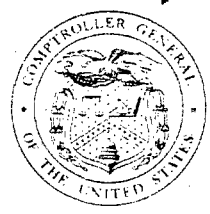


PLM-J

14014

DECISION



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

FILE: B-197489

DATE: June 12, 1980

MATTER OF: Robert Zolczer, Michael Smith, Dennis O'Scier-
[Claim for Overtime Compensation]

DIGEST: Customs employees are not entitled to 2 extra days overtime pay for work performed on holiday under provisions of 19 U.S.C. §§ 267, 1451, where merchandise had already crossed border and duties performed were done on holiday to expedite paperwork for benefit of importer and not directly related to Customs inspection of merchandise as required by law.

This decision is in response to a request for an advance decision by an authorized certifying officer of the Department of the Treasury, U.S. Customs Service. The request concerns the question of whether three U.S. Customs employees, Robert Zolczer, Michael Smith, and Dennis O'Scier, are entitled to overtime compensation at the rate specified in section 5 of the Act of February 13, 1911, ch. 46, (36 Stat. 901, 19 U.S.C. § 267) (1976). The employees contend that they are entitled to the higher rate of overtime in that Act instead of that paid them under the provisions of the Federal Employees Pay Act of 1945 (FEPA), 5 U.S.C. §§ 5542 and 5546 (1976), for work performed on a holiday, February 20, 1978. A Customs Service grievance examiner held in favor of the employees based on the advice of a Customs attorney. The agency has denied payment on the basis that the employees' duties were not related to the lading or unloading of merchandise.

The pertinent statutes are sections 267 and 1451 of title 19, United States Code. Section 267 of title 19 provides for 2 additional days pay for Customs officers and employees who are required to work on Sundays or holidays. Section 1451 of title 19 provides for the assignment of Customs officers and employees at night or Sundays and holidays upon the request of Custom brokers and others. In addition

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it contains a proviso enacted by the Act of June 3, 1944, ch. 233, section 1, 58 Stat. 269. The proviso states that officers and employees will be assigned 24 hours a day, including Sundays and holidays, for inspection related to certain vehicle, bridge, tunnel and ferry traffic between the United States, Canada, and Mexico. In addition, it provides for overtime compensation to the Customs officials by the Government without requiring any license or bond from the Customs brokers. The higher rate of overtime is commonly referred to as "1911/1944 Act overtime."

The Customs attorney interpretation of section 1451, based on the legislative history, as applied to this case, is that the employees were entitled to the 1911/1944 Act overtime if the work performed is at the request of the broker, for his benefit, and the broker has a bond on file. The Customs attorney says that the language authorizing overtime in section 1451 was broadened by the Act of June 25, 1938, ch. 679, 52 Stat. 1082. He refers specifically to Committee Hearings on H.R. 6738, May 19 to June 1, 1937, page 133, which states:

"The proposed amendment of the law is therefore deemed desirable to eliminate present inequities by uniformly requiring the payment of overtime compensation for all overtime services performed on special request and for the benefit of particular importers, exporters, or carriers."

He says further that, prior to the amendment, the payment of 1911/1944 Act overtime had to relate directly to the lading and unlading of merchandise or baggage before the employees could be compensated, and that the amendment changed that.

The above interpretation of section 1451 has the effect of automatically entitling the employee to 1911/1944 Act overtime anytime the broker requests it for his benefit, and he has a bond on file. We do not agree with such a broad liberal interpretation of the statute nor do we believe that it was the intent of Congress to provide "automatic" 1911/1944 Act overtime entitlement.

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We do agree that the language of the statute was broadened, but disagree as to the extent. The Act of June 25, 1938, expanded the custom bond requirement from a "master, owner, or agent of any vessel," to include an owner, master or person in charge of a vehicle, "or by or on behalf of a common carrier or by or on behalf of the owner or consignee of any merchandise or baggage." The same Committee Hearings cited above states that:

"Section 8. Section 451 of the Tariff Act of 1930 (U.S.C., 1934 ed., title 19, sec. 1451) authorizes the assignment of customs officers and employees to overtime duty, and the payment of such overtime by the requesting master, owner, or agency only in connection with the unloading or lading under special license of merchandise, baggage or passengers, the entering or clearing of a vessel or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title.

