BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the matter of	)	
	)	
Procedures for Reimbursement of Airports,	)	
On-Airport Parking Lots and Vendors	)	**Docket FAA-2001-11172**
of On-Airfield Direct Services to	)	
Air Carriers for Security Mandates	)	
	)	
14 CFR Part 154, Notice No. 154	)	

COMMENTS OF THE AIRLINE SERVICES COUNCIL

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Dated: January 22, 2002

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COMMENTS
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By Notice of Proposed Rule Making (NPRM), dated December 21, 2001, the Federal Aviation Administration (FAA) proposed procedures for reimbursement for Airports, Airport Parking Lot Operators, and Vendors of "on-airfield direct services to air carriers" (Vendors). These comments are submitted in response thereto on behalf of The Airline Services Council of the National Air Transportation Association ("ASC").

ASC is an industry council within NATA. Its members are all airline vendors – fueling companies, ground handling companies, maintenance organizations, security firms and airline food services companies. These companies experienced precisely the sort of negative economic impact that the NPRM was intended to address. ASC met with FAA staff before the issuance of this proposal. The FAA should be commended for the speed with which it responded to the Congressional timetable. ASC compliments the

FAA staff for its expedited actions. While the below comments provide examples of concerns that ASC has with the NPRM, the FAA should be commended for the overall package. The rules generally are well conceived and well drafted.

Section 121 of the Aviation and Transportation Security Act (ATSA) authorized the FAA to reimburse airports and airport parking lot operators, and vendors for certain costs associated with the increased security measures implemented after September 11, 2001. That statute did not appropriate the $ 1.5 billion authorized therein. Supplemental legislation has appropriated funds for the reimbursement of airports. While there is in no legislation pending that would appropriate funds for vendors, several Members of Congress have committed to introducing and supporting such legislation. After issuance of the NPRM, Congress appropriated funds to compensate airports for their security-related expenses. ASC assumes that such legislation obviates the need for airports to be considered with vendors and parking lot operators in the same final rule

Below are the comments of ASC on the FAA NPRM.

1. <u>§154.3-Definitions: Parking Lot Clarification</u>

Many companies operate parking lots that are in the vicinity of airport terminals. Most of them are open to the public, but more than a few are operated for airline employees and for the employees of vendors to airlines. All parking lots that are proximate to the terminal experienced, we believe, added security costs after September 11, 2001. To the extent that these added expenses are eligible under ATSA, the definition should recognize that all parking lot operators may apply.

2. <u>§ 154.3-Definitions Should be more Inclusive</u>

The preamble review of the definition of "direct air services to an air carrier" includes an extensive list of eligible activities. It, however, does not include all possible services. It does not, for example, include an airline contract with a private company to provide security services (other than passenger and baggage inspection). Cargo servicing and aircraft handling are not mentioned. Oddly, the list fails to mention the one function that was 100% mandated by an FAA Security Directive after September 11, 2001. Prior to that date there was no "search and seal" function for airline food services, see Security Directive 108-01-10D. The Final Rule should be more inclusive in its definition of eligible firms; the definition should include the words "and all other contracts to provide services to an airline on the airport" in its recitation.

3. <u>§154.3-Definitions "On the Airfield" Should be Clarified.</u>

The "on the airfield" definition indicates that the service, to be eligible, should be delivered in the Airport Operating Area ("AOA"). The clarifying comment suggests that the facility need not be an airport, "so long as the work is performed on the airfield." The example of the repair of an aircraft indicates that "at least part of the service [must] be on the airfield to be covered." Many airline vendors can meet this test easily because they are located on airport. However, in that on-airport leases tend to be expensive, some vendors choose to locate their facilities off airport, and their AOA contacts are not as clear. In each such situation, there usually is some mechanism to deliver the service or product to the airlines somewhere in the AOA. Thus, all of the added mandated security costs for these companies should be eligible.

Some companies may have more marginal contacts with the AOA, but still should be considered as qualifying because some aspect of the FAA security directives attach to their airline work. For example, a security firm may provide the airline with perimeter protection at an off-airport location. That firm may be required to meet frequently with airline staff at the airport. That person may be required under the active contract to hold SIDA identification. The new security directives may have required additional costs.

