

**UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

**Donald V. McCray** : **Docket No.: 17-1875**

**Appellant,** :

**vs.**

**Robert L. Wilkie** :

**Secretary of Veterans Affairs**

**Appellee.** :

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OF ATTORNEYS’ FEES AND EXPENSES PURSUANT TO 28 U.S.C. §  
2412(d)**

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UNITED STATES COURT OF APPEALS  
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Donald V. McCray : Docket No.: 17-1875  
Appellant, :  
vs. :  
Secretary of Veterans Affairs :  
Appellee. :

APPELLANT'S APPLICATION FOR AN AWARD OF ATTORNEYS FEES  
AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and U.S. Vet. App. R. 39, Appellant, Donald V. McCray, applies for an award of reasonable attorneys' fees and expenses in the amount of \$8,118.40.

**I. PROCEDURAL HISTORY**

On June 9, 2017, the Board of Veterans' Appeal (the "Board") issued a decision denying Appellant entitlement to service connection for a bilateral hearing loss disability. Appellant filed a timely Notice of Appeal to this Court on June 15, 2017.

The Record Before the Agency ("RBA"), containing 1361 pages, was served upon the Appellant on August 24, 2017. Appellant reviewed the RBA,

and then served a Memorandum upon Appellee regarding issues on appeal in preparation of a conference before the Court's Central Legal Staff. On December 11, 2017, a conference was held with the assistance of the Court's Central Legal Staff.

At the conference, the parties were able to discuss in detail the case in hopes of reaching a joint resolution to the case. Unfortunately, no agreement could be reached. On February 26, 2018, the Appellant filed his principal brief. The Appellee's brief was filed on April 26, 2018. A Reply Brief was then filed on May 24, 2018.

The case was then assigned to the Honorable Judge Bartley. The matter was submitted to a panel on July 31, 2018. Oral argument was then scheduled for November 1, 2018 at 10:00 a.m. Following oral argument, a decision was issued but the panel on June 18, 2019. In the decision, the Court set aside and remanded the June 2017 Board decision. The Court found that a medical text's qualifying or contradictory aspects may affect the probative value and adequacy of any ensuing medical opinion that relies on the text. The Court also found that the Board erred in failing to assess the impact of apparently qualifying or contradictory statements in the medical text on the probative value and adequacy of the negative VA medical opinion. An inadequate statement of reasons or bases was also provided by the Board.

On July 10, 2019, Judgment was entered on the docket. Mandate was then issued on September 10, 2019.

## II. AVERMENTS

Mr. McCray was a prevailing party, the Secretary's position in this matter was not substantially justified, and Mr. McCray's net worth at the time the appeal was filed did not exceed \$2 million. Itemized statements detailing the time spent and fees sought on the case are attached. Mr. McCray meets all of the criteria under the statute, and the Court should award fees as requested. *See* 28 U.S.C. § 2412(d).

### III. ARGUMENT

#### A. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD.

To obtain “prevailing party” status, a party need only have obtained success “on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing the suit.” *Shalala v. Schaefer*, 113 S. Ct. 2625, 2632 (1993). Appellant is a prevailing party because the Court vacated the Board’s decision based upon administrative error and remanded the case for further development and adjudication in accordance with its decision. See *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (en banc). This Court-ordered relief creates the “material alteration of the legal relationship of the parties necessary to permit an award of attorney’s fees.” *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 121 S. Ct. 1835, 1840 (2001) (quoting *Texas State Teachers Association v. Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989)).

Appellant is a party eligible to receive an award of reasonable fees and expenses because his net worth did not exceed \$2 million at the time this civil action was filed, nor did he own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7,000,000 (seven million dollars), and which had

more than 500 employees. *See Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996). In addition, Appellant filed a Declaration of Financial Hardship, which was accepted for filing by the Court on June 15, 2017. *See Owens v. Brown*, 10 Vet. App. 65, 67 (1997).

B. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS  
WAS NOT SUBSTANTIALLY JUSTIFIED.

The Secretary of Veterans Affairs can defeat Appellant's application for fees and costs only by demonstrating that the government's position was substantially justified. *See Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord, Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary's administrative position was not substantially justified. As described more fully in the "Procedural History," *supra*, the Court vacated and remanded the Board decision and found that the Board failed to assess the impact of contradictory statements in a medical text and failed provide an adequate statement of reasons or bases, in

violation of 38 U.S.C. § 7104(d)(1). This error, and the other errors made by the Board, had no reasonable basis in fact or in law. Moreover, there is no evidence that special circumstances exist in Appellant's case that would make an award of reasonable fees and expenses unjust. *See* 28 U.S.C. § 2412(d)(1)(A).

