UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-219121 November 29, 1985

Mr. E. M. Keeling
Director of Accounting, AAA-1
U.S. Department of Transportation
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Mr. Keeling:

In your letter of June 4, 1985, you request our opinion concerning the subsistence expenses payable to an employee who, for reasons of personal convenience, elects to use a privately-owned vehicle (POV) rather than common carrier for temporary duty travel. Simply stated, your question is whether an employee who travels by POV as a matter of personal preference may be paid subsistence expenses for traveltime exceeding that required for travel by the appropriate common carrier. You state that an employee would be charged annual leave for such excess traveltime, and you recognize that, in B-171420, March 3, 1971, we held that per diem may not be paid during excess traveltime charged to annual leave. However, you question the continued applicability of our determination in B-171420 in light of our subsequent decision in 55 Comp. Gen. 192 (1975), interpreting para. 1-4.3 of the Federal Travel Regulations, incorp. by ref., 41 C.F.R. § 101-7.003 (1984) (FTR).

In the first decision you cite, B-171420, we held that an agency may, in its discretion, charge an employee annual leave for excess traveltime attributable to his use of a POV rather than common carrier. We then determined that, under section 6.3 of the Standardized Government Travel Regulations (the predecessor to FTR paras. 1-7.5a and 1-8.4a), an employee may not be paid per diem while he is in an annual leave status. Based on the prohibition contained in the travel regulations, we concluded that an employee traveling by POV may not receive per diem for the excess traveltime involved if that traveltime is charged to annual leave.

In the second decision you mention, 55 Comp. Gen. 192, we did not address the charging of annual leave for excess

traveltime or the regulatory prohibition against paying per diem during traveltime charged to leave. Rather, in 55 Comp. Gen. 192, we evaluated and decided to change our prior rules for computing the "actual versus constructive" costs payable to an employee who travels by POV rather than common carrier. First, we noted that, in our prior decisions in 45 Comp. Gen. 592 (1966) and 47 Comp. Gen. 686 (1968), we interpreted regulations issued by the Bureau of the Budget (now Office of Management and Budget (OMB)) as imposing separate restrictions on the payment of actual per diem and mileage expenses, limiting an employee's reimbursement to the following: (1) the lesser of actual per diem or the constructive per diem allowable for travel by common carrier; plus (2) the lesser of actual mileage expenses or the constructive cost of common carrier transportation. We then noted that, subsequent to our decisions in 45 Comp. Gen. 592 and 47 Comp. Gen. 686, OMB issued superseding regulations which prescribed a different method for computing reimbursable costs. These regulations, which eventually became codified in FTR para. 1-4.3, are quoted in 55 Comp. Gen. 192 at 194 as follows:

> " * * * Whenever a privately owned conveyance is used for official purposes as a matter of personal preference in lieu of common carrier transportation under 2.2d payment for such travel shall be made on the basis of the actual travel performed * * * plus the per diem allowable for the actual travel but the total allowable will be limited to the total constructive cost of appropriate common carrier transportation including constructive per diem by that method of transportation. * * *" [Emphasis added in 55 Comp. Gen. 192.]

Because the above-quoted regulations refer to the "total allowable" and the "total constructive cost," we concluded in 55 Comp. Gen. 192 that an employee electing to travel by POV may be reimbursed for such travel on the basis of his total actual travel costs (transportation and per diem), limited to the total constructive travel costs (transportation and per diem). Accordingly, we overruled our prior decisions in 45 Comp. Gen. 592 and 47 Comp. Gen. 686.

Although we did not mention B-171420, cited above, in our decision in 55 Comp. Gen. 192, you suggest that we implicitly overruled the former decision through our interpretation of FTR para. 1-4.3. Under your interpretation of FTR para. 1-4.3 and our decision in 55 Comp. Gen. 192, an employee traveling by POV instead of common carrier is entitled to reimbursement for subsistence costs incurred during the excess traveltime involved, as long as those subsistence costs, when combined with mileage expenses, do not exceed the constructive cost of travel by common carrier.

We have not previously had occasion to consider whether B-171420 has been superseded by FTR para. 1-4.3 and our decision in 55 Comp. Gen. 192. Your request raises a difficult issue because, although FTR para. 1-4.3 was promulgated after our decision in B-171420, the principles underlying that decision remain in effect. Specifically, we note that FTR paras. 1-7.5a and 1-8.4a continue to prohibit the payment of subsistence expenses during periods for which a traveler is charged annual leave.

Although the issue you have presented is one of first impression, we are unable to render a decision at this time because the question is hypothetical. Normally, our Office will not consider hypothetical questions but will defer such quesitons for future consideration in the context of a specific claim. Accordingly, if you desire a ruling on this issue, we suggest that you submit a specific travel voucher or claim containing full documentation concerning the actual travel involved, a comparison of actual versus contructive travel costs, and the amount of traveltime charged to annual leave. After we have received this information, we will be able to render a decision responding to the issue you have presented.

Sincerely yours,

Robert L. Higgins

Robert L. Higgins
Assistant General Counsel