BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the matter of	)	
Revisions to Passenger Facility Charge Rule for Compensation to Air Carriers;	)	**Docket No. FAA-2002-13918**
Notice of Proposed Rulemaking; Notice No. 02-19	)	

COMMENTS OF UNITED AIR LINES, INC.

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Introduction

On November 27, 2002, the Federal Aviation Administration ("FAA") published a Notice of Proposed Rulemaking entitled "Revisions to Passenger Facility Charge Rule for Compensation to Air Carriers," Notice No. 02-19, Docket No. FAA-2002-13918. 67 Fed. Reg. 70878-89 ("the NPRM"). The Notice proposes to amend FAA's passenger facility charge ("PFC") regulations by purportedly "changing the amount and unit of collection that a carrier may retain for collecting and handling (including remitting) PFC revenue." See 67 Fed. Reg. 70878. Under the proposal, carriers would be allowed to keep $0.10 of each PFC they collect in calendar years 2002 through 2004, and $0.11 for each PFC they collect thereafter.

On behalf of its members, the Air Transport Association ("ATA") has filed comments in response to the NPRM. While generally joining in the ATA's comments, United Air Lines, Inc. ("United") files these separate comments both to underscore the

vital need for prompt adoption of an increased handling fee to ensure that carriers are adequately reimbursed for the costs of collecting PFCs and to address the question of whether, under the existing PFC rule, the unit of collection is each PFC "collected" or each PFC "remitted."

The NPRM makes clear that under the proposed rule, the unit of collection is each PFC collected. See proposed Section 158.53 ("Collection compensation"), stating that the collecting carrier is entitled to retain $0.10 "of each PFC collected" until January 1, 2005, after which carriers are entitled to $0.11 "of each PFC collected." However, as to the existing rule, the NPRM suggests that "[c]urrently, FAA bases PFC handling fees on remitted PFCs rather than collected PFCs" (67 Fed. Reg. 70888). United believes that statement is incorrect,[1] and would result in gross under-compensation of air carriers totaling approximately $4 million per year based on the 1999 data which the FAA used to formulate the NPRM.

Accordingly, when it promulgates the final rule in this proceeding, the FAA should indicate that, as far as the "unit of collection" issue is concerned, it is simply clarifying what has been intended all along, *i.e.*, that carriers are (and have been) entitled to retain the designated amount (currently $0.08) of each PFC *collected.* Alternatively, the FAA should recognize explicitly that a dispute exists over the interpretation of the existing rule and should state that, in establishing a new compensation fee of $0.10 for each PFC collected, the Agency is expressing no view as to whether the old

[1] Indeed, elsewhere in the NPRM the FAA indicates that under the current rule, compensation for collecting carriers is based on PFCs "collected." See 67 Fed. Reg. 70879 ("[o]n June 28, 1994, under the terms of § 158.53, compensation dropped from $0.12 to $0.08 for each PFC collected ....") (emphasis added).

compensation fee was based on PFCs collected or PFCs remitted, or whether the term "remitted" was used interchangeably with (and deemed to have the same meaning as) "collected" under the old rule.

I. THE PFC RULEMAKING SHOULD BE PROMPTLY FINALIZED AND AN INCREASED HANDLING FEE ADOPTED EFFECTIVE JANUARY 1, 2002.

The industry data on which the FAA developed the NPRM demonstrates that the current $.08 handling fee has failed to reimburse air carriers adequately for their PFC collection and handling costs for a number of years. This result is directly at odds with Congress' directive that the Secretary of Transportation establish a means by which carriers would recover their reasonable and necessary expenses incurred in collecting and handling PFCs.[2] Under these circumstances, it is imperative that this rulemaking be finalized as promptly as possible and an appropriate handling fee be adopted. At a time when the industry is suffering unprecedented losses, the impact of inadequate PFC reimbursement exacerbates an already critical problem. Increasing the PFC handling fee to a compensatory level, as Congress originally directed, must be a top FAA priority.