C. ITEMIZED STATEMENT OF SERVICES RENDERED AND  
AMOUNTS OF REASONABLE FEES AND EXPENSES

An itemized statement of the services rendered and the reasonable fees and expenses for which Appellant seeks compensation is attached to this application as Exhibit A. Counsel also certifies that counsel has “(1) reviewed the...billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005).

Appellant is seeking an hourly rate of \$190.00 per hour. This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Cincinnati-Hamilton. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from 1996 (the start date of the

EAJA rate), to 2018 half 1, the date closest to the mid-point date for the litigation in this case, using the method described in *Elczyn v Brown*, 7 Vet. App. 170, 181.

The rate was calculated as follows:

$\$125.00 \times \text{CPI-U}/153 = \text{attorney fee};$

$\text{CPI-U 2018 Half 1} = 233.651$

$\$125.00 \times 233.651/153 = \$ 190.89 \text{ per hour}$

Rounded down to \$ 190.00 per hour

Counsel also expended and advanced expenses during this case. Counsel had a total amount of \$3.50 in postage expenses, which in the exercise of billing discretion, is not seeking reimbursement for. Oral argument was held in Washington, D.C. A flight was purchased for that trip (Attached) in the amount of \$366.40, which counsel is seeking reimbursement for. Counsel is not seeking any reimbursement for ground transportation or meals associated with the oral argument.

Appellant has claimed a reasonable amount of fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997)



#### D. THE EXERCISE OF REASONABLE BILLING DISCRETION

##### *a. Reasonable Billing Discretion*

Counsel for Mr. McCray has exercised sound billing judgment and has made significant reductions in the billing itemization. Detailed itemizations clearly indicate where charges have been reduced or eliminated altogether. All time spent reviewing court orders or routine pleadings filed with the Court has been reduced. Further, all time spent drafting and filing motions for an extension of time has been eliminated. No time has been billed for work performed on unreasonable motions; for any argument made in a reply brief which repeats the same argument in the principal brief; for work spent on activities that are not required for preparation of the billed pleading; and for irrelevant work.

In the exercise of billing judgment, Appellant has eliminated 6.7 hours of attorney time from this itemized statement and this fee petition.

WHEREFORE, Appellant respectfully requests that the Court award attorney's fees and expenses in the total amount of \$8,118.40 in this matter.

Respectfully submitted,

**Date: October 6, 2019**

**/s/ Maxwell D. Kinman**

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Mason, OH 45040  
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**EXHIBIT A**

**ITEMIZED BILLING STATEMENT**

**Donald V. McCray, 17-1875**

**Attorney Maxwell D. Kinman, Esq.**

7/25/2017	0.5	Return call from client; discuss outline of case. Overview for client process at the CAVC.
7/28/2017	0.3	Receive signed representation agreement from client with additional documents; Draft & e-file NOA and Representation Agreement.
	0.1	Create hard file, draft and mail representation letter to client and next steps.
8/9/2017	0.1	Draft & mail client letter re: appearance of VA counsel
8/18/2017	0.1	Mail client consent to release form.
8/23/2017	0	E-mail consent to opposing counsel. <b>[.1 hours eliminated in the exercise of billing judgment]</b>
8/28/2017	0.2	Receive copy of RBA from VA; ensure initial working condition and page amount; update calendar with review date

- 0.1 Letter to client re: RBA received.
- 9/11/2017 0 Draft & efile extension of time to review RBA. [**.2 hours eliminated in the exercise of billing judgment**]
- 10/27/2017 4.5 Begin Reviewing RBA, including BVA Decision (1361 Total Pages), creating timeline and table of contents; Review RBA for any missing documents; Highlight and make comments on important facts, sections, and evidence in preparation for CLS conference and filing of briefs. (RBA Pages 1-1361 );
- 10/30/2017 0.1 Review notice from court regarding brief due in 60 days, update calendar.
  - 0.1 Draft & mail client letter regarding brief due in 60 days and update of case.
- 11/14/2017 0.1 Update calendar with CLS Conference date.
  - 0.1 Mail client letter re: CLS Conference
- 11/26/2017 1 Review RBA highlights, timeline, and notes for drafting of CLS Memo Notes, draft outline

