

DATE: March 6, 2023

_____)
In Re:)
[REDACTED]) Claims Case No. 2022-CL-021502.3
)
Claimant _____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member purchased tickets from a foreign flag carrier in violation of the Fly America Act, 49 U.S.C. § 40118. Reimbursement of the member is not proper, as claims against the government may be allowed only for expenses authorized by statute or regulation.

DECISION

A member of the U.S. Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-021502, dated May 9, 2022. In that decision, DOHA denied reimbursement of the cost of the member's return flight from overseas on an airline that was not a U.S. flag carrier as required under the Fly America Act.

Background

On March 30, 2021, the member was issued permanent change of station (PCS) orders from Riyadh, Saudi Arabia, to Fort Eustis, Virginia, to report on October 1, 2021. His PCS orders contained the following statement:

All official travel must be arranged through the commercial travel office (CTO) under contract to the government. Official travel arranged through CTO not under contract to the government is not reimbursable. CTO will provide instructions and make arrangements for any required changes in travel plans.

On May 3, 2021, the member sent an email to his Deputy Finance and Accounting Officer at the United States Military Training Mission to Saudi Arabia (USMTM). In that email, he requested authorization to procure his airfare without arrangement through the CTO on the basis that there would be cost savings to the government and savings on his time. On May 3, 2021, the USMTM Transportation Management Office (TMO) issued a memorandum authorizing travel reimbursement for the member's self-procured travel from the King Khalid International Airport in Riyadh to Dulles International Airport in Virginia, to his duty station at Fort Eustis, citing paragraph 020207 of the Joint Travel Regulation (JTR). The TMO listed the government's constructive cost total as \$1,651.93. On May 19, 2021, the member's Deputy Finance and Accounting Officer sent the member a response to his email request dated May 3, 2021. In that email, the officer stated the following:

With the information you provided, I concur that the travel arrangements set is more advantageous to the government and time saving. As mentioned, I am not an AO but with the approval of TMO, for flights, your travel arrangements should be reimbursed. Keep in mind that by self-procuring travel, you may not be reimbursed for any cancellations or insurances.

On May 19, 2021, the member purchased his airfare through KAYAK, booking with Saudi Arabian Airlines, for a total cost of \$883.48. After completing his travel, the member filed for reimbursement for his airfare.

The Defense Finance and Accounting Service (DFAS) denied reimbursement of the member's airfare because his purchase of a ticket from Saudi Arabian Airlines violated the Fly America Act. Specifically, DFAS found that under JTR ¶ 020206, the Fly America Act requires that a U.S. flag carrier be used for all commercial transportation when the government funds travel, and Saudi Arabian Airlines is not a U.S. flag carrier and is not an authorized airline under the code share listing. The member appealed DFAS's denial of his claim. In his appeal, he stated that prior to his PCS travel, he sought guidance from his TMO to ensure he would be reimbursed his self-procured non-stop airfare. He stated that the TMO then provided him with a government constructive cost worksheet reflecting his total authorized airfare to be \$1,651.93. He stated that the Judge Advocate General (JAG) at Fort Eustis has reviewed his case file and found that his travel was in compliance with the Fly America Act as set forth under 49 U.S.C. § 40118(b). Under that section, transportation of passengers and property by a foreign air carrier is not precluded by the Fly America Act if the transportation is provided under a bilateral or multilateral air transportation agreement. The member maintained that under the Fly America Act, Saudi Arabia is recognized as having a bilateral-multilateral agreement with the United States, and Saudi Arabia operates Saudi Arabian Airlines, the carrier of his self-procured PCS. He also stated that DFAS claims that his ticket did not have a code share with a U.S. carrier. However, he stated that the closest major airport to Fort Eustis with significant international travel is Dulles, and all outgoing DoD personnel from Saudi Arabia only have the airline choice of Saudia, Qatar Airways, KLM or Lufthansa. He stated that all the choices required a stop-over in a foreign country to connect to Dulles at further considerable cost than what was approved for his travel.

