119550

DECISION

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

FILE: B-172733 DATE: September 24, 1982

MATTER OF: William L. Lamb - Air Safety Investigators - Overtime Pay for Travel to and from Accidents

DIGEST: 1. The National Transportation Safety Board may administratively settle overtime travel claims of air safety investigators for periods of time not time barred under 31 U.S.C. § 71a (1964), pursuant to the Court of Claims reasoning in Russell J. Abbott, et al. v. United States, Ct. Cl. No. 317-71, May 30, 1980. Decision 52 Comp. Gen. 702 (1973) will no longer be followed.

2. Travel to and from accident sites by air safety investigators on commercial airlines, performed under access-to-aircraft (cost free) authority in emergent situations, is compensable work for the purposes of 5 U.S.C. §§ 911 and 912b (1964). The investigators are entitled to overtime pay for such travel outside normal duty hours. Where, however, access-to-aircraft travel was utilized in non-emergent situations and no work was performed or was required during the travel, such travel only served the purpose of transporting the investigator and is not compensable overtime work.

3. Air safety investigators traveling as fare-paying customers on commercial aircraft while proceeding to and from aircraft accidents and while in furtherance of ongoing investigations of aircraft accidents and who perform their investigative function while traveling under emergent conditions are performing work under 5 U.S.C. §§ 911 and 912b (1964). However, routine fare-paying air travel not under emergent conditions is not compensable.

4. Air safety investigators who travel by means other than aircraft, usually by automobile, to and from accident sites, and who are found to perform their investigative function while traveling under emergent conditions, are performing compensable overtime work under 5 U.S.C. §§ 911 and 912b (1964).. Likewise air safety investigators who pilot planes under the same circumstances may be paid overtime compensation for such travel.

5. Air safety investigator who is ordered to transport documents, equipment and exhibits and who is required to personally travel with the items in order to protect their integrity or to ensure they are not damaged, lost, or tampered with, may have such traveltime considered work for the purposes of overtime under 5 U.S.C. §§ 911, 912b (1964). If, however, an investigator incidentally transports these items when the main purpose of his travel is for other reasons, then such travel is not compensable as overtime work under 5 U.S.C. §§ 911 and 912b.

Mr. B. Michael Levins, Director, Bureau of Administration, National Transportation Safety Board (NTSB), has requested our approval for the payment of overtime compensation for travel to air safety investigators, consistent with the principles established by the court in Russell J. Abbott, et al. v. United States, Ct. Cl. No. 317-71, May 30, 1980. 1/ For the reasons which

1/ In Abbott, judgments were rendered against the United States and in favor of the following named plaintiffs: William L. Lamb, Ivan R. Stracener, Philip W. Atkins, Robert E. Gilmour, John Sahaida, Robert H. Shaw, Guy D. Moshier

follow, we have no objection to paying these or similar air safety investigator claims, subject to 31 U.S.C. § 71a. Our decision 52 Comp. Gen. 702 (1973) will no longer be followed.

BACKGROUND

Claimants are air safety investigators employed by NTSB to engage in the investigation and prevention of accidents and incidents involving United States aircraft anywhere in the world and foreign aircraft in the United States. Claimants are also engaged in the establishment of programs and procedures to provide for the notification and reporting of accidents. At issue here is whether they may be paid overtime compensation for travel going to and from the scene of accidents when it is performed beyond their regularly scheduled 40 hour workweeks.

The relevant overtime provisions for the period of time involved are 5 U.S.C. §§ 911 and 912b (1964) 1/ which read as follows:

> "All hours of work officially ordered or approved in excess of forty hours in any administrative workweek performed by officers and employees to whom this subchapter applies shall be considered to be overtime work and compensation for such overtime work, except as otherwise provided for in this chapter, shall be at the following rates. * * * 5 U.S.C. § 911.
>
> "For the purposes of this chapter, 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, including regularly scheduled overtime hours, or (2) when the travel

1/ Now codified, as amended, at 5 U.S.C. §§ 5542(a), 5542(b) (1976).

involven the performance of work while traveling or is carried out under arduous conditions." 5 U.S.C. § 912b.

The claimants, along with other air safety investigators, originally filed their claims with the General Accounting Office in 1970. Subsequently, in our decision on the overtime claim of Garnett E. Lowe, Jr., 52 Comp. Gen. 702 (1973), we held that air safety investigators could not be paid overtime compensation for traveling on commercial airline flights unless they were occupying the jump-seat in the aircraft cockpit. We also held that when the investigators piloted aircraft to their work they were not engaged in compensable work because such travel was not arduous.

We so held relying on the Commissioner's finding of facts in Griggs v. United States, Ct. Cl. No. 336-65 (Trial Div. 1967), involving another claim for overtime compensation for travel by an air safety investigator. The Commissioner described the travel as not being compensable under 5 U.S.C. § 912b since the evidence did not show the performance of work was required while traveling and since the travel could not be described as being arduous.

