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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Alaska Airlines, Inc., et al. - Effect of Deregulation - Overcharge Collection - Reconsideration

File: B-231659.4

Date: September 23, 1991

DIGEST

1. Under the airlines' deregulated pricing system the city-pair contract fare, if applicable, or the fare selected when a reservation is made or the ticket is issued is the applicable fare for government passenger transportation, and decisions that held that the government is entitled to the lowest published tariff rate as a matter of law are not applicable in the deregulated environment. Also, the rule in United States v. New York, New Haven and Hartford Railroad Co., 355 U.S. 253 (1957), which places the burden on the party in possession of the necessary documents, is applicable to place the burden on the airlines to show that a particular fare was not available only if the government shows that it requested a lower fare than was charged. Upon reconsideration, Alaska Airlines, Inc., et al., B-231659, Sept. 10, 1990, 69 Comp. Gen. ____, is affirmed and clarified as to the time to be used in determining applicable fares.

2. The holding in Alaska Airlines, Inc., et al., B-231659, Sept. 10, 1990, 69 Comp. Gen. ____, was not a changed interpretation of the law but an initial interpretation of the government's legal entitlement to airfares under the deregulated system. It is applicable to the claims for which the carriers requested the Comptroller General's review, and is not limited to prospective application only.

DECISION

This decision is in response to a request from the General Services Administration (GSA)1/ for reconsideration and reversal, in part, of an opinion of the Comptroller General, Alaska Airlines, Inc., et al., B-231659, Sept. 10, 1990, 69 Comp. Gen. ____. That decision was issued based on a request by numerous airlines pursuant to 31 U.S.C. § 3726 that

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1/ The request was submitted by Mr. William B. Early, Acting Comptroller.

we review GSA audit actions on a sample of airline billings for domestic passenger transportation during the period of early 1985 through late 1986. We held therein, inter alia, that in the deregulated air transportation environment the government, like other passengers, generally is entitled only to the fare selected at time of reservation. If in its audit GSA seeks to apply a fare other than an otherwise applicable fare shown on the ticket, it must first establish that the fare it seeks to apply was requested by the government or that the government was contractually entitled to that fare. The airlines have submitted briefs opposing GSA's request and urging that we affirm our September 10, 1990 holding.2/

In its request for reconsideration, GSA states four points of contention where it is in disagreement with our previous decision. GSA's positions on these points are as follows: (1) The government is entitled to the lowest fare for which it qualifies at the time of ticket issuance; (2) Demand for the lowest fares from the airlines has been made through various GSA regulations, memorandums of understanding, government contracts with travel management centers, government city-pair contracts, and the Federal Travel Directory; (3) The burden of proof of non-availability of controlled capacity seats is on the airlines; and, (4) The airline computer reservations systems do not assure that the lowest fare was billed. GSA also argues that, in the alternative, the opinion should be made prospective only in application.

For the reasons that follow, we affirm our decision of September 10, 1990.

BACKGROUND

Deregulation has made fundamental changes in the system under which airlines price their services for domestic transportation and in the legal basis GSA may use to determine which fares are applicable in its audit of the government's airline bills.

As we indicated in our previous decision, prior to deregulation, the airlines' pricing of their services was subject to elaborate regulatory requirements established pursuant to statute under Civil Aeronautics Board (CAB) jurisdiction. The airlines were required by law to publish their fares in tariffs filed with the CAB, the fares were subject to the CAB's approval, and generally those fares were the only fares the airlines could legally charge. Under this system there

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2/ The airlines, in conjunction with the Air Transport Association of America, are represented by counsel, Booth, Wade and Campbell of Atlanta, Georgia.

was little price competition among airlines, there were relatively few different types of fares and fares fluctuated little. The airlines were prohibited by law from charging a different fare than the published, filed fare to which all users of their services in like circumstances were entitled by law. Aloha Airlines, Inc. v. Civil Aeronautics Board, 598 F.2d 250, 263 (D.C. Cir. 1979), and cases cited. It was, therefore, a relatively simple matter to look back after the service was provided and paid for and determine the applicable legal fare from the tariff filed with the CAB in effect at the time the service was performed.

