., the highway ahead and behind them was closed due to wind and snow. R. Dockins called his Foreman to advise of the problem and told him they still planned to go to Rawlins that afternoon and to call Rawlins and make sure their motel rooms at Rawlins were held as they might arrive late. The Foreman guaranteed the rooms at Rawlins and tried several times to reach the men by telephone at Lamont. The men also tried several times to call the Foreman, but each time the telephone lines were busy. Radio communication is normally available from the linemen to the Foreman, but the radio system was inoperative at this time. The men kept checking with the highway patrol and were informed each time that the road ahead to Rawlins would be opened soon.

"The men were unable to leave Lamont until 1:00 p.m. on February 6, 1979, and spent the night in their vehicles as motel accommodations were not available. Lamont, Wyoming, is a small town with a population of approximately 100. The highway patrol estimated approximately 600 people were stranded in Lamont the night of February 5, 1979.

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"The men left Lamont February 6, 1979, at 1:00 p.m., after the road was opened, and arrived in Rawlins at 2:00 p.m. R. Dockins contacted his Foreman by telephone and told of their situation. The Foreman released the men from work at this time. The men stayed at Rawlins, working during February 7 and returned to Casper on February 8, 1979. The men involved, R. Dockins, S. McDonald and R. Cameron, have asked for 21-3/4 hours of overtime pay as a result of being snowed in without motel accommodations.

"The normal workday for these men was 7:30 a.m. to 4:15 p.m. with a 45 minute lunch period from 11:45 a.m. to 12:30 p.m. The overtime requested is for 7-3/4 hours on February [5], 1979, from 4:15 p.m. to 12:00 midnight, and for 14 hours on February [6] from 12:00 midnight to 2:00 p.m.

"The overtime request is based on the agreement with IBEW, Local No. 1759, Supplementary Labor Agreement No. 1, Section 4, Overtime, Meals, Rest Periods and Section 6, Conditions of Employment. The men spent the night in the pickup and the diesel truck. They were forced to continuously run the engines during the night to keep warm. They also kept checking periodically to see if the road was open and checked trucks for oil and fuel. The temperature was 20° below zero or worse.

"The overtime claimed for the normal work day on February 6, 1979, from [7:30] a.m. to 2:00 p.m. is based on Supplementary Labor Agreement No. 1, Section 4.6. The men are claiming overtime during the night of February 5 for staying in the vehicles and claiming overtime during the day of February 6 until contact was made with their supervisor at 2:00 p.m."

#### ISSUES

The primary issue is whether the payment of overtime is precluded by prior decisions of our Office, particularly B-164683, July 17, 1968. If our decisions do not preclude

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payment of overtime, may overtime be paid under their collective-bargaining agreement. Our decision B-164683 concerned two employees who had to spend the night at a microwave station in which they had been working because of a snow storm. There we held that the employees who had cots and rations available in the building where the temperature, despite the use of heaters, ranged from +15° to -30°, were not entitled to overtime compensation. We stated the following:

"Basically, the issue presented by your letter is whether nonduty time which normally would be spent in recreation, sleeping or eating, may, because of existing arduous conditions, be regarded as compensable work time.

"We are aware of no provision of law, express or implied, which authorizes the payment of compensation for hours that are allocable to sleeping or eating. The courts consistently have held that such time is not compensable. Rapp v. United States, 167 Ct. Cl. 852 (1964); Bantom v. United States, 165 Ct. Cl. 312 (1964); Ahearn v. United States, 151 Ct. Cl. 21 (1960)."

In its submission, IBEW argues that B-164683, July 17, 1968, is not dispositive of this case. Moreover, IBEW argues that the labor-management agreement is covered by the savings provisions of section 9(b) of Pub. L. No. 92-392 and the subsequently enacted savings provisions in section 704 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, October 13, 1978, 92 Stat. 1218.

#### OPINION

Section 9(b) of Pub. L. No. 92-392, August 19, 1972, 86 Stat. 574, states:

"(b) The amendments made by this Act shall not be construed to--

"(1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the

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wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;

"(2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract;

"(3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date."

The record shows that the labor-management agreement between the Bureau of Reclamation, Region 7, Department of the Interior, and IBEW Local 1759, was effective September 29, 1960. In this connection we point out that the Federal power marketing functions of the Department of the Interior were transferred to DOE by section 302 of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. § 7152. ARTICLE V, Section 5.1 of the agreement, provides that "\* \* \* The rates of pay and working conditions affecting the employees covered by this agreement shall be determined through the process of collective-bargaining between the Union and the Region \* \* \*." Therefore, the agreement here is covered by the savings provisions of section 9(b) quoted above.