Claimants then pursued their legal remedies in the Court of Claims and in Abbott, Trial Judge Colaianni rejected the applicability of 52 Comp. Gen. 702 to the claimants' case and found that in the case of air safety investigators, travel under certain circumstances in commercial aircraft and automobiles, and travel while piloting planes could be considered compensable overtime work. Russell J. Abbott (William L. Lamb, Plaintiff No. 15) v. United States, Ct. Cl. No. 317-71, (Trial Division) May 30, 1980. Mr. Levins states that none of the parties have appealed the Abbott decision and judgments have been entered for the claimants by the court.

The NTSB now recommends payment of those portions of the overtime claims occurring prior to April 11, 1965, which were barred from consideration by the Court of Claims by virtue of the court's 6-year statute of limitations, 28 U.S.C. § 2501, but which may be administratively considered because claimants had previously filed their claims with GAO. See 31 U.S.C.

§ 71a(1) (1964). Mr. Levins accordingly asks whether NTSB may settle the investigators' claims for the period prior to April 11, 1965, based on the court's rulings in Abbott.

The court in Abbott described the reasons for and conditions of air safety investigators' travel to be as follows:

> "An aircraft accident or incident is a random, unscheduled occurrence which may take place under varying conditions of weather and terrain. The CAB, and its successor, the NTSB, were charged with responsibility under federal law to take custody of the wreckage, records, cargo, mail, flight records, and bodies of victims. Thus, expedient arrival at an accident scene was a necessity, and the air safety investigators, including the engineering technicians, had to be available 24 hours a day, 7 days a week, and 365 days per year.
>
> * * * * *
>
> "If the distance to the accident scene was substantial, the initial phase of the travel was normally performed by the first available commercial airline flight to the airport nearest the accident scene. The investigator, if he were notified of the accident during off-duty time, would proceed from his home to the airport either in his private automobile, in a Government vehicle that might be available for his use, or in a taxi. An investigator traveling by commercial air carrier would either acquire, similar to the general public, a ticket for first class or tourist seating, or fly at no cost to the Government in an access-to-aircraft status."

See pages 4, 5, and 6 of trial judge's opinion in Russell J. Abbott, et al. (William L. Lamb, Plaintiff No. 15) v. United States Ct. Cl. No. 317-71, May 30, 1980.

I

ACCESS-TO-AIRCRAFT TRAVEL

The court found that access-to-aircraft authority was exercised in several situations. First, if the investigators desired or needed to make observations of the operations of the aircraft as an aid to the performance of their assigned duties and investigations, they would exercise their right to fly in the cockpit jump-seat.

Access-to-aircraft authority was also exercised when the investigator wished to travel on the same carrier involved in the accident to observe the carrier's operational procedures or when he wished to inspect a particular type of aircraft, aircraft components or route facilities involved in the accident. Additionally, when no other means of transportation to a location near an accident was reasonably available, access-to-aircraft authority was exercised on a must-ride basis. The court found that access-to-aircraft travel was generally performed in the jump-seat but seats in the cabin were also used for such travel.

The court found that, while traveling under access-to-aircraft authority, the investigators performed various duties, including meeting and briefing the crew, observing and reporting on the crew's activities and coordination, and familiarizing themselves with the aircraft, its instrumentation, the cockpit's configuration, functional operating procedures, air traffic control systems being employed, and all other facets of safety in air commerce. The court found that NTSB acknowledged that these activities were performed during access-to-aircraft travel. The court held that these activities were work within the meaning of 5 U.S.C. §§ 911 and 912b. Accordingly, time spent in access-to-aircraft travel was deemed to be compensable overtime.

The court also found, however, that some access-to-aircraft travel was accomplished when no work was performed or was required. For example, in the case of

Ivan R. Stracener, Plaintiff No. 32, the court held that his access-to-aircraft travel to a meeting in a nonemergent situation when he was not ordered to perform such travel was not compensable overtime work. See page 21 of trial judge's opinion in Russell J. Abbott, et al. (Ivan R. Stracener, Plaintiff No. 32) v. United States Ct. Cl. No. 317-71, May 30, 1980.

We have no objection to the application of these rules to claims arising prior to April 11, 1965. As to most of the access-to-aircraft travel the court found that the travel was not merely for the purposes of transporting the investigator but also served the purpose of allowing the investigator to perform his investigative function. Under the facts as determined by the court, the investigators were engaged in direct, productive benefit while traveling, and may therefore be compensated for such work under 5 U.S.C. §§ 911, 912b. Burich v. United States 366 F.2d 984 (Ct. Cl. 1966). Where, however, access-to-aircraft travel was performed in nonemergent conditions as in the above case of Mr. Stracener, the travel is not compensable at overtime rates. Payments of overtime compensation for access-to-aircraft travel should accordingly not include such travel during which work was not performed or required.

