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

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April 16, 1973

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Thomas H. Cittings, Jr., Esq.
Suite 425, Shoreham Building
800 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Cittings:

This refers to your letters of July 13, 1972, and January 11, 1973, making additional claims on behalf of Mr. Garnett E. Lowe, Jr., for overtime compensation for travel performed outside of his regular scheduled duty hours as an employee of the Civil Aeronautics Board and the National Transportation Safety Board.

[Claim for

Mr. Lowe presently has pending in the United States Court of Claims a suit for the recovery of overtime compensation for the period May 1960 to May 1966 as an employee of the Civil Aeronautics Board, Garnett E. Lowe, Jr. v. United States, C. Cls. No. 302-69. You previously advised us that a motion to dismiss this suit was delivered to the Department of Justice on June 29, 1971, to be held in escrow pending the issuance of a satisfactory settlement by our Office pursuant to the holding in the Commissioner's decision in the case of Griggs v. United States, dated November 24, 1967, C. Cls. No. 336-65. Also, that motions to dismiss all of the claims (except Leon B. Cuddeback) involved in the similar case of Abbott et al. v. United States, C. Cls. No. 317-71 were filed with the Department of Justice to be held pending settlement of such claims by the Department of Transportation or our Office. As to the Lowe case a Certificate of Settlement was issued on March 24, 1972, by our Transportation and Claims Division (General Claims) and transmitted to the National Transportation Safety Board, Department of Transportation, for payment. The Certificate of Settlement, issued consistent with the Griggs case, was returned to our Office by letter of July 21, 1972, from the National Transportation Safety Board, with the notation that you, as counsel for Mr. Lowe, advised the National Transportation Safety Board not to accomplish payment because Mr. Lowe intends to litigate certain portions of his claim that have been disallowed. The other claims involved in the Abbott case had been transmitted to the Department of Transportation by our Office for settlement.

By letter of July 13, 1972, you submitted an additional claim on behalf of Mr. Lowe for 215 hours of overtime performed by him in a travel

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status aboard commercial carriers predicated upon 28 Comp. Gen. 183 (1948) which authorized the inclusion of travel time for purposes of overtime pay incident to work required under emergent conditions performed by rail safety investigators employed by the Interstate Commerce Commission. Similar additional claims were submitted in 1972 for each claimant (party) involved in the Abbott case.

By your letter of January 11, 1973, you requested a decision covering the compensability of the travel time performed by the plaintiff and other air safety investigators, outside of their regular workweek. You submit that since an examination of the record in the Griggs case establishes that neither party brought the holding in 28 Comp. Gen. 183 to the Commissioner's attention, such holding should be extended to Mr. Love and to other air safety inspectors so as to permit payment of overtime compensation for commercial flights. You say that air safety inspectors are required to proceed to the scene of an accident at any hour of the day or night on any day of the year. In some instances the air safety inspectors have piloted private, rented, or agency owned aircraft to the scene of an accident. You consider this type of travel to be inseparable from work performed and as such compensable as overtime. In the alternative, you submit that time spent in piloting privately owned, rented, or agency owned aircraft to and from the scene of an accident outside of regularly scheduled work hours constituted an "arduous mode of transportation" and as such compensable as overtime.

In 28 Comp. Gen. 183 (1948) it was held quoting from the syllabus that:

> Time consumed by safety, signal, and locomotive inspectors of the Interstate Commerce Commission, outside of their regular daily or weekly tours of duty, or on holidays, in traveling to and from the scene of train or locomotive accidents by regularly scheduled trains, in day coaches, or railroad business cars, or on freight work or special trains, or in privately owned automobiles, may be regarded as work and all such time in excess of 40 hours in any one workweek is compensable at overtime rates pursuant to section 201 of the Federal Employees Pay Act of 1945.

That decision was predicated on the ground that the travel was inseparable from work under the particular facts there considered.

In response to a submission from the Secretary of the Army as to the effect of 28 Comp. Gen. 183 upon the general rule that additional compensation was not payable "solely because of official travel outside the basic workweek," we stated in 28 Comp. Gen. 547 (1949) that no rigid rule may be fixed or stated for determining in all cases when travel time outside an employee's 40-hour tour of duty is compensable at overtime rates. It was further stated that in those cases where the payment of overtime compensation for travel time has been authorized by decisions of this Office, the circumstances and conditions of the travel were so unusual as to warrant a conclusion that such travel was inseparable from "work" or "employment" within the meaning of the applicable overtime statutes. It was pointed out that since the facts of a particular case may vary considerably, no specific answer could be given to what is the basis of distinction to be used to determine whether travel time outside the employee's tour of duty is compensable.

