

travel on a space-available basis.⁶ United states that its “preliminary” review persuades it that its costs exceed \$25.00 each way but, due a lack of time in the immediate aftermath of the Vanguard and National shutdowns for detailed cost analyses and in view of the small number of passengers involved, it elected as a matter of policy to charge affected passengers \$25.00 each way. United states that, because it has chosen to abide by the suggested \$25.00 amount, it does not wish to burden itself with providing cost information at this time. United points out, however, that a variety of factors may affect its costs in any future instance where section 145 comes into play, such as fuel costs, the number of passengers affected, and the itineraries involved, such as domestic versus international travel. United states that it may, in some instances, impose a charge higher than \$25.00 each way but adds that it will advise the Department before doing so.

We see no reason, based on the comments submitted, to change our guidance with respect to the implementation by carriers of the requirements of section 145. We find particularly unpersuasive Delta’s and American’s argument that we lack the authority to provide any guidance with respect to section 145, and that our actions are unlawful ratemaking. Equally unpersuasive is the carriers’ argument that the so-called “marketplace” rate, *i.e.* whatever rate those carriers elect to charge, is what Congress intended in requiring carriers to accommodate displaced passengers “to the extent practicable.”⁷

We are not, as suggested by Delta and American, setting rates. As we stated in our earlier notices, in requiring carriers to accommodate passengers of a failed carrier “to the extent practicable,” it is reasonable to assume that Congress did not intend to prohibit carriers from recovering minimal amounts associated

with the actual cost of providing alternate transportation.⁸ Adoption of Delta’s and American’s “marketplace” charge argument would render section 145 meaningless. Prior to enactment of section 145, airlines were free to transport passengers of a carrier that had ceased operations on a standby or confirmed basis at whatever charge they deemed appropriate. If, as Delta and American suggest, Congress intended to permit carriers to continue to charge passengers of carriers that had ceased operations a so-called “marketplace” rate, *i.e.*, whatever rate the carriers deem appropriate, then Congress need not have enacted section 145 in the first place.⁹

Furthermore, the carriers’ argument that it is unfair to charge a section 145 passenger less than they charge their own passengers to be reticketed is inapposite. Some of American’s and Delta’s domestic passengers are assessed a “standard reticketing fee” under terms of their contract of carriage with the respective airline for the fare under which they were ticketed, but only after they have voluntarily changed their travel plans as provided in the contract of carriage. Such change fees are in large measure assessed not simply to recoup reticketing costs, but in order to differentiate one fare product from another, *i.e.*, as a “penalty” to affect passengers’ purchasing behavior. Indeed, some fare-paying passengers of American and Delta may change their travel plans at will and are not required to pay any “reticketing” fee at all.

We believe that the airlines’ normal pricing practices provide powerful evidence that the carriers’ domestic “standard reticketing fee” of \$100 far exceeds any costs of providing that service.¹⁰ Each day, tens of thousands of Delta and American passengers are charged less than \$100 each way, including taxes, by those carriers for their air transportation. Indeed, statistics filed with the Department by Delta show that in the second quarter of 2002, more than 3 million of Delta’s fare-paying passengers, about 36 percent, paid less than \$100 each way

to travel on the carrier.¹¹ Similarly, statistics filed with the Department by American show that, for the same period, more than 2.3 million passengers, about 28 percent, paid less than \$100 each way to travel on the carrier. Thus, it appears that unless those two carriers are offering a large percentage of their seat inventory at prices below their cost, there is no relation between the “standard reticketing fee” and Delta’s or American’s cost to carry a passenger.¹²

American also asserts that we have not adequately addressed its concerns over establishing the validity of tickets, especially electronic tickets, of passengers seeking to be reaccommodated under section 145. We disagree. We continue to believe that, in the case of electronic tickets, it is reasonable for airlines to take steps to satisfy themselves of the *bona fides* of the ticketholder requesting alternate transportation. Our suggestion that it would be appropriate to require passengers to provide proof of payment and confirmation, such as receipts and printed itineraries, was not intended to be exclusive, but only an example of the types of steps that might be taken by a carrier to satisfy itself of the validity of a passenger’s claim to transportation under section 145. We recognize that there may be instances in which, absent verification of the passenger’s status by the failed carrier, an airline cannot confirm the validity of the passenger’s claim to transportation under section 145. However, that fact does not require the conclusion that the only way in which to validate a passenger’s status is through a paper ticket or access to the failed carrier’s reservation system.

As we have made clear in our prior notices, we are sympathetic to carriers’ concerns that they not suffer uncompensated additional expenses in transporting passengers pursuant to section 145. We are disappointed, however, that no carrier, particularly those raising the strongest objections about our prior notices, chose to provide

⁶ We have reason to believe that such a system would result in charges far in excess of \$25.00 each way. Soon after National ceased operations, America West orally advised a Department staff member posing as a National passenger that its charge for transportation from Las Vegas to Chicago and return would be \$168.50. At that time, the walk-up fare for any passenger was \$276. Upon further inquiry by the Department, America West stated that this system was no longer being used in connection with section 145 and that it was assessing National passengers a \$25 charge each way for standby travel.

⁷ Section 145 cannot be viewed in a vacuum. Congress enacted section 145 in an effort, at least in part, to ensure some measure of relief to aviation consumers who might be adversely affected by the serious economic consequences on airlines resulting from the terrorist attacks on September 11, 2001. At the same time it imposed these new duties on airlines, it also provided them with compensation totaling billions of dollars.

⁸ However, since section 145 is silent on the issue of whether any fees may be assessed for transporting passengers of a carrier that has ceased service on a route, another possible interpretation might be that Congress intended that carriers not charge passengers at all for carriage under section 145.

⁹ For this same reason, American’s argument that Congress intended that passengers should assume the risk in booking with a financially weak carrier would, if adopted, necessarily render section 145 meaningless.

¹⁰ We note that both American and Delta assess a “standard reticketing fee” of \$150 for international travel.

¹¹ This information is based on Passenger Origin-Destination Survey data filed with the Department. Most passengers purchase tickets on a round trip basis.

¹² In addition, the position asserted in the comments filed by Delta and American is inconsistent with information provided to us by those airlines during our reviews of competition issues. In those cases, and in court proceedings under the antitrust laws, airlines routinely contend that their incremental cost of carrying an additional passenger is minimal, being made up largely of Computer Reservations System or other booking fees, credit card fees, commissions, marketing fees, and minor costs for fuel and food. In fact, we have recently been advised by a Delta official that the variable cost of accepting an additional passenger is \$25 or less.