

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

In re:)
)
Revisions to Passenger Facility)
Charge Rule for Compensation) Docket No. FAA-2002-13918
To Air Carriers)
)
14 CFR Part 158)

COMMENTS OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc. (“ATA”) submits these comments in response to the Notice of Proposed Rulemaking changing the amount airlines are reimbursed for collecting and handling Passenger Facility Charges (“PFCs” or “PFC”) imposed by airports, 67 Fed. Reg. 70878 (November 27, 2002) (the “NPRM” or “proposed rule”). ATA appreciates the opportunity to comment on the NPRM on behalf of its member passenger airlines.¹

ATA commends the FAA’s efforts to respond to air carrier and Congressional concerns that the costs incurred by airlines for collecting and handling PFCs exceed the amounts airlines are reimbursed.² The FAA’s data collection effort and carefully constructed methodology, developed in coordination with the Office of the Inspector General and independent auditing firms, allowed the airlines to document the annual

¹ Passenger members are: Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, Hawaiian Airlines, JetBlue Airways, Midwest Express Airlines, Northwest Airlines, Southwest Airlines, United Airlines, and US Airways. Associate members are: Aerovias de Mexico, Air Canada, Air Jamaica, KLM -Royal Dutch Airlines, and Mexicana de Aviacion.

² Although FAA refers to this as compensation, in point of fact the purpose of these payments is to reimburse, not compensate, air carriers for actual expenses they incur to collect PFCs for the benefit of airports with approved projects. Casting this item as “compensation” is a misnomer.

reimbursement shortfalls while protecting the public interest in ensuring that PFCs are put to their intended, approved purposes. Although we do not agree completely with all of the FAA's conclusions, we believe the process was fair and that the interests of the public (and by extension airports with approved PFC program) have been fairly protected.

ATA believes that the final rule should address additional policy and process issues.³ These issues include devising a methodology to reimburse airlines for the documented shortfall in reimbursement since 1999, and establishing a regular process to review air carrier reimbursement periodically – such as every two years. Now that a review process has been developed, it should be codified in some fashion, such as by regulation or advisory circular, so that the Congress and air carriers can be assured that air carriers will continue to be fairly reimbursed without the necessity of Congressional intervention. It would be unreasonable, if not arbitrary and capricious, to assume that the costs incurred by air carriers to collect PFCs will remain static in years beyond the time frame addressed by the NPRM.

As discussed below in greater detail, we also believe that adequate justification exists to recalculate and increase the “average” of the air carrier reasonable and necessary expenses of collecting and handling PFCs. This is because FAA's calculation in the NPRM fails to fully compensate carriers for documented PFC disclosure costs. Based on our analysis, we believe the amount carriers are reimbursed must be increased, at a minimum, by an additional \$0.01 – to \$0.11 per PFC collected in 2002 and \$0.12 per

³ ATA is very concerned about these issues and believes FAA must address them. However, FAA should do so *without* causing further delay to implementing the new reimbursement fees. Accordingly, if necessary as a matter of administrative process, they should be addressed in a separate proceeding.

PFC collected in 2005.

Finally, we recommend an implementation schedule.

1. Cost Data Categories. FAA accepted all but one of the cost categories used to collect airline cost data. ATA supports the cost categories used by FAA to determine the new reimbursement amounts. The categories used to collect cost data and finally accepted by the FAA fairly capture the incremental costs incurred by airlines to collect and handle PFCs. Additionally, however, ATA urges the FAA to continue to work with airlines on the “absorption” cost category. Further refinement of this issue ultimately may allow airlines to provide information on how the absorption cost is, in fact, related to the cost of collecting and handling PFCs, a connection that FAA identified as lacking in air carrier submissions.

2. Collected v. Remitted. ATA agrees with FAA’s determination to calculate the reimbursement amount based on collected PFCs versus remitted PFCs. As FAA acknowledges, this is particularly important in relation to the issue of refunded PFCs. Although FAA contends that when it calculated the existing reimbursement fee it included a component for the costs associated with refunding PFCs, the administrative record does not substantiate that assertion.⁴ Indeed, at one time, FAA proposed revising the reimbursement fee in part because of this problem. *See* 61 Fed.Reg. 16678 (April 16, 1996).

Going forward, the NPRM resolves the issue of reimbursing airlines for processing PFCs on refunded tickets, and does so in a way that is sensible

⁴ For example, information submitted by air carriers in response to the NPRM promulgating Part 158 was based on collected PFCs, not remitted PFCs.

administratively. While under the proposed formula there will still be a disparity between airlines with more refunds compared to airlines with fewer refunds, the NPRM offers a practical means to minimize that disparity.

