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**DECISION**



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

**FILE:**

**DATE: MAR 8 1977**

**MATTER OF: D-172671**

**DIGEST:**

**Mark Burstein - Claim for compensatory time  
while in travel status**

1. NLRB Field Attorney claims compensatory time for travel time incident to interview of witness away from duty station and after regular duty hours. Claim is denied since interview did not create such immediate necessity for travel as to preclude scheduling of travel during regular duty hours under 5 U. S. C. §6101 (b).

2. Entitlement to overtime (or compensatory time) for travel time under 5 U. S. C. §542 (b)(2)(B)(iv) depends not only on the event necessitating travel being administratively uncontrollable but also on the necessity for scheduling the travel during nonduty hours. If the scheduling of the travel during regular duty hours would not result in 2 or more days of additional per diem, then travel may not be scheduled during nonduty hours with resulting overtime pay. B-172671, November 19, 1974, modified.

This action is in response to the request for a decision from Mr. Robert Draker, President, National Labor Relations Board Union (hereinafter referred to as the "Union"), concerning the entitlement of Mr. Mark Burstein, a National Labor Relations Board (NLRB) Field Attorney, to overtime compensation or compensatory time in lieu thereof for time spent in travel incident to the interview of a witness after the employee's regular duty hours.

The facts in this case are not in dispute. It appears that on November 4, 1975, Mr. Burstein, who was assigned to the Milwaukee, Wisconsin, NLRB Regional Office left Milwaukee at 6:15 p.m. and traveled to Oconomowoc, Wisconsin, to conduct a pre-trial interview of a witness scheduled to appear in a NLRB unfair labor practice trial. Mr. Burstein arrived at the witness' home in Oconomowoc at 7 p.m., completed the interview at 8:30 p.m., and returned to Milwaukee at 9:15 p.m. He has requested 1-1/2 hours of overtime compensation (or compensatory time) for his travel time to and from the interview in accordance with the provisions of 5 U. S. C. §§ 542 (b)(2)(B)(iv), 5543 (Supp. V, 1975). The submission from the Union states that the witness to be interviewed had essential testimony for the trial and that he had been "somewhat uncooperative" during the initial investigation of the unfair labor practice charge. In addition, the Union states that

B-172671

the witness worked the same hours as that of the Milwaukee Regional Office and that he insisted upon being interviewed at 7 p.m., after he had completed dinner.

Mr. Burstein's claim was denied by the NLRB, and he filed a grievance pursuant to the Agreement between the NLRB General Counsel and the Union. On January 13, 1976, a "STEP THREE DECISION" was issued by Mr. Joseph E. DeSio, Associate General Counsel for the NLRB, denying Mr. Burstein's claim as not compensable under 5 U.S.C. §5542 (b)(2)(B)(iv) since the event which necessitated travel was not of such an uncontrollable nature as to preclude the scheduling of the employee's travel time during regular working hours. The decision of the NLRB cited two decisions of our Office, 51 Comp. Gen. 727 (1972) and B-172671, November 19, 1974. The Union, therefore, elected to request a decision from our Office.

The Union says that for the purposes of pre-trial preparation, Mr. Burstein had no alternative but to interview the witness, and since the witness was not available during the normal office hours of the Milwaukee Regional Office, the scheduling of the interview could not be controlled administratively. Further, the Union points to language in our decision B-172671, for the principle that where the employee has to accommodate to the schedules of outside parties, this constitutes an event which cannot be controlled administratively as contemplated under 5 U.S.C. §5542 (b). The Union views the "Greco case", 51 Comp. Gen. 727, supra, as distinguishable in that the employee in that case, Mr. Greco (also a NLRB Field Attorney), had the discretion to interview or not interview a witness in an investigatory matter, and Mr. Greco scheduled the interview at the convenience of the witness and himself. The Union contends that Mr. Burstein was obligated to interview this witness and that he was forced to adhere to the schedule dictated by the witness.

In response to our request for comments the General Counsel of the NLRB states that, while the NLRB has no objection to granting Mr. Burstein's claim, it feels bound by our prior decisions involving NLRB Field Attorneys, 51 Comp. Gen. 727, supra; B-172671, November 19, 1974, and April 21, 1976, which the NLRB interprets as allowing compensation for travel outside normal working hours only where there is no administrative alternative to the proper scheduling of travel in accordance with 5 U.S.C. §6101 (b)(2). As noted above, the NLRB contends that the circumstances surrounding

B-172671

Mr. Burstein's travel do not meet the conditions set forth in 5 U. S. C. §5542 (b)(2)(B)(iv) as interpreted by our decisions.

