Certified Air Service at Smaller Communities: The Need for Service as a Determinant of Regulatory Policy

Craig Mathews

Recommended Citation
Craig Mathews, Certified Air Service at Smaller Communities: The Need for Service as a Determinant of Regulatory Policy, 34 J. AIR L. & COM. 27 (1968)
https://scholar.smu.edu/jalc/vol34/iss1/3
CERTIFICATED AIR SERVICE AT SMALLER COMMUNITIES:
THE NEED FOR SERVICE AS A DETERMINANT OF REGULATORY POLICY

By Craig Mathews†

I. INTRODUCTION

ONE OF THE most complex issues facing the Civil Aeronautics Board today is the problem of providing adequate commercial air service to the smaller communities of our nation. It may seem paradoxical that this problem grows more severe at a time when the domestic airlines industry is experiencing unprecedented growth. To a significant degree, however, the industry's success has become the smaller community's problem.

At the present time, numerous cities and towns in the United States face the possible loss or downgrading of service previously rendering by one or more certificated air carriers. Between 1949 and 1965, 224 such

† B.A., Yale University; LL.B., Yale Law School; LL.M., Georgetown University Law Center. Partner in the firm of Leva, Hawes, Symington, Martin & Oppenheimer, Washington, D.C.; Member of the Bars of Ohio and District of Columbia.

Much of the statistical information contained in this and the following paragraph is conveniently presented in unpublished materials maintained by the Civil Aeronautics Board. See particularly CAB, Schedules and Records Unit, “Suspensions and Points Authorized.” For one enumeration of specific points served as of the end of 1965, see, Hearings on the Review of the Local Air Carrier Industry Before the Aviation Subcomm. of the Senate Comm. on Commerce, 89th Cong., 2d Sess. 106-08 (1966), hereinafter cited as Review of the Local Air Carrier Industry. Additional detail concerning certificated operations at each such point appears in the annual joint publication of the CAB and the Federal Aviation Administration, Airport Activity Statistics of Certificated Route Air Carriers. See also the FAA's annual publication, Statistical Handbook of Aviation. For specific information concerning discontinuation of trunkline service, see CAB series entitled Historical Review of Trunkline Suspensions and Deletions at Points Served by Local Service Carriers, particularly Supplement No. 4 covering the years 1949-1965.

The following table, derived from the foregoing source, summarizes the extent of certificated air service in the United States during the period since World War II:

<table>
<thead>
<tr>
<th>AUTHORIZATIONS</th>
<th>1948</th>
<th>1956</th>
<th>1967</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trunk points</td>
<td>*</td>
<td>203</td>
<td>67</td>
</tr>
<tr>
<td>Local points</td>
<td>336</td>
<td>202</td>
<td>297</td>
</tr>
<tr>
<td>Combination points</td>
<td>154</td>
<td>178</td>
<td>170</td>
</tr>
<tr>
<td>Total points authorized</td>
<td>*</td>
<td>583</td>
<td>534</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SUSPENSIONS</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Trunk points</td>
<td>*</td>
<td>22</td>
<td>6</td>
</tr>
<tr>
<td>Local points</td>
<td>168</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>Combination points</td>
<td>10</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Total points not served</td>
<td>*</td>
<td>35</td>
<td>13</td>
</tr>
</tbody>
</table>

* Data not known to be on comparable basis.

It is apparent from the table (1) that the trunk carriers are serving far fewer points today than heretofore; (2) that although the number of points served by local carriers has increased markedly since 1956, the figure is nonetheless lower than during the period following World War II; and (3) that the local and trunk carriers together are currently serving less points today than in 1956. Furthermore, assuming that the 1948 figures for trunk carriers are on a roughly comparable basis, the certificated airlines presently provide domestic service to substantially fewer
communities lost service by a trunkline carrier; roughly half of these sus-
pensions or terminations have occurred since 1960. Of nearly 9,000 air-
ports conducting civil air operations in the continental United States
today, only 521 have scheduled service by either trunk or local carriers.
At present fewer communities receive scheduled commercial service—
either authorized or operated—than at any time during the past decade.