Finally, as the NPRM points out, reimbursing airlines based on PFCs collected does not adversely impact airports. The net amount deducted from PFCs transmitted to airports remains the same because the net amount reimbursed remains the same, whether calculated on a remitted basis or collected basis.

3. Disclosure Costs and Assumptions. FAA correctly determined that disclosure costs incurred by air carriers should be included in the reimbursement calculation. These are actual costs air carriers incur specifically related to the collection of PFCs.

However, ATA disagrees with FAA's determination to discount the disclosure cost information provided by Southwest Airlines. The explanation in the NPRM (p. 70883) is arbitrary and capricious and has no basis in fact or law. In particular, this determination is not in accordance with the Aviation Safety and Capacity Expansion Act of 1990 (49 USC § 40117, et seq., the "Act"), which requires that carriers be reimbursed based on the average necessary and reasonable expenses for collecting and handling PFCs. If Southwest's data were included in the reimbursement calculation, as it should be, the average air carrier expense calculation and corresponding reimbursement fee would increase by \$0.01 per PFC collected for all air carriers. FAA's failure to give full credit to Southwest's disclosure costs guarantees that the industry as a whole, and every airline individually, will continue to be under-compensated.

FAA recognizes that Southwest relies more heavily on fare advertising than other

airlines and thus incurs higher disclosure costs.⁵ Without explanation, however, FAA arbitrarily and radically reduces Southwest's disclosure costs for purposes of calculating this component of the reimbursement fee, thereby reducing the total dramatically.

Separately, Southwest has submitted additional data supporting the information previously provided. Although we do not believe it was necessary for Southwest to submit additional data to support a determination by FAA to include Southwest's disclosure cost information, this additional data should resolve any questions about the accuracy or legitimacy of Southwest's data. Under the Act, FAA must include Southwest's actual disclosure costs and revise the calculation of the average expense for all air carriers. By FAA's own figures in the NPRM, this should raise the reimbursement fee by \$0.01 per PFC collected. Accordingly, reimbursement should be set at \$0.11 beginning in 2002, and \$0.12 in 2005.

A separate issue concerns FAA's assumptions regarding the proportion of \$4.50 PFCs to \$3.00 PFCs collected in 2001 and 2002. In its comments, American Airlines provides data demonstrating that carriers collected a materially greater number of \$4.50 PFCs in 2001 and 2002 than the FAA assumed in its rate calculations. For example, by the end of 2002, 65% of the PFCs collected by American were \$4.50 PFCs. If the FAA's assumptions regarding the mix of \$3.00 and \$4.50 PFCs are revised, the rate calculation changes, adding an additional \$0.01 to the reimbursement rate. FAA should revise its assumptions consistent with the data provided by American.

4. Prior Under-Reimbursed Years. The Act expressly requires that air carriers be reimbursed for the costs they incur in handling PFCs. The Act directs the Secretary to

⁵ Southwest spends more on television fare advertising, in particular, because its business model is based on stimulating air travel with low fares.

prescribe regulations that “ensure” air carriers are reimbursed based on the average of the reasonable and necessary expenses they incur to collect and handle PFCs. 49 USC § 40117(i). Accordingly, the FAA lacks the discretion to require air carriers to absorb these costs. Failure by the FAA to “ensure” air carriers are reimbursed would be unlawful and would violate the Administrative Procedure Act.

As the NPRM points out, since June 28, 1994, air carriers have been reimbursed \$0.08 for each PFC remitted.⁶ In the NPRM, FAA calculated that the actual average 1999 PFC handling cost incurred per *remitted* PFC was \$0.1111, or slightly over 11¢ (NPRM, table 2), and that the total 1999 average cost, factoring in a \$4.50 PFC, was \$0.0995 (actual) and \$0.1184 (pro-forma) per *remitted* PFC.

Based on this data it is clear that between January 1999 and the present, air carriers have been, and continue to be, under-reimbursed contrary to the Act’s mandate. Accordingly, FAA is obligated by the Act to establish a plan for air carriers to recover the amounts they have been under-reimbursed. By our calculation, for more than four years air carriers have been under-reimbursed by at least \$0.03 per remitted PFC, and even more when Southwest’s disclosure costs are factored into the calculation. This is a significant amount of money that, bluntly, is absolutely critical to U.S. airlines. For 1999 alone, based on 436,659,521 remitted PFCs, this amounts to \$13,099,786.00.

