UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 2, 2015

CBCA 4821-TRAV

In the Matter of IVAN J. RIOS-GRAJALES

Ivan J. Rios-Grajales, Woodbridge, VA, Claimant.

James E. Hicks, Office of Chief Counsel, Drug Enforcement Administration, Department of Justice, Springfield, VA, appearing for Department of Justice.

LESTER, Board Judge.

Claimant, Ivan J. Rios-Grajales, is a Special Agent (SA) in the Washington Field Office of the Drug Enforcement Administration (DEA). He has asked us to review DEA's partial denial of air travel costs that he incurred for official travel from Washington, D.C., to Kabul, Afghanistan. For the reasons set forth below, although requiring SA Rios[1] to pay for most of his flight to and from Kabul is unfortunate in the circumstances here, we are powerless to overturn the agency's decision. Accordingly, based upon the current record, we must deny SA Rios' request.

Background

The Temporary Duty Travel Policy Handbook for the DEA's Office of Finance, dated September 2013, indicates that travelers must use United States flag air carriers for all air travel funded by the United States unless the travel falls into one of several listed exceptions.

[1] Because it appears from the evidentiary material in the record that the appellant uses the surname "Rios" in his work environment, we will refer to him by that name here.

See Handbook at 31. That provision of the handbook is intended to implement and explain to DEA employees the requirements of the Fly America Act, 49 U.S.C. § 40118 (2012). The handbook also indicates that, "[t]o receive authorization for using a foreign air carrier for all or a portion of your international travel, you must qualify for one of the allowable exceptions to flying US flag carrier" and "must complete the Fly America Act Waiver Checklist/Certification form." *Id.* at 32. The handbook further provides that, "[i]f a portion of travel is flown on foreign air carrier, without appropriate authorization, the foreign air carrier portion will not be reimbursed by DEA." *Id.*

SA Rios was ordered to travel for temporary duty (TDY) from Washington, D.C., to Kabul from April 17 through May 3, 2015.

On March 30, 2015, as part of the process of preparing for his upcoming travel, SA Rios submitted a Fly America Act Waiver Certification form to DEA's GetThere Travel Helpdesk (the Helpdesk), seeking permission to fly Emirates, a foreign air carrier, from Washington to Kabul because no United States flag air carrier travels that route or into Kabul. Later that day, the Helpdesk responded in an e-mail message as follows: "Mr. Rios, Is this for Emirates flight between Kabul and Dubai. If so, you may simply use the attached Fly America Act Waiver Annual Certification form approved for this particular market." The waiver form that accompanied the e-mail message only referenced the Kabul-to-Dubai route. Nevertheless, the e-mail message said nothing expressly to inform SA Rios that he would have to find a United States flag air carrier for the Washington-to-Dubai portion of his flight. After receiving this e-mail message, SA Rios sent the following e-mail message to an individual who appears to have been a supervisor within his office: "I am good to go with the waiver? Thank you." The record does not reflect the individual's response.

SA Rios then booked his international travel on the Helpdesk website and subsequently traveled on an Emirates flight from Washington, D.C., to Dubai, where he transferred to an Emirates flight to Kabul. On May 3, 2015, he returned from that travel, again using Emirates flights.

On or about May 5, 2015, SA Rios submitted a travel voucher for expenses incurred during his trip, including a request for reimbursement of $1418 in round-trip airfare. On May 18, 2015, a representative from the Helpdesk sent an e-mail message to SA Rios, indicating that "[w]hat you booked . . . doesn't match the waiver we provided," which was limited to the use of foreign carrier service between Dubai and Kabul. The Helpdesk representative sent another e-mail message later that day, stating that the claimant "didn't obtain approval from HQ [Headquarters] to use DEA funds to purchase airline tickets with a foreign carrier" from Washington to Dubai, adding that "[t]his is not just DEA policy, it's the law." After SA Rios indicated that he had not noticed when the Helpdesk responded to

his original waiver certification submission that the waiver provided did not apply to his entire trip, the Helpdesk responded that he would have to obtain a written justification from his supervisor and submit a waiver request.