These statistics must be assessed in context. The local service airlines
provide scheduled service at nearly one hundred more communities today
than was the case ten years ago. Both the trunklines and the local carriers
have reduced the number of cities and towns at which they do not provide
the service authorized in their certificates. The airlines also offer faster,
larger and more comfortable equipment than formerly existed. In many
instances they provide more frequent schedules. These improvements in
the average quality of service are a credit to the industry. Yet they may
be slight consolation to a community confronted with the prospect
that its own air service will be reduced or terminated. Such a community
is apt to wonder whether the service needs, with which it is primarily con-
cerned, will prevail over other factors affecting the decisions of the Civil
Aeronautics Board.

The provisions of the Federal Aviation Act of 19582 give major em-
phasis to the “public interest” and the “public convenience and necessity.”
Standing alone, therefore, the Act might appear to justify the presump-
tion that the Board will be guided primarily by the needs of the traveling
public in assessing the air service requirements of communities. At first
impression, the language of the Board’s decisions might seem to confirm
this presumption, for although the Board has always been conscious of
subsidy problems and conditions within the industry, it has also consistently
stated that its objective is to improve the quality of airline service.

Yet, in evaluating this hypothesis, it is necessary to remember that the
issuance, modification or termination of the operating authority of certifi-
cated air carriers depends upon numerous intricate considerations. The
Board’s decisions are inevitably formulated in the context of a highly com-
plex industry, which resembles a traditional public utility more in political
than economic terms. Moreover, even cursory reference to the Act reveals
that the Board’s regulatory mandates are not wholly consistent. In these
circumstances, it would be unrealistic not to expect the Board’s decisions
to reflect its persistent attempts to balance interacting and often recal-
citrant factors.

points than in the decade following World War II. The data for the intervening years confirm the
general consistency of these trends; they also show that during the past several years the local
carriers have slightly reduced the number of points they serve.

The foregoing data give perspective to the problem of service at smaller communities. While
the factors influencing service trends are complex, they reflect the steadily increasing concentration
of trunkline service in longer-haul and higher density markets. As suggested infra in the text,
there is reason to anticipate that, if current CAB policy continues, the service patterns of the
local carriers may increasingly manifest a trend similar to that of the trunks, although in lesser
degree.

Act of 1938, 52 Stat. 973. For a legislative summary through 1958, see Lindsey, The Legislative
For these reasons, it is appropriate at the outset to enter a disclaimer concerning the scope of the present inquiry. Evaluations of the Board's regulatory endeavors are many and diverse. Critics have asserted that its policies are overly concerned with strengthening the industry rather than satisfying the public's requirement for adequate air service. Critics have also charged that the desire to reduce subsidy has unduly jeopardized worthier objectives. Some commentators have alleged more bluntly that, at least in the cases involving route authority, the Board has followed no discernible policy at all. The converse of each of these positions has been urged with equal vigor.

This study does not undertake to participate in that intriguing but extensive controversy. For present purposes it suffices to pose a more limited question: To what extent do the Board's standards concerning the public's interest in adequate air service comprise a consistent and reliable precedent which has persuasive decisional effect? This question inevitably suggests another: Insofar as these standards prove inadequate for the foregoing purpose, what are in fact the underlying determinants of policy?

The first of these questions raises issues which are significant from the viewpoint of regulatory policy. It will, therefore, be considered in some detail. The second question, because of its obvious importance, deserves more extended treatment than is possible within the scope of the present inquiry. Moreover, it has been much debated in the literature already published. It will therefore be mentioned here only insofar as a brief reference appears necessary to supplement the former answer.

There are various methods by which the first question may be approached. Insofar as the Board's concern with the traveling public is a predominant element in its decisions, we should expect that the articulated criteria relating to the public's need for air service would disclose patterns which would serve as guides to the solution of future cases. We might also anticipate that the cases would reveal rational and consistent relationships between the levels of service deemed adequate by the Board and the actual service requirements of the communities concerned.

But, when these presumptions are tested against the decided cases, the need for air service does not appear to comprise the principal basis for decision. At the verbal level, these "public interest" factors serve reasonably well as references for counsel who seek appropriate citations to buttress...