ATA recognizes that establishing a mechanism to reimburse air carriers the amounts that they should have received, but did not, will be complicated. However, there are several ways this could be achieved. Possibilities include extending the time

⁶ ATA does not agree that the correct reimbursement unit is per remitted PFC. As noted above, the administrative record for Part 158 does not support this conclusion. For purposes of this discussion, however, we cite to FAA’s analysis in the NPRM, which is based on a per remitted calculation.

airports with approved PFCs may collect those PFCs and increasing the amount air carriers retain until fully compensated (similar to how FAA handled initial start-up costs); allowing air carriers to continue to collect PFCs at specific airports after the PFC expires until the airlines at that airport are fully compensated; and permitting airports to grant airlines credits against landing fees and charges, provided such credits are not funded from aviation revenues. The fundamental issues are determining the amount each airline is due from each airport, and ensuring that airport PFC-based financial commitments and PFC projects are not adversely affected. Indeed, FAA may wish to allow airports to choose a preferred method from among several options approved by FAA, subject to the ability of individual airlines to accommodate administratively the preferred option.

5. Implementation Schedule. Closely related to the issue discussed above is when to implement the new reimbursement fee. The NPRM proposes to initiate the new reimbursement “in calendar year 2002.” However, we are already in calendar year 2003.⁷ To simplify this process, provided FAA adopts a procedure to make carriers whole for past under-reimbursed years as outlined in paragraph 4 above, we urge FAA to make the new reimbursement effective as of January 1, 2003, and allow carriers to make a one-time adjustment at the time of their next remittance to each airport to catch up for any shortfall for the period January 1, 2003 through the date of remittance. If the FAA does not establish a mechanism to reimburse carriers for their past under-reimbursement, we urge the FAA to make the new reimbursement fee effective as of January 1, 2002

⁷ Congress encouraged FAA to act promptly (within 189 days after receiving air carrier data) to determine if this amount should be revised when it passed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), signed into law on April 5, 2000. See House Report 106-513, accompanying AIR-21. After extensive but appropriate preparation, FAA requested air carrier data on October 19, 2000. Air carriers submitted all of their 1999 cost data to the FAA by January 31, 2001.

(consistent with FAA's original plan to implement the new fee in 2002). The adjustment would be subject to existing audit and documentation requirements so that FAA and airports could confirm the accuracy of these adjustments. If FAA issues a final rule promptly, the aggregate adjustment among air carriers at any one airport will not be material and should be covered by existing reserves. If this turns out not to be the case at specific airports, FAA should meet with the affected airport and airlines to identify a mutually acceptable alternative solution. As noted above, FAA is statutorily obligated to ensure that air carriers are fully reimbursed based on the average of air carrier actual and necessary expenses incurred to collect PFCs on behalf of airports.

6. Formalizing This Review Process. FAA, the DOT Inspector General, and the airlines have invested a lot of time and effort to develop this review methodology and process. Also, airports and other interested parties will expend energy and resources commenting on the NPRM. These efforts should not be discarded upon completion of this rulemaking. The stakeholders and interested parties, including the FAA, should not have to reinvent this wheel in the future, regardless of when this issue is revisited, be it in two, five or ten years.

Further, as discussed above, we believe that the FAA has a continuing obligation under the Act to "ensure" that air carriers are fully reimbursed. Under the Act, it is reasonable for FAA to establish a periodic review of air carrier reimbursement using the methodology established in this proceeding. For these reasons, and to avoid the difficulties associated with correcting under-reimbursement, we urge FAA to formally establish a bi-annual review of air carrier reimbursement beginning in 2007. Reviewing this issue every two years will enable the FAA to fulfill its statutory obligations

efficiently and effectively, and will impose little burden on airlines and airports. Having established this methodology, airlines will be able to collect this data on an on-going basis, and the data collection and submission effort by airlines will be relatively simple. Likewise, the review process by the FAA will be straightforward, and the comparison to the prior data sets a relatively easy exercise. The administrative burden on all parties will be minimal.

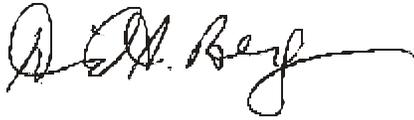
On the other hand, if a regular review process is pushed aside in favor of an ad-hoc process, the administrative burden on all parties will be considerably greater, and it is likely that the institutional memory among all interested parties concerning the methodology developed for this proceeding will be diminished or lost entirely. That would not be in the public interest.

ATA urges FAA to formalize this process, whether by revising Part 158 or issuing an Advisory Circular or other formal administrative vehicle, and beginning in 2007 establish a bi-annual review of air carrier reimbursement for collecting and handling PFCs.

Conclusion. ATA urges FAA to publish a final rule implementing the new reimbursement fee as soon as possible. At a minimum, the final rule should set the new fees at \$0.11 per collected PFC as of January 1, 2003, and \$0.12 per collected PFC beginning January 1, 2005. If FAA revises its assumptions regarding the mix of \$4.50 and \$3.00 PFCs, the reimbursement fee should be further adjusted.

Respectfully submitted,

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