Under this and similar regulated systems applicable to other transportation modes, as GSA notes, our Office and the courts long held that a government agent had no authority to contract for a higher rate than the lowest applicable rate in the carrier's filed tariff available to the public for the same service. Under special arrangements, generally available only to the government, however, the carriers could and did provide special rates to the government. However, these special rates were held inapplicable if they resulted in higher charges for the same service than the published, filed rates legally available to all. See e.g., 44 Comp. Gen. 769, 772 (1965).

Under this system the audit of government transportation pursuant to the Transportation Act of 1940[3]/ was performed by comparing the charges billed by the carriers with the charges resulting from applicable rates and fares published in their filed tariffs and any special rates or fares offered to the government to determine whether there had been an overcharge.

This relatively static, regulated pricing system was changed significantly for domestic air transportation by the economic deregulation of the airlines beginning in the late 1970's and culminating with the 1984 act repealing the requirements to publish fares in tariffs filed with the CAB and to charge no other fares than those published fares, and abolishing the CAB itself. As a result, under deregulation the airlines are free to price their services based on competitive market factors.[4]/

In this open market system there is a variety of discounted airline fares, and they vary from day-to-day and sometimes from hour-to-hour. As we understand it, many of these

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3/ Act of Sept. 18, 1940, § 322, 54 Stat. 955, currently codified at 31 U.S.C. § 3726 (1988).

4/ See generally the discussion of the effect of deregulation in First Pennsylvania Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1119-1120 (3rd Cir. 1984).

discounted fares have specific conditions attached, such as time of ticket purchase, limited or non-refundability, and specific times of travel. The availability of these fares may fluctuate depending on competitive factors and often only a limited number of seats on a flight are offered at the lower fares. It is our understanding that frequently several travelers on the same flight, receiving the same transportation services will have paid different fares for the service depending upon what fares were being offered when they made their reservations or purchased their tickets, and which conditions they were willing to accept.

It is in this new, deregulated environment that the government, like other airline customers, now finds itself when it enters the market place for airline services. To take advantage of this system the consumer must evaluate his or her transportation needs in advance to make the appropriate selection from the various services and fares offered at the time he or she enters the market place (makes the reservation or purchases the ticket). As is indicated above, those offerings vary from time-to-time, and it is generally up to the consumer to decide when and what to select from what is being offered.5/ The government, too, must select from what is being offered when it makes its purchase, or it may, as it has done for numerous city-pairs, contract in advance with the airlines for special fares. In either event, it is the agreement which generally determines the fare, not the overriding principle applicable under the old regulated system that the government cannot be charged more than the lowest published fare offered the public for the same service.

The legal basis under the old regulated system for finding the government to be entitled to be charged no more than the lowest fare offered the public (lowest published tariff fare) has been swept away by repeal of its statutory foundation. Therefore, while GSA retains its authority under 31 U.S.C. § 3726 to audit airline bills for services furnished the

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5/ While we have found few court decisions dealing with deregulated airfares, it has been recognized that domestic air transportation is now controlled by common law contract principles, and in buying the ticket the purchaser accepts and agrees to be bound by the terms and conditions of the contract of which the passenger is given actual notice. American Airlines, Inc. v. Platinum World Travel, 717 F. Supp. 1454, 1461 (D. Utah 1989), modified, but not as to this point, 737 F. Supp. 627 (D. Utah 1990). It has also been noted by at least one court that deregulation allows air carriers to fly the public at different rates or without charge. Morris v. Northwest Airlines, Inc., 737 F. Supp. 422, 426 (note 4) (E.D. Mich. 1989).

government, the determination of the correct fare in the audit must be made based on the service and fare selected when the purchase was made or on a fare available under a government contract such as the city-pair contracts. Thus, once the purchase is made and the travel is completed, there generally is no legal basis to go back later and assert an overcharge on the basis that if the purchase had been made earlier or later, or under some other circumstance it may have been made at a lower cost.

With this background we now approach the specific issues GSA raises in its request for reconsideration.