On January 24, 2022, DFAS reviewed the member's appeal and issued its administrative report upholding the initial denial of the member's claim under the Fly America Act. DFAS advised the member that the exception he raised under 49 U.S.C. § 40118(b) to the Fly America Act did not apply to his flight because the United States does not recognize Saudi Arabia as a country under the Open Skies Agreement. DFAS concluded that since Saudi Arabian Airlines is not in a code share agreement with any U.S. flag carrier, the cost of the member's airfare was not reimbursable. DFAS also noted that of the four choices the member raised in his appeal for outgoing flights from Saudi Arabia, KLM is the only one with a code share agreement with a U.S. flag carrier, namely Delta. DFAS stated that if the member had flown KLM, even if it cost more than the flight he procured, the flight would have been reimbursable under JTR Table 2-3.

In response to DFAS's administrative report, the member stated that the denial of reimbursement of his airfare has forced him to pay out of his own pocket for his PCS flight from his deployment to his next duty station despite his TMO authorizing him to self-procure his ticket and promising him reimbursement for it.

In the appeal decision, the DOHA attorney examiner explained that payment may only be made for an expense authorized by statute and regulation. He stated that although the member had permission from the TMO to self-procure his ticket from Riyadh to Dulles, he purchased a ticket on a non-U.S. flag carrier. The attorney examiner explained that the member did not have prior written permission from the authorizing or approving official (AO) to be reimbursed for a ticket on a non-U.S. flag carrier. The attorney examiner stated that the fact that the member purchased a ticket that cost less than the U.S. flag carrier ticket is not a factor in determining whether reimbursement is authorized. Therefore, under applicable statute and regulation, the claim was not payable.

On reconsideration, the member states that the TMO's authorization for him to self-procure his airfare along with the cost construction worksheet was itself written permission by the AO given the location and circumstances surrounding the flights available in Saudi Arabia with Fort Eustis as a destination. The member further states that although DFAS and DOHA have denied his claim based on the Fly America Act, no consideration nor review was given to the facts of his case under the exceptions to the Fly America Act. He references two exceptions listed on the General Services Administration's (GSA's) website at <https://www.gsa.gov/policy-regulations/policy/travel-management-policy/fly-america-act>. The first exception is when a U.S. air carrier is not available. The second exception is when a U.S. carrier does not offer a nonstop or direct flight between origin and destination, and using a U.S. Carrier:

Increases the number of aircraft changes outside the United States by two or more;

Extends travel time by six hours or more; or

Requires a connecting time of four hours or more at an overseas interchange point.

The member states that there were no U.S. carriers that had a direct flight between Riyadh and Dulles. He maintains that using another airline would include a layover time of 3 hours and 10 minutes at an overseas interchange point, which would increase his overall travel time by a minimum of 5 hours. He concludes that a confluence of factors, including a longer travel time and requiring an overseas interchange point during international COVID conditions and travel restrictions, made other options besides the non-stop Saudi Arabian Airlines flight he flew unviable or not preferred.

Discussion

The well-established rule is that a claim can be paid only if there is a basis for such payment in statute or regulation. *See* DOHA Claims Case No. 2016-CL-120101.2 (March 8, 2016); DOHA Claims Case No. 02062502 (July 31, 2002); and DOHA Claims Case No. 00021005 (June 12, 2000). Regulations that are promulgated pursuant to an express statutory authority have the force and effect of law, and our Office cannot issue a determination at variance with such regulations. *See* DOHA Claims Case No. 09032301 (April 2, 2009); DOHA Claims Case No. 98120402 (January 14, 1999); and DOHA Claims Case No. 97121518 (February 10, 1998).

A member's entitlement to travel and transportation allowances is governed by title 37 of the U.S. Code and the JTR. The JTR implements policy and laws establishing travel and transportation allowances of members and Department of Defense (DoD) civilian travelers. The JTR has the force and effect of law for travelers. Members and travel officials must adhere strictly to the JTR because a member could be personally financially liable for any expense accrued by not complying with the JTR. When the GSA's Federal Regulation (FTR) authorizes a discretionary travel and transportation allowance that the JTR does not address, the allowance is not authorized or implemented within the DoD. *See* JTR Introduction.

