

6611c

DECISION



L. Wilcox CP
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON 20548

FILE: B-138942

DATE: June 5, 1978

**MATTER OF: Joint Chiefs of Staff - Fly America
Act - Connecting Service in New York**

DIGEST: Where U. S. air carrier service originating in Vienna, Austria, requires connections in New York en route to Washington, D. C., traveler may not use foreign air carrier between Vienna and London, England, or Paris, France, to connect with a direct flight to Washington, to avoid the congestion of JFK International Airport, New York. The inconvenience of air traffic routed through New York is shared by approximately 40 percent of all U. S. citizens traveling abroad. It does not justify deviation from the scheduling principles that implement 49 U. S. C. § 1517 inasmuch as the proposed deviation would diminish U. S. air carrier revenues.

We have been asked by the Per Diem, Travel and Transportation Allowance Committee to consider a request by the Director, Joint Staff, Office of the Joint Chiefs of Staff, to waive the requirement imposed by 49 U. S. C. § 1517 for use of certificated U. S. air carrier service available at point of origin for travel from Vienna, Austria, to Washington, D. C. In addition, we are asked to consider a proposed change to the Joint Travel Regulations (JTR), Volume 1, to permit deviations in cases of "undue hardship" from the routing principles set forth in the Comptroller General's Guidelines for Implementation of Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, B-138942, March 12, 1976, as clarified by our decisions.

The Guidelines require use of certificated U. S. air carriers for all Government-financed commercial foreign air transportation of persons or property if certificated service is available. Certificated service is defined as available "if the carrier can perform the commercial foreign air transportation needed by the agency and if the service will accomplish the agency's mission," and even though:

"(a) comparable or a different kind of service
by a noncertificated air carrier costs less,
or

B-138942

- "(b) service by a noncertificated air carrier can be paid for in excess foreign currency, or
- "(c) service by a noncertificated air carrier is preferred by the agency or traveler needing air transportation, or
- "(d) service by a noncertificated air carrier is more convenient for the agency or traveler needing air transportation."

The Guidelines set out four conditions, all involving periods of en route delay, under which certificated air carrier service may be considered unavailable. None of the conditions are applicable to the present case.

In 55 Comp. Gen. 1230 (1976) we held that, consistent with the Guidelines, the traveler should use certificated U. S. air carrier service available at point of origin to the furthest practicable interchange point on a usually traveled route and that where the origin or interchange point is not served by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Our decisions at 56 Comp. Gen. 216 (1977), 56 Comp. Gen. 629 (1977), and 57 Comp. Gen. 76 (1977), have served to further define availability of certificated service. The employee's personal financial responsibility for improper travel aboard foreign carriers is spelled out in 56 Comp. Gen. 209 (1977). The basic concepts of scheduling travel to comply with the mandate of 49 U. S. C. § 1517 apply to travel by military officers and enlisted members as well as to the travel of civilian officers and employees of the Government.

The specific itinerary with which the Director is concerned involves return travel from Vienna to Washington. While certificated service is available in Vienna, such service involves a change of planes in New York. Under the Guidelines and our decisions, employees returning to Washington, D. C., from Vienna would be required to use this service. The Director suggests that this requirement imposes an undue hardship upon the traveler and asks that a waiver be granted permitting travel to be routed with connections in Frankfurt, Germany, direct to

B-138942

Washington, D. C., avoiding the congestion of the JFK International Airport in New York. The proposed scheduling would involve use of a foreign air carrier for that segment of the travel between Vienna and Frankfurt which, in the absence of justification, would subject the traveler to a financial penalty under 56 Comp. Gen. 209, supra.

In support of his waiver request, the Director has submitted as an illustration of the travelers' burden in complying with the Fly America scheduling principles, a trip report filed by a staff member recounting the inconvenience experienced in connection with his return trip from Vienna to Washington, in July of 1976. The TWA flight from Vienna was temporarily diverted to Hartford, Connecticut, apparently as a result of air traffic congestion over New York, resulting in arrival at the JFK International Airport too late for connecting flights to Washington. The staff member continued his travel the following day, having spent an uncomfortable night in New York. The documentation forwarded for our consideration includes a letter from the same staff member addressed to TWA describing similar circumstances in July of 1977. The delay in that case was attributable to bad weather. Together with these examples we have been furnished the following listing of factors which are felt by the Director to impose personal hardship and inconvenience to travelers required to route their travel through New York in accordance with the Fly America scheduling principles:

"* * * delayed departure from negotiating site awaiting U. S. carrier (up to four hours); another four-hour delay in New York awaiting connection to Washington, D. C.; multiple baggage handlings greatly increasing the likelihood of loss or misrouting; bus and/or taxi rides from JFK to La Guardia to make a connecting flight; wasted time, additional expense and further inconvenience when delayed arrival and/or weather conditions require remaining in New York over night; and the usual frustrations associated with flights requiring customs clearance before arrival at final destination. * * *"

Although the Director's specific waiver request covers only travel between Vienna and Washington, the inconvenience on which

B-138942

the request is based is applicable to all international travel involving routing via New York. There is little, if any, difference between travel originating in Vienna and travel from most of the other locations in Europe in terms of the inconvenience experienced by the traveler. To illustrate the scope of the problem, we point out that in the summer of 1977 of the 255 flights provided each week by U. S. air carriers between the U. S. and 13 gateway cities in Europe, 154 involved routings with connections or stopovers in New York. Travel from Europe to Washington, without intermediate baggage handling and customs clearance in New York can be avoided only by initiating travel on one of the two nonstop flights departing daily from either London, England, or Paris, France. In this connection we note that the certificated service between Frankfurt and Washington, to which the Director refers as imposing less hardship on travelers, is in fact routed through New York. While the same flights continue on to Washington, the traveler is required to deplane, claim his baggage, and clear customs in New York.