If these interpretations are correct, all of its qualifying costs (all post September 11, 2001) should be eligible. The final rule should include a reference to such possible, broader interpretations, mentioning specifically these two examples.

4. §154.3 – Definition- "Eligible Security Requirements" are difficult for Vendors to know.

Airline vendors rarely receive a direct call from a PSI offering to send the company a copy of a new SD, even if the terms apply directly to the vendor from a customer airline. A more likely scenario is a call from an airline customer. That conversation might, for example, include a comment that "under the FAA security plan all your trucks need to be padlocked." Because under Part 191 uncertificated vendors do not have direct access to the FAA protected documents,[1] the vendor must assume that the airline was given the precise instruction by the FAA, even if the vendor is not privy to the underlying FAA document.

ASC vendors do not and cannot know whether the FAA mandated (whatever the airline indicated what was required) a Security Directive or some other Part 107 or 108

[1] "Security directives, emergency amendments, orders, regulation approved airport and air carrier security programs, contingency measures and implementing instructions" are the FAA's full list of possible documents monitored by the FAA that may communicate the agency's security requirements. These comments, for brevity purposes, will not repeat this litany every time that reference is made to some FAA mandate; however, we request that the FAA assume that the full list be considered as appropriate.

mechanism. ASC members do not and cannot know whether the air carrier included the new requirement as part of its FAA approved plan. It is possible that the airline instruction was based on its own interpretation of what an FAA SD required. An individual airline "requirement" may have been based on its exercise of its air carrier certificate obligations or possibly the airline's own policies. The ASC member has little ability or authority to differentiate among such possible bases for its compliance with airline.

The NPRM seems to assume that soon after a new SD or other FAA mandate is issued, the airlines would all issue exactly the same guidance to their vendors. That is not the case.

There are multiple possible sources for inconsistent communication of the mandates to the ASC vendors:

- the initial communication between the PSI and the airline; the PSI may have a specific concern with regard to an airline and may have emphasized some aspect of the SD, which in turn caused the airline to tailor its response;

- the intra-airline communication process is a possible source of variation; typically the airline security/director, who receives the message from the PSI, disseminates that information within the company; that transfer is subject to further interpretations and modifications, both intentionally and inadvertently;

- the last link is between the airline and the vendor; it is possible that the airline task of communicating the new FAA directive to the ASC member may be assigned to someone other than the airline's security organization; frequently the contract administrator or the actual service organization (baggage, maintenance, food services, etc.) will be told to contact the vendor; the person at the vendor provides the final opportunity for confusion; often the person with the responsibility of dealing with the client may not have much security background; she or he will ultimately transfer the message to the vendor staff with security expertise.

Obviously this chain of communication is fraught with opportunities for introducing variations from the original SD; some of those changes reflect conscious decisions by the airlines, some do not. An ASC member cannot divine what is FAA mandated or not.

This FAA proposal assumes that the vendors receive clear, precise instructions as to what the FAA mandates are, and that the vendors can readily discern what the FAA "eligible security requirements" are. This is not so.

Based on these observations, ASC urges that the FAA should take one of these two approaches in its Final Rule:

(i) provide copies of all the relevant FAA documents mandating actions by the vendors and instruct the vendor to determine what is eligible or

(ii) allow the vendor to exercise its best judgement as to what may have been required and have the FAA determine what is eligible

If the FAA adopts either such approach, the certification (§154.17, §154.19 and Appendix A) should be modified to reflect the alternative chosen.

5. <u>§154.13 – Distribution: The Application Due Date Should be Amended</u>

Congress has taken exceptional action in authorizing this reimbursement regime. It is unusual for the House, Senate and Administration to agree that private companies should be compensated for regulatory-mandated expenses. This legislation was enacted, ASC would argue, because Congress acknowledged that these security measures were extraordinary and that the companies bearing these costs have been negatively impacted to an extreme degree. The expenses at issue have been incurred over the past almost five months, will continue to accumulate until a final rule is issued and will not be offset by any reimbursement until the federal government issues a check under ATSA and appropriation legislation. In the interim each eligible company is financing significant operational and capital expenses; those on-going obligations are producing massive financial pressures on the vendor companies. There is much urgency to the recompense of these expenses; the choice of an application date of June 1, 2002 does not reflect the extreme need for immediate relief.

