



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

September 29, 2017

CBCA 5686-RELO

In the Matter of DAVID C. TURNBULL

David C. Turnbull, Ho Chi Minh City, Vietnam, Claimant.

Mark Dellinger, Transportation and Travel Management Division, Department of State, Washington, DC, appearing for Department of State.

O'ROURKE, Board Judge.

Claimant, Mr. David C. Turnbull, a Department of State employee who is serving overseas, requested reimbursement of travel expenses for extended economy seating (EES) which was authorized on his orders. The agency denied his request after determining that the circumstances of his travel did not meet the agency's requirements for reimbursement. We grant the claim.

Background

Claimant is a foreign service officer currently assigned to Vietnam. On August 15, 2016, claimant and his spouse traveled twenty-three hours from Washington, D.C. to Ho Chi Minh City, Vietnam pursuant to permanent change of station (PCS) orders. Claimant's orders authorized extended economy seating at the rate of \$300 per person. Although the trip was booked on American Airlines,¹ the leg from Boston, Massachusetts to Tokyo, Japan was operated by Japan Airlines (JAL). At the ticket counter in Boston, claimant inquired about upgrading his seats to extended economy, consistent with his authorization. The agent

¹ The entire itinerary consisted of three separate flights. The first flight was from Washington, D.C. to Boston; the second flight was from Boston to Tokyo; and the third flight was from Tokyo to Ho Chi Minh City.

confirmed that such seats were available and reassured claimant that the seats were located in economy class. Claimant upgraded his seats for the sum of \$600.

Claimant subsequently submitted a travel voucher for reimbursement of travel expenses. His request for reimbursement of the cost of extended economy seating was denied. In an electronic mail (email) message to claimant, the agency representative stated:

I understand that you were authorized extended economy seating on your [travel orders], however, per guidance set forth by TTM-A/LM Transportation Branch and the guidance cable you have attached, not all airlines have economy seating available. In addition, TTM informed us that “premium” economy [programs] are not reimbursable as we are not reporting this under the Department’s mandatory annual Premium Class Travel Report. Based on our research on the Japan Airlines website and the seat guru site, Japan Airlines offers “premium” economy with extra services . . . and the seat guru showed that all Japan Airlines aircraft[] have [a] distinct premium economy cabin.

In response to the denial, Claimant requested a review of the decision, stating:

JAL Extended Economy is still Economy Class seating in [an] economy cabin with additional leg room, and seems to fit within [the] definition . . . My travel was over 14 hours at the allowable cost, and I did not take a rest stop or purchase business lounge [access]. . . The claim reviewer has only stated her reason [for denial] as JAL providing additional entertainment services in extended economy. Nowhere does the [Foreign Affairs Manual] or guidance mention entertainment services as something to preclude use of extended economy seating.

Claimant also stated that his seats did not appear to be located in a cabin that was separate and distinct from other economy class seats. He reiterated that he simply requested economy class seats with additional leg room and that was precisely what he received. He further pointed out that the cost was within the allowable limit and that universal standards for EES do not exist. More leg room may be a common factor among such programs, but claimant observed that airlines differ with regard to what other services (if any) are included when EES is purchased, making it impractical for even the most seasoned travelers to distinguish reimbursable programs from prohibited ones.

The higher-level review also resulted in a denial of the request for reimbursement of the cost of extended economy seating. Claimant then appealed the denial to this Board. In

its response to the appeal, the agency requested that the Board uphold its decision, and explained its determination that JAL's Premium Economy (PE) seats were in a separate and distinct cabin. "The JAL website includes a seat map of the Boeing 787-9 Series aircraft, which clearly shows separate and distinct rows for PE seating . . . [P]hotos from the JAL website show that Premium Economy is separated from Business Class by dividers and from Economy by the barrier created by the galley and bathrooms." The agency also points to the written description of PE class to further support its position:

PE seats are 19.2 inches wide (.3 inches wider than economy) and have extendable leg and foot rests. They also provide setbacks in front of passengers and per the JAL website "do not recline backwards, providing even more relaxing and luxurious personal space." In addition, the JAL website indicates that PE seating offers enhanced benefits not available in the economy cabin. Specifically, the seats have larger entertainment screens, privacy dividers, larger water holders, USB ports, additional video selection, and are located in a designated area of the aircraft. . . . The JAL website also states that the following items are available to travelers seated in PE which are not available to standard economy fliers: additional premium liquors, noise cancelling headphones, a larger amenity pack and access to the JAL Lounge.