Subsequently, on May 18, 2015, a DEA supervisor submitted a Fly America Act Waiver Certification form "to bring SA Rios into compliance with the relevant and applicable travel regulations." On May 19, 2015, a different Helpdesk representative from the one with whom SA Rios had communicated the prior day initially approved the waiver request, albeit on a different basis than SA Rios had originally requested, and notified SA Rios' supervisor of the approval. Later that same day, however, that Helpdesk representative rescinded the approval after communicating with the first Helpdesk representative and realizing that the signed approval did not reflect his intent only to grant approval for the Dubai-to-Kabul route. He then denied the certification as it applied to the Washington-to-Dubai route, stating that "several American carriers fly from DC to Dubai." The Helpdesk then calculated the amount of airfare that DEA could reimburse by determining the amount applicable to the approved foreign carrier travel between Dubai to Kabul. Ultimately, the Helpdesk paid SA Rios $717.20 for the Dubai-to-Kabul leg of his trip, but denied reimbursement of $700.80, which represented the cost attributable to the Washington-to-Dubai flight.

On May 21, 2015, SA Rios appealed the disallowance to the DEA Financial Policy Section, which upheld the partial denial of payment on June 10, 2015. He subsequently submitted to the Board this challenge to the disallowance.

Discussion

"The 'Fly America' Act was originally enacted by section 5(a) of the International Air Transportation Fair Competition Practices Act of 1974." *Major General Isaac D. Smith – Fly America Act*, B-234719 (Sept. 15, 1989) (citing Pub. L. No. 93-623, § 5(a), 88 Stat. 2102, 2104 (1975)). "The purpose behind section 5 of the [Act] [was] to counterbalance the advantages many foreign airlines enjoy by virtue of financial involvement and preferential treatment by their respective governments." *Fly America Act – Revision of Joint Travel Regulations*, 57 Comp. Gen. 546, 547 (1978). "Thus, the clear intent of Congress was for United States Government-financed foreign air transportation to be accomplished by certificated United States air carriers to the greatest extent possible." *Id.*

As originally written, the Act imposed upon the Comptroller General the obligation to prohibit "any expenditure from appropriated funds for transportation of personnel on a non-certificated (foreign flag) carrier in the absence of satisfactory proof of the necessity of using a non-U.S. carrier." *Isaac D. Smith*, B-234719. After the Act was repealed but then

reenacted in a similar form in 1994, *see* Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 1116-17 (1994), the Act was again amended in 1996 to eliminate the Comptroller General's review responsibility and, as a substitute, to require the Administrator of General Services (GSA) to "prescribe regulations under which agencies may allow" employees to use foreign air carriers "when satisfactory proof is presented showing the necessity for the transportation." 49 U.S.C. § 40118(c); *see* Pub. L. No. 104-316, § 127(d), 110 Stat. 3826, 3840 (1996). The Administrator accomplished that responsibility through the promulgation of the Federal Travel Regulation (FTR). *See Maynard A. Satsky*, GSBCA 16632-RELO, 05-2 BCA ¶ 33,042, at 163,766.

Under the current version of the Fly America Act, as implemented by GSA, "government agencies must ensure that their employees fly on U.S.-flag air carriers whenever such a carrier is 'available, if the transportation is between a place in the United States and a place outside the United States' 'or reasonably available, if the transportation is between 2 places outside the United States.'" *Mark Alden*, CBCA 4055-TRAV, 15-1 BCA ¶ 35,852, at 175,309 (2014) (quoting 49 U.S.C. § 40118(a)(3)(A), (B)). "Agencies may allow the expenditure of an appropriation for transportation" on a foreign air carrier "only when satisfactory proof is presented showing the necessity for the use of a foreign air carrier's transportation services." *Id.*; *see Desiree Fray*, GSBCA 15012-TRAV, 99-2 BCA ¶ 30,485, at 150,595 ("the statute in effect requires the Government to obtain its employees' air transportation . . . from United States flag carriers unless the Government can show that transportation by foreign air carrier is necessary"). Pursuant to the FTR's implementation of this requirement, "[a]nyone whose air travel is financed by U.S. Government funds" is "required to use a U.S. flag air carrier" unless one of the regulatory exceptions at 41 CFR 301-10.135, .136, or .137 applies. 41 CFR 301-10.132 (2015); *see Satsky*, 05-2 BCA at 163,766. It makes no difference whether a traveler was "unaware of the provisions of the Fly America Act" when he used a foreign air carrier because "we are not authorized to waive the provisions of the Act." *George K. Wilcox*, B-256736 (July 8, 1994).

