

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

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**FILE:** B-213012**DATE:** November 3, 1983**MATTER OF:** Jose Najjar, et al. - Customs Inspectors -  
Overtime Compensation During 8-1/2-Hour  
Shift**DIGEST:**

Customs Inspectors in El Paso, Texas, who previously worked 8-hour shifts claim overtime for 26-month period they worked 8-1/2-hour shifts. Based on the record before our Office, we conclude the plaintiffs are entitled to overtime where the agency has failed to establish that plaintiffs had a duty-free lunch break which may be offset against their claims. The agency failed to meet its burden of proof that a duty-free lunch period was established during the 8-1/2-hour shift where none existed during the 8-hour shift. It appears that lunch periods were scheduled and taken in the same manner when the 8-1/2-hour shift was in effect as when the 8-hour shift was used.

This decision is in response to a request for an opinion from the United States District Court for the Western District of Texas, El Paso Division. Pending before the court is a class action lawsuit seeking overtime compensation for U.S. Customs Service Inspectors working at the El Paso, Texas, port of entry during the period from January 3, 1977, until March 4, 1979. National Treasury Employees Union, et al. v. United States, et al., No. EP-83-CA-7 (filed Jan. 14, 1983). The court has issued a stay of the proceedings pending our opinion on the entitlement of the plaintiffs to overtime compensation.

ISSUE

The issue in this decision is the entitlement of certain Customs Service Inspectors, including Jose Najjar, to overtime compensation during a scheduled 8-1/2-hour workshift. Based on the record before us, we hold that the Inspectors are entitled to overtime compensation where the agency has failed to establish that the Inspectors received a 1/2-hour, duty-free lunch break which might be offset against their overtime claims.

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BACKGROUND

The record before us contains: (1) a claim filed by the union (National Treasury Employees Union) with our Claims Group by letter dated September 2, 1982, which was supported by 58 affidavits from Customs Inspectors as well as documents related to the unfair labor practice charge filed by the union; (2) documents pertaining to the litigation including the complaint, defendant's motion to dismiss, plaintiff's response to the motion to dismiss, and a motion to intervene as plaintiffs filed by nine Supervisory Customs Inspectors; (3) a brief report by the U.S. Customs Service with affidavits from five Supervisory Customs Inspectors; and (4) a brief rebuttal by the union on the issue of whether a duty-free lunch period was provided.

Based on the record before us, it appears that prior to January 1977, these Customs Inspectors assigned to the El Paso, Texas, port of entry worked 8-hour shifts. However, effective January 3, 1977, the Customs Service established a "team concept" and ordered its Inspectors to report 1/2 hour early for inspection of uniforms and issuance of instructions and information. The union subsequently filed an unfair labor practice complaint charging the agency with failing to negotiate over these changes. Following a decision by the Assistant Secretary of Labor for Labor-Management Relations, the agency agreed to return to status quo ante effective March 5, 1979, with respect to the length of the scheduled workshifts. The union then sought backpay for the period the Inspectors worked 8-1/2-hour shifts but, after numerous appeals, the Federal Labor Relations Authority stated, by letter dated August 12, 1982, that since there had been no finding of backpay entitlement as a result of the agency's unfair labor practice, the union's remedy would be within the jurisdiction of our Office.

The union filed a claim with our Office on behalf of 58 Customs Inspectors, but prior to our receiving an agency report or deciding the claim, the union filed the suit referred to above. The court has granted a stay in the proceedings pending issuance of our opinion on the entitlements of the plaintiffs to overtime compensation.

Union Position

The union argues that prior to January 3, 1977, there were no scheduled, duty-free lunch breaks during the 8-hour shift, and meal breaks were allowed on an informal, when

available, basis. Although the agency provided a "break area" where the Inspectors could relax away from public view, the union contends the employees were always on call and were expected to respond immediately when a supervisor ordered them to perform certain duties. The union also argues that these Inspectors were not permitted to leave the premises during the scheduled 8-hour shift. The affidavits of 58 Customs Inspectors provided by the union support the union's contentions that while "breaks" were generally available, there was no scheduled lunch break and the Inspectors were always subject to call during the entire shift.