Discussion

Unlike civil service employees, whose official travel is governed by the Federal Travel Regulation (FTR), foreign service officers and their family members are subject to the provisions of the Foreign Affairs Manual (FAM)² under the authority of the Foreign Service Act of 1980, 22 U.S.C. § 4081 (2012).³ *Panfilo Marquez*, GSBICA16287-TRAV, 04-1 BCA ¶ 32,617, at 161,411 (2003).

Regarding official travel by foreign service officers, the FAM states, "[T]he general policy of the U.S. Government [is] that less-than-premium-class accommodations must be used for all modes of passenger transportation." 14 FAM 561.1. For airplane travel, the

² 14 FAM 511.2-1 states, "Except as provided . . . these regulations cover travel of Foreign Service (FS) employees and the members of their families, storage and shipment of their effects and motor vehicles, and apply to travel and transportation within the United States as well as abroad."

³ 14 FAM 511.2-2, "Relation to Federal Travel Regulation," provides: "The Federal Travel Regulation (FTR) does not apply to travel authorized under the Foreign Service Act except as specifically referenced by Department regulations."

FAM provides, with certain specified exceptions, that “U.S. Government employees who use commercial air carriers for domestic and international travel on official business must use coach-class airline accommodations.” 14 FAM 567.2. One exception to this general rule is EES, which is defined as:

Airline programs whereby a passenger may obtain a more desirable seat choice within the coach class cabin for a fee. Sometimes called “coach elite,” “coach plus,” “preferred coach,” “economy plus,” “economy comfort,” or “main cabin extra.” This does not include products that are available in separate and distinct cabins on some airlines.

14 FAM 511.3.

The FAM permits official travel in EES, at government expense, when certain requirements are met. These include: 1) obtaining pre-authorization, 2) not exceeding the maximum allowable reimbursement of \$300 per person, 3) using the benefit for direct travel only (authorized origin to authorized destination), and 4) justifying use of the benefit by one of several permissible reasons, such as medical disability, security, agency mission, and use of frequent traveler benefits. 14 FAM 567.2-6 (Dec. 22, 2015).

The agency does not dispute that claimant met the FAM criteria. (A pre-authorization was obtained and reflected on his PCS orders, the actual cost of the benefit was within the permissible limit of \$300 per person, and it was for direct, official travel from his prior duty assignment in Washington, D.C. to his new official duty station in Ho Chi Minh City.) Instead, the agency contends that claimant purchased seats that did not meet the definition of EES. The FAM’s definition of EES refers to “airline programs” that allow passengers to obtain “a more desirable seat choice within the coach class cabin for a fee.” Here, claimant upgraded his seat to an economy class ticket with extra leg room. He did not appear to be in a separate cabin from the other coach seats, and the upgrade fee exactly matched the allowance of \$300 per person. The agency disagreed and denied reimbursement after finding that claimant’s seat choices ran afoul of previously published guidance.

Prior to the FAM’s update, the agency issued a guidance cable on April 29, 2015, with the subject “Extended Economy Travel Cable.” The first paragraph of the cable states:

With the release of this cable, the Department is implementing a new travel subsidy to allow employees on official travel with itineraries of more than 8 hours between authorized origins and destinations to be reimbursed for up to \$300 in fees associated with Extended Economy seating in the coach class cabin of the aircraft. This subsidy is subject to bureau and post-specific

funding and policy guidance. The Office of Logistics Management is in the process of updating the Foreign Affairs Manual to add 14 FAM 567.2-6 to reflect this new policy.

