

**DECISION**

24883  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE:** B-205206**DATE:** April 15, 1983**MATTER OF:** Daniel Bienstock**DIGEST:**

Employee assessed a Fly America Act penalty for foreign air carrier travel to and from China as a member of a delegation offers explanation that foreign air carrier travel enabled delegation to arrive as a group and that individual arrivals would have interfered with diplomatic process. If agency determines that diplomatic considerations warrant finding that use of U.S. air carrier would not accomplish agency's mission, traveler's liability may be excused on basis that travel by foreign air carrier was a matter of official necessity.

Dr. Daniel Bienstock requests reconsideration of our decision Matter of Bienstock, B-205206, June 28, 1982, in which we held him liable for the cost of his travel by foreign air carrier between New York and China in the absence of an agency determination that the purpose of his travel could not have been accomplished without the use of the foreign carrier. Based on the information Dr. Bienstock has presented in support of his request for reconsideration we would not object to the agency's determination that his travel by foreign air carrier was a matter of official necessity. However, that determination is for the agency rather than this Office.

The facts are set out at length in our June 28, 1982 decision and will be repeated only where necessary for clarity. Dr. Bienstock, an employee of the Department of Energy, traveled to China as a member of a delegation of United States energy experts. Travel arrangements, including a Japan Air Lines flight from New York to China and return, were made for the entire group by one of its members who was not a Government employee. Because air carrier service was available between New York and China we held that Dr. Bienstock was liable under the Fly America Act, 49 U.S.C. 1517, for the cost of his transportation in the absence of a determination by his agency that his mission would not have been accomplished without use of the foreign carrier.

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In support of his request for reconsideration Dr. Bienstock has submitted a letter dated September 5, 1982, from Mr. Luke C. L. Yuan, Brookhaven National Laboratory, Upton, New York, leader of the delegation visiting China. Mr. Yuan explains that members of the delegation followed his advice in booking transportation aboard the Japan Air Lines flight which he had determined was the only flight available from the New York area which would allow all members of the delegation to arrive at Beijing on the afternoon of April 15, where he had arranged for them to be met by officials of the Chinese State Energy Commission. Dr. Bienstock states that it was important for the entire delegation to be welcomed as a group and that individual arrivals would have precluded this diplomatic process. He points out that the group travel arrangements enabled members of the delegation to discuss and finalize its position before arriving in China.

The Fly America Act requires the use of available certificated U.S. air carriers for international air travel paid for from appropriated funds. It imposes a nondiscretionary duty on the Comptroller General to disallow expenditures from appropriated funds for such travel by foreign air carriers in the absence of satisfactory proof of the necessity therefor. The revised implementing guidelines, B-138942, issued March 31, 1981, clearly provide that neither considerations of cost nor the preferences or convenience of the traveler will justify the use of foreign air carriers. They provide, however, that the use of foreign air carrier may be deemed necessary if a U.S. air carrier otherwise available cannot provide the foreign air transportation needed or if use of such service will not accomplish the agency's mission.

In 57 Comp. Gen. 519, 522 (1978), we pointed out that it is within an agency's authority to determine whether otherwise available U.S. air carrier service will or will not accomplish the agency's mission and that an agency determination that U.S. air carrier service will not meet the agency's transportation needs will not be questioned by this Office unless it is arbitrary or capricious. We have recognized that diplomatic or political considerations of an international nature may provide the basis for an agency determination that use of a foreign air carrier is necessary

to accomplish the agency's mission. Matter of Panama Canal Commission's Supervisory Board, B-206329, April 9, 1982. However, as pointed out in 59 Comp. Gen. 66 (1979) there is often a very thin line between preference or convenience to the traveler and accomplishment of the agency's mission. It is for this reason that the determination of necessity for travel by foreign air carrier is to be made by the agency.

The additional information Dr. Bienstock has submitted indicates that convenience to the traveler was certainly a factor in Mr. Yuan's recommendation that delegation members take the Japan Air Lines flight they did. Dr. Bienstock's and Mr. Yuan's statements, nevertheless, suggest that they felt the foreign air carrier transportation served an official purpose beyond convenience to the individual members of the delegation. If the agency determines that that purpose rises to the level of actual mission necessity within the meaning of the Fly America Act Guidelines Dr. Bienstock's liability as determined by our decision of June 28, 1981, may be excused on the basis that his travel by foreign air carrier was a matter of official necessity.

*for* *F. H. Barclay, Jr.*  
Comptroller General  
of the United States