Unfortunately, the handling fee proposed under the rulemaking — $0.10 of each PFC collected until January 1, 2005, and $0.11 of each PFC collected thereafter — is based on an artificially constructed industry average that does not fairly represent the true average cost associated with PFC collection and handling. As more fully discussed in the ATA comments, the proposed handling fee excludes from the industry average certain Southwest Airlines disclosure expenses that are both appropriate, in terms of category,

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[2] 49 U.S.C. § 40117(i)(2)

and fully supported in the record. Nonetheless, because these expenses exceed the industry average, the FAA proposes to reduce the level of expense Southwest actually incurred for purposes of calculating the PFC handing fee, artificially skewing the handling fee downward. In setting a uniform handling fee that reflects the average reasonable and necessary expenses of collecting and handling PFCs, the FAA does not have the discretion to disregard a portion of a carrier's reported costs simply because the identified costs are higher than those of other industry members. Absent evidence that the reported costs are erroneous, they must be included in the calculation in order to arrive at a true average. United believes that the FAA must adjust the handling fee to take into account these inappropriately excluded expenses. Nonetheless, if resolution would prompt further delay, the FAA should implement the proposed handling fee immediately and take up this cost issue in a separate administrative proceeding.

In terms of timing, the FAA has proposed to implement the new reimbursement "in calendar year[] 2002," but later contradicts this statement by proposing a revised Section 158.53 that permits carriers to retain the new handling fee "on or after (the effective date of the final rule)."[3] Faced with clear and convincing evidence that carriers have been under-reimbursed by millions of dollars per year, the FAA should maintain its determination that the new, higher handling fee becomes effective beginning calendar year 2002. Indeed, when Congress passed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21") in April 2000, it directed the FAA to revise the handling fee promptly and suggested a period of 189 days. In light of Congress'

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[3] Compare 67 Fed. Reg. 70878 and 67 Fed. Reg. 70889.

repeated admonitions that the FAA ensure that carriers are adequately reimbursed, carriers should not be forced to absorb another year of losses stemming solely from the delays associated with this rulemaking.

United supports a mechanism by which the carriers can be made whole by crafting an adjustment based on the 1999 industry data in the record, as more fully discussed in the ATA comments. If that is not feasible, by way of compromise and to reduce the burden of calculating losses back to 1999, United suggests at a minimum that the new higher handling fee be adopted beginning in calendar year 2002, as suggested in the FAA's summary of the NPRM. This would partially address the issue of chronic under-reimbursement and would be consistent with Congressional directives. If it deems necessary, the FAA could require that carriers recoup the difference in the increased handling fee from January 1, 2002, through the effective date of the final rule from individual airports over a number of months to minimize any impact associated with the adjustment. Although this may impose a temporary burden, any such burden would pale in comparison to the impact of years of under-reimbursement on the air carriers that are compelled by the statute to bear the economic burden of administering the PFC program for airport sponsors.

II. AIR CARRIERS ARE CURRENTLY ENTITLED TO RETAIN A HANDLING FEE FOR EACH PFC COLLECTED.

Background

Under the Aviation Safety and Capacity Expansion Act of 1990, as amended by AIR-21 ("the ASCE Act"), the Secretary of Transportation may authorize public agencies controlling commercial airports to impose a PFC of $1.00, $2.00, $3.00, $4.00 or $4.50

on each paying passenger of an air carrier boarding an aircraft at the airport. To implement this provision, Congress directed the Secretary to prescribe regulations requiring air carriers and their agents to collect PFC fees and to pay them to the eligible airport authorities, "less a uniform amount the Secretary determines reflects the average *necessary and reasonable expenses* (net of interest accruing to the carrier and agent after collection and before remittance) incurred in *collecting and handling* the fee."[4] The regulations, as the FAA points out, were to identify an amount (sufficient to cover these reasonable and necessary expenses) "that carriers could retain from PFCs *collected*."[5] The Secretary, acting through the FAA, first proposed and promulgated such regulations in 1991. They are currently codified at 14 C.F.R. Part 158 ("the PFC regulations").