Government Entitlement to the Lowest Fare for Which it Qualifies at the Time of Ticket Issuance

It is GSA's audit policy to select the lowest available fare applicable to the carrier used for which the record shows the travel performed qualified. This fare may be one offered by the airline to the general public or a fare applicable only to government travelers set by contract between the airlines and the government covering travel between specified city-pairs. GSA states that it is its policy to apply a fare only if the travel meets any specific conditions applicable to the fare.6/ However, GSA does apply so-called controlled-capacity fares which are discounted fares whose availability can change frequently based on demand and competitive factors. This is a major point of contention with the airlines since, at the time of its audit, GSA does not have information as to whether seats were actually available at these fares. It merely assumes seats were available and applies these fares if they are the lowest applicable and leaves it to the airlines to furnish evidence to the contrary if they wish to rebut GSA's action.

In our previous Alaska Airlines decision, we held that GSA's position that the government is entitled to the lowest available fare, whether or not it is the one selected, no longer has a reasonable basis in law in the deregulated air transportation environment. Instead, the government, like other users of the airlines' services, generally is entitled only to the fare selected at time of reservation. If GSA seeks to apply a fare other than that shown on the ticket, it must first establish that the other fare was requested by the government or that the government was contractually entitled

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6/ The airlines have alleged that at times GSA applies fares with conditions the travel did not meet. GSA responds that this may occur occasionally, inadvertently, but it is contrary to GSA's audit policy, and when it is brought to GSA's attention, they make any necessary refund of collections.

to that fare. If GSA does so, we concluded, it may assert an overcharge based on that fare and collect by offset. The airline then has the burden of proving that such fare was not, in fact, available and justifying the application of the higher fare.

GSA in its request for reconsideration contends that we ignored several leading court cases as well as a long line of our own decisions in concluding that the government is not entitled by law to the lowest applicable rate. GSA states that these cases show that it is well established that when there is more than one rate available, the government is entitled to the lowest rate applicable, and agents of the government are not authorized to contract for higher charges for similar services.

GSA also argues that although the airlines are no longer required to publish their fares in tariffs filed with the CAB, the availability of their fares provided by commercial services in the ATPCO tariff or PIPPS,7/ which GSA uses in its audit, is the equivalent of the former system of fares published in tariffs filed with the CAB.

We did not ignore the cases and the principles of law relied on by GSA; rather, we held they do not apply in the deregulated airline environment. Those cases were decided on the basis of rates established under regulatory systems prescribed by law which bind the carrier to charge and the shipper to pay those rates.8/ Thus, under those systems there was, in effect, only one legal rate and government agents were held not to have the authority to bind the government to a rate higher than the legal tariff rate to which it was already entitled, unless the government received additional consideration for the additional cost. The government could, of course, receive lower rates under special authority generally not available to the public. See e.g., section 22 of the Interstate Commerce Act, 49 U.S.C. § 10721 (1988); and Transcontinental Bus System, Inc. v. C.A.B., 383 F.2d 466, 480-481 (5th Cir. 1967), cert. denied, 390 U.S.C. 920 (1968).

7/ Airline Tariff Publishing Company (ATPCO), which publishes a tariff listing airfares covering the United States, and the Passenger Interline Pricing Prorate System (PIPPS), which is a computerized system with a data base similar to ATPCO's.

8/ For a recent discussion of this system by the Supreme Court in relation to the Interstate Commerce Act, upon which the airline regulatory statutes were patterned, see Maislin Industries, U.S. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990).

The three principal cases to which GSA refers and which often have been cited by our Office and the courts as standing for this rule are Great Northern Railway v. United States, 170 Ct. Cl. 188 (1965); U.S. Lines Operations, Inc. v. United States, 99 Ct. Cl. 744 (1943), cert. denied, 321 U.S. 755 (1944); and Missouri Pacific Railroad Company v. United States, 71 Ct. Cl. 650 (1931). They all involved regulated carriers, i.e., two railroads subject to regulation by the Interstate Commerce Commission (ICC) pursuant to the Interstate Commerce Act, and a steamship line subject to regulation pursuant to the Shipping Act, 1916.