- of CLS Memo arguments.
- 0.1 Begin Draft of CLS Conference Memo.
    - Introduction
  - 0.4 Draft Procedural Summary
  - 0.5 Draft Factual Summary
    - 1 Draft CLS Conference Memo and research case law re: Medical Opinion Analysis.
    - 1 Draft CLS Conference Memo and research case law re: Reasons & Bases.
  - 11/27/2017 0.3 Final editing of the CLS Conference Memo.
    - 0.1 E-mail opposing counsel and CAVC staff completed CLS Conference Memo.
    - 0.1 Draft & e-file Rule 33 Certificate of Service.
    - 0.3 Phone call with client, update.
  - 12/11/2017 0.3 Prepare for CLS Conference: Draft CLS Quick Notes in preparation of conference.
    - 0.1 CLS Conference
    - 0.1 Draft & Mail client letter re: CLS Conference.
  - 1/10/2018 0 Draft & efile extension of time for Appellant Brief. **[.2 hours eliminated in the exercise of**

**billing judgment]**

- 2/23/2018
- 1 Briefly review CLS Memo and RBA in preparation for Brief writing.
  - 0.3 Set up form and format of Appellant Brief, insert main issues from CLS memo, create draft of statement of issues.
  - 0.6 Draft Statement of the Case - Procedural Issues; review record for pertinent dates and citations.
    - 1 Draft Statement of the Case - Facts
    - 2 Research delayed onset hearing loss. IOM study and background.
  - 1.5 Draft section/research case law re: Reasons & Bases.
    - 2 Draft section/research case law re: Medical Opinions.
- 2/24/2018
- 1 Draft section/research case law re: Downgrade Opinion.
    - 0.1 Finish and refine Statement of Issues
    - 0.3 Draft Summary of the Argument.

- 0.2 Draft & set up headings for the table of contents.
- 0.5 Proofread all sections.
  - 1 Compile Table of Authorities, including identifying complete record sections.
- 0.3 Final proofread and put together of brief.
- 2/26/2018 0.1 E-file appellant brief.
- 0.1 Draft & mail client letter re: filing of Appellant brief and what to expect next.
- 4/27/2018 0.1 Download Appellee Brief. Draft & mail client letter re: Appellee Brief filing.
- 5/10/2018 0 Draft & efile extension of time for Reply Brief. [.2 hours eliminated in the exercise of **billing judgment**]
- 5/21/2018 0.3 Return client phone call re: update.
- 5/24/2018 0.8 Review Appellee Brief for potential Reply Brief Arguments.
  - 0.1 Set up form and format of Reply Brief.
  - 1.5 Draft Reply Brief
  - 0.2 Review and edit Reply Brief

0.2 Draft Table of Contents/Authorities - Final Editing

0.1 E-File Reply Brief.

6/8/2018 0.4 Download & review ROP for accuracy.

0.1 Draft & efile response to ROP.

6/12/2018 0.1 Letter to client re: Judge Assigned.

8/25/2018 0.2 Review Notice of Oral Argument. Update calendar. Letter to client.

10/20/2018 1.5 Oral Argument Preparation. - Review rules of Court and outline argument.

10/22/2018 3 Review briefs. Outline arguments.

10/29/2018 4 Mock out oral argument. Review arguments

11/1/2018 0.5 Travel to and from oral argument. **[6.0 hours eliminated in the exercise of billing judgment]**

1.5 Oral Argument and meet with clerk.

11/28/2018 0.2 Phone call with client, update.

6/23/2019 0.5 Review Court decision. Letter to client re: Decision.

10/6/2019 0.8 Prepare drafting of EAJA application, set-up



format, review of pertinent case law and statutes.

- 1 Draft EAJA application (.5), Review & edit billing statement for EAJA, ensure accuracy of all time entries, ensure complete descriptions of all entries; exercise billing judgment to remove time that is duplicative or clerical or time that would not be charged to a private client.

- 0.1 Finalize and file EAJA application

<b>Total Hours:</b>	<b>40.8</b>
<b>Total Fee:</b>	<b>\$7,752.00</b>
<b>Total Expenses:</b>	<b>\$366.40</b>
<b>Total Bill:</b>	<b>\$8,118.40</b>

**EXHIBIT B****Consumer Price Index - All Urban Consumers**

**Series Id:** CUUR0200SA0,CUUS0200SA0  
 Not Seasonally Adjusted  
**Area:** Midwest  
**Item:** All items  
**Base Period:** 1982-84=100

