



The Comptroller General
of the United States

Washington, D.C. 20548

Walsh

Decision

Matter of: Technical Sergeant Johnny W. Cunningham -
USAF

File: B-235536

Date: August 29, 1989

DIGEST

1. A member who is not granted emergency leave upon the death of his grandmother and travels to the funeral at his own expense is entitled to reimbursement under 37 U.S.C. § 411d when his orders are amended putting him in an emergency leave status.
2. The Fly America Act prohibits the use of appropriated funds for government financed air transportation on a foreign air carrier unless service by U.S. carrier is not available. A member on emergency leave is entitled to the reimbursement in accordance with 37 U.S.C. § 411d for use of a foreign carrier when it can be demonstrated that a U.S. carrier was not available as defined in the regulations.

DECISION

Technical Sergeant Johnny W. Cunningham, USAF, appeals a settlement of our Claims Group which denied his claim for \$630 representing the cost of air fare on a foreign air carrier used in connection with emergency leave. His claim may now be allowed to the extent indicated.

Sergeant Cunningham was initially denied emergency leave and transportation from Korea to Columbus, Mississippi, to attend his grandmother's funeral due to lack of evidence of an in loco parentis relationship with him. He was granted ordinary leave. Subsequently, Air Force authorities verified that there was in fact an in loco parentis relationship and amended his orders to place him in an emergency leave status. This action made him eligible for government procured or financed travel in connection with the emergency leave under 37 U.S.C. § 411d. Prior to the amendment to his orders, he attempted to secure passage through the Military Airlift Command (MAC) at Osan, Korea, on a space available basis but flights on 2 successive days were cancelled for mechanical reasons. After

046341/139428

Sergeant Cunningham was advised of the cancellation of the second flight, the ticketing facilities at Osan had closed for the day. The member traveled to the United States on a foreign air carrier on the advice of a MAC representative that use of that carrier was the only way he could arrive in the United States in time for the funeral. As a result of the foregoing facts, we must decide whether Sergeant Cunningham is entitled to reimbursement for the air fare under 37 U.S.C. § 411d since his orders were retroactively amended. Additionally, we must decide whether his use of a foreign air carrier precludes reimbursement.

ANALYSIS AND CONCLUSION

Section 411d of title 37, United States Code, provides that transportation may be provided for a member incident to emergency leave granted for reasons of personal emergency. In the case of a member stationed outside the continental United States transportation is provided to the international airport from which the member and his dependents departed. The cost of such transportation may not exceed the cost of government procured transportation. Implementing regulations are found in Volume 1, Joint Federal Travel Regulations (JFTR), para. U7205.

At the time Sergeant Cunningham embarked on his travel he did not have orders authorizing emergency leave due to erroneous information provided the order issuing authority and as a result he was not eligible for the entitlements authorized by 37 U.S.C. § 411d. Subsequently, when the mistake was realized, orders were issued placing him in an emergency leave status. In connection with amended orders, we have held that as a general rule travel orders may not be revoked or modified retroactively so as to increase or decrease the entitlements which have accrued or become fixed under the laws and regulations when the travel has been performed. Exceptions to that rule have been recognized where a modification is made within a reasonable time after the issuance of the basic orders in order to correct an administrative error or to show the original intent. 51 Comp. Gen. 736 (1972). In this case the original orders were issued on the basis of erroneous information. As soon as the mistake was discovered orders were issued to place the member in an emergency leave status. In these circumstances, the amending orders meet the criteria mentioned above and must be considered valid orders. Thus, Sergeant Cunningham was eligible for transportation under 37 U.S.C. § 411d.

The so called Fly America Act, 49 U.S.C. App. § 1517, prohibits the expenditure of appropriated funds for

government-financed air transportation on a foreign air carrier unless United States air carriers are unavailable. Criteria for determinations of unavailability are set forth in 1 JFTR para. U3125-C-3. Paragraph U3125-C-3-c provides that a U.S. carrier will be considered unavailable if it takes 12 or more hours longer from the origin to destination airport to accomplish the mission than by foreign air carrier. See also 55 Comp. Gen. 52 (1975).

The personal emergency which created the mission was the timely return of the member to the United States for his grandmother's funeral. Time being of the essence, the cancellation for mechanical reasons on 2 consecutive days of the space available flights on which the member was booked, and the closing of the ticketing facilities, left the member no other alternative in completing the mission. This is confirmed not only by the advice of the MAC representative who advised the member that Korean Airlines was probably the only way he could leave that evening, but also by the post-event unavailability determination of the Accounting and Finance Officer for the Headquarters, 51st Tactical Fighter Wing (PACAF). We also verified this in the Official Airline Guide, Worldwide Edition, March 1987, which indicates a delay of an additional 12 hours or more would have resulted.^{1/}


Additionally, where such a delay is not involved, we have held that it is not necessary to use a U.S. carrier if it can neither serve the agency's transportation needs nor accomplish its mission. See 57 Comp. Gen. 519, 522 (1978), B-202413, Nov. 16, 1981, and 1 JFTR para. U3125-C-3-j. The existence of a statutory transportation entitlement for a person eligible for return to the United States in an emergency leave-type situation is a clear example of when an agency can authorize the use of a non-U.S. carrier to accomplish its mission since the purpose of the travel would have been frustrated had the member not taken the Korean flight.

In this case no certificate or memorandum from the transportation or other appropriate officer has been provided justifying the unavailability as required in 1 JFTR para. U3125-C-4. However, the record now clearly indicates that more than 12 additional hours of travel

^{1/} Our review of this publication indicates that it would not be possible to obtain access to a certificated carrier for either direct or connecting transoceanic service from Seoul until more than 12 hours after the member arrived at the airport at 7 p.m. on March 28, 1987.

from origin to destination would have been involved, and that in any event, the needs of the government would have been frustrated if the member had waited for U.S. carrier service on the following day. While we have generally held that a traveler's unsubstantiated justification generally is not sufficient to authorize reimbursement for the use of a foreign air carrier, reimbursement may be permitted to the extent that the reason for the unavailability is verifiable from other sources. 62 Comp. Gen. 512, 514 (1983).

Since government transportation was not reasonably available the member may be reimbursed in accordance with 37 U.S.C. § 411d (c) for travel on Korean Air, if otherwise proper.

for 
Comptroller General
of the United States