The decision in 28 Comp. Gen. 183 has been cited in numerous decisions as standing for the proposition that where the travel is indistinguishable from work, it may be counted for overtime pay purposes. It has never been considered however as standing for the proposition that travel under emergency conditions alone is compensable time for overtime pay purposes, nor to be considered as you suggest applicable to cases other than the one therein specifically considered. See 28 Comp. Gen. 547, supra. Cf. 41 Comp. Gen. 82, 85 (1961).

In the Griggs case the plaintiff, an air safety investigator of the Civil Aeronautics Board, was authorized overtime compensation only for the overtime work performed at on-site accident investigations and while traveling on commercial airlines occupying the "jump-seat" in the aircraft cockpit. The Commissioner in his report on the Griggs case, found insofar as travel time was concerned where travel was by commercial airline, or by other means allegedly under arduous conditions, as follows:

Claim for Overtime for Travel

The third, and smallest, category of plaintiff's claim concerns time he spent traveling in after-duty hours on commercial airline flights to and from the sites of accidents he was assigned to investigate. In the overwhelming majority of such instances, plaintiff flew as a

commercial passenger, purchasing a ticket with a Government Transportation Request. While plaintiff was traveling in this status, he was not required to perform any work, and he traveled as would any passenger on a commercial flight. It is evident that travel of this type was an incidence of the performance of duty and does not constitute overtime work under section 205(b) of the Federal Employees Pay Act Amendments of 1954, (5 U.S.C. § 912b (1964)) which provides that "time spent in a travel status away from the official-duty station of any officer or employee shall be considered as hours of employment only when (1) within the days and hours of such officer's or employee's regularly scheduled administrative workweek, or (2) when the travel involves the performance of work while traveling or is carried out under arduous conditions." Big. Burich v. United States, supra, 177 Ct. Cl. at 148-49, 366 F.2d at 990; Byrnes v. United States, supra, 163 Ct. Cl. at 177, 324 F.2d at 970; Bigos v. United States, 152 Ct. Cl. 545, 287 F.2d 593 (1961). Plaintiff claims further that approximately 10 per cent of his travel consisted of travel under arduous conditions. This item must be rejected, however, for there is no probative evidence in the record from which a determination or even a reasonable estimate may be made as to how much, if any, of this claimed percentage was actually under arduous conditions.

The last aspect of plaintiff's claim for travel arises from the circumstances (1) that whenever all the passenger seats on a particular flight were filled, plaintiff and the other investigators were authorized to ride in the jump-seat located in the cockpit of the plane by filing a Form 160 ("Request for Access to Aircraft or Free Transportation"), and (2) that in every case where the investigator traveled on this basis using a Form 160, he was required to observe the operations of the aircraft and, upon his return to the office, to make a report on any unsafe conditions or procedures, or any safety violations he may have observed. Against this background, it is clear that such jump-seat travel by plaintiff involved the "performance of work" under section 205(b) of the Pay Act, as amended, and that overtime under those conditions is compensable. The record

shows, moreover, (i) that during plaintiff's period of employment by the CAB, he spent a total of nine and one-half hours in jump-seat travel during which he was required to observe the aircraft's operations and submit a report; (ii) that of these nine and one-half hours, three were within the ambit of his normal work days; and (iii) that six and one-half hours occurred during weekends or represented work in excess of eight hours on a regular work day for which plaintiff is entitled to recover overtime, with the amount of recovery to be determined pursuant to Rule 47(c).

The above report is consistent with the law and decisions applicable to the claims here involved. We therefore consider such report which rejected travel time claimed for commercial flights and certain travel time claimed under allegedly arduous conditions as the correct basis for the settlement of Mr. Lowe's and similar claims. Moreover, we do not regard the piloting of aircraft as arduous work in the absence of other factors such as those referred to in our decision in 41 Comp. Gen. 82, supra.

Sincerely yours,

Paul G. Dembling
For the Comptroller General
of the United States