

20048

DECISION



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

FILE: B-200279

DATE: November 16, 1981

MATTER OF: Howard B. Keller - Fly America Act -
Indirect Travel

- DIGEST:**
1. Fly America Act applies not only to transportation secured with appropriated funds but also to transportation secured with funds "owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States." Where international air travel is secured with trust funds under control of United States, Fly America Act Guidelines apply.
 2. Employee on authorized official travel from Islamabad to London and return, undertook indirect travel by foreign air carrier to Madrid, Geneva, and other cities as matter of personal convenience. In accordance with penalty formula set forth at 56 Comp. Gen. 209 (1977), employee is liable for \$195.47, the amount by which his personal travel diverted revenues from United States air carriers to foreign carriers, notwithstanding that miles traveled on United States air carriers were not reduced.

By letter dated August 18, 1980, Howard B. Keller, an employee of the Agency for International Development (AID), requested reconsideration of Settlement Certificate Z-2820851, March 13, 1980, issued by our Claims Group which sustained a penalty deduction of \$195.47 under section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. No. 93-623, January 3, 1975, 88 Stat. 2102, 2104, 49 U.S.C. § 1517 (1976) (Fly America Act), assessed by AID in connection with his air travel between Islamabad, Pakistan and London, England and return, in November and December of 1978.

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Mr. Keller was authorized to perform travel on official business from Islamabad to London and return during December of 1978. Enroute to London, Mr. Keller undertook indirect travel for his own convenience to Tunis, Geneva, Madrid, Malaga, Lisbon, and Manchester. Mr. Keller paid the small additional cost for the side trips from his own funds. He used certificated U.S. air carrier service for the round-trip travel between Rome and Karachi, Pakistan. The remainder of the travel was performed by foreign air carriers. Certificated carrier service between Islamabad and Karachi and between Rome and London was not available and AID does not question the employee's travel by foreign air carriers for that portion of the trip. The issues presented for our decision relate only to Mr. Keller's use of foreign air carrier service in connection with the indirect travel performed for his own convenience enroute to London, for which AID has assessed him a penalty of \$195.47.

Mr. Keller contends that he has been improperly penalized the entire amount of \$195.47. In support of his contention, Mr. Keller asserts that the Fly America Act does not apply to travel paid for by trust funds. He also contends that to penalize him is contrary to the intent of Congress as manifested in the passage of the Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 706, 92 Stat. 992, 49 U.S.C. § 1518 (Supp. III 1979) (the Amendment), which authorized the relaxation of the Fly America Act restrictions for certain agencies' official travel between points which are outside the United States. Finally, he states that even if the Fly America Act applies to his travel, he has complied with its provisions.

We affirm our Claims Group's disposition of Mr. Keller's claim. We find that trust funded travel is not automatically exempt from the Fly America Act, that the 1978 amendment to the Fly America Act is not relevant to the consideration of this claim, and that the penalty was proper under the provisions of the Fly America Act.

FLY AMERICA ACT APPLICABILITY

The Fly America Act requires the Comptroller General to disallow any expenditures from appropriated funds for payment for transportation of personnel on non-certificated air carriers (those carriers that do not hold certificates under section 401 of the Federal Aviation Act of 1958, 49 U.S.C § 1371) "in the absence of satisfactory proof of the necessity therefor." The purpose behind this provision is to counterbalance the advantages many foreign airlines enjoy by virtue of financial involvement and preferential treatment by their respective governments. 55 Comp. Gen. 1230, 1232 (1976). In order to carry out our responsibilities under this provision, our Office issued guidelines on June 17, 1975, B-138942, (revised March 12, 1976, and March 31, 1981), which directed the Executive departments, agencies, and instrumentalities of the United States to modify their regulations concerning Government-financed commercial foreign air transportation to comply with the Fly America Act.

We note that although our Fly America Act Guidelines refer to transportation secured with appropriated funds, the provisions of the Fly America Act for use of available certificated air carrier service apply to transportation secured with funds "appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States." In implementing the Fly America Act provisions with respect to transportation procured with other than appropriated funds, we have held that agencies should apply the standards set forth in our Fly America Act Guidelines. 57 Comp. Gen. 546, 548 (1978). Thus, where international air transportation is secured with trust funds under the control of the United States Government, agencies should apply our Fly America Act Guidelines. This is true even though Mr. Keller paid the additional amount necessary to allow him to undertake the indirect travel for his own convenience. The fact that the majority of the cost was paid from trust funds controlled by the Government is sufficient to invoke the Fly America Act.

Mr. Keller has not established the nature of the trust funds used to pay for his travel. The burden of establishing a valid claim against the Federal Government is on the person asserting the claim. Frederick J. Chace, B-140972, October 24, 1979, and 4 C.F.R. § 31.7 (1981).

Since Mr. Keller has submitted no evidence to show that these trust funds were not under the control of the United States Government, and AID has informally advised us that the funds were under Government control, we find that the Fly America Act was applicable to Mr. Keller's travel. In any event it appears from Mr. Keller's travel orders that at least a portion of the funds used to pay for his travel were actually appropriated funds.

Further, Mr. Keller relies on a 1975 AID cable to the U.S. Mission in Pakistan which is alleged to state that trust funded travel on host country air carriers is exempt from the Fly America Act. From the record as a whole it appears that that cable and other documents may exempt host carriers, but hold that travel on third country carriers is covered. The record does not contain a copy of the cable. The cable is not relevant to the disposition of this case, however, since the distinction drawn between carriers here is not based on whether a carrier was a host country carrier, but whether or not a certificated carrier was available and/or authorized.