There is no practical reason to wait until June to submit the request for reimbursement. Each ASC member vendor believes that it knows now what the dollar amounts of these added security requirements are and will continue to be. Many of the FAA mandates have been in place since September and October; as best we can tell, few new FAA requirements have been imposed on the vendors recently. The Final Rule could require the vendor to submit their applications on March 1, 2002, because the necessary supporting information is available today. An extra three months is not required for the vendors to prepare full, substantiated and accurate applications.

If the FAA and/or TSA makes changes to the requirements applicable to vendors between now and the due date or after the due date, the vendors would be willing to amend their requests for reimbursement.

Many vendors desperately need these funds. The final rule should be amended to move up the date from June 1, 2002 to March 1, 2002. Although the appropriations legislation has not been enacted, there are several good reasons to advance the due date:

(i) the calculation of the actual total vendor reimbursement needs will facilitate Congress passage of an appropriation bill;

(ii) the time between the deadline and Congressional enactment can be used to audit the vendor application data; and

(iii) the June 1 date bears no greater relationship to the appropriations process; typically these bills are not passed by that date; however by March, the Administration's proposed appropriations bill has usually been circulated and the Congressional hearings (particularly on this subject) have usually been completed by that date.

ASC would urge that the final rule adopt as the application date, March 1, 2002 to reflect the urgency of the situation. Private lenders will regard such an action as some indication that relief may be forthcoming.

6. § 154.7 Distribution – Pro Rata Does Not Reflect the Individual Degree of Economic Impact.

The vendors, parking lot operators and airports (we assume that the needs of airports have been redressed in the supplemental appropriation and are not truly at issue here) have all been substantially impacted by the FAA mandates. Many airline vendors have had cost increases of substantial percentages and revenue decreases of equal or greater proportions. Many parking lot operators have seen their revenues go to zero, while others have not had the same negative economic impact. Their cost impacts have also varied based on the proximity of their parking lots to the terminal. The same wide variations in both revenues and costs are likely among airports. The statute, however, only recognizes added expenses; the net financial impact was ignored by Congress' word choice. That drafting decision to examine only expenses should not preclude the FAA's consideration of the range of comparative impact.

A pro rata distribution fails to recognize any such relative equity. Very large institutions, public or private, have greater financial reserves than a small business would have available. For a marginally capitalized entity, loss of income or increase in costs of even a small percentage can put the enterprise at risk. A purely pro rata distribution rule fails to recognize such comparative impacts. A very large company or airport may experience increased costs in the millions with a revenue base in the billions. Such entities do not need the same level of financial assistance as a smaller, less secure firm. Under the NPRM proposed formula a very large entity with very large (in absolute dollar terms) expenses will receive a higher percentage of a pro rata distributions than a smaller airport/business with smaller absolute dollar impacts, even though the latter category may have experienced a greater negative impact and may be at greater risk.

The NPRM's pro rata proposal should be amended to reflect some level of equity. Firms should be required to show the eligible expenses as a percentage of the actual revenues during the relevant period. This percentage would reflect a degree of impact and should help create a prioritization for the distribution. The recompensation basis should not be purely as to percentage, but the severity of the impact and absolute dollar amount both be considered.

7. § 154.7 Distribution – Ten Percent Withholding is an Unnecessary Protection

The NPRM again seems to fail to recognize the financial exigencies that the vendor has experienced and continues to experience as a result of these added rules. Many of the vendors at issue are financially strapped. By withholding ten percent of its reimbursement, the FAA may be denying companies much needed cash. The need for compensation is immediate. The need to protect the ten percent by withholding is neither justified nor the most efficient method of controlling this money.

Today the federal government pays and receives billions of dollars in grants and taxes without withholding. The FAA's own AIP program issues billions of dollars in grant money without retaining some percentage. The expenses here at issue are capable of reliable proof and will be subjected to audit. Payment of the full application amount, subject to audit and refund, is appropriate given the urgency of the situation, the degree to which the government can audit "direct costs" and the relatively small number of companies that are eligible and likely to seek compensation.