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Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1996	150.2	150.8	151.7	152.3	152.7	152.9	153.2	153.4	154.0	154.4	155.0	155.3	153.0	151.8	154.2
1997	155.5	155.9	155.9	156.1	156.3	156.7	156.6	157.2	157.5	157.7	157.7	157.3	156.7	156.1	157.3
1998	157.6	158.0	158.4	159.0	159.4	159.5	159.8	159.5	159.9	160.1	160.1	159.8	159.3	158.7	159.9
1999	160.4	160.5	161.0	162.2	162.2	162.5	162.9	163.2	164.3	164.3	164.6	164.4	162.7	161.5	164.0
2000	164.9	165.9	167.1	167.0	167.5	169.7	168.8	168.2	170.0	170.1	170.3	170.2	168.3	167.0	169.6
2001	171.9	172.1	171.7	172.8	174.2	173.8	172.5	173.0	174.6	172.6	172.5	171.9	172.8	172.8	172.9
2002	172.1	172.5	173.6	174.7	174.8	175.3	175.3	175.8	176.2	176.3	176.1	175.5	174.9	173.8	175.9
2003	176.2	177.8	178.6	177.8	177.7	178.4	178.1	178.8	179.5	179.1	178.9	178.4	178.3	177.8	178.8
2004	179.4	180.2	181.0	181.5	182.9	183.3	183.2	183.3	183.6	184.5	184.8	183.8	182.6	181.4	183.9
2005	184.1	185.2	186.3	187.7	187.4	187.8	188.4	189.7	192.5	192.1	190.3	189.7	188.4	186.4	190.5
2006	190.8	190.7	192.0	193.0	193.6	194.1	194.6	195.1	193.7	192.3	192.8	192.9	193.0	192.4	193.6
2007	193.068	194.458	196.389	197.405	199.194	199.263	198.989	198.551	199.714	199.455	200.762	200.227	198.123	196.629	199.616
2008	201.427	201.896	203.723	205.393	207.168	208.968	210.071	209.351	209.252	206.019	201.737	199.582	205.382	204.763	206.002
2009	200.815	201.453	202.021	202.327	203.195	205.350	204.814	205.632	205.601	205.706	206.247	205.613	204.064	202.527	205.602
2010	206.564	206.563	207.359	207.777	207.987	207.886	208.211	208.639	208.788	208.689	208.816	209.270	208.046	207.356	208.736
2011	210.388	211.090	212.954	214.535	215.899	215.954	216.099	216.586	216.968	215.653	215.614	215.173	214.743	213.470	216.016
2012	216.368	216.855	218.975	219.405	219.145	219.017	218.956	220.462	221.125	220.375	219.483	219.033	219.100	218.294	219.906
2013	219.282	221.599	222.121	221.931	223.049	223.775	222.902	223.046	223.252	222.171	221.718	221.194	222.170	221.960	222.381
2014	222.247	223.493	225.485	226.214	226.565	227.588	226.997	226.587	226.913	225.793	224.396	222.821	225.425	225.265	225.585
2015	221.545	222.301	223.550	223.797	224.732	225.946	225.853	225.830	225.184	225.050	224.009	222.722	224.210	223.645	224.775
2016	223.301	223.196	224.621	225.609	226.476	227.835	226.786	227.097	227.636	227.358	226.673	226.794	226.115	225.173	227.057
2017	228.279	228.633	228.824	229.682	229.705	229.780	229.820	230.443	231.030	230.660	231.084	230.548	229.874	229.151	230.598
2018	232.028	232.512	232.931	233.913	235.065	235.455	235.346	235.276	235.524	235.680	234.292	233.458	234.290	233.651	234.929
2019	233.837	235.444	236.793	237.510	238.219	238.288	238.760								236.682



Maxwell Kinman <maxwdk@gmail.com>

### Your trip confirmation-IAEKTG 01NOV

1 message

American Airlines <no-reply@notify.email.aa.com>  
To: "MAXWDK@GMAIL.COM" <MAXWDK@gmail.com>

Sun, Oct 21, 2018 at 3:47 AM



Hello Maxwell Kinman!

Issued: Oct 21, 2018

## Your trip confirmation and receipt

Record locator: **IAEKTG**

[Manage Your Trip](#)

### Thursday, November 1, 2018

CVG	→	DCA	Seats: --
<b>6:20</b> AM		<b>7:51</b> AM	Class: Economy (S)
Cincinnati		Washington Reagan	Meals:
American Airlines 5445			
OPERATED BY PSA AIRLINES AS AMERICAN EAGLE.			

DCA	→	CVG	Seats: <a href="#">9F</a>
<b>2:49</b> PM		<b>4:37</b> PM	Class: Economy (S)
Washington Reagan		Cincinnati	Meals:

American Airlines 5562  
OPERATED BY PSA AIRLINES AS AMERICAN EAGLE.