"Merchandise, baggage, and persons may arrive otherwise than by vessel or vehicle, as in the case of livestock driven into the country. Moreover, overtime customs services are sometimes requested for the benefit of importers or exporters in connection with the segregation or manipulation of merchandise and in various other circumstances not included in the above enumeration.***"

Section 1451 still refers to lading and unloading. In addition the proviso, which was added by the Act of June 3, 1944, supra, applies to traffic between the United States and Canada, and specifically refers to the lading or unloading of merchandise, baggage or persons. Also the special licensing provisions of 19 U.S.C. §§ 1450 and 1452 refer to lading and unloading on Sundays, holidays, or at night. Moreover, section 1451 must be read in connection with section 267 since it specifically refers to it, and section 267 refers to lading and unloading.

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We believe that the many references to the lading and unloading of merchandise, persons, and baggage require a strict interpretation of the statute with the result that employees are not entitled to the 1911/1944 Act overtime unless the duties and services they perform are directly related to the Customs inspection required by law. In 2 Comp. Gen. 512 (1923) overtime under the Act of February 20, 1920, 41 Stat. 402, which amended the Act of 1911, was denied to Customs inspectors who were performing guard duty at night and on Sunday to prevent the unlawful landing of liquor from a particular vessel. In 10 Comp. Gen. 176 (1930) we held that Customs inspectors who examined vessels under the Passenger Act of 1882, 22 Stat. 191, were not entitled to overtime under the Act of 1911, as amended. The decision in that case turned on the fact that while the duties to be performed under the Passenger Act might or might not prevent clearance of the vessel, they did not pertain to the actual Customs clearance.

The Customs attorney stated that these cases were decided before the 1938 amendment and are, therefore, not applicable. We disagree since the cases hinge on the duties actually performed in relation to the Customs clearance. Similarly, in 50 Comp. Gen. 703 (1971) we held that Customs inspectors assigned to conduct predeparture inspections of passengers under the Presidential program for dealing with the problems of air piracy did not perform duties pertaining to Customs functions required by law and thus were not entitled to 1911/1944 Act overtime. Further, this Office recently held in Michael J. Murphy, Frank R. Doud, B-194568, February 15, 1980, that Customs Service Dog Handlers were not entitled to the 1911/1944 Act overtime where their assigned duties were investigative in nature and not directly related to Customs services required by law.

The courts have similarly indicated that the employees' duties must be related to the statutory functions in order for them to qualify for the special overtime. In Wiley v. United States, 136 Ct. Cl. 778

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(1956), the Court of Claims considered a case involving a similar statute applicable to Immigration Officers, the Act of March 2, 1931, ch. 368, section 1, 46 Stat. 1467, codified at 8 U.S.C. § 1353a (1976). The statute allows immigration officers and employees 2 additional days pay for Sunday and holiday duty performed in connection with the examination and landing of passengers desiring to enter the United States. The court concluded that supervisory officers as well as primary inspectors performed "duties in connection with the examination and landing" of persons within the meaning of the Act. This case contains many comparisons with the Customs statute pertaining to 1911/1944 Act overtime and strongly indicates that only those performing work "in connection with" the primary inspection would be eligible for compensation. See Wiley at page 787. Further, the court held at page 790 that:

"Finally this court has consistently held that payment of the extra compensation authorized by the statute is mandatory upon the agencies (the Immigration Service and the Bureau of Customs), and that the payment must be made in the amounts specified to those officers and employees who meet the statutory specifications of hours worked, tours of duty, and services performed."
(Emphasis ours.)

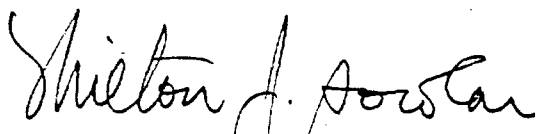
Therefore, as indicated by the Wiley case, payment of overtime under the 1911/1944 Act would depend on the hours the employee worked, his or her tour of duty, and the services the employee actually performed.

The record shows that with the advent of the "trigger price system," a measure to protect United States steel companies from foreign steel products sold here at below cost, a new requirement was

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necessary. A Special Summary Steel Invoice had to be prepared effective on the day after the holiday. Thus, in order to avoid preparation of the document, two United States Customs brokers requested on behalf of certain Canadian steel firms that Customs accept entries on a non-work day. The agency says that in each case, the actual movement of the merchandise was not contingent upon acceptance of these entries. The steel had already crossed the United States/Canadian border and had been examined and released from Customs' custody by inspecting officers under the immediate delivery procedure. Importers have up to 10 working days after release of the merchandise to present an entry for consumption to Customs. 19 C.F.R. § 142.11 (1979). Thus, the employees' duties were performed in order to save the broker additional paper work and were not directly related to the Customs inspection as required by law. The agency determined that the employees were not entitled to the overtime, and we agree.

Accordingly, the employee's claim for overtime compensation under the 1911/1944 Act may not be certified for payment.


For the Comptroller General
of the United States