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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Consideration of Fly America Act Violation]

FILE: B-I38942

DATE: October 30, 1979

MATTER OF: Department of Treasury - Fly America Act - Agency discretion in scheduling travel

DIGEST: In the case of an employee of the Jewish faith, where the agency finds that the individual's determination not to travel on his Sabbath is not a matter of his preference or convenience, but the dictate of his religious convictions, it may properly determine that U.S. air carrier service to the furthest practicable interchange point, requiring departure before dark on Saturday, cannot provide the transportation needed and, thus, is unavailable under the Fly America Act and the implementing guidelines.

The Acting Assistant Secretary (Administration), Department of the Treasury, has asked whether the failure to use certificated U.S. air carrier service to the furthest practicable interchange point violates the Fly America Act, 49 U.S.C. § 1517, where such scheduling would require a person of the Jewish faith to travel on his Sabbath.

The problem is a recurring one. As an example, the Acting Assistant Secretary has referred to the difficulty experienced in connection with Mr. Mordecai S. Feinberg's participation in certain treaty negotiations in Malta. His attendance was regarded as essential to the negotiations, which initially were scheduled to begin on Monday. Because Mr. Feinberg is an observant Jew whose religion requires him to abstain from all travel from sundown Friday until dark on Saturday, his travel could not be scheduled by U.S. air carrier from Washington, D.C., to Rome, the furthest practicable interchange point, since service to Rome, with foreign air carrier connections to Malta required departure before dark on Saturday.

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B-138942

Although his travel could have been scheduled by U.S. air carrier to London departing Saturday night, with foreign air carrier connections to Malta, London is not the furthest practicable interchange point and Mr. Feinberg would have incurred a financial penalty for excess use of foreign air carrier service in accordance with 56 Comp. Gen. 209 (1977). In the particular instance cited, the treaty negotiations were delayed until Tuesday so that Mr. Feinberg could travel outside his Sabbath. However, because Mr. Feinberg's participation is essential to many international conferences, we are asked whether he may use alternative U.S. air carrier service when scheduling strictly in accordance with the Fly America Act would interfere with his religious practices.

Under 49 U.S.C. § 1517 and in accordance with the availability criteria set forth in the Comptroller General's Guidelines, B-138942, March 12, 1976, we have held that a Government traveler is required to use U.S. air carrier service available at point of origin to the furthest practicable interchange point on a usually traveled route. 55 Comp. Gen. 1230 (1976). In the case of Mr. Feinberg's travel to Malta, both London and Rome are usual interchange points, however, travel by way of Rome involves a greater use of U.S. air carrier service. Since Rome is the furthest practicable interchange point, the Acting Assistant Secretary correctly determined that Mr. Feinberg's travel by way of London would have resulted in a reduction of revenues by U.S. air carriers in favor of foreign air carriers and, unless otherwise justified, would have involved a financial penalty.

The Guidelines state that an air carrier which can provide the service needed is considered available even though comparable or a different kind of service by a foreign air carrier costs less or is preferred by the traveler. Consistent with the Guidelines, decisions of

B-138942

this Office have held that neither considerations of cost nor the preferences or convenience of the traveler will justify the use of foreign air carriers. 57 Comp. Gen. 519 (1978), and Robert A. Young, B-192522, January 30, 1979.

The Guidelines, however, recognize an agency's authority to determine that certificated service otherwise available cannot provide the foreign air transportation needed or will not accomplish the agency's mission. An agency's determination that an air carrier cannot serve its transportation needs will not be questioned by this Office unless it is arbitrary or capricious. 57 Comp. Gen. 519, supra.

As evidenced by Mr. Feinberg's situation, there are circumstances in which the line between preference or convenience and accomplishment of the agency's mission is a thin one. In 59 Comp. Gen. 519, supra., we ruled that the ordinary hardship and inconvenience of changing flights in New York on trips between Washington and Europe did not make United States air carriers requiring New York connections unavailable. In that decision we specifically recognized that there are considerations surpassing mere preference and inconvenience that may warrant deviation from strict adherence to the Fly America Act scheduling principles. For example, we have stated that the concept of availability of United States 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. In the case of an individual traveling to the U.S. for medical treatment, we held it was appropriate to schedule her travel by foreign air carrier to reduce the number of travel connections and avoid possible delays. Given the medical necessity involved, we concurred with the agency's determination

B-138942

that her travel by foreign air carrier was necessary to accomplish the agency's mission -- her safe and expeditious medical evacuation. Richard H. Howarth, B-193290, February 15, 1979.

The Acting Assistant Secretary suggests that the words "preference or convenience" should not apply to a situation in which an employee is required by his religion to abstain from travel. And, as evidenced by the fact that the treaty negotiations were rescheduled to begin one day later to accommodate Mr. Feinberg, it appears that the Department of Treasury in fact did consider Mr. Feinberg's conviction not to travel from Friday evening to Saturday night to be the dictate of his religious convictions and not merely a matter of his personal preference. Based on that same consideration, we believe that the Department properly could have determined that U.S. air carrier service by way of Rome departing before dark on Saturday could not meet the agency's mission -- Mr. Feinberg's attendance at the negotiations on Monday.

We have not been told the specific dates of the negotiations in Malta and, therefore, we are unable to verify that in the example given, Mr. Feinberg should have been scheduled to travel Saturday night by way of London. Although the submission suggests that the Saturday night flight to London was the only available alternative, based on the Official Airline Guide, it appears that it may have been possible to travel via Rome by U.S. air carrier departing Thursday night or Friday morning. While such scheduling would have involved an earlier departure, up to 48 hours additional per diem is payable to facilitate use of certificated service. 56 Comp. Gen. 216 (1977). Moreover, connections to Malta can be made in Paris, which is

B-138942

a usual interchange point involving greater use of U.S. air carrier service. It is not clear that these alternatives were considered.

A handwritten signature in cursive script, reading "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name.

For The Comptroller General
of the United States