When the PFC regulations were initially proposed, the FAA believed that interest income on the "float" during the period between collection from passengers and remittance to airport agencies would be sufficient by itself to reimburse carriers for the costs they would incur in "collecting, handling, remitting, and reporting PFC's."[6] Thus, the agency hypothesized that "should $1 billion per year be collected in $3 PFC's, 333 million PFC's would be handled," resulting in about $10 million in interest income under prevailing interest rates.[7] At the same time, the FAA recognized that the available cost data were inadequate to determine the appropriate level of compensation; it therefore

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[4] 49 U.S.C. § 40117(i)(2) (emphasis added).

[5] See 67 Fed. Reg. at 70879 (emphasis added).

[6] 56 Fed. Reg. 4678, 4691 (1991).

[7] See id.

specifically requested "data on collection costs and comments on the availability of alternatives to minimize uneconomic PFC collections."[8] Upon review of the roughly five volumes of comments it received from interested parties,[9] the FAA agreed with the carriers' consistent view that the proposal to limit carrier compensation to the interest earned on the PFC "float" would yield inadequate reimbursement. Notably, this conclusion was based on data reflecting the total number of PFCs the carriers expected would be *collected and handled*, as the statute contemplates, not on how many PFCs would ultimately be *remitted*. In the final rule published on May 29, 1991,[10] the FAA permitted carriers to retain "[a]s compensation for collecting, handling and remitting the PFC" a portion of each PFC ($0.12 for the first three years; $0.08 thereafter), in addition to any interest or investment return earned on PFC revenue.[11]

A. As Required by Statute, the FAA Intended the Existing Regulations To Allow Carriers To Retain a Handling Fee for Each PFC Collected.

The final PFC rule, codified in the regulations at 14 C.F.R. § 158.53, states that "air carriers shall be entitled to $0.08 of each PFC remitted." In interpreting this provision, certain FAA staff previously have taken the position that current PFC handling fees are based on the volume of PFCs remitted *after refunds*, rather than on the volume of

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[8] See id.

[9] See generally FAA Docket No. 26385.

[10] See Passenger Facility Charges, 56 Fed. Reg. 24254-87 (1991). The section on Collection Compensation was renumbered as section 158.53, instead of 158.51 as proposed. Id. at 24284.

[11] Id. See section 158.53, codified at 14 C.F.R. § 158.53.

PFCs collected, without regard to refunds.[12] But that view was expressed solely in the context of informal non-binding opinions that did not involve a thorough review of the rulemaking record and did not consider the implications as to consistency with the ASCE Act. When the rulemaking record is considered carefully, it is clear that the word "remitted" as used in current Section 158.53 was not intended to connote a distinction from the term "collected." Otherwise, the FAA would have been acting contrary to an explicit statutory directive and without evidentiary support.

When it promulgated the PFC rule in 1991, the FAA used the term "remitted" loosely and largely interchangeably with the term "collected," since nothing in the record of that rulemaking suggested there would be a difference between the two. Indeed, the FAA still uses the terms loosely and interchangeably.[13] Despite the loose use of language, however, it is clear the FAA intended carriers to be compensated on the basis of PFCs *collected* without regard to refunds. That is the only interpretation consistent with the ASCE Act, which expressly requires that carriers receive compensation reflecting the "average necessary and reasonable expenses . . . incurred in *collecting and handling* the [PFC] fee. . . ."[14] Furthermore, when Part 158 is read "as a whole"—giving particular attention to the various indicia of the FAA's intent in using the word

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[12] See Letter of Quentin S. Taylor, Acting Assistant Administrator for Airports, FAA, and Mark S. Gerchick, Chief Counsel, FAA, to Thomas J. Browne, ATA, dated on or about October 22, 1993, at 2; Advance Notice of Proposed Rulemaking, 61 Fed. Reg. 16678 (April 16, 1996), issued in response to a petition filed by the ATA on May 27, 1994, notice of which was published at 59 Fed. Reg. 32668 (June 24, 1994); and FAA staff memo (Order 5500.1, Aug. 9, 2001).