The Missouri Pacific case concerned certain extra charges, in addition to the ticket revenues, for which the carrier billed the Army. The extra charges to which the Army Quartermaster General had agreed were derived from a circular not filed with the ICC and intended to apply only to government traffic. The court found, however, that the Army's agreement to the extra charge was based on a misunderstanding of the carrier's fare, and it held that since the Army had paid charges for the service based on the through fare applicable to the public under the carrier's tariffs on file with the ICC, the government was not liable for the additional charge which did not apply to the public for the same service. The court noted that while the government may agree to special charges when additional service is performed, in this case the published through fare covered the service rendered, and government officers are without authority to contract for rates higher than those tendered to the public in "duly published and authorized tariffs."

The Great Northern case was essentially a dispute over the appropriate description of the commodity shipped which, when resolved, determined which rates were applicable to several carload shipments of military poison gas. The carrier argued that either special rates tendered the government under a "section 22 quotation" or its commercial class rates under its tariff, both of which were applicable to poison gas, were the correct rates. Our Office, which at that time performed the transportation audit, had applied a lower rate from the carrier's commodity tariff. While the case was ultimately decided against the government on the basis that poison gas was not covered by the commodity tariff's rate, the court noted that it had repeatedly held that the government is at all times entitled to the lowest published tariff rate, and that government officers and agents are without authority to contract for higher than published rates for like services under like conditions.

The U.S. Lines case concerned the interpretation of an agreement entered into in 1930 by the Quartermaster General of the Army with U.S. Lines, an ocean steamship line subject to

regulation pursuant to the Shipping Act, 1916, 46 U.S.C. Chapter 23 (1925), for round-trip transportation between New York and France for several groups of widows and mothers of deceased military members. In the negotiations leading to the agreement, the Quartermaster General had advised the carrier that no official of the government had the authority to enter any contract that would commit the government to the payment of higher rates than those charged the general public. The ultimate agreement provided that the transportation would be at tariff rates for the accommodations occupied.

The carrier billed the government on the basis of its full tariff rates without a discount for off-season travel provided in its tariff for members of the public.9/ The carrier's position was that the discount did not apply because the agreement between the carrier and the Quartermaster General provided for charges at tariff rates and did not specifically provide for the discount. Without an analysis of the principle stated by the Quartermaster General as to the limitation on government officials' authority, the court held that under the terms of the agreement and the carrier's tariff, the government was entitled to the tariff rates as reduced by the discount.

As we held in our September 10, 1990 decision, these and other similar decisions which were decided under the regulated tariff system, do not hold that the government had a special entitlement to the lowest fare. They stand only for the proposition that the government, "as other shippers," is entitled to the lowest published tariff rate applicable to its shipments, and therefore government officers had no authority to contract for discriminatory higher rates. See Puerto Rico Marine Management, Inc., 57 Comp. Gen. 584, 586 (1978). See also 19 Comp. Dec. 208, 211 (1911).

When the airline regulatory system was abolished, also abolished was the binding legal effect of the airlines' rates published in tariffs filed with the CAB and the passenger's right prescribed by law to be charged the lowest applicable

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9/ At the time in question, the Shipping Act did not require common carriers by water in foreign commerce to file their tariffs with the regulatory agency; however it did prohibit unjust discrimination in rates and required that any rate agreements between carriers be filed with the regulatory agency. 46 U.S.C. §§ 814, 816 (1925). The record in the U.S. Lines case indicates that the discounts were established pursuant to agreement by the Transatlantic Passenger Conference to which U.S. Lines belonged, and the minutes of that agreement were filed with the Department of Commerce Shipping Bureau.

rate published in those tariffs. Thus, while the ATPCO and PIPPS "tariffs" to which GSA refers show fares and services offered by the airlines subject to various conditions, they do not have the same binding effect prescribed by law that tariffs filed under the regulatory system had. Now the application of a particular fare is determined by the agreement made when the desired service and fare are selected from those offered at the time the reservation is made or the ticket is purchased. Accordingly, our view remains, as stated in our prior decision, that the government generally is entitled only to the fare selected at the time of reservation or ticket purchase, or to a special fare under the city-pair contracts.