During the 26-month period from January 3, 1977, through March 4, 1979, the union contends that Inspectors were ordered to report 1/2 hour early for each shift (except the 12 a.m. to 8 a.m. shift) for "briefing" and "orientation." However, the union argues that the meal break practice continued as before under the 8-hour shift; that is, Inspectors were not scheduled for a duty-free meal break and they were subject to call. The 58 affidavits provided by the union support these contentions.

The union notes that the agency's policy on meal breaks during the 8-hour shift is defined in a memorandum dated March 30, 1979, from the Customs Regional Commissioner stating that an 8-hour shift does not include any scheduled periods for lunch or "breaks," but that employees working such shifts may eat a meal or take a break as permitted by the supervisor depending on the workload. The union contends that the same practice was in effect before, during, and after the 26-month period that the Inspectors worked 8-1/2-hour shifts.

Finally, the union argues that the five affidavits submitted by Supervisory Customs Inspectors are not consistent and do not establish that there was a clear and definite duty-free meal break.

#### Agency Position

The agency argues that during the 26-month period in question, the 8-1/2-hour shifts included, "a scheduled, uninterrupted 30-minute lunch break during which no work was performed or required to be performed." Customs letter dated July 3, 1979. The agency's position on this issue is supported by testimony before the administrative law judge

for the Department of Labor, who considered the unfair labor practice charge, as well as five affidavits submitted by Supervisory Customs Inspectors.

The five affidavits from the supervisors all agree that a period of up to 30 minutes was allowed for meal breaks, that lunchrooms or facilities were available, and that the lunch breaks were the same both before and during implementation of the "team concept" and the 8-1/2-hour shift. The affidavits are inconsistent with respect to whether or not the Inspectors could leave the premises during the meal breaks and whether or not the Inspectors were subject to call during the meal breaks.

The agency argues that since a duty-free lunch period was provided, the Inspectors did not perform more than 8 hours of compensable work during the 8-1/2-hour shift.

#### Intervenors Position

Recently, nine Supervisory Customs Inspectors, including the five supervisors who provided affidavits to the agency, moved to intervene in the pending litigation as plaintiffs arguing that, for the 26-month period in question, they were required to work 8-1/2 hours but were paid for only 8 hours. Their claims are substantially the same as those of the nonsupervisory Inspectors who are the plaintiffs in the pending litigation.

#### OPINION

Under the provisions of 5 U.S.C. § 5542 (1976), employees who work more than 40 hours in an administrative workweek or more than 8 hours in a day are entitled to overtime compensation. Although the plaintiffs also claim overtime under the Fair Labor Standards Act, 29 U.S.C. § 207, this claim would appear to be barred in the present litigation by the 2-year (3-year for willful violations) statute of limitations. See 29 U.S.C. § 255, 256 (1976); and 57 Comp. Gen. 441 (1978).

The plaintiffs in this litigation contend that they worked 8-1/2 hours per day, 42-1/2 hours per week, but were only compensated for 8 hours per day and 40 hours per week. The key question in this case is whether, during the 26-month period the Inspectors worked 8-1/2-hour shifts, they were afforded duty-free lunch or meal breaks which the

agency may offset against their overtime claims thereby reducing the hours worked to 8 hours per day and 40 hours per week.

Normally, it is the policy of this Office, where a disagreement exists over the facts, to accept the facts as reported by the agency unless the claimants furnish evidence which clearly shows the facts as reported by the agency to be in error. Ambrose W. J. Clay, et al., B-188461, December 20, 1977; and B-173092, July 27, 1971. By doing so we reserve controversial matters for scrutiny in the courts where the facts may be determined by the court through sworn testimony provided by competent witnesses. See B-156407, July 7, 1965, citing Longwill v. United States, 17 Ct. Cl. 288, 291 (1881); and Charles v. United States, 19 Ct. Cl. 316, 319 (1884). Since these claims are currently before the court, we will issue our opinion with our determination of the factual issues based on the written record before us. Obviously, the court may wish to make its own factual determinations through the testimony of competent witnesses.

