



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 30, 2015

CBCA 3903-TRAV

In the Matter of STEPHEN M. ENGLAND

Stephen M. England, Glen Mills, PA, Claimant.

Anne M. Schmitt-Shoemaker, Deputy Director, Finance, Finance Center, United States Army Corps of Engineers, Millington, TN, appearing for Department of the Army.

DRUMMOND, Board Judge.

The Army Corps of Engineers directed employee Stephen M. England to travel from Philadelphia, Pennsylvania, to Key West, Florida, on official business from March 16 through 28, 2014. The agency determined that the most advantageous method of travel for this trip was by airline. Mr. England asked to be allowed to drive his motor home instead of flying, so that he could stay in Key West in a campground instead of a hotel and thereby incur much lower lodging costs. The agency authorized him to drive, stating on his travel orders that “mileage reimbursement [at fifty-six cents per mile] and per diem is limited to constructed cost of common carrier transportation and per diem as determined and travel time as limited per JTR [the Department of Defense’s Joint Travel Regulations].”

After returning from Key West, Mr. England sought reimbursement for his travel expenses. The agency paid him a total of \$3037.36, which represented the cost of his lodging, a per diem allowance, and highway tolls, plus the airfare he would have incurred if he had flown to and from Key West.

Mr. England believes that he should have been reimbursed \$4127.65, a figure which represents the above costs, less airfare, plus \$1472.80 in mileage. He maintains that the constructive cost of his trip – the cost he would have incurred if he had traveled by air – would have been much higher than his actual costs (\$4965.60 instead of \$4127.65). The constructive cost, therefore, should not have limited his reimbursement.

Section 301-10.309 of the Federal Travel Regulation (FTR) establishes the general rule for the circumstance which occurred here:

What will I be reimbursed if I am authorized to use common carrier transportation and I use a POV [privately owned vehicle] instead?

You will be reimbursed on a mileage basis, plus per diem, not to exceed the total constructive cost of the authorized method of common carrier transportation plus per diem.

41 CFR 301-10.309 (2013). The term “per diem,” as used in the FTR, includes lodging as well as a per diem allowance for meals and incidental expenses. *Id.* 300-3.1

Mr. England and the Corps both ask us to look to JTR C4710-C. This provision restates the FTR rule more elaborately:

If a traveler elects to use a POC [privately owned conveyance] instead of the authorized transportation mode (other than GOV [government owned vehicle]), reimbursement must be limited to the authorized transportation mode constructed cost, which is the sum of per diem and the transportation cost the GOV'T [Government] would have incurred if travel was performed by the authorized transportation mode.

JTR C4710-C then continues, confusingly:

No other costs are added to the computation. Reimbursable expenses associated with driving a POC (e.g., parking, tolls) and incurred during travel between the PDS [permanent duty station] and TDY [temporary duty] location are not authorized.

Example: A traveler is authorized air transportation from Washington, DC, to Orlando, FL, at a cost to the GOV'T of \$500 for the air transportation only. The traveler elects to use a POC to perform travel to the TDY site. The traveler is limited to a maximum of \$500 for transportation costs. Any other costs that MAY HAVE BEEN associated with the use of the authorized air transportation have no bearing on the cost construction of the reimbursable transportation costs. Reimbursement for parking, ferry fares, or tolls are not authorized.

We have recently explained how the FTR provision should be applied:

The regulation requires an agency, when an employee chooses to travel in his or her own vehicle rather than by the means of transportation most advantageous to the Government, to calculate the employee's travel costs in two separate ways. First the agency should determine, through the standard application of statute and regulation, the allowability of the various components of an employee's travel claim

Second, the agency should determine the total constructive cost of the employee's travel had he or she traveled by the method of transportation deemed to be in the Government's best interest [C]onstructive costs are by their very nature *not* costs which are actually incurred. Although these costs, too, should be determined through application of statute and regulation, the calculation necessarily will involve assumptions. As with the employee's travel costs determined in standard fashion to be allowable, the agency should likewise calculate a total constructive cost.

After computing the two totals, the agency should compare them. If the total of costs determined in standard fashion to be allowable is greater than the total of the constructive costs, the agency should limit reimbursement to the latter figure.

Robert A. Cherry, CBCA 3878-TRAV, 14-1 BCA ¶ 35,707 (quoting *Peter C. Thurman*, GSBCA 15562-TRAV, 01-2 BCA ¶ 31,516, and *Russell E. Yates*, GSBCA 15109-TRAV, 00-1 BCA ¶ 30,785).

The first sentence of the JTR provision cited above is faithful to both the FTR provision and the Board's explanation of how that provision is to be applied. Unfortunately, the remainder of JTR C4710-C, to the extent that it may be comprehended at all, makes hash of the first sentence. The "authorized transportation mode constructed cost," to use the first sentence's phrase, cannot be calculated without taking into consideration all the costs that a traveler would incur if he traveled by that authorized mode. "Reimbursable expenses associated with driving a POC" are by definition not authorized when the Government finds travel by common carrier most advantageous, but they are essential to a comparison between costs actually incurred and the constructed cost of traveling by common carrier. Similarly, every cost that "MAY HAVE BEEN associated with the use of the authorized air transportation" is essential to such a comparison, and so are "parking, ferry fares, [and] tolls" that a traveler actually pays when driving his own vehicle.

As we have explained many times, the FTR is a “legislative rule” – a regulation issued under express authority from Congress, for the purpose of affecting individual rights and obligations by filling gaps left by a statute, after following the Administrative Procedure Act’s notice and comment provisions. It therefore has controlling weight – the force of law – unless the provision in question is arbitrary, capricious, or manifestly contrary to statute. Any agency rule which is inconsistent with an FTR provision is consequently trumped by the FTR and must give way.

Cherry (citing *Kevin D. Reynolds*, CBCA 2201-RELO, 11-1 BCA ¶ 34,756 (citing numerous prior decisions)). The portion of JTR C4710-C other than the first sentence deserves no credence because it is not faithful to the FTR.

Mr. England correctly points out that if he had traveled to Key West by air, he would have incurred higher lodging costs, as well as airfare, airline baggage fees, airport parking fees in Philadelphia, and rental car costs in Key West. The constructive cost would have been greater than the costs he actually incurred by driving to and from Key West and staying in a campground. Thus, applying the FTR and the first sentence of JTR C4710-C, he must be reimbursed for his actual costs.

We make an adjustment to one element of the costs he claims and question whether another element should be reimbursed. (1) Mr. England seeks a per diem allowance at the rate prescribed for Key West in 2014 (\$71/day) for each of twelve days. The FTR limits the per diem allowance for the day of departure and the last day of travel to seventy-five percent of the applicable rate. 41 CFR 301-11.101. Consequently, Mr. England is entitled to only \$53.25 in per diem allowance for each of the first and last days of his trip. (2) He also seeks reimbursement of \$17.05 per day for a tax he allegedly paid on the campground fee. The FTR provides that a traveler on official business must pay applicable lodging taxes, unless exempted by the state or local jurisdiction, and those taxes are reimbursable as a miscellaneous travel expense. *Id.* 301-11.27, -11.28. Our record contains no documentation that Mr. England ever paid such taxes, however. He is entitled to reimbursement for them only if he can show the agency that he actually paid them.

JEROME M. DRUMMOND
Board Judge