In like manner the labor-management agreement is covered by section 704 of Pub. L. No. 95-454 which states as follows:

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"Sec. 704. (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

"(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of--

"(A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;

"(B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code; or

"(C) any rule, regulation, decision or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code." (Underscoring supplied.)

In view of the above provisions of law, particularly section 704(b)(C), the WAPA prevailing rate employees here are entitled to negotiate contract provisions in accordance with prevailing rates and pay practices without regard to 5 U.S.C. § 5544 or any rule, regulation, decision, or order made thereunder. Such contract provisions which may be inconsistent with 5 U.S.C. § 5544 are protected by law and may be properly implemented. 58 Comp. Gen. 198 (1979). Therefore, our decisions

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concerning 5 U.S.C. § 5544 have no relevance per se to the issue at hand but rather the provisions of the agreement negotiated in accordance with the prevailing rates and pay practices govern.

Initially we note that the agreement calls for overtime compensation much as in 5 U.S.C. § 5544. Section 4.5 states:

"Any hours of work in excess of eight (8) hours in a calendar day or forty (40) hours in the basic workweek shall be considered overtime."

The questions then are (1) whether the hours after the employees' duty shift on February 5, and prior to the employees' duty hours on February 6, may be found to be compensable at overtime hours of work, and (2) whether the employees may be compensated at overtime rates for their regular duty hours from 7:30 a.m. to 2 p.m. on February 6, at which time they were released from work. A determination on the first time period of the claim depends on whether the time spent outside of duty hours in the vehicles is work and, thus, compensable at overtime rates. A determination on the second time period of the claim depends on whether the employees must be compensated at overtime rates for what are, in effect, their regular duty hours, for which they must at least receive straight-time pay.

In regard to these periods of claimed overtime the pertinent provisions in the WAPA/IBEW agreement are as follows.

Section 4.9:

"An employee who worked sixteen (16) hours or more continuously because of an emergency beyond the control of management or the employee, such as extreme weather conditions, shall upon release from duty, be entitled to an eight (8) hour rest period before he returns to work. If the eight (8) hour rest period extends into his basic workday, he shall be granted administrative leave for any portion thereof required to complete this rest period. This provision shall not apply to employees serving under temporary limited appointments."

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Section 6.2:

"\* \* \* Travel time (time required to travel between the assembly point and the actual place of work) shall be part of the employee's work time and any transportation necessary after arriving at the point of assembly shall be provided by Management."

Section 6.3:

"Travel time as mentioned above will be compensable at overtime rates if it exceeds 8 hours per day or 40 hours per week, only when it is considered to be an inherent part of, and inseparable from the work assignment."

Section 4.6:

"An employee called to report for duty five (5) hours or more before his normal starting time and not released before his normal starting time, shall be paid at the overtime rate, including reasonable travel time from place called, until released by the Bureau. The employee may elect to take the day off on annual leave or work his regular shift at straight time pay. If the Bureau requests employee to remain, he shall receive one (1) hour premium pay at the overtime rate for each hour worked on his regular shift." (Underscoring supplied.)

With regard to the claim for overtime compensation for the period from 4:15 p.m. on February 5 through 7:30 a.m. on February 6, sections 4.9, 6.2, and 6.3 offer general guidance. In particular, section 4.9 contemplates situations in which employees are required to be in a work status for long periods because of extreme weather conditions. Section 6.3 requires the payment of overtime where travel is an inherent part of and inseparable from the work assignment.

The employees here had to spend the night in a pickup and a diesel truck and had to keep the engines running to stay warm. Opportunity for sleep was evidently minimal. They were required to check periodically to see if the road was clear and had to

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ensure that the engines had fuel for their constant operation. In view of the above agreement and in light of the facts presented, it is our view that the employees were engaged in compensable work while in a travel status for the whole night because the normal 8-hour period of sleep was unavailable to them and because their duties were an integral part of their assignment. Under the circumstances, therefore, the time the employees spent in their vehicles from 4:15 p.m., February 5, to 7:30 a.m., February 6, is hours of work and may be compensated for at overtime rates under their agreement.

As for the period from 7:30 a.m. through 2 p.m. on February 6, we find that sections 4.6 and 4.9 implicitly require the payment of overtime as a form of penalty payment for keeping an employee on duty for excessive lengths of time. The employees were required to perform duties as during the previous night. Since they were on duty all night, they necessarily meet the condition of having been called to duty 5 hours or more prior to their normal day shift. It would not be reasonable to hold that the contract was only designed to grant the overtime compensation to employees called out to work early but not those who had been on duty continuously from their previous shift. Obviously the employees did not elect to take the day of February 6 off on annual leave since they were required to remain in their duty status until relieved by proper authority. Accordingly; the employees may also receive overtime compensation under the WAPA/IBEW contract for the period from 7:30 a.m. through 2 p.m.



For The Comptroller General  
of the United States