The background paragraph in the cable cites increasingly crowded economy class seating as the justification for the program and states, “This new Extended Economy benefit addresses this single issue and gives the traveler the option to upgrade to Extended Economy to increase leg space in the coach class cabin of the aircraft at Department expense, up to \$300, when all criteria are met.” Paragraph 3 of the cable informs travelers that extended economy travel is not an entitlement, and that Bureaus and Posts will issue their own policies which “apply to their own assigned employees and must make those policies known to their traveling employees, travel arrangers/approvers, and the Post Support Unit as applicable. Bureaus and Posts may further restrict this travel benefit or disallow it entirely.”

Paragraph 6 of the cable defines EES as “airline programs in which a passenger may obtain seating with additional space within the coach class cabin for a fee sometimes called, ‘Economy Plus,’ ‘Comfort+,’ or ‘Main Cabin Extra.’ This does not include products that are available in separate and distinct cabins other than the coach/economy class cabin on some airlines.”⁴ Paragraph 8 describes “Traveler Responsibilities” and advises the traveler to follow these steps:

- a. Request and receive approval for Extended Economy seating on the travel authorization . . . for PCS travel in accordance with Bureau or Post policy,
- b. After ticketing (normally 72 hours prior to departure) or during the 24-hour online check-in process, navigate to the operating carrier’s website to access the flight information and seat map,
- c. Select the preferred Extended Economy seats and when prompted, enter personal credit card information for the Extended Economy purchase,
- d. Print receipts, which must be included with the voucher (all receipts, even those under \$75, must be submitted to qualify for reimbursement),

⁴ This definition is similar to, but not identical to, the one in 14 FAM 511.3. This definition specifically refers to “additional space within the coach class cabin,” whereas the FAM definition refers to a “more desirable seat choice within the coach class cabin.”

e. After completion of travel, submit your Extended Economy seating receipts, along with all other receipts, as you normally would for reimbursement.

Note 2 for this section states, “Not all carriers or aircraft configurations offer an Extended Economy seating product. This benefit does not apply to carriers offering separate premium economy cabins with additional services over the standard coach/economy class cabin.”

Paragraph 9 references a list of frequently asked questions (FAQs) attached to the cable and asks travelers to review them carefully and contact the transportation and travel management division if travelers have further questions. The agency relies on FAQs 26(a) and 26(b) in support of its determination. They state the following:

Question 26(a): For FY15, United Airlines is the contract carrier between Washington, DC and Frankfurt, Germany. Some of the flights in this market are operated by United Airlines, and some are operated by a codeshare partner. My itinerary is ticketed on United, however, the aircraft is operated by Lufthansa, which does not offer an Extended Economy product. How am I able to get Extended Economy seating in this authorized itinerary?

Answer: Since United offers this product, you may change your flight to any of the flights that are available in this market and are operated by United and priced as the contract fare.

Question 26(b): In this same scenario, Lufthansa sells a product that’s called Premium Economy, which is a separate and distinct cabin, not simply extended seating which offers a higher level of service and is a separate booking class. May I be reimbursed if I choose this option?

Answer: No. Separate and distinct cabins, with a higher level of service are not authorized under this program.

Claimant traveled to Vietnam in August 2016. By then, the FAM had already been updated. In denying claimant’s request for reimbursement, the agency did not reference the FAM. Instead, it relied on “guidance set forth by TTM-A/LM Transportation Branch and the guidance cable.” The representative also added that “TTM informed us that ‘premium’ economy [programs] are not reimbursable because we are not reporting this under the Department’s mandatory annual Premium Class Travel Report.” It also referenced a commercial website called “Seat Guru,” as well as the JAL website.

There are several reasons why this analysis is problematic. First, the record contains no evidence of specific guidance issued by TTM. To the extent that it exists and the agency relied on it, the guidance should be published and authoritative. The Board has routinely found that “where regulations clearly set forth requirements, an employee is bound by them.” *Elizabeth D. Gosselin*, CBCA 2208-RELO, 11-2 BCA ¶ 34,876, at 171,537. On the other hand, employees cannot comply with esoteric rules or guidance.

