

comments in advance of the meeting. Written comments should be submitted by e-mail to Mary Helen Carlson at carlsonmh@ms.state.gov. All comments will be made available to the public by request to Ms. Carlson via e-mail or by phone (202-776-8420).

Mary Helen Carlson,

Office of the Legal Adviser for Private International Law, Department of State.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Honoring Tickets of National Airlines Pursuant to the Requirements of the Section 145 of the Aviation and Transportation Security Act

On November 14, 2002, the Department of Transportation issued a notice providing guidance for airlines and the traveling public regarding the obligation of airlines under section 145 of the Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 645 (November 19, 2001) ("Act"), to transport passengers of airlines that have ceased operations due to insolvency or bankruptcy. That notice, issued after National Airlines' November 6, 2002, cessation of operations, followed a similar notice issued August 8, 2002, after Vanguard Airlines' July 2002 cessation of service. Both notices were intended to provide immediate guidance in response to numerous complaints from ticketed passengers and inquiries from airlines. In addition, the November 14 notice also requested comments from airlines and the traveling public about the cost to carriers of transporting passengers of carriers that had ceased operations. The purpose of this notice is to respond to those comments.

Section 145 requires, in essence, that airlines operating on the same route as an insolvent carrier that has ceased operations transport the ticketed passengers of the insolvent carrier "to the extent practicable." Our earlier notices mentioned several factors that we would look to in determining whether airlines were complying with section 145.¹ We stated, among other things, our preliminary view that, at a minimum, section 145 requires that passengers holding valid confirmed tickets, whether paper or electronic, on an insolvent or bankrupt carrier be

transported by other carriers who operate on the route for which the passenger is ticketed on a space-available basis, without significant additional charges.² We made clear in our guidance, however, that we did not believe that Congress intended to prohibit carriers from recovering from accommodated passengers the amounts associated with the actual cost of providing such transportation. We stated that we did not foresee that such costs would exceed \$25.00, an amount that we made clear was an estimate of the magnitude of the additional direct costs carriers might incur in transporting affected passengers on a standby basis.³

In our November 14 notice, in response to informal concerns raised by several carriers that our \$25.00 cost estimate is too low, we formally requested that any airline or person who believes that the Department's estimate of \$25.00 is either insufficient, or is more than necessary to cover the direct costs of accommodating ticketed passengers on a space-available basis, contact the Department and provide written comments and cost evidence in support of that position. Our formal request for written comments was made after complaining carriers had failed to respond to our earlier, informal requests for such information, and after reports that consumers had been, at least initially, charged far in excess of \$25.00 for transportation.⁴

Delta Airlines ("Delta"), American Airlines ("American"), America West Airlines ("America West"), and United Airlines ("United") filed comments in response to our request. Unfortunately,

² We further pointed out that, under section 145, passengers whose transportation has been interrupted have 60 days after the date of the service interruption to make alternative arrangements with an airline for that transportation.

³ We pointed out that examples of such costs include the cost of rewriting tickets, providing additional onboard meals, and the incremental fuel costs attributable to transporting an additional passenger.

⁴ Long before formal comments were requested, Department staff had informally advised carriers that expressed concerns about this guidance that, to the extent they experienced and could document reasonable direct costs in excess of \$25.00, they should be entitled to recover such costs under the statute. At that time, Department staff specifically requested each airline that had expressed concern to provide evidence demonstrating that its reasonable direct costs exceeded the estimated \$25.00 amount. No airline provided any documentation in response to that informal request. A few airlines also expressed separate concerns about difficulties in verifying confirmed reservations of passengers holding electronic tickets, in which case a hard-copy ticket would not be available. Department staff suggested it would be appropriate to require such passengers to provide proof of payment and confirmation, such as receipts and printed itineraries.

none of those carriers provided information responsive to our request or otherwise demonstrating costs in excess of \$25.00 each way for space-available transportation. Instead, Delta and American chose to argue that the Department has no ratemaking authority, and the Department's suggestion that, for purposes of section 145, \$25.00 each way is a reasonable estimate of the cost to a carrier of providing alternate, space-available transportation constitutes ratemaking.⁵ They both further argue that, even if the Department had authority under section 145 to review the reasonableness of fees charged to accommodate another airline's passengers, the marketplace should dictate the amount of that charge. American argues that in a deregulated environment passengers should assume the risk in booking with a financially weak carrier and, according to American and Delta, an airline's "standard reticketing fee," which is charged to fare-paying passengers who, under terms of their contract of carriage with the airline, voluntarily change their travel plans, is what the marketplace dictates. The carriers further argue that charging passengers of another airline that has ceased operations under section 145 an amount less than that "standard reticketing fee" is unfair to their fare-paying passengers. American also asserts in its comments that we have not adequately addressed its concerns over establishing the validity of tickets, especially electronic tickets, of passengers seeking reaccommodation under section 145.

America West and United both assert that their respective costs for providing alternate transportation on a space-available basis exceed \$25.00 each way. Neither airline, however, provided information in support of that assertion, as requested by the Department. According to America West, the costs associated with transporting passengers of an airline that has ceased operations involve consideration of delays, security and baggage screening, and fraud, and could vary by market, time of service, and season. Accordingly, the carrier states, it did not have sufficient time to document all such costs. It states that instead, it elected to assess such passengers the same fare it would charge employees for friends and family members, under its "buddy pass" system, which permits those persons to

⁵ Both carriers have challenged the Department's efforts to provide guidance regarding section 145 in the U.S. Court of Appeals for the District of Columbia. See *Delta Air Lines, Inc. and American Airlines, Inc. v. U.S. Department of Transportation*, Case No. 02-1309 (D.C. Cir. filed October 8, 2002).

¹ Failure by an airline to comply with section 145 may constitute an unfair and deceptive practice violation of 49 U.S.C. 41712.