In view of the above, we consider the Director's request for waiver as posing the broader issue of whether travelers may deviate from the requirement to travel by U. S. air carrier available at point of origin to the extent necessary to connect with a certificated U. S. air carrier providing direct service to a gateway airport which is determined to be more convenient by the agency. In general, the proposed deviation would involve travel aboard a foreign air carrier from the point of origin at which travel is begun to one of a very few gateway cities abroad offering certificated service that avoids connections or layovers in New York. The Director's waiver request involves essentially the same considerations as does his request for approval of the following proposed change to 1 JTR para. M2150-3 to recognize as an additional circumstance of unavailability of certificated service occasions where:

"* * * the traveler would be subjected to undue hardship which can be avoided by using a non-certificated air carrier to the nearest practicable interchange point on a usually traveled route to connect with service by a certificated air carrier to the intended destination."

Neither the Fly America provisions of 49 U. S. C. § 1517 nor the Guidelines issued thereunder include a provision for waiver of

B-136942

the Act's requirements. The Guidelines do, however, recognize broad authority on the part of the agency to determine that certificated service otherwise available cannot provide the foreign air transportation needed or will not accomplish the agency's mission. Thus, the concept of availability of U. S. air carrier service includes such basic assumptions as that reservations can be secured and a reasonable degree of certainty that the service which the airline offers to provide will be provided without unreasonable risk to the traveler's safety. The Guidelines specifically provide that convenience to the traveler or agency will not support a determination that certificated U. S. air carrier service is unavailable. We recognize that there are considerations that surpass mere inconvenience that may well warrant deviation from strict adherence to the Fly America scheduling principles. For example, we understand that for a period of time hotels in Cairo refused to make or keep reservations for U. S. travelers. Based on its finding that travelers routed through Cairo with connections the following day faced a substantial risk of being left stranded without overnight accommodations, the Department of State, for that period of time, permitted travelers to avoid U. S. air carrier service requiring overnight connections in Cairo. We believe this was a proper exercise of administrative discretion in determining that the U. S. carriers involved could not provide the commercial foreign air transportation needed.

In general, the determination that a U. S. air carrier cannot serve the agency's transportation needs is to be made by the agency and will not be questioned by this Office unless it is arbitrary or capricious. However, because of the potentially far reaching consequences of a determination that U. S. air carrier service requiring connections or layovers in New York falls within this category, and because the matter has been raised informally on several occasions, we feel it is appropriate to specifically address the question of whether the inconvenience to the traveler described by the Director is of such magnitude as to surpass mere inconvenience and warrant a determination that the U. S. air carrier available at point of origin cannot provide the transportation required.

We take note of the fact that the JFK International Airport in New York is the busiest of the international airports in the U. S. and that experienced travelers may sometimes prefer to avoid its congestion. The Department of Commerce's figures indicate that

B-138942

of the 6,226,290 U. S. citizens who traveled abroad in 1975, 2,648,752, or 42.5 percent, departed from the JFK International Airport. Although there is no breakdown, it has been estimated that more than 75 percent of the passengers departing from that airport travel eastward. While we do not have data indicating how many of those U. S. citizens returned to the U. S. by way of New York, we have no reason to believe that the percentage would deviate substantially from the departure figure. Whatever inconvenience is imposed upon the Government traveler in requiring his use of a carrier routed through New York, that inconvenience is shared by more than 40 percent of all U. S. citizens traveling abroad and does not warrant a deviation from the Fly America scheduling principles that would diminish U. S. air carrier receipts of Government revenues.

The on-time arrival figures for the two major international air carriers indicate that the cases which the Director offers as illustrative of the traveler's hardship in traveling via New York are atypical. A review of the airline schedules indicates that most flights from Europe arrive sufficiently early in the afternoon so that even when arrivals are delayed connections to Washington can be obtained the same day. The fact that departure from the negotiating sites and connections in New York may each involve 4 hours of waiting time poses no unusual hardship. In this connection the Guidelines recognize that where a traveler is required to wait 6 hours or more to make connections en route, certificated service may be considered unavailable. Under 56 Comp. Gen. 216, *supra*, an employee is expected to delay his departure to use certificated service for a period that may well exceed 4 hours. The suggestion that the deviation proposed would reduce the number of baggage handlings does not take into account the fact that the transfer of baggage in New York would merely be replaced by another transfer of baggage at the alternative locations in Europe. Although the traveler may be faced with customs inspection at JFK International Airport instead of a less congested airport and that some connections may require a transfer between New York airports, we do not believe these facts evidence greater inconvenience than that shared by the greater proportion of all individuals traveling to Europe.

We recognize that international travel is not always a pleasant experience. However, the inconveniences complained of by the Director are no greater than the inconveniences that confront most

B-138942

international travelers. For this reason and inasmuch as the deviation proposed by the Director would result in a diversion of revenues from U. S. to foreign air carriers, we are unable to agree that such deviation comports with the requirement of 49 U. S. C. § 1517 for use of available U. S. air carrier service.

R. F. Kitten
Acting Comptroller General
of the United States