

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

February 24, 2006

GSBCA 16684-RELO

In the Matter of JAMES L. LANDIS

James Yorke, Labor Management Specialist, American Foreign Service Association, Washington, DC, appearing for Claimant.

Paul B. Dean and Shawn Pompian, Attorney-Advisers, Office of the Legal Adviser, United States Department of State, Washington, DC, appearing for Department of State.

HYATT, Board Judge.

Claimant, James L. Landis, is a security officer employed by the Department of State. After completing a year of service in Iraq, Mr. Landis was reassigned to the Diplomatic Security Field Office in Houston, Texas, under a direct transfer order dated December 9, 2004. His permanent change of station (PCS) travel arrangements were processed by the Department of Defense's (DoD's) Amman Support Unit and included a return flight to the United States on a United Airlines code-share seat on a flight operated by Lufthansa. The flight was to originate in Kuwait on January 2, 2005,¹ and arrive in Houston after a stop in Frankfurt, Germany.

Mr. Landis explains in his submission that traveling from Iraq to Kuwait was somewhat difficult. Travelers were required to depart the "Green Zone" one day prior to

¹ It is not altogether clear from the paperwork submitted whether the flight was scheduled for January 2 or 3, but the actual date is not critical for the purpose of reviewing this claim.

their scheduled departure from Baghdad by military transport. After flying by helicopter to the Baghdad Airport on December 31, 2004, Mr. Landis was unexpectedly offered the opportunity to take a military flight to Kuwait that same day in lieu of staying overnight at the airport at Camp Victory and flying into Kuwait on January 1 as scheduled. Claimant elected to get to Kuwait earlier, and arrived at the Kuwait Airport at about 10:00 p.m. on December 31.

After arriving in Kuwait, Mr. Landis learned that as a State Department employee he would not be required to remain in Kuwait overnight and “process-out” from there, but could proceed directly to the United States. At that point, claimant tried to pick up his ticket from the Kellogg Brown & Root (KBR) help desk at the Kuwait Airport. KBR did not have his ticket because the flight was scheduled for January 2, and apparently was unable to provide any further assistance. Mr. Landis was reluctant to take a hotel room in Kuwait since he had not been specifically authorized to do so. He had no access to a phone at the airport and thus could not contact Amman Support Unit, the American Embassy, or any American travel agencies. Additionally, there were no U.S.-flag carriers with desks open at the Kuwait Airport at that hour.

Since claimant did not have a hotel reservation in Kuwait for that night, and did not know if he would be reimbursed for that expense, he proceeded to the Lufthansa desk to inquire whether it might be possible to catch an earlier flight back to the United States. He chose Lufthansa because he was aware that it had a code-sharing partnership with United Airlines and his original ticket had been issued through Lufthansa. He learned that the airline could book him immediately on the same flights that he would have taken had he traveled on January 2. The ticket agents at Lufthansa’s desk were not able to tell Mr. Landis whether he was obtaining code-share seats for the flight from Frankfurt to Houston in compliance with the Fly America Act, but he did not want to spend two nights in Kuwait at Government expense when he could travel on to the United States expeditiously. He reasoned that taking the earlier flight was the appropriate action to minimize the expense of his return travel.²

When he presented his tickets to the State Department for reimbursement, Mr. Landis was informed that he had not been issued a code-share seat for the leg of his flight from Germany to Houston and that, as a result, he had violated the Fly America Act’s requirement

² Mr. Landis also noted that he did not consider it to be feasible to fly to Germany and attempt to procure a U.S.-flag carrier flight after arriving in Frankfurt because he was traveling on a Diplomatic passport without a valid visa for Germany. In addition, this would have required him to go through customs and immigration, reclaim his baggage and then locate an American carrier’s desk.

to use only U.S.-flag carriers for Government-financed air transportation between foreign and U.S. points of origin and destinations. As a consequence, this leg of the flight, which cost \$1693.99, was deemed to be not reimbursable. Mr. Landis exhausted his remedies within the State Department and was told that he could file a claim with the Board.