Demand for the Lowest Fare

GSA states that although it disagrees with our prior holding, assuming, arguendo, that the government is required to specifically request the lowest fare at time of reservation or ticketing, if it seeks to apply that fare, such request for the lowest fares has been made by the government to the airlines in several ways. First, GSA cites various provisions in its regulations and its Federal Travel Directory which it contends indicate that the government seeks the lowest fare. For example, the Federal Travel Regulations (FTR) promulgated by GSA require that commercial travel agents and Travel Management Centers which supply transportation services for federal employees follow all provisions of the FTR.10/ The FTR provides in turn that when common carriers furnish the same method of travel at different fares between the same points for the same type of accommodations, the lowest cost service shall be used unless use of a higher cost service is administratively determined to be more advantageous to the government. See 41 C.F.R. § 301-3.4(c) (1990), previously FTR, para. 1-3.4c, FPMR 101-7, Sept. 28, 1981.

GSA also refers to a provision of its contract with the airlines for city-pair contract fares which states that "if, after award, the contractor offers commercial fares lower than the contract fare, the government may use the lower fare in lieu of the contract fare if otherwise eligible." GSA says that in the context of the regulatory requirements for the government traveler to utilize the lowest cost service for which he qualifies, it views the contract language in the city-pair contracts as requiring contracting airlines to offer such fares to a government traveler. Thus, GSA concludes, if such fares are available, they must be offered to the

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10/ These provisions, currently found in 41 C.F.R. § 301-15 (1990), prior to March 23, 1990, were found in FTR Temporary Regulation 1. See 55 Fed. Reg. 10771, March 23, 1990.

government traveler and GSA's audit practice during the period which our decision covered, 1985-86, is based on this position.

GSA's interpretation of the language in its city-pair contracts, which allows the government to use lower fares under certain circumstances, to be a request to the carrier for such fare seems inconsistent with the recognized rule of contract interpretation that words are to be given their plain and ordinary meaning. The Tester Corporation v. United States, 1 Cl. Ct. 370 (1982). While this provision allows the government to use the lower fares, it remains the government's obligation to select the fare and service it finds suitable to its needs. We fail to see where this provision or any provision of GSA's city-pair contracts in effect during the period covered by the claims under review in our prior decision places a mandatory requirement on the air carrier to charge the government a lower commercial fare regardless of whether it is selected. GSA has not furnished us with any authority, nor are we aware of any authority, where the applicable city-pair contracts have been so interpreted.11/ To the contrary, while the government is entitled to the city-pair rates under the terms of the contracts, as to other rates, it may request them if it determines they meet the requirements of the travel to be performed. If the government requests such rates, it is entitled to them as would be any other traveler, if they are available.

We also are of the opinion that GSA's regulations pertaining to the selection of air carriers, its use of Traffic Management Centers, travel agents, and its policies set out in the Federal Travel Directory, do not have the mandatory effect GSA seeks to place on them so as to require the air carriers to automatically charge the government only the lowest air fare available. While they give direction to the government traveler and travel office and seek to have travel arranged at the lowest cost to the government consistent with the circumstances of the travel being performed, they do not

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11/ GSA also refers to new provisions added to the city-pairs contracts beginning February 1, 1988, as support for its position. These provide for special audits in certain circumstances where 1. a carrier which offers only an unrestricted contract fare subsequently provides a lower fare to the public, or 2. a carrier which offers a restricted contract fare fails to satisfy a 45 percent seat availability minimum at that fare. The airlines and GSA apparently do not agree on the applicability of these provisions; however, we need not resolve that disagreement here since the claims which are the subject of this decision arose prior to the effective date of the new provisions.

constitute a basis in GSA's audit to reduce otherwise proper carrier billings to the lowest rate that could have applied.

Accordingly, we see no reason to change our position in Alaska Airlines, supra, to the effect that GSA's regulations and the city-pair contracts in effect at the time the claims under consideration arose do not place an affirmative burden on the airlines to charge the government the lowest applicable rate, unless such rate is requested.

The Burden of Proof as to Availability of Controlled-Capacity Seats

This issue concerns application of lower fares which apply to controlled-capacity seats the availability of which is limited and fluctuates frequently. GSA's position on this issue is linked to its position that the government is entitled to be charged no more than the lowest available fare, and if such a fare applies only to a controlled capacity seat, the burden is on the carrier to charge that fare or show that such a seat was not available. Thus, GSA contends that government auditors should not approve airline higher billings which assume, without either proof or certification by airline employees or agents, that controlled-capacity seats, to which lower fares apply, were not available. GSA says that in United States v. New York, New Haven and Hartford Railroad Company, 355 U.S. 253 (1957), the Supreme Court placed this burden of proof on the carriers, and our decision in Alaska Airlines would improperly shift the burden to the government.