[13] See note 1 supra.

[14] 49 U.S.C. § 40117(i)(2)(C) (emphasis added). See also 67 Fed. Reg. at 70878 (describing this as a "statutory requirement").

"remitted"—it is clear the FAA did not wish to deny carriers the right to retain a handling fee on refunded PFCs.[15] To the contrary, when the phrase at issue is considered in the overall context of the regulation and its administrative history, there is little doubt that the FAA believed it was adopting a rule that would provide the full compensation needed to cover all necessary and reasonable expenses incurred by carriers in collecting and handling PFC fees.[16]

Throughout its commentary on the final rule, the FAA alluded to the fact that carriers would be permitted to retain a handling fee on each PFC *collected*. For example, when summarizing the method of compensating carriers for the cost of administering the PFC program, the FAA explained: "The final rule provides for a specific fee per PFC *collected* in addition to the interest earned prior to remittance"[17] Similarly, in its explanatory notes on what was then new section 158.53, the FAA referred to the compensation for carriers as the "cost of PFC *collection*."[18] And elsewhere in the preamble, the FAA stated that "[t]he statute requires *collection* compensation to reflect

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[15] See Rock of Ages Corp. v. Secretary of Labor, 170 F.3d 148, 154-55 (2d Cir. 1999) (construing regulation as a whole so as not to be "at odds" with the purposes of the enabling Statute).

[16] See Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 53 (D.C. Cir. 1999) (evaluating the regulation's "surrounding regulatory text," including the preamble); Martin v. American Cyanamid Co., 5 F.3d 140, 145 (6th Cir. 1993) ("[t]he Preamble to a regulation may be consulted in determining the administrative construction and meaning of the regulation").

[17] 56 Fed. Reg. at 24255 (emphasis added).

[18] Id. at 24269 (emphasis added).

the carrier's average costs," and the "*collection* compensation provided in the final rule is a reasonable assessment of carriers' average costs."[19]

In sum, throughout the explanatory preamble to the 1991 rule, the FAA consistently used the term "collected," rather than "remitted," to describe the compensation to which the carriers were entitled. And in providing an illustration of how the compensation system would work, the FAA also described the amounts to be retained by the carriers in terms of each "PFC collected."[20] Obviously, a fee on each PFC collected was what the FAA had in mind when it used the term "remitted" rather loosely in the text of the rule.[21]

B. The FAA Calculated the Current Handling Fee on the Assumption that Carriers Would Retain a Fee on All PFCs Collected.

Apart from the fact that the FAA's explanation of the rule spoke in terms of PFCs *collected*, the nature of the rulemaking record itself demonstrates that the FAA intended to permit carriers to retain a handling fee on all PFCs collected, not just those remitted

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[19] Id. (emphasis added).

[20] See 56 Fed. Reg. at 24277 (explaining that if "$1 billion per year [were] *collected* in $3 PFC's, *333 million PFC's would be handled*"; that "[w]ith earnings on the float of approximately $12 million per year, interest earnings would be on the order of $0.036 per PFC *collected*"; and that "compensation per $3 PFC *collected* would be approximately $0.156 during the initial 3-year period and $0.116 thereafter") (emphasis added).

