UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 17, 2015

CBCA 4942-TRAV

In the Matter of MATTHEW J. KLAGES
and MATTHEW J. WALDRON

Matthew J. Klages, Dana Point, CA, and Matthew J. Waldron, Los Angeles, CA, Claimants.

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

LESTER, Board Judge.

It appears that, during the eighteen-year period from mid-1996 (when the General Services Board of Contract Appeals (GSBCA), one of our predecessor boards, was delegated authority to decide travel and relocation claims) to mid-2014, six federal employees filed claims with the GSBCA (or this Board) seeking review of travel reimbursement denials resulting from alleged violations of the Fly America Act, 49 U.S.C. § 40118 (2012).[1] In the eleven-month period from September 2014 to August 2015, employees from a single agency – the Drug Enforcement Administration (DEA) – came fairly close to meeting that number, with four DEA employees having filed claims during those eleven months alleging that they

[1] *See Stuart Jones*, CBCA 3631-TRAV, 14-1 BCA ¶ 35,583; *Token D. Barnthouse*, CBCA 1625-RELO, 10-1 BCA ¶ 34,353; *James L. Landis*, GSBCA 16684-RELO, 06-1 BCA ¶ 33,225; *Maynard A. Satsky*, GSBCA 16632-RELO, 05-2 BCA ¶ 33,042; *Catherine L. Haddow*, GSBCA 16240-TRAV, 04-2 BCA ¶ 32,693; *Desiree Fray*, GSBCA 15012-TRAV, 99-2 BCA ¶ 30,485.

unknowingly had violated the Fly America Act by booking overseas air travel on a foreign air carrier rather than a United States flag air carrier. Each of the DEA employees alleged that, when they were making travel arrangements, DEA's travel system did not warn them that the flights that they were booking would not be eligible for reimbursement because the flights did not comply with that statute.

We previously denied the first two recent DEA employee claims that we considered because we have no authority to disregard the requirements of the Fly America Act. *See Ivan J. Rios-Gonzales*, CBCA 4821-TRAV, 15-1 BCA ¶ 36,124, at 176,346-49; *Danielle M. Claude*, CBCA 4134-TRAV, 15-1 BCA ¶ 35,827, at 175,185-86 (2014). We now have before us the third and fourth DEA employee claims, and we similarly have no choice but to deny them. Nevertheless, given the historical rarity of employee claims involving Fly America Act violations, we are concerned that DEA may have created a travel reservation system – a system that DEA employees are required to use – that lulls employees into believing that they have complied with all statutory requirements for official travel when the opposite is true. Although we cannot compensate the two DEA employees whose claims are pending before us, we hope that DEA will review its travel reservation procedures in an effort to assist its employees in minimizing the likelihood of future Fly America Act violations.

Background

As requested by the DEA Special Operations Division, DEA issued official travel orders for Special Agents (SAs) Matthew J. Klages and Matthew J. Waldron to travel from DEA's Los Angeles Field Office to San Jose, Costa Rica, from June 1 to 5, 2015. Neither SA Klages nor SA Waldron had previously been on official travel to a foreign destination for DEA. Having to book their own flights to Costa Rica, they selected the most cost effective and economical airfare that they could find, which included a return flight from Costa Rica to Los Angeles on Avianca Airlines. Although Avianca Airlines is one of United Airlines' code-share partners, Avianca Airlines itself is the national airline of Colombia and is not a United States flag air carrier, and no United States flag air carrier had any code-share seats on the flight on which SAs Klages and Waldron traveled.[2] The claimants' supervisory

[2] "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." *Landis*, 06-1 BCA at 164,645. Although SAs Klages and Waldron indicate in their claims that Avianca Airlines had a United States flag

SA has informed us that at no time during any stage of the booking process were SAs Klages and Waldron alerted that the use of a foreign air carrier flight might violate the Fly America Act or that a waiver was required for use of a non-United States flag air carrier. The supervisory SA has also informed us that no "Out of Policy" symbol was triggered when SAs Klages and Waldron were selecting the return flight on Avianca Airlines to notify them of any problem with the reservation.

On June 25, 2015, two-and-a-half weeks after their return, SAs Klages and Waldron were informed by DEA's Get There Travel Helpdesk that their return flight violated the requirements of the Fly America Act because Avianca Airlines is a foreign flag air carrier. DEA ultimately denied $497.31 of each employee's air travel reimbursement claim as the unrecoverable cost of the non-compliant foreign carrier airfare.[3] SAs Klages and Waldron requested a waiver of the Fly America Act requirements, but, on July 23, 2015, DEA's Office of Finance denied the waiver request, finding that none of the regulatory exceptions to the requirement to use only United States flag air carriers set forth in the Federal Travel Regulation (FTR), 41 CFR 301-10.135 to -10.143 (2015), applied.

