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DECISION

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

FILE: B-206329 DATE: April 9, 1982

MATTER OF: Panamanian Members of the Panama Canal Commission's Supervisory Board

DIGEST: Where refusal of Panama Canal Commission to pay official travel expenses of Panamanian members of its Supervisory Board who use a Panamanian airline would be detrimental to its overall objectives, the Commission may determine that use of available service by U.S. air carriers would not accomplish agency's mission, making use of foreign air carrier necessary. The Comptroller General would not question agency's determination of necessity in these circumstances, and would allow payment of travel expenses.

The Panama Canal Commission asked us to decide whether the Fly America Act prohibits the Commission from paying the travel expenses of the Panamanian members of its Supervisory Board who fly to Board meetings on Air Panama. We conclude that payment of these expenses would be allowed if the Commission were to determine that the use of available service by U.S. carriers would not accomplish the agency's mission.

The Panama Canal Commission is an executive branch agency of the United States Government created by the Panama Canal Act of 1979, Pub. L. No. 96-70, 22 U.S.C. § 3601 et seq. It is responsible for the maintenance and operation of the Panama Canal. The Commission is supervised by a Board composed of nine members, as many as four of whom may be nationals of the Republic of Panama. 22 U.S.C. § 3612(a). Members of the Board serve without compensation but are allowed travel or transportation expenses while on official business in the same manner as persons employed intermittently in Government service are allowed expenses under 5 U.S.C. § 5703. 22 U.S.C. § 3617. The Board holds regular meetings four times during the year; the next meeting is scheduled for October 1982. At present, the Panamanian members of the Board plan to fly to the meeting on Air Panama even though two U.S. air carriers have daily service between Panama and the United States. These plans present an ostensible conflict with the so-called Fly America Act.

The Fly America Act, 49 U.S.C. § 1517, provides that all Government-financed foreign air travel must be by U.S. air carriers certificated under 49 U.S.C. § 1371, to the extent that service by such carriers is available. Enacted in 1974 by section 5 of Pub. L. No. 93-623, 88 Stat. 2104, the Act's purpose was to counterbalance the dominance that foreign carriers enjoyed with respect to business and Government air traffic originating abroad. H. Rep. No. 93-1475, 93d Cong., 2d Sess. 7, reprinted in [1974] U.S. Code Cong. & Ad. News 7461, 7466. The Act was amended in 1980 by section 21 of Pub. L. No. 96-192, 94 Stat. 43, to provide in part that the requirement to travel by U.S. air carriers does not apply when transportation is provided for under the terms of a bilateral or multilateral air transport agreement that is consistent with the international aviation policies of the Federal Aviation Act as set forth at 49 U.S.C. § 1502(b). The Department of State, Aviation Affairs Division (Policy), has advised us informally that no such agreement exists with respect to Panama, nor is any such agreement under current consideration.

The Fly America Act directs the Comptroller General to disallow any expenditure in violation of the Act in the absence of proof that use of a foreign air carrier was necessary. 49 U.S.C. § 1517(d), as amended. Criteria for determining when U.S. air carrier transportation is unavailable and standards for determining when travel by foreign air carriers is otherwise necessary are found in the Revised Guidelines for Implementation of the "Fly America Act" issued by the Comptroller General on March 31, 1981, B-138942. These have been incorporated into the Federal Travel Regulations (FPMR 101-7) at paragraph 1-3.6 (revised September 28, 1981). This regulation provides that:

> "* * * Use of foreign air carrier service may be deemed necessary if a U.S. flag air carrier otherwise available cannot provide the foreign air transportation needed, or use of U.S. flag air carrier service will not accomplish the agency's mission." FTR, para. 1-3.6b(3).

A number of our prior decisions have considered the issue of what constitutes necessity under the Fly America Act and the implementing administrative regulations. These cases indicate that use of a foreign air carrier may be necessary where the use of an available U.S. air carrier might jeopardize the health of the traveler, Matter of Howarth, B-193290, February 15, 1979, or would create a risk to the safety and well-being of the traveler, Matter of the Joint Chiefs of Staff, 57 Comp. Gen. 519, 522 (1978). In Matter of Swiontek, B-199957, August 17, 1981, only use of a foreign air carrier would permit the traveler to report for duty on time. Since timely reporting was essential to the mission of the agency, use of the foreign air carrier was considered to be necessary.

In this case there is no indication that the health or safety of any of the Panamanian members of the Board would be compromised by use of U.S. air carriers. Nor does it appear that use of U.S. carriers would interfere with the scheduling of the Board's business. Compare, Matter of Department of Treasury, 59 Comp. Gen. 66 (1979). Rather, the considerations in this case are essentially political. We believe that the Panama Canal Commission might reasonably conclude that these political considerations are so sensitive as to make necessary the use of a foreign air carrier, i.e., Air Panama, by the Panamanian members of the Board.

The Republic of Panama requires its governmental officials to use Panamanian airlines while traveling on official duty. The submission states that failure to use a Panamanian carrier would subject the Panamanian Board members to severe criticism at home and could be detrimental to the overall objectives of the Commission. We said in Matter of the Joint Chiefs of Staff, supra, that "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." We will defer, as well, to the agency's determination that use of a U.S. carrier would not accomplish the agency's mission. In this case, there may be a sufficient basis upon which the Commission

could conclude that use of U.S. air carriers by the Panamanian members of its Supervisory Board would not accomplish the agency's mission.

Our opinion here expressed should not be read so broadly as to sanction the use of foreign air carriers whenever the potential exists for adverse reaction abroad. It is significant in this case that the mission of the Panama Canal Commission is to implement a treaty between Panama and the United States. The Commission is charged with a sensitive task and should have the flexibility to decide that its mission would best be served by avoiding controversy of this nature.

In light of the unusual circumstances of this case, the Comptroller General would take no action to disallow expenditures for travel on Air Panama by Panamanian members of the Board if the Commission were to make the necessary determination of necessity. In that event, the voucher should be accompanied by the certificate required by FTR para. 1-3.6c(3).

for Milton J. Socolar
Comptroller General
of the United States