FLY AMERICA ACT AMENDMENT

On October 7, 1978, Congress passed the Amendment, allowing certain agencies' -- including AID's -- appropriated funds to be used to pay for transportation between two places both of which are outside the United States, aboard foreign air carriers. Mr. Keller, referring to the Amendment, asserts that to financially penalize him for his travel goes against the intent of Congress. He states that in passing the Amendment, Congress greatly relaxed the restrictions of the Fly America Act for official travel between points which are outside the United States.

We need merely note that the Amendment made the allowance of foreign air carrier travel under those circumstances a matter of discretion for certain agencies --

including AID. At the time of Mr. Keller's travel, AID had not exercised that statutory discretion to exempt his travel between Islamabad and London via foreign air carriers.

Furthermore, the legislative history of the Amendment makes it clear that the Congressional policy of giving preference to United States air carriers is still to be given great weight. The Conference Committee considering the Amendment recognized that the Fly America Act had created substantial hardships for Government personnel required to travel overseas to carry out their official duties, but stated that it did not intend that the Amendment be implemented in a "broad and sweeping manner." It was expected to be implemented "in a manner which will continue to encourage U.S. Government employees to use United States air carriers to the maximum practical extent." It was expected that agencies would "take into account both the continuing policy of Congress that U.S. airlines be used to the greatest practical extent and also any significant adverse economic impact which use of this authority may have on the revenues of any U.S. certificated air carrier." H.R. Conf. Rep. No. 95-1535, 95th Cong., 2d Sess., 46 (1978). Therefore, penalizing Mr. Keller under the Fly America Act for his travel does not go against the intent of Congress in passing the Amendment.

FLY AMERICA ACT COMPLIANCE

Mr. Keller further asserts that even if the Fly America Act were applicable to his travel, he complied with it. He states that his responsibilities under the Fly America Act ceased, having maximized mileage on a U.S. carrier upon reaching the interchange point where a shift had to be made to a foreign carrier.

We acknowledge that Mr. Keller flew U.S. air carriers for all the segments of his travel that he could have. We recognize that the number of miles Mr. Keller traveled on certificated U.S. air carriers was not

reduced by his side trips and that the additional air travel involved in his side trips was at little additional cost, which Mr. Keller paid. We do not question the propriety of Mr. Keller's direct travel by foreign air carriers or the justification offered for the use of such service in connection with the authorized travel performed.

However, as previously noted, the purpose of the Fly America Act is to counterbalance financial advantages enjoyed by foreign air carriers. 55 Comp. Gen. 1230, 1232 (1976). In meeting his responsibilities under the Fly America Act, the Comptroller General has looked at the financial consequences to U.S. air carriers of indirect travel, rather than only considerations of distance. In Gilbert Griffis, B-188648, November 18, 1977, we said that where the employee takes a side trip or otherwise indirectly routes his travel and where such indirect travel is wholly or in part subsidized by the fare payable by the Government in connection with the employee's official itinerary, the employee is responsible not only for any additional cost attributable to his personal travel, but for any diversion of revenues from certificated U.S. air carriers.

The concept of a diversion of revenues is important because the through fare paid for travel over two or more route segments is less than the sum of the segment fares. The distribution of revenue between the involved air carriers is determined by private agreements between the carriers. Since such agreements are not readily available, there is no source from which it can be determined how two or more carriers share in the fare revenues received. Therefore, in the absence of administrative regulations adopting a fare proration formula for determining liability, we have determined to apply the mileage proration formula set out in Arthur R. Thompson, 56 Comp. Gen. 209 (1977).

Applying our diversion of revenue concepts, in Gilbert Griffis, B-188648, November 18, 1977, we held a Government employee liable under the Fly America Act for \$16.02 where, incident to his official travel to London, he combined personal travel to Edinburgh,

Scotland. He traded in his ticket to obtain a substitute ticket permitting him a side trip between London and Edinburgh aboard a foreign air carrier. The penalty - - which was determined using our formula - - was properly assessed, because the employee had engaged in indirect travel for his personal convenience on a foreign air carrier in conjunction with official travel. He was liable for the diversion of revenues from certificated U.S. air carriers to the foreign air carrier supplying transportation between London and Edinburgh. This was so, even though there was no U.S. air carrier service between London and Edinburgh, the additional travel involved no additional expense, and the additional travel was performed on his own time.

Here, Mr. Keller was authorized to engage in official travel from Islamabad to London and return. In conjunction with his official travel, Mr. Keller undertook indirect travel by foreign air carriers to Madrid, Geneva, and other cities as a matter of personal convenience. The miles he traveled on certificated U.S. air carriers were not reduced by this change in his itinerary, and the additional air travel was at little additional cost, which Mr. Keller paid. His personal travel was done on his own time.

The opportunity that Government travel may afford an employee to augment his personal travel plans is purely fortuitous and is sanctioned only insofar as it does not result in additional cost to the Government or contravene otherwise applicable laws and regulations. To the extent such personal travel results in a reduction in receipt of Government revenues by U.S. air carriers over revenues they would have earned had the employees performed only authorized travel, that personal travel does involve a violation of the requirement for the use of certificated U.S. air carrier service imposed by the Fly America Act. Gilbert Griffis, B-188648, November 18, 1977.

Under our diversion of revenue concept, Mr. Keller's indirect travel aboard foreign air carriers for his personal convenience in conjunction with official travel makes the Fly America Act applicable to him. He

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is liable for the portion of the airfare payable by the Government which his personal travel to Madrid, Geneva, and other cities diverted from certificated carriers to non-certificated carriers. AID correctly applied our liability formula to Mr. Keller's travel and disallowed the resulting penalty amount: \$195.47.

Accordingly, we affirm our Claims Group's previous disposition of Mr. Keller's claim.

for *Milton J. Fowler*
Comptroller General
of the United States