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## Your trip receipt



Visa XXXXXXXXXXXXXXX1362

### Maxwell Kinman

FARE-USD	\$ 314.42
TAXES AND CARRIER-IMPOSED FEES	\$ 51.98
<b>TICKET TOTAL</b>	<b>\$ 366.40</b>



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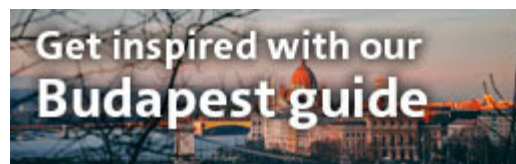
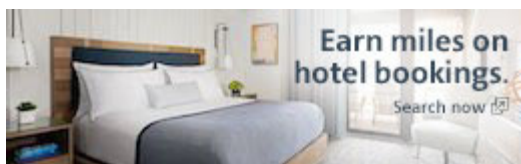


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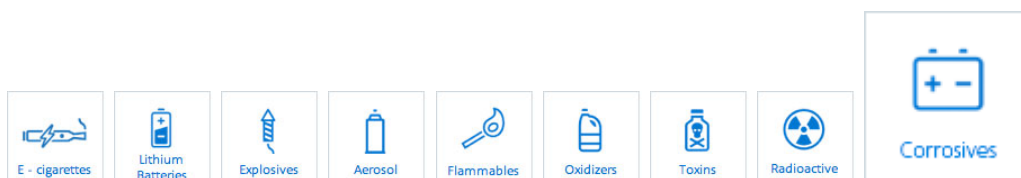
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## SERVICE & SUPPORT ANIMAL REQUIREMENTS

For tickets issued on or after July 1, 2018, customers traveling with emotional support animals are required to submit documents to our Special Assistance Desk at least 48 hours in advance of travel for cabin accommodation. Your animal must be trained to behave properly in public. During your journey, if any form of disruptive behavior is observed that cannot be successfully corrected or controlled, your animal will not be permitted to fly with you in the cabin. Visit [Traveling with Service Animals](#) for more information.



Some everyday products, like e-cigarettes and aerosol spray starch, can be dangerous when transported on the aircraft in carry-on and/or checked baggage. Changes in temperature or pressure can cause some items to leak, generate toxic fumes or start a fire. Carriage of prohibited items may result in fines or in certain cases imprisonment. Please ensure there are no forbidden hazardous materials in your baggage like:

Some Lithium batteries (e.g. spares in checked baggage, batteries over a certain size), Explosives / Fireworks, Strike anywhere matches/ Lighter fluid, Compressed gases / Aerosols Oxygen bottles/ Liquid oxygen, Flammable liquids, Pesticides/ Poison, Corrosive material.

There are special exceptions for small quantities (up to 70 ounces total) of medicinal and toilet articles carried in your luggage, spare lithium batteries for most consumer electronic devices in carry-on baggage, and certain smoking materials carried on your person.

Certain items are required to be carried with you onboard the aircraft. For example, spare lithium batteries for portable electronic devices, cigarette lighters and e-cigarettes must be removed from checked or gate-checked baggage and carried onboard the aircraft. However, e-cigarettes may not be used on-board the aircraft.

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Air Transportation, whether it is domestic or international (including domestic portions of international journeys), is subject to the individual terms of the transporting air carriers, which are herein incorporated by reference and made part of the contract of carriage. Other carriers on which you may be ticketed may have different conditions of carriage. International air transportation, including the carrier's liability, may also be governed by applicable tariffs on file with the U.S. and other governments and by the Warsaw Convention, as amended, or by the Montreal Convention. Incorporated terms may include, but are not restricted to: 1. Rules and limits on liability for personal injury or death, 2. Rules and limits on liability for baggage, including fragile or perishable goods, and availability of excess valuation charges, 3. Claim restrictions, including time periods in which passengers must file a claim or bring an action against the air carrier, 4. Rights on the air carrier to change terms of the contract, 5. Rules on reconfirmation of reservations, check-in times and refusal to carry, 6. Rights of the air carrier and limits on liability for delay or failure to perform service, including schedule changes, substitution of alternate air carriers or aircraft and rerouting.

You can obtain additional information on items 1 through 6 above at any U.S. location where the transporting air carrier's tickets are sold. You have the right to inspect the full text of each transporting air carrier's terms at its airport and city ticket offices. You also have the right, upon request, to receive (free of charge) the full text of the applicable terms incorporated by reference from each of the transporting air carriers. Information on ordering the full text of each air carrier's terms is available at any U.S. location where the air carrier's tickets are sold or you can click on the Conditions of Carriage button below.

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