Although the burden of proof is normally on the claimants (see 4 C.F.R. § 31.7), our decisions have followed the court cases on the question of a duty-free lunch by holding that the burden of proof is on the agency to establish that the employee actually took advantage of available lunch or meal breaks away from his post of duty. Raymond A. Allen, et al., B-188687, September 21, 1977. See also Otis Air Force Base, B-198065, October 6, 1981; and Frank E. McGuffin, B-198387, June 10, 1980.

As we stated in Allen, quoting from the decision in Baylor v. United States, 198 Ct. Cl. 331, 365 (1972), the agency may offset a lunch break when it makes such time available and the employee actually takes advantage of the break. The break need not be regularly scheduled so long as it is regularly taken, and the break may be offset against the employee's claim even where the employee is subject to emergency call unless responding to such calls substantially reduced his duty-free time. Allen, cited above. One qualification is that the employee must be permitted to leave his post for lunch break or the lunch break will not be considered duty-free. B-179412, February 28, 1974, citing Bennett v. United States, 194 Ct. Cl. 889 (1971); Ayers v. United States, 186 Ct. Cl. 350 (1968); Bantom v. United States, 165 Ct. Cl. 312 (1964), cert. den. 379 U.S. 890 (1964); and Armstrong v. United States, 144 Ct. Cl. 659 (1959), cert. den. 361 U.S. 825 (1959).

Based on the affidavits provided by both the agency and union, it appears that the Inspectors were able to eat on the employer's premises and away from their duty posts for brief periods at irregular times during their shifts. However, the length of the duty-free break has not been clearly established as required by our decision in Allen, cited above.

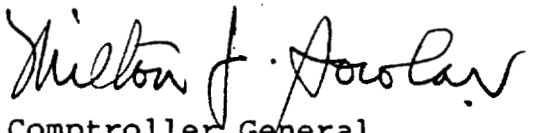
Although the five affidavits submitted by Customs from supervisory personnel support the contentions of the agency, these affidavits are questionable. The affidavits state that the procedures for lunch periods were essentially the same before January 1977, and during the 26-month period of 8-1/2-hour shifts. Additionally, in response to the initial claim for backpay by the union, the Regional Commissioner, by letter dated July 3, 1979, clearly stated that under the 8-hour shift prior to January 1977, there was no scheduled, 30-minute lunch break since to do so would have meant paying employees 8 hours of pay for 7-1/2 hours of work.

Thus, it is conceded by all parties that there was no duty-free 30-minute lunch period during the time the employees were scheduled to work 8-hour shifts. It follows that the crux of this case is whether there was a discernible change in procedures regarding lunch breaks during the 26-month period the Inspectors were assigned to 8-1/2-hour shifts. The union contends that no such changes took place, and the union points to the absence of any regulations, policies, or schedules regarding such breaks as evidence that no changes took place. Our view is that the record supports the union's contentions.

We note that the stated intention of changing to an 8-1/2-hour shift was not to provide a meal break or duty-free period but to allow for the inspection of uniforms and issuance of information and instructions prior to the start of each shift. See also the recommended decision of Labor's administrative law judge, Finding No. 23, September 28, 1978. In addition, the absence of any change in the procedures regarding lunch breaks is corroborated by the finding of the Regional Director of the Federal Labor Relations Authority, dated February 6, 1980, in determining whether the agency had complied with the cease and desist order of the Assistant Secretary of Labor for Labor-Management Relations. The Regional Director of the FLRA states that the agency conceded that the purpose of the additional 30 minutes was for briefings prior to each affected shift,

and the Regional Director continues, "[a]t no time was there any change regarding how, when or where employees took their lunch. The practice as to the lunch break continued as it always had."

Accordingly, we conclude based on the record before us that the Customs Service has failed to sustain its burden of proof regarding the existence of duty-free lunch period which may be offset against the plaintiffs' claims for over time compensation. Therefore, in our opinion the Plaintiff-Inspectors are entitled to overtime compensation for performing duties during 8-1/2-hour shifts for the period January 3, 1977, through March 4, 1979.

*for*   
Comptroller General  
of the United States