8. <u>§154.9 Reimbursement Limits – Relevant Capital Costs must be Included</u>

Many of the FAA directives resulted in substantial capital expenditures; fingerprinting equipment, new security systems, etc. are primary examples of the major impact of the new security regime. The NPRM seems to exclude such relevant costs from consideration.

While perhaps expenses which have an expected life of greater than one-year should not be fully recognized, the FAA must acknowledge the validity of these agency-mandated expenses through some amortization rule. The acquisition of new capital assets was among the most burdensome expenses imposed as a result of September 11,

2001. An accounting system, which ignores such capital expenses, which fails to reflect the real financial impact of the FAA's actions, which distorts recovery among the various applicants (some companies were required to acquire more assets than others) and which is not required by ATSA, does not seem to be well advised. Equity can be restored, if the final rule incorporates a reasonable amortization procedure that allows the applicant to include the financial impact of such capital expenditures for the relevant period.

9. <u>§ 154.17 – Reimbursement Proof</u>

Documents clearly labeled as being directly related to a specific expense are not required under most accounting procedures. While ideally these are records that solely relate to specific, new security expense, such documentation is not required for an accountant to make reasonable, substantiated cost allocations. The NPRM seems to suggest that each vendor opened up a new ledger in the midst of the September 11 crisis and neatly entered each new security expense. That is not realistic.

What did happen was management made a series of quick decisions attempting to implement the FAA mandated requirements as quickly as possible. Equipment was purchased, consultants designed procedures, fingerprint firms were hired and a whole host of urgent actions were taken to comply with the FAA rules. Some of these expenses were recorded as a line item in a bill; some were included in existing service or supply contracts and reflected as added total costs; and others can be deduced through tested accounting procedures. The final rule should acknowledge that statements by accountants, based on careful reviews, will be accepted if the underlying financial analysis is supported by standards, normal accounting procedures and adequate documentation. To require ledger-like proof is to deny the reality of the situation and to reward the institution with the most fastidious accountants. The final rule should provide more latitude.

10. <u>§ 154.9 Reimbursement Limits – Offsetting of Surcharges, Fees, etc.</u>

The NPRM suggest that if the applicant imposed a surcharge or fee, "the costs would not be reimbursed." The language of the NPRM is not so precise that this may be an extreme interpretation. A more appropriate statement would appear to be "to the extent that such surcharge or fees <u>exceed</u> costs, then those costs would not be reimbursed."

The economics of this situation are complex. First, the vendors incurred costs beginning on some specific date(s). The added fees or surcharges were imposed days if not weeks, after the expenses were incurred. The added revenues were not collected until weeks, or months after the expenses paid. This delay factor means that the vendor had to finance the expenses, until (when and if) the added revenues equaled the actual expenses. At a minimum this delay phenomena should recognize the interest expense related to this situation. Second, it is unlikely that the vendor was able to impose a fee that truly compensated the company for all of the related costs.

While the NPRM considers only the expense aspect of the situation, the surcharge of a fee may have been assessed by the vendor in order to recover indirect costs, financial expenses, lost revenues, penalties imposed through contract cancellation, personnel costs associated with laying off staff, etc. These all constitute valid business reasons for imposing a fee. The company or companies that successfully implemented such fees should not be penalized if the dollars it received under such surcharge exceeded its eligible security costs. An applicant, that imposed a fee, should be allowed to demonstrate what costs targets were used to assess the fee and whether it was able to recover some or all of those costs. Any shortfall between targeted costs and actual recovery should translate to pro rata percentages among the various targets. To the extent that the eligible security target was greater that the apportioned revenues, the vendor should be able to claim that difference.

WHEREFORE, for the above stated reasons, ASC requests that the FAA include the suggested changes in the final rule.

Respectfully submitted

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J.E. Murdock III

Counsel to
Airline Services Council
National Air Transportation

DATED: January 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this 22 day of January, 2002, served the foregoing Comments of ASC/National Air Transportation Association in accordance with the FAA Procedures.

Diane Giuliani