[21] As the quotations in text illustrate—and as the rulemaking record discussed below confirms—the FAA did not focus on the question of refunds and did not differentiate between the number of PFCs collected and the number remitted after deducting refunds. Instead, it implicitly assumed that the number of PFCs collected and the number remitted would be the same. Its use of the term "remitted" in the text of the rule referred to a different stage in the overall process, i.e., the point in time when the retained handling fee would become the property of the carriers, rather than being held in trust by the carriers for the benefit of an airport sponsor. The FAA did not intend to imply a difference (or limitation) with respect to the *number of PFCs* as to which a compensation fee could be retained. On that issue, the agency made no distinction between PFCs collected and PFCs remitted.

after refunds had been made. In the 1991 rulemaking, the handling fee per PFC unit was calculated through an equation in which—

- the numerator was the total estimated cost of collecting, handling, and remitting PFCs, minus the estimated amount of interest on the "float"; and
- the denominator was the estimated volume of PFCs to be *collected* (without any reference to, or allowance for, refunded PFCs).

Dividing the total cost (minus "float") by the estimated volume of PFC units to be *collected* produced the initial PFC retention figure of $0.12 per PFC—which, by the terms of the rule, fell to $0.08 per PFC in 1994.[22]

If the denominator of the equation had been the volume of PFCs *remitted net of refunds* (necessarily, a considerably smaller figure), the retention fee per PFC unit obviously would have had to be *larger* in order to meet the statutory requirement that the fee must cover the carriers' necessary and reasonable expenses of collecting and handling

[22] There is little question that the original PFC cost data submitted by industry participants in 1991 (and presumably used by the FAA in calculating the $0.12/$0.08 fee) reflected estimates of the total number of PFCs the carriers expected to *collect*. For example, United estimated that its "costs of implementing and maintaining the systems necessary to collect, remit and report PFC[s]" would be on the order of $5.2 million per year, "based on 112.5 million *bookings*." See Comments of United Air Lines, Inc., March 19, 1991, at 7-8 (emphasis added). United's submission neither recognized nor accounted for any differences between collected and remitted PFCs. American, likewise, presented cost data in terms of total PFCs, stating that the "proper compensation level is approximately $.15 *per PFC*." See Comments of American Airlines, Inc., March 25, 1991, at 6 (emphasis added). In fact, American's itemized costs—comprising credit card fees, audit fees, advertising, reservations, bad debts, data entry systems, PFC accounting, and so on—all are incurred regardless of whether a ticket is later refunded. See id. at 7. Since American made no attempt to estimate the number of PFCs that would be refunded, its cost estimate per PFC clearly was based on the number of PFCs it expected to *collect*.

Other carriers also focused on total PFC costs and the total number of PFCs they expected to collect. See, e.g., Comments of Northwest Airlines, Inc., dated March 18, 1991; Comments of USAir, Inc., dated March 15, 1991; Comments of Continental Airlines, dated March 15, 1991; Comments of Delta Air Lines, Inc., dated March 18, 1991; Comments of Southwest Airlines, dated March 15, 1991; Joint Comments of the Airport Operators Council International, American Association of Airport Executives, and the Air Transport Association of America, dated March 18, 1991.

PFCs. This is so because the estimate of the total cost of handling PFCs (the numerator of the equation) remains the same regardless of the number of PFC units over which the total cost is spread (the denominator of the equation). Hence, if the number of PFC units in the denominator were smaller (reflecting the netting out of refunds), the resulting fee per PFC unit would have to be larger in order for the equation to balance. Since the volume of PFCs *collected* was the denominator in the equation used in 1991,[23] the $0.12/$0.08 retention fee set in that rulemaking would not have been adequate to cover the carriers' "necessary and reasonable expenses" if it had been limited to the volume of PFCs remitted after refunds.

In sum, during the 1991 rulemaking, no one—neither industry nor the FAA—presented estimates of the volume of PFCs expected to be refunded. Hence, there was no evidence in the rulemaking record from which the volume of PFCs *remitted net of refunds* could be estimated; accordingly, that value could not have been—and was not—used to calculate the retention fee per PFC unit when the rule was initially adopted.