Here, there was no United States flag air carrier service directly between the United States and Kabul when SA Rios traveled in 2015. However, there was United States air carrier service from Washington to Dubai, from which the traveler could connect to foreign air carrier service that would continue through to Kabul. The FTR expressly provides that, although travelers may use foreign air carriers on those legs of an overseas route for which no United States air carrier provides service, they can use foreign air carriers only to and from "the nearest interchange point on a usually traveled route" at which they can connect with a United States flag air carrier. 41 CFR 301-10.135(d). When SA Rios traveled in 2015, there was a previously approved blanket waiver of the Fly America Act's requirements for travel between Dubai and Kabul, but there was no such waiver of the Act's requirements for travel between Washington and Dubai. Consistent with 41 CFR 301-10.135(d) and with

the approved waiver, the agency here authorized reimbursement of SA Rios' airfare expenses between Dubai and Kabul, but not between Washington and Dubai. Unless his travel falls into one of the regulatory exceptions at 41 CFR 301-10.135, .136, or .137, which we cannot find based upon the current record, there is no statutory or regulatory basis upon which the agency could pay for SA Rios' travel on a foreign air carrier between Washington and Dubai.

The fact that, after his travel was completed, a Helpdesk representative initially approved a waiver of the foreign air carrier prohibition between Washington and Dubai does not change this result in the circumstances here. The record makes clear that the approval was in error, and the error was corrected the very same day. It is true that "legal rights and liabilities in regard to travel allowances vest as and when travel is performed under a competent order; generally, the order may not be revoked or modified retroactively so as to increase or decrease the rights and benefits which have become fixed under applicable statutes and regulations." *Andre E. Long*, GSBCA 14498-TRAV, 98-1 BCA ¶ 29,731, at 147,387 (citing *Dana Riser*, GSBCA 14017-RELO, 98-1 BCA ¶ 29,417, at 147,129 (1997)). This rule precludes an agency from unfairly prejudicing an employee who has incurred costs in reliance on a previously approved travel authorization. Here, however, SA Rios had already completed his travel when the Helpdesk representative approved (and then rescinded) the waiver request. Since he had already incurred the costs of flying on the foreign air carrier when the approval was temporarily issued, his rights in the approval could not have vested "as and when" he traveled, and, because he did not incur costs in reliance upon that waiver approval, he was not prejudiced by the rescission. In the circumstances here, the now-rescinded approval does not waive the prohibition on reimbursement for flying between Washington and Dubai on a foreign air carrier.

SA Rios asserts that, when he was scheduling his travel to Kabul, he was unfamiliar with the applicable laws and requirements that would limit his ability to obtain reimbursement for his travel. He also asserts that, through his numerous communications with the Helpdesk and his own office, he was effectively misled into believing that he had complied with all of the requirements for overseas travel. Yet, "because the requirement for use of United States flag carriers is imposed directly by statute, all persons are charged with notice of it." *Token D. Barnthouse*, CBCA 1625-RELO, 10-1 BCA ¶ 34,353, at 169,642; *see Jasinder S. Jaspal*, 60 Comp. Gen. 718, 720 (1981) (discussing same). As a result, "and because Government funds may not be used to pay for unnecessary travel by foreign air carrier, . . . the traveler is personally liable for any costs incurred because of his failure to comply with this requirement." *Jaspal*, 60 Comp. Gen. at 720; *see Barnthouse*, 10-1 BCA at 169,642-43. The traveler "is not relieved of this responsibility merely because he relied upon the advice or assistance of others in arranging his travel." *Jaspal*, 60 Comp. Gen. at 720; *see Alden*, 15-1 BCA at 175,309 (erroneous advice about Fly America Act did not affect claimant's responsibility for costs); *John King, Jr.*, 62 Comp. Gen. 278, 279-80 (1983) ("the

traveler may not be relieved of personal liability" under the Fly America Act "because of ignorance of the law or because others made travel arrangements for him").