II

TRAVEL AS FARE-PAYING CUSTOMERS

The air safety investigators also claimed in the Abbott case that their travel as fare-paying customers on commercial aircraft while proceeding to aircraft accidents, and while in furtherance of ongoing investigations of aircraft accidents, was work. The court found in this regard that, although there were no official orders directing air safety investigators to work while enroute to an accident site, they were expected to go into action immediately upon arrival. Accordingly, while traveling to an accident site it was necessary to review checklists, discuss with or brief other investigators on the status of the investigation, familiarize themselves with the type of plane involved in the accident and maintain contact with

air traffic control so as to gather as much information as possible. The investigator would plan the course of action to be taken upon arrival at the accident scene, maintain contact with ground points to locate the accident site, and accumulate additional information. At times they would also study manuals to refresh their memories of different systems of the particular aircraft involved in the accident.

After completing their investigation at the accident site, the investigators were expected to return to their duty stations as expeditiously as possible. They were also expected to file their reports within 10 days. Since there was a real possibility of being assigned to a new accident shortly after returning to their duty stations it was imperative that the most advantageous use be made of their travel periods.

The court held that the above activities performed in emergent conditions constituted the performance of work while traveling. The court stated:

> "it is clear, * * * that work performed while traveling to and from the scene of an accident was not voluntary, for the investigators were never given a free choice. Anderson v. United States, 136 Ct.Cl. 365, 369 (1956). The emergent nature of each accident clearly required the performance of work while traveling to and from the accident. Had plaintiffs not worked in the face of the clear neccessity to be as informed as possible about the accident and to have a good understanding of what they were going to do upon their arrival at the accident scene, they would have been derelict in the performance of their duties. Byrnes v. United States, [330 F.2d 986 (Ct. Cl. 1964)]. There was more than a 'tacit expectation' that plaintiffs would work while traveling to and from the scene of an accident; they were induced to work, and inducement to work is sufficient under the Federal Employees Pay Act to satisfy the requirement that the work be 'officially ordered or approved' Fix v. United States, 177 Ct. Cl. 369, 375 (1966)."

Page 22 of the Trial Judge's opinion, Russell J. Abbott, et al. (William L. Lamb, Plaintiff No. 15) v. United States, Ct. Cl. No. 317-71, May 30, 1980.

The court distinguished its holding from our decision 52 Comp. Gen. 702 (1973), cited above, as follows:

> "It should * *. * be realized that the Comptroller General's opinion was not based on factual findings made after a full hearing of the evidence, but was rather written in response to a letter requesting a ruling. The opinion was based on those facts found by Commissioner Maletz in Griggs v. United States, No. 336-65 (Ct. Cl. Trial Div. 1967). In Griggs, however, Commissioner Maletz did not conclude that plaintiffs had worked while traveling. Plaintiff sought overtime solely on the grounds that the travel was performed under emergent conditions. The Commissioner and the Comptroller General were clearly correct in holding that the existence of emergency conditions is not, by itself, a sufficient ground for awarding overtime compensation.
>
> "By contrast, plaintiffs here seek overtime compensation on the ground that they performed work while traveling. Thus the opinion of the Comptroller General and the opinion of Commissioner Maletz are, on this point, factually distinguishable."

Page 25, and 26 of the Trial Judge's Opinion in Russell J. Abbott, et al. (William L. Lamb, Plaintiff No. 15) v. United States, Ct. Cl. No. 317-71, May 30, 1980.

In view of the fact the Abbott court found that the investigators were performing their investigative function and were thus working while traveling on commercial airlines to and from accidents, we agree that such traveltime is compensable work under 5 U.S.C. §§ 911 and 912b. Likewise, we agree with the court's

statement that, although the existence of an emergency is not, by itself, sufficient to award overtime pay, the emergent conditions in these specific cases effectively required that the investigators perform work while they were traveling and such work was induced so that it was tantamount to having been ordered or approved. Baylor v. United States 198 Ct. Cl. 331 (1972). Compare Gene L. DeCondo, B-146288, January 3, 1975. Accordingly, overtime payments for such travel may be administratively made for those irvestigators otherwise so entitled.

III

TRAVEL BY MEANS OTHER THAN AIRCRAFT

Also involved here are claims for overtime for work performed while traveling by means other than aircraft, commonly by automobile. The court held that work performed while traveling to and from an accident site by means other than aircraft, for the reasons stated in application to work performed aboard aircraft, was officially ordered or approved.