This is not simply an academic point. As demonstrated in the careful analysis contained in the current NPRM, the decision whether to include or exclude refunds is of critical importance in determining the amount of compensation to which carriers are entitled. The difference between calculating handling fees on remitted versus collected PFCs translates into millions of dollars annually, the loss of which would deprive carriers

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[23] See note 20, supra.

of a substantial portion of the compensation to which they are entitled under the statute.[24] For example, assuming an average refund rate of 10 percent and total costs (less interest) of roughly $43 million in 1999,[25] carriers would be undercompensated by approximately $4 million that year if they could not retain the $0.08 fee on PFCs that were refunded. That is $4 million less than they are entitled to receive under the statute, since the $0.08/PFC rate was calculated on the basis of total PFCs *collected*. The FAA has discretion to set the compensation fee on either a "collected" or "remitted" basis. However, it may not calculate the compensation rate based on the total volume of PFCs to be *collected* (as it did in the 1991 rulemaking) and then limit carriers to retaining the fee only on PFCs that are *remitted after refunds*. As the current NPRM illustrates, there must be symmetry on both ends of the process. Otherwise, the rule would deny carriers the opportunity to recover their "necessary and reasonable expenses"—a result clearly at odds with the statute.

In fact, if the fee established under the 1991 rulemaking could not be recovered on PFCs that are refunded, the result would be even more perverse than the foregoing discussion suggests—because, as the FAA recognizes, carriers with higher refund rates incur greater handling costs than carriers with lower refund rates, since "a carrier must handle refunded tickets twice."[26] That being the case, if Section 158.53 were construed to

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[24] As the FAA is well aware, U.S. airlines can hardly afford to forfeit compensation to which they are entitled. As reported in the *Wall Street Journal*, "U.S. airlines are expected to collectively have suffered losses of more than $2 billion in the fourth quarter of last year, and a least $8.5 billion for all of 2002." Wall St. Journal, January 16, 2003.

[25] See 67 Fed. Reg. at 70884, Table 4.

[26] 67 Fed. Reg. 70885.

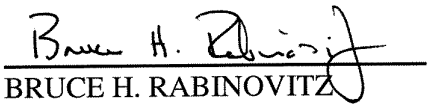
disallow the compensation fee on PFCs that are refunded, the carrier making the refund not only would be deprived of a fee to cover its collection and handling expenses, but also the collection and handling expenses for which compensation was denied would be twice the normal rate—thus adding insult to injury, and guaranteeing that carriers with above-average refund rates would not receive adequate compensation to cover their "necessary and reasonable expenses . . . incurred in collecting and handling" PFCs. This perverse result can be avoided—and consistency with both statutory requirements and the rulemaking record can be achieved—by construing current Section 158.53 to allow carriers to retain the $0.08 compensation fee on all PFCs they collect.

Conclusion

Under the ASCE Act and the current PFC regulation, carriers are entitled to be compensated for each PFC they collect, so that they may recover their collection and handling costs consistent with congressional intent. A contrary interpretation—one that limited carrier compensation to $0.08 on PFCs remitted *after refunds*—would mean that the FAA has acted in violation of a clear statutory directive and without any support in the rulemaking record. Moreover it would deprive air carriers of a significant portion of the revenue intended to compensate them for collecting and handling PFCs. Obviously, that cannot have been the FAA's intent. Accordingly, the FAA should state that in authorizing carriers to retain a designated handling fee for "each PFC collected" under the amended rule, it is merely clarifying what the language of current Section 158.53 has meant all along. Only that interpretation will compensate carriers adequately for their reasonable and necessary expenses incurred in collecting and handling PFCs. That is

what the statute requires, and that is what the FAA purported to do when it promulgated Section 158.53 more than a decade ago. It is time now to make that point clear.[27]

Respectfully submitted,



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[27] Alternatively, the FAA should state explicitly that it is taking no position on this issue in the present rulemaking since it is not germane to the decision of how to structure the compensation program prospectively, even if the higher handling fee compensation proposed is made effective retroactively. See 67 Fed. Reg. at 70888.