Mr. Landis argues that he was trying to avoid the extra costs for hotel rooms and the like, which would have been incurred had he waited for his original flight or waited until the next day to consult with a U.S.-flag carrier or travel agent. He says he had no reason to suspect that he had not traveled on a code-share seat since he took the same flight he was originally booked on, just two days earlier. The agency is sympathetic with claimant's unusual situation, and appreciates his performance of service for his country, but does not believe it has the authority to reimburse the air fare, since on its face it was purchased in violation of the Fly America Act.

Discussion

Prior to addressing the merits of Mr. Landis' claim, we note that ordinarily the Board would not have the authority to resolve a travel claim presented by a member of a collective bargaining unit, as Mr. Landis is here, except under very limited circumstances. *See, e.g., Rolando J. Jimenez*, GSBCA 16570-TRAV, 05-1 BCA ¶ 32,916 ("If a claim concerning expenses of travel or relocation is susceptible to resolution under the terms of a collective bargaining agreement's grievance procedure, we lack the authority to settle the claim using our administrative procedures unless the agreement explicitly and unambiguously excludes the disputed matter from its procedures."). The Foreign Service Act of 1980, as amended, explicitly recognizes the right of Foreign Service employees to bargain collectively and establishes the Foreign Service Grievance Board to hear grievances that are not resolved under procedures negotiated between the Department and the employee representative. *See* 22 U.S.C. §§ 4101-4141 (2000).

Mr. Landis is a member of the American Foreign Service Association (AFSA), which, under the Foreign Affairs Manual (FAM), is the exclusive employee representative under the Foreign Service Act of 1980, as amended. 3 FAM § 4412(f). The FAM implements the statutory provisions establishing the Foreign Service Grievance Board. Pertinent to this claim, the FAM provides that:

A grievant may not file a grievance with the [Foreign Service Grievance] Board if the grievant has formally requested, before filing a grievance that the matter or matters which are the basis of the grievance be considered or resolved and relief be provided under another provision of law, regulation, or

Executive Order, and the matter has been carried to final decision under such provision on its merits or is still under consideration.

3 FAM 4428.

Both the AFSA representative and counsel for the State Department urge that, in light of this provision, since Mr. Landis opted to pursue his statutory remedy at the Board under 31 U.S.C. § 3702(a)(3), in lieu of filing a claim with the Foreign Service Grievance Board, the Board is indeed authorized to consider this claim. We agree.

Having concluded that we have the authority to settle this claim, we turn to the merits. Mr. Landis' claim for reimbursement of his airfare from Kuwait to Houston has been partially disallowed because he did not use a U.S.-flag air carrier for the portion of the trip from Frankfurt, Germany, to Houston.³ In doing so, he ran afoul of the requirements of the Fly America Act, 49 U.S.C. § 40118(a)(3)(B) (2000). Under this Act, government-financed transportation requires the use of service provided by U.S.-flag carriers to the extent such service is available. Agencies may allow the expenditure of an appropriation for transportation in violation of this requirement only when satisfactory proof is presented showing the necessity for the use of a foreign air carrier's transportation services. *Id.* § 40118(c); 6 FAM 135 (now found at 14 FAM 581). *See, e.g., Maynard A. Satsky*, GSBCA 16632-RELO, 05-2 BCA ¶ 33,042; *Desiree Fray*, GSBCA 15012-TRAV, 99-2 BCA ¶ 30,485.

Code-sharing arrangements, which are practices under which U.S.-flag carriers routinely lease space on foreign aircraft, rather than schedule their own flights, have been deemed to be in compliance with the Fly America Act, such that passengers may properly use tickets paid for by the Government under a code-share arrangement if the tickets were purchased from the U.S.-flag carrier. 70 Comp. Gen. 713 (1991). The Comptroller General's decision explained that under such a system, the seats leased by the U.S.-flag carrier would show that carrier's flight number, while remaining seats on the foreign carrier's flight would show the foreign carrier's flight number. *Id.* The FAM now specifically recognizes that in most instances code-share flights qualify as available U.S.-flag carrier service. 14 FAM 581.4(b).

³ As a State Department employee, Mr. Landis was authorized to use a foreign carrier between Kuwait and Germany, since both the point of origin and the destination of that flight were not in the United States.