Another problem with this analysis is that the agency erroneously conflates the word “premium” with “premium class travel,” inferring that seats booked in premium economy class would have to be reported in the Government’s annual report on premium class travel. The General Services Administration (GSA) maintains this report and specifically excludes certain extra fare seats from the report. Guidelines for the report are published on its website and state:

Extra Fare Seats on Airplanes: Seats that require extra fare for early boarding, leg room, seat choice (aisle seat, exit row, etc.), or other options within the lowest class cabin, should not be reported as premium class accommodations, even if paid by government funds, §301-10.124. Extra fare seats may be paid for by the Government whenever agencies determine them advantageous.

The guidance references section 301-10.124 of the FTR. This section specifically addresses coach class seating upgrade programs and defines them almost exactly the way the FAM does with regard to EES. Section 301-10.121(b) defines “other than coach-class” as “Any class of accommodations above coach class, e.g., first-class or business-class.” Based on the definitions of these booking classes, merely adding the modifier “premium” to the class does not elevate its status to “other than coach.” It is still an economy class seat.

A third issue we must address is the authoritative significance of the guidance cable after the FAM was updated. In analyzing whether or not the agency properly denied reimbursement of this travel benefit, we need to know whether the guidance cable—which is much more detailed than the FAM—was superseded by the FAM. Based on the information contained in 2 FAM 1115.2,⁵ entitled “Interim Directive,” we find that the FAM replaces the

⁵ 2 FAM 1115.2(a) states, “An office may issue an interim directive that has immediate effect. (1) Interim directive refers to a new policy or a change in policy that is announced in a cable (ALDAC) or Department Notice prior to being codified in the Foreign Affairs Manual (FAM) or associated Foreign Affairs Handbook (FAH). An interim directive is issued due to an urgent or compelling need or an emergency situation. An interim directive might result in conflicting guidance with the FAM/FAH. Due to the possible

guidance cable, rendering moot any subsequent reliance on the provisions of the cable. The FAM specifically incorporated certain provisions of the cable. Here, however, the agency justified its denial based on information that did not carry over into the final FAM update, such as the FAQs and Note 2 to paragraph 8. Once the FAM update was issued in December 2015, the guidance cable was archived and considered an official agency record.⁶ The FAM became the controlling authority on EES, undermining any continued reliance on the obsolete cable.

We are left, then, with the provisions of the FAM in deciding whether the agency properly denied claimant's request for EES. Those provisions simply do not support the agency's position. The purpose of this program is to provide travelers with additional space in economy class when traveling on long, international flights in support of an agency's mission. To deny this authorized benefit by stating that the seats in question are .3 inches wider than regular economy seats and have extendable leg and foot rests makes no sense. The agency's reliance on the "seat guru" website and JAL's marketing materials further undermines any chance of achieving the objective and universally enforceable standards it seeks for approving or denying reimbursement of this benefit. Reviewing cabin layouts and online brochures requires a subjective analysis that could lead to disparate treatment of similarly situated travelers.

To demonstrate the fallibility of such a convoluted approach, one of the extended economy programs the agency identifies as meeting its criteria for reimbursement is Delta's Comfort+ program. The information about this travel benefit on Delta's website, describes Comfort+ as a "premium flying experience . . . with up to 4 inches of additional legroom, dedicated overhead bin space, and priority boarding." Comfort+ travelers also enjoy a

confusion that may be caused by having more than one version of a policy in existence, interim directives are valid and supersede the FAM/FAH for the time period identified within the ALDAC or Department Notice. If an interim directive expires, the effective policy will be the policy codified in the FAM/FAH." This is consistent with 2 FAM 1111.2, "Objective," which states, "The Department's directives program provides agency managers with the means to convey written instructions to Department and other relevant personnel and to document Department directives. . . . The Department achieves its objective by (1) Providing a single, comprehensive, and authoritative source: The Foreign Affairs Manual (FAM) and the related Foreign Affairs Handbooks (FAH)."