In preparing our September 10, 1990 decision we carefully considered the rule espoused in the New York, New Haven case, a rule of evidence to the effect that where evidence necessary to establish a fact lies peculiarly within the knowledge and competence of one of the parties, the principle of fairness requires that party to bear the burden of going forward with evidence on the issue. In that case, the government had specifically requested rail cars of a certain dimension, which if they were available would have entitled the government to a lower rate, and the burden was then held to be on the carrier to prove that such cars were not available. However, as stated in our discussion concerning point one, above, under the deregulated system the government is not automatically entitled by law to the lowest available rate. Therefore, as we indicated in our prior decision, the rule is not applicable here unless the government can show it requested a capacity-controlled fare and it was not provided. If, however, the government requests such a fare and it is not furnished, the burden of proof is then on the carrier to show that a seat at that fare was not available. Therefore, the holding in our prior decision on this point is consistent with the Supreme

Court's opinion in the New York, New Haven case. Accordingly, we can not agree with GSA's position on this point.

Reliability of Airline Computer Reservation Systems

GSA states that we ignored its discussion as to the unreliability of the airlines computer reservation systems and the various examples it gave to show that the computer reservation systems show a bias which in turn affects the production of accurate information at the time of reservation. GSA contends that this prevents the government traveler from receiving the lowest fare applicable.

We did not specifically address this point since the challenges to the accuracy of the computer reservation systems seem to be related to bias as to the choice of a carrier rather than as to a choice of fares. In any event we do not find these allegations to be sufficient to support a general audit policy of reducing charges based on otherwise applicable fares to the lowest applicable fare.12/

In the Alternative the September 10, 1990 Opinion Should be Made Prospective Only in Application

GSA says that with respect to the important principles concerning fare applicability put in doubt by the opinion, it would seem that considering GSA was following clear-cut judicial precedent and innumerable GAO decisions, the Alaska Airlines opinion should be made prospective only in application. GSA cites several decisions in support of its contention. E.g. Civic Action Institute, 61 Comp. Gen. 637 (1982); B-213771.2, Apr. 1, 1985.

The decisions GSA cites in support of its contention are inapposite here since they do not involve the settlement of claims. Our general rule in this area is to allow prospective application where the decision represents a changed interpretation of law. Turner-Caldwell-Reconsideration in view of Wilson v. United States, 61 Comp. Gen. 408 (1982). In the present case it was the first time we had ruled on these issues as they relate to airline fares after they were deregulated pursuant to repeal of the regulatory statutes. Thus, our decision did not involve a changed interpretation of law but rather an interpretation of the effect of the change in the law made by repeal of the regulatory statutes. In addition, we had agreed with the parties at the outset that

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12/ Allegations of this nature appear to be more properly for consideration by the Department of Transportation which has the authority under consumer protection statutes to consider and take action on them, if warranted.

the airlines would submit a sample of overcharge claims for our review pursuant to 31 U.S.C. § 3726(g)(1), and that we would consider that sample as representative of all similar claims for the 2-year period commencing in early 1985 and ending in late 1986. Accordingly, our decision applies to those claims. It also may be considered precedent for settling claims arising under similar circumstances, and under similar statutory and contractual provisions after the 1985-1986 period.

GSA has also requested that we clarify the issue in our Alaska Airlines decision as to the point in time as of which the correct fare is to be determined, i.e., at the time of reservation or at the time of ticketing. That determination is to be based on the fare effectively selected, usually at time of purchase which is ordinarily at the time of ticketing. However, applicability may depend upon the fare selected and agreed to by the parties at time of reservation, such as where the fare is contingent on some condition applicable at the time of reservation.

Our decision in Alaska Airlines, Inc., et al., B-231659, Sept. 10, 1990, 69 Comp. Gen. ____, is affirmed.

Milton J. Socolar

for Comptroller General
of the United States