Mr. Landis states that his quandary is attributable to the fact that when he sought to reschedule to the earlier flight, neither he nor the ticket agent had a viable means to determine if the seats available on the earlier flight were code-share seats. As it happened, all the code-share seats on the earlier flight had already been sold and Mr. Landis was assigned a seat that did not satisfy the requirements of the Fly America Act. Mr. Landis has attached a copy of his ticket which shows him to have been booked on LH 440 from Frankfurt to Houston. The GAO decision would suggest that a careful review of the ticket should have alerted both the claimant and the ticket agent that the seat sold was not a U.S.-flag carrier code-share seat, since such a code-share seat presumably would have shown the U.S.-flag carrier's flight number, not a Lufthansa flight number.

We turn now to the determination of whether the purchase of the non-U.S.-flag carrier transportation may nonetheless be deemed permissible because a reasonable alternative was not available. Mr. Landis urges that since no other viable alternatives were available when he arrived in Kuwait, he should be deemed qualified to use one of the exceptions to the requirement that government-financed travel be by U.S.-flag carrier. The FAM states that a U.S.-flag carrier must be used if the trip is between the United States and a foreign country and the U.S.-flag carrier offers non-stop or direct service from origin to destination unless such use would delay travel time (scheduled departure to scheduled arrival, including delay at origin) by twenty-four hours or more or using a U.S.-flag carrier would increase the number of aircraft changes abroad by two or more; or would extend travel time (scheduled departure to scheduled arrival) by six hours or more; or would require a connecting time of four hours or more at an interchange point abroad. 6 FAM 135.2.

Mr. Landis basically argues that these exceptions should be deemed to apply when travel has started and changed circumstances mean that the traveler will be substantially delayed if unable to take advantage of a non-U.S.-flag carrier's flight. He thus thinks that the exceptions should apply to his unique circumstances since he had no way to determine if a U.S.-flag carrier's flight would be available without waiting until morning.

The difficulty with claimant's argument is that his scheduled departure from Kuwait to return to the United States was, at the earliest, on January 2, 2005, and the ticket purchased for that date was compliant with Fly America Act requirements. The exceptions are applicable when the travel is being scheduled. The perceived need to perform return travel earlier was attributable to Mr. Landis' decision to fly into Kuwait early, thus creating his dilemma with respect to whether to spend that night in Kuwait or try to get back to the United States as quickly as possible. He states that he was familiar with the Fly America Act's requirements and contends that he made every effort to comply. He also argues that he saved the Government money by leaving Kuwait promptly and not staying in Kuwait for at least

one night.⁴ Be that as it may, as other travelers have learned to their chagrin, the fact that a traveler acts with the good intention to save the Government money does not permit payment of an expense that is otherwise unauthorized. *See, e.g., Panfilo Marquez*, GSBCA 15890-TRAV, 03-2 BCA ¶ 32,394; *Lorna J. Laroe-Barber*, GSBCA 14890-TRAV, 99-2 BCA ¶ 30,484.

Like the administrative officials at the State Department, we are sympathetic with Mr. Landis' plight. Nonetheless, we similarly cannot detect a basis for invoking an exception to the requirement for using a U.S.-flag carrier in these circumstances. In the absence of an applicable exception, there is no authority to expend the funds and the traveler is, unhappily, out-of-pocket for the air fare that has been paid. Mr. Landis tells us, moreover, that as a seasoned overseas traveler he was well aware of the Fly America Act restrictions, and was knowledgeable enough to endeavor to confirm that the seat he was sold on the flight to Houston was a code-share seat. Once he realized he would not be able to determine this on December 31 in Kuwait, the prudent course of action would have been to remain in Kuwait until the following day when it might have been possible to deal with a U.S.-flag carrier or travel agent. Alternatively, claimant could have attempted to rectify the situation in Frankfurt, even if this meant a degree of personal inconvenience in terms of having to go through customs and risk delay in catching a connecting flight. Under the Fly America Act, however, it is simply not an option to take the first available flight and worry about sorting out the details later.

CATHERINE B. HYATT
Board Judge

⁴ Although Mr. Landis may be able to make a compelling case of concern for his personal safety prompting his early exit from Baghdad, there is no suggestion that it is equally dangerous to remain in Kuwait.