SA Rios also asserts that he did not act in bad faith or with a bad motive in traveling on a foreign air carrier. The record makes clear that SA Rios worked diligently, acting within DEA's system (as he was required to do), in attempting to ensure that his travel was scheduled appropriately and was fully authorized. Yet, SA Rios' good faith does not provide us with a basis for overriding mandatory statutory and regulatory requirements. *Graphic Creations, Inc.*, 72 Comp. Gen. 291, 292 (1993).

It is unfortunate that DEA's travel authorization and reservation system served SA Rios so poorly. It appears that, when SA Rios was attempting to maneuver through the various agency requirements applicable to overseas official travel, there was no particular (and knowledgeable) individual either at the Helpdesk or elsewhere assigned to oversee his travel planning, to educate him about his travel, or to review his travel reservations in advance of his departure to ensure that his travel complied with all statutory and regulatory requirements. Instead, he was obligated to figure out his travel plan and book it himself on a website, despite having no background in the requirements for overseas government travel. With such minimal oversight and assistance by the agency, the fact that employees may make travel plans that they do not know are inconsistent with statutory and regulatory requirements is not surprising.

We note that we recently reviewed another DEA employee's strikingly similar failure to comply with the Fly America Act when booking an overseas flight on DEA's travel website, *see Danielle M. Claude*, CBCA 4134-TRAV, 15-1 BCA ¶ 35,827, at 175,185-86 (2014), making us question whether DEA is satisfying its obligations adequately to assist its employees in booking overseas travel and in protecting them from the type of error that occurred both here and in *Claude*. Unfortunately, even though it appears that DEA must bear the blame for the lack of oversight and assistance that created the problem here, we have no power to order a travel reimbursement inconsistent with the Fly America Act. *George K. Wilcox*, B-256736. We can only hope that DEA, in the future, will make serious efforts to correct any deficiencies in its overseas travel booking process.

Although we cannot grant SA Rios' claim based upon the record here, we note that there are exceptions to the requirements for using United States flag air carriers, and it is unclear whether the agency considered them here. Although, under 41 CFR 301-10.135(d), an individual traveling to a location with no United States flag air carrier service must normally travel on a United States carrier to "the nearest interchange point on a usually traveled route" and then connect to a foreign air carrier, that rule does not apply if doing so would, among other things, require a connecting time of four hours or more at the overseas

interchange point or extend the individual's travel time by at least six hours. *See* 41 CFR 301-10.136(b). From the limited paperwork that appears in the record of this matter, it is unclear whether the agency believes that it could never, under any circumstances, pay for a traveler's use of a foreign air carrier on the Washington-to-Dubai portion of a Washington-to-Kabul trip. To the extent that the agency holds such a belief, it is wrong. If transfer from the United States flag air carrier to a foreign carrier during travel from Washington to Kabul would require a layover of four hours or more in Dubai, the traveler would be entitled to reimbursement for the entirety of his trip from Washington to Kabul using only a foreign air carrier. *See id.* Although nothing in the record here indicates that SA Rios requested agency consideration of these exceptions, we suggest that the agency consider (if it has not yet done so) whether one of these exceptions could apply to permit payment of SA Rios' travel cost within the requirements of the Fly America Act. Further, nothing in this decision precludes SA Rios from asking the agency to renew its review of his claim based upon one of these exceptions.

Decision

For the foregoing reasons, the claim is denied. Nevertheless, we encourage the agency to undertake a new review of SA Rios' claim to determine, if it has not already done so, whether one of the exceptions to the Fly America Act prohibitions applies to his travel between Washington and Dubai.

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HAROLD D. LESTER, JR.
Board Judge