⁶ 5 FAH-1 H-211 states, "Archive Messages document the substantive functions for which an office is responsible. They are the essential, official evidence of an organization's business and may be analogous to cables, memos, some current emails, external correspondence, and other documents of long-term record value."

complimentary headset, access to Delta Studio, which is a large library of films, TV, HBO, Showtime, music and games, and “little extras” such as a pillow, blanket, and an amenity kit on long-haul international flights. The website features various categories for travel, including Basic Economy, Main Cabin, Delta Comfort+, First Class, and Delta Premium Select. Basic Economy and Main Cabin merely provide snacks, meals, and sleep kits, as compared to the premium snacks, premium meals, and amenity kits, that Comfort+ passengers receive. Both provide complimentary alcoholic beverages on international flights. American Airlines “Main Cabin Extra” is another program identified as meeting the requirements. In addition to Main Cabin Extra, American has PE seating. When comparing the seats in these two sections with the main cabin seats, seat pitches and seat width vary, but all receive the Wi-Fi, seat-back entertainment, and power access. Thus, these programs have amenities which the agency maintains in its response in this case preclude reimbursement under the EES program.⁷

Another aspect of the agency’s evaluation of travel vouchers for reimbursement is whether the seats are located in a “separate and distinct cabin.” The agency identifies United’s Economy Plus as meeting the requirements of the EES program. Economy Plus seating is located between first class (Polaris) and economy class. More importantly Economy Plus seats and economy seats have a block of shared restrooms and a beverage galley between them. On JAL, premium economy seats and economy seats also have a block of shared restrooms and a beverage galley between them, yet the costs of upgrading to an Economy Plus seat on United is reimbursable, whereas an upgrade to economy premium on JAL, according to the agency, is not.

Agencies do not have unfettered discretion once the basic requirements of the regulation are met. Their review must not lead to arbitrary and capricious results. *Charles A. Houser*, CBCA 2149-RELO, 11-1 BCA ¶ 34,769, at 171,112. In this instance, the agency’s determination is arbitrary and capricious. The seats on JAL were not in first class or business class; they were in economy class. They met the criteria for cost, time/duration, and direct travel. Together, these criteria establish a bright line rule consistent with the FAM. By further complicating the analysis with a subjective determination of “separate and distinct cabins” without any specific guidance on what that means, or by identifying specifically authorized programs with features similar to that which was denied, the agency’s actions cannot be sustained.

⁷ On May 15, 2017, the agency issued a guidance cable with the subject: “Updated Guidance for Use of Extended Economy Seating.” For the purposes of this appeal, the referenced cable is irrelevant.

The agency's position that it was claimant's responsibility to determine whether the seats he purchased would qualify for reimbursement is correct. We have previously determined that the FAM, when read as a whole, places the burden of understanding a particular travel benefit on the traveler. *Robert Weisberg*, CBCA 667-RELO, 07-2, BCA ¶ 33,608, at 166,439. In examining the provisions of the FAM and claimant's actions, we do not find that claimant failed in his responsibilities. The fact that the FAM did not include some of the very provisions relied on by the agency supports this finding.

We have also observed the overarching principle that "a federal civilian employee traveling on official business must exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business." *Carleton Bulkin*, CBCA 1511-TRAV, 09-2 BCA ¶ 34,143, at 168,788 (citing 41 CFR 301-2.3 (2006)). The FAM contains a parallel provision in 14 FAM 513, which obligates travelers to act conscientiously and minimize the costs of official travel. Even if the FAM required travelers to visit the "Seat Guru" website (which it did not), it is not clear that even the most prudent of travelers would have determined that a block of shared restrooms establishes a separate and distinct cabin within the economy class. Since these are airline programs, it is reasonable to rely on the airline's determination of what constitutes economy class. Claimant's actions in seeking reassurance that the seats were in economy class do not violate this principle, especially in light of the cost of the seats and the location of the seats in the economy cabin. Here, claimant acted prudently and consistent with the FAM in purchasing the upgraded seats.

Decision

The claim is granted. The agency shall reimburse claimant \$600 for travel expenses related to EES.

KATHLEEN J. O'ROURKE
Board Judge