On August 20, 2015, SAs Klages and Waldron submitted their claims to the Board, asking us to review DEA's decision. DEA responded on September 24, 2015, and SAs Klages and Waldron subsequently elected not to file a reply.

Discussion

In our recent decision in *Rios-Gonzales*, we discussed in detail the purposes behind and the history of enforcement of the Fly America Act, which was originally enacted in 1974. *See* Pub. L. No. 93-623, § 5(a), 88 Stat. 2102, 2104 (1975). As we stated in *Rios-Gonzales*, "[t]he 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." *Rios-Gonzales*, 15-1 BCA at 176,347 (quoting *Fly America Act – Revision of Joint Travel Regulations*, 57 Comp. Gen. 546, 547 (1978)). "[T]he clear intent of Congress," we recognized, "was for United States Government-financed foreign air

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code-share partner, that fact is irrelevant here because there was no code-sharing arrangement for the flight on which they traveled and because the claimants did not purchase their tickets through the United States flag code-share partner.

[3] DEA has informed us that, if SAs Klages and Waldron each submit supplemental travel vouchers for $33.30, they will each be entitled to an additional payment in that amount, leaving only $464.01 disallowed and unpaid. We assume that DEA will follow through upon this representation if the claimants submit the requested supplemental travel vouchers.

transportation to be accomplished by certificated United States air carriers to the greatest extent possible." *Id.* Pursuant to the implementation of this requirement in the FTR, "[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, exceptions that generally relate to the unavailability of United States flag carriers to or from a specific location. *Rios-Gonzales*, 15-1 BCA at 176,347 (citing 41 CFR 301-10.132).

Here, there is nothing in the record to indicate that any of the regulatory exceptions applies to the claimants' travel. Instead, it appears that the claimants simply were unaware of the requirement to fly only on a United States flag air carrier and that, as they were making their flight arrangements, no one told them about the statute or that they were doing anything in violation of its requirements. "It makes no difference whether a traveler was 'unaware of the provisions of the Fly America Act' when he used a foreign air carrier." *Rios-Gonzales*, 15-1 BCA at 176,347-48 (quoting *George K. Wilcox*, B-256736 (July 8, 1994)). Because the requirement is created by statute, all individuals are charged with notice of it and must comply with it:

> "[B]ecause 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.

Id. at 176,348. "[W]e are not authorized to waive the provisions of the Act," and we cannot order reimbursement of travel costs incurred in violation of it. *Id.* (quoting *Wilcox*).

The claimants' supervisor has informed us that, when SAs Klages and Waldron were booking their flights, there was no warning on DEA's travel reservation website that the flights did not comply with mandatory statutory requirements. In response, DEA informs us that it makes its employees aware of the Fly America Act requirements through references on pages 31 and 32 of its Temporary Duty Travel Policy Handbook; through a discussion in the December 14, 2014, edition of DEA Travel News; and through two pages of a PowerPoint document on a training website that discusses the requirement. We are not aware of any mandatory requirement that, in addition to this guidance, DEA create a travel

reservation system that warns employees of potential Fly America Act violations. Because, by law, all individuals are charged with notice of statutory requirements, *Barnthouse*, 10-1 BCA at 169,642, we are required to impose that constructive knowledge upon SAs Klages and Waldron. A lack of notice, or even erroneous advice, from an agency to its employees during the travel reservation process about the Fly America Act's requirements does not change the fact that the applicable statute and its implementing regulations "do not permit reimbursement for tickets issued on non-U.S.-flag carriers." *Mark Alden*, CBCA 4055-TRAV, 15-1 BCA ¶ 35,852, at 175,309 (2014). Agencies lack authority to disregard mandatory statutory and regulatory requirements. *Kenneth T. Donahoe*, CBCA 3619-RELO, 14-1 BCA ¶ 35,746, at 174,937; *William T. Orders*, GSBCA 16095-RELO, 03-2 BCA ¶ 32,389, at 160,290.

Nevertheless, the number of Fly America Act claims that DEA employees have recently submitted should raise red flags within DEA that something is missing in its training process and travel reservation system. The claimants here were novices in foreign official travel, and, if their allegations (which are consistent with the allegations in *Rios-Gonzales* and *Claude*) are true, they were left on their own to digest a large number of travel requirements and restrictions without any guidance from those with actual expertise in federal travel rules. We encourage DEA to take a serious look at its travel reservation system to identify ways to improve the agency's ability to assist in protecting its employees from inadvertent Fly America Act violations in the future.

Decision

For the foregoing reasons, the claims from SAs Klages and Waldron are denied.

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HAROLD D. LESTER, JR.
Board Judge