Under the Fly America Act, 49 U.S.C. § 40118, a government agency must take necessary steps to ensure that passengers flying at government expense use certificated U.S. flag carriers, unless the necessity for using a non-certificated carrier is proven in the accordance with applicable regulations. The implementing regulations for the Fly America Act for military members are contained in the JTR at paragraph 020206. Under that paragraph, certified U.S. flag air carrier service includes service provided under a code share agreement with a foreign air carrier when the ticket, or documentation for an electronic ticket, identifies the U.S. flag air carrier's designator code and flight number. JTR ¶ 020206-I states that the Fly America Act requires that U.S. flag carriers be used for all commercial transportation when the government funds the travel. That paragraph states that under the Fly America Act, the travel management company (TMC) and the AO require that travel by air be on a U.S. flag carrier for every leg of a trip, "unless the TMC and AO provide supporting documentation that a U.S. flag carrier is not available." Under ¶ 020206-I-2, if a U.S. flag carrier is available for an entire trip and the traveler uses a non-U.S. flag air carrier for any part of the trip, the transportation cost on the non-U.S. flag air carrier is not payable. JTR ¶ 020206-I-3 requires the following:

Documentation must be provided to the traveler to support all reasons when a non-U.S. flag air carrier is used in accordance with Service regulations. The documentation should include the traveler's name, non-U.S. flag air carrier used, flight number, origin, destination and en route points. Endorsements on the order or Government-travel procurement document, made in accordance with Service regulations, are acceptable.

Table 2-3 of the JTR sets forth the rules for ¶ 020206-I. Under section 7 of that table, if a U.S. flag air carrier does not offer non-stop or direct service between origin and destination, then a U.S. flag air carrier must be used on every flight segment in which it provides service unless, when compared to using a non-U.S. flag air carrier such use would result in one of the following:

- a. Increase the number of foreign location aircraft changes made by two or more.
- b. Extend travel time by 6 or more hours.
- c. Require a connect time of 4 or more hours at a foreign interchange point.

In this case, there are four other airlines outgoing from Saudi Arabia that DoD personnel had their choice to use: Saudia, Qatar Airways, KLM and Lufthansa.¹ As DFAS has already advised, of these four, KLM is in a code share agreement with Delta, and the flight would be reimbursable. *See* JTR Table 2-3. The member received authorization from his TMO to purchase his own airfare without arrangement through the CTO. However, the member did not receive authorization to use a non-U.S. flag air carrier service prior to purchasing his airfare. He purchased a ticket from Saudi Arabian Airlines, a foreign flag carrier that is not recognized as providing service under a code share agreement with the United States. As set forth above, the JTR requires the determination of unavailability of a U.S. flag carrier be made by the TMC and the AO.

The member contends that the TMO's memorandum authorizing him to self-procure his own ticket should be accepted as the AO's authorization to allow him to use a non-U.S. flag carrier. The TMO's memorandum cannot provide a basis for the claim because it did not state that the member was authorized to use a non-U.S. flag carrier. As set forth in the JTR, both the TMC and the AO must make such a determination or authorization. Moreover, the TMC and the AO must provide the documentation to the member to support the reasons why a non-U.S. flag air carrier is to be used.

Although the member requests that the exceptions listed on GSA's website be considered by DOHA, the pertinent regulations regarding the member's travel entitlements are set forth under JTR. The exception in JTR concerning the use of a non-U.S. flag carrier when a U.S. flag carrier does not offer a non-stop flight is contained in section 7 of Table 2-3. However, there is no evidence reflecting that the member's use of the U.S. flag carrier flight would have extended his travel time by 6 or more hours, or that it would require a connect time of 4 or more hours at a foreign interchange point. In any event, the TMC and the AO had to specifically authorize the member to use a non-U.S. flag carrier prior to the member's travel and provide the necessary

¹We further note that Lufthansa is in a code share agreement with United Airlines. Therefore, it appears that the flight would also be reimbursable.

documentation to the member supporting the use of it. Under applicable statute and regulation, the claim cannot be paid.

Conclusion

The DOHA Claims Appeals Board upholds the appeal decision dated May 9, 2022, sustaining the denial of the member's claim. In accordance with ¶ E7.15 of Department of Defense Instruction 1340.21, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairperson, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board