Section 5542 of title 5, United States Code, provides, in pertinent part:

"(b) For the purpose of this subchapter

\* \* \* \* \*

"(2) time spent in a travel status away from the official duty station of an employee is not hours of employment unless --

\* \* \* \* \*

"(B) the travel \* \* \* (iv) results from an event which could not be scheduled or controlled administratively." 5 U. S. C. §5542 (b)(2)(B)(iv) (Supp. V, 1975).

In addition, an employee's travel is to be scheduled in accordance with the provisions of 5 U. S. C. §6101 (b) which provides, in part:

"(2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee."

The "event" referred to in 5 U. S. C. §5542 has been held to be anything which necessitates the employee's travel. 51 Comp. Gen. 727, supra; and B-172036, October 4, 1973. To be compensable travel time there must also exist an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours. See 51 id. 727, supra, and cases cited therein. If the necessity is not so immediate as to preclude proper scheduling of the travel, then overtime compensation may not be paid for travel time. 51 id. 727, supra; 50 id. 674 (1971); and B-183493, July 25, 1976. That the event necessitating the travel "could not be scheduled" means more than that it was difficult or impractical but not necessarily just an emergency

B-172671

situation. The Union in the present case has laid great emphasis on the argument that Mr. Burstein was forced into conforming to a schedule of an outside party and that the scheduling of the event, the interview, was administratively uncontrollable. However, it must also be shown that the employee's travel could not be properly scheduled in accordance with 5 U.S.C. §6101 (b). For example, in 50 Comp. Gen. 674 (1971) an employee with a Sunday through Thursday workweek was ordered to perform duty away from his duty station on Saturday morning, and he traveled on Friday to his temporary duty station. We held, however, that he could have been scheduled to travel Thursday afternoon during regular duty hours since such travel would not result in payment of 2 or more days of additional per diem prior to the beginning of the scheduled event. 50 id. 674, *supra*. See also 55 id. 390 (1975); 53 id. 882 (1974); and B-169078, April 22, 1970.

Therefore, there must be both an uncontrollable event and an immediate necessity for the employee's travel which precludes proper scheduling. In the present case, it appears, based on the record before us, that Mr. Burstein could have traveled to the interview during his regular duty hours in the afternoon of November 4, 1975, and, therefore, he may not be paid overtime compensation (or compensatory time) for travel to the interview. As to his return trip from the interview, there is no evidence that an uncontrollable event necessitated his return travel during nonduty hours, and, therefore, this claim is also denied. B-172671, April 21, 1976, and November 19, 1974; and 51 Comp. Gen. 727, *supra*.

The Union in the present case has referred to our prior decision B-172671, November 19, 1974, for authority to allow Mr. Burstein's claim. In that cited decision, it was concluded that Mr. Ratajczak, a NLRB Field Attorney, had no administrative alternative but to conduct a representation election on a Saturday away from his duty station. We then stated that "\* \* \* there was no administrative alternative to the scheduling of Mr. Ratajczak's travel on the weekend." Our decision stated further:

"We find from the above that the NLRB had no alternative but to schedule Mr. Ratajczak's travel on a weekend since the necessary parties

B-172671

to either a manual election or to a formal hearing required as a precedent to a mail-ballot election could not have attended on a weekday. It is clear that when an employee's travel is not controllable but rather must fit the time schedule set by persons outside of his agency, in this case the management and union of the trucking firm involved, such travel may be compensable at overtime rates if performed outside of normal duty hours. 50 Comp. Gen. 519 (1971)."

It appears, in light of the discussion above, that our decision B-172671, November 19, 1974, should have stated that the NLRB had no alternative but to schedule the election on a weekend since the necessary parties to either a manual election or to a formal hearing required as a precedent to a mail-ballot election could not have attended on a weekday. Thus, where Mr. Ratajczak's duty assignment to conduct the election was not controllable but had to fit the time schedule set by persons outside of his agency, our Office would consider this to be an event which could not be scheduled or controlled administratively as contemplated under subparagraph 5542 (b)(2)(B)(iv). However, there is no indication in the record that the NLRB had no administrative alternative but to schedule Mr. Ratajczak's travel on Saturday. To order Mr. Ratajczak to travel on Friday afternoon would have been consistent with the provisions of 5 U. S. C. §8101 (b) and with our decisions, 55 Comp. Gen. 590 (1976); 50 id. 574 (1971); B-179430, November 25, 1974 and December 18, 1973; and B-180078, supra. Therefore, our decision B-172671, November 19, 1974, is hereby prospectively modified in accordance with the discussion above with regard to the employee's travel time to the election. Our decision in 50 Comp. Gen. 519 (1971), cited in B-172671, November 19, 1974, is not hereby modified since in our published decision it appears that the event necessitating travel was uncontrollable and the travel could not be scheduled within the employee's regular working hours. 50 id. 519, at 521-22 and 525-26, supra.

Accordingly, Mr. Burstein is not entitled to overtime compensation for the time spent in travel to and from the interview.

Comptroller General  
of the United States