August 19, 2014

CBCA 3878-TRAV

In the Matter of ROBERT A. CHERRY

Robert A. Cherry, Albuquerque, NM, Claimant.

Lake Begay, Supervisory Auditor, Office of Trust Review and Audit, Office of the Special Trustee for American Indians, Department of the Interior, Albuquerque, NM, appearing for Department of the Interior.

DANIELS, Board Judge (Chairman).

The Department of the Interior (DOI) directed employee Robert A. Cherry to travel from Albuquerque, New Mexico, to Billings, Montana, on official business in June 2014. The agency determined that the most advantageous method of travel for this trip was by airline, with a rental car available for the employee's use in and around Billings. Mr. Cherry did not fly to Billings or use a rental car there; instead, he chose to drive his privately owned vehicle (POV). The issue presented by this case is how much he should be reimbursed for the expenses he incurred while on the trip.

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 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).

One of our predecessor boards, the General Services Board of Contract Appeals, explained how this regulation 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.

Peter C. Thurman, GSBCA 15562-TRAV, 01-2 BCA ¶ 31,516 (quoting *Russell E. Yates*, GSBCA 15109-TRAV, 00-1 BCA ¶ 30,785). This Board follows this guidance. *Alfonso Diaz Del Castillo*, CBCA 2250-TRAV (June 21, 2011); *Daniel G. Shelton*, CBCA 473-TRAV, 07-1 BCA ¶ 33,493.

DOI and Mr. Cherry have both attempted to follow this guidance as well. In implementing it, however, they have different views on three matters:

– Should the employee's actual costs of traveling by POV be measured by using the mileage rate prescribed for POVs or the lower mileage rate prescribed for Government owned vehicles (GOVs)?

– Should the employee's actual costs include lodging and a per diem allowance for days when he was traveling by POV, but would not have been traveling if he had gone to the assignment location by air?

– Should the constructive cost of travel by air include the cost of a rental car and gasoline which the employee would have needed to conduct his business at his destination, had he traveled by air?

With regard to each of these matters, DOI has followed its Temporary Duty Travel Policy, which was issued in March 2014. This Policy contains the following statements: "The Bureau must apply . . . the . . . [l]ower [mileage] rate when the traveler . . . uses a POV instead of an available GOV or chooses to use a POV as a personal preference." "Per diem is not authorized for any non-compensable days that are required to reach the TDY [temporary duty] destination because the traveler chose to travel via POV." "Do not include the cost of a rental car in any of the cost estimates."

Although we cannot fault the agency representative for her attentiveness to the Temporary Duty Travel Policy, we agree with Mr. Cherry that as to the three matters in dispute, that policy is not faithful to the FTR and therefore cannot govern his claim.

> 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.

Kevin D. Reynolds, CBCA 2201-RELO, 11-1 BCA ¶ 34,756 (citing numerous prior decisions), *motion for reconsideration dismissed*, 11-2 BCA ¶ 34,793.

As to the first matter in dispute, which mileage rate should be used as the measure of Mr. Cherry's actual costs of transportation, we note that the FTR provides that the GOV mileage rate should be the measure of costs of the use of a POV when an employee is authorized to use a GOV but uses a POV instead. 41 CFR 301-10.310. This rule, the FTR states, applies when determining the constructive cost of transportation when an employee is authorized to travel by common carrier but chooses to travel by POV. *Id.* 301-10.309. The DOI policy goes beyond the FTR rule by requiring the use of the GOV mileage rate in cost comparisons *regardless of whether a GOV is available*. This extension of the rule is inconsistent with the FTR. The POV mileage rate "reflect[s] the current costs of operating privately owned vehicles, including depreciation of original vehicle costs; gasoline and oil; maintenance, accessories, parts, and tires; insurance; and state and federal taxes." *Glenn S. Podonsky*, GSBCA 14207-TRAV, 97-2 BCA ¶ 29,229; *see* 5 U.S.C. § 5707(b) (2012). Unless a GOV is available and the employee chooses to use a POV instead, there is no justification for using a rate which does not reflect these costs. DOI has provided no evidence that it made a GOV available to Mr. Cherry for his trip to Billings, so it must use the POV mileage rate in calculating his actual costs of transportation. *Cf. Herbert H. Galliart*, CBCA 3242-TRAV, 13 BCA ¶ 35,294 (agency made GOV available).

The second matter in dispute is whether Mr. Cherry's actual costs should include the costs of lodging he incurred and the associated per diem allowance for the days in which he was driving to and from Billings, but would not have been traveling had he flown to that temporary duty location. These costs were actually incurred, regardless of whether the days on which they were incurred were compensable work days. *See* 41 CFR 301-11.9 (per diem entitlement starts when employee departs his home, office, or other authorized point and ends on the day he returns to that point). While it is possible that Mr. Cherry drove on non-work days (such as weekends) or days on which he took annual leave, the costs were incurred nonetheless. They must be considered in calculating the actual costs which must be compared with constructive costs, consistent with section 301-10.309 of the FTR and implementation of that section described in *Yates* and *Thurman*. Because we have no evidence of the cost of Mr. Cherry's lodging on the way to and from Billings, however, we cannot at this time determine his actual costs in this regard. Mr. Cherry must show DOI receipts for lodging expenses he incurred en route for those expenses to be considered part of his actual costs. 41 CFR 301-11.25.

The third matter is whether the cost of a rental car (including gas) in Billings should be considered in determining the constructive costs of Mr. Cherry's trip. The DOI policy preventing this cost from being included is plainly at variance with the meaning of the term "constructive cost," since this is a cost which the agency acknowledges would have been incurred if Mr. Cherry had flown to and from Billings.

We now apply these rulings to the dollar amounts cited by the parties. The actual costs incurred by Mr. Cherry on this trip were $2741.92 (or $2907.92 if he can produce lodging receipts in the amounts he claims). This amount consists of $1207.92 in mileage (2157 miles at fifty-six cents per mile), $913 in lodging expenses ($1079 if the receipts in question are produced), and $621 in per diem allowance. The constructive costs – the costs he would have incurred if he had traveled by air – are $2630.92. This figure includes the rental car costs at issue. Because the constructive costs are less than the actual costs (whether receipts for lodging en route are produced or not) Mr. Cherry's reimbursement is limited to the amount of the constructive costs. DOI has already reimbursed him in the amount of $1995.91. Consequently, as he contends, the agency must now pay him an additional $635.01 – the difference between $2630.92 and $1995.91.

STEPHEN M. DANIELS
Board Judge