The court found that investigators utilized their traveltime, among other things, to sort evidence, and review, prepare, and record notes relating to the investigation. When traveling with other investigators, they would discuss the results of the investigation to that point, the possible causes of the accident, and the changes which should be made to conclude the investigation. The court found that, where these activities were required to be performed during travel because of the constraints of time due to the obvious unplanned nature of aircraft accidents, such traveltime was spent in the performance of compensable work.

Again, in view of the court's review of all the evidence and its factual determination that this work had to be performed while the investigators were traveling, we have no objection to an administrative finding that such traveltime is work under 5 U.S.C. §§ 911 and 912b.

As the court noted, the facts applicable to air safety investigators are distinguisnable from those in Barth v. United States, 568 F.2d 1329 (Ct. Cl. 1978).

where the travel served no purpose other than to transport the employee from one place to another. Here, the absolute necessity to proceed as quickly and expeditiously as possible and the emergent nature of the travel, dictated that the investigators utilize their travel periods for the performance of work which was necessarily, primarily, and predominantly for their employer's benefit.

IV

EFFECT OF EMERGENT CONDITIONS ON TRAVEL

We do note, however, that the court allowed the investigators' claims for compensation for traveltime only to the extent that the investigators could prove that they performed work under the above rules, and claims were reduced or denied where there was no evidence to show that the investigator performed work or was required to do so while traveling.

A major reason for the Abbott court's decision that the investigators were performing work while traveling was that, given the emergent conditions of the travel, the investigators' function necessarily had to be performed during the travel as it was of such a nature that it could not be left until after the travel was completed. Accordingly, where emergent conditions did not exist for the travel, the Abbott court found that the travel did not require the performance of work and any work performed in such cases was voluntary, not ordered or aproved, and thus such travel would not be compensable. The NTSB should be similarly guided in its settlement of these claims.

V

TRAVEL WHILE PILOTING A PLANE

The Abbott court also allowed the claims of investigators who piloted their planes in emergent conditions under the same circumstances to those existing for automobile travel. We likewise have no

objection to administrative payments where work was performed during emergent travel.

The court did allow overtime compensation for nonemergent travel in a case where the investigator was delivering an aircraft for testing. We agree with the court's following analysis of such travel and it may be applied in like cases:

> "The travel was not performed to transport plaintiff from one point to another. The plaintiff was delivering the airplane, and this is no different than the transport of a prisoner by a sheriff, Burich v. United States, * * * or the work of a chauffeur or a truck driver."

Russell J. Abbott, et al., (Robert E. Gilmour, Plaintiff No. 10) v. United States Ct.Cl. No. 317-71, May 30, 1980. Other nonemergent travel which only served the purpose of transporting the investigator, however, may not be considered compensable work.

VI

TRANSPORTING DOCUMENTS EQUIPMENT AND EXHIBITS

The Abbott court also approved overtime compensation for travel during which documents, equipment and exhibits were transported by an investigator. For example, one plaintiff was directed by his supervisor to travel from Washington, D. C., to New York City in his personal automobile to transport 267 pounds of exhibits that would be needed at a hearing for which he was a member of the technical panel.

As to whether or not an employee is entitled to overtime compensation while transporting various items, we are guided by the following language in B-178458, June 22, 1973:

> "A courier is one whose duties include carrying information, mail, supplies, etc., work which to a large extent can be performed

> only while traveling and which would be compensable * * *. In most instances of travel, a Government employee will necessarily transport supplies or equipment and to this extent incidentally serve a 'courier' function. We have expressly held, however, that the fact that incident to the purpose of travel, files, documents, supplies, etc. are transported, does not change the character of travel."

In that case an employee traveled with 100 pounds of excess baggage containing tools and equipment. We denied overtime compensation for the travel because there was no indication that the transportation of that equipment was other than incidental to the employee's transportation or that the employee's function during travel was to accompany, protect, or perform work on the equipment.

Accordingly, it is our view that if an investigator is ordered to transport documents, equipment and exhibits and is required to personally travel with the items in order to protect their integrity or to ensure they are not damaged, lost or tampered with, then such time should be considered as compensable work. If, however, the investigator incidentally transports documents, equipment, or exhibits when the main purpose of his travel is for other reasons, then such travel is not compensable as overtime work. As we stated in the latter cited case "whether the transportation of equipment is merely incidental to the employee's travel, or is itself the employee's primary function is for determination by the administrative agency." The NTSB should make its decisions accordingly.

VII

CONCLUSION

Accordingly, the NTSB may administratively settle the claims of air safety investigators for overtime compensation for travel which occurred prior to April 11, 1965, under the above guidelines as long as a claim was

timely filed in this Office in accordance with 31 U.S.C. § 71a, Decision 52 Comp. Gen. 702 (1973) will no longer be followed.

Harry R. Van Cleve
for Comptroller General
of the United States