---

2 Among the most vigorous recent critics, see Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 73 Harv. L. Rev. 863, 1035, 1263 (1962), especially at 863-83, 1072-097 and 1293-318. Judge Friendly asserts at 881 that the CAB is among the agencies which have most "conspicuously failed to define the standards governing their decisions." See also, Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 Yale L.J. 931 (1960). Mr. Hector asserts at 942 that "the Board has almost no general policies whatever." An earlier criticism appeared in U. S. Commission on Organization of the Executive Branch of the Government, Task Force Report (1949), more commonly known as the Hoover Task Force Report. A former chairman of the CAB has suggested that the principal focus of the Board's concern has shifted from the public convenience and necessity to protection of the rights of the carriers; see Rizley, Some Personal Reflections after Eight Months as Chairman of the Civil Aeronautics Board, 22 J. Air L. & Cost. 445 (1951); Contra, Kintner, The Current Ordeal of the Administrative Process: In reply to Mr. Hector, 69 Yale L.J. 965 (1960) (discussing criticisms of the administrative process primarily in the context of Federal Trade Commission practice); see also Cary, Politics and the Regulatory Agencies (1967), particularly Ch. 5.
an argument; but he who would predict the Board's decisions by this means is apt to stray. The factual components of a proceeding which relate to service needs—the volume of air traffic, length of trip, size and economic circumstances of the communities involved, and similar factors—do not always furnish reliable guides to the quality of service which the Board will authorize.

These results do not necessarily indicate that the Board has acted arbitrarily. Rather, they suggest that its concern with the requirements of the traveling public has been substantially tempered by its sensitivity to other facets of airlines regulation. Subsidy considerations, and the related but distinct objective of strengthening carriers and "balancing" the industry, have traditionally had relatively greater weight with the Board than the statutory and decisional references to the public convenience and necessity might imply. Furthermore, the extent to which these other considerations have determined the Board's policy has tended to fluctuate through time in accordance with factors not directly related to the service requirements of the communities involved in CAB proceedings.

II. The Background Of The Problem

The Board's attitudes towards the question of air service at smaller communities become more meaningful if they are assessed in the context of the development of the airlines industry itself. The latter topic has been extensively treated elsewhere, and is necessarily beyond the scope of this inquiry. For present purposes we need only to note three aspects of this development: first, the rapid growth of the airlines industry as a whole; second, the genesis and development of the local service carriers with which smaller communities are apt to be principally concerned; and third, the changing role of the local carriers in consequence of current conditions in the industry. These phenomena are sufficiently familiar to require only brief mention.

A. The Growth Of The Airlines Industry

Since the early days of commercial aviation, the airlines industry in the United States has grown dramatically. In 1930, United States air carriers accounted for only slightly more than 93 million revenue passenger miles in domestic and international operations. By 1967, passenger miles had increased to nearly 100 billion. In domestic operations within the continental United States, the trunk and local service carriers together have nearly tripled their revenue passenger miles during the past decade. Similarly, scheduled passenger revenues for continental operations of United States trunk and local carriers have increased by more than sixty percent in the

past ten years. In fiscal year 1967, they amounted to $3.8 billion dollars.\(^5\)

The aspect of the industry most familiar to the general public is the unusually high rate of technological innovation. One observer has accurately remarked that "most of the productivity gains evident in the airline industry are traceable to changes in the character of aircraft." As aircraft become larger and faster, their revenue-generating capacity has naturally increased. They have also—with notable exceptions—become less expensive to operate. Jet operating costs per available seat mile range normally from one-third to one-half of the corresponding costs for piston and turboprop aircraft.\(^7\)

These economic as well as competitive considerations have characteristically been cited by the airlines as reasons for replacing prior equipment with the latest available models, usually well in advance of normal obsolescence. The consequence has been the recurrent re-equipment cycles since World War II which have become so familiar in the industry. The bigger and faster models now in commercial service may be less expensive to operate in terms of available seat miles; but they also contain more seats, therefore, requiring more passengers to achieve load factors comparable to those of the smaller models which preceded them. Furthermore, the emphasis on speed and size has resulted, even in the case of the smaller jets, in the development of aircraft which tend to become economically inefficient over relatively short stage lengths. Yet it is precisely these shorter stage lengths and lower traffic volumes that are of primary importance to many smaller communities.

B. Historical Developments In Local Air Service

Local service carriers in the United States today fly more than four billion revenue passenger miles. Their annual revenues from scheduled passenger operations approached $300 million. As an industry, they offer air service in every region of the country. It is evident that the local service airlines have become an important component of the national business economy.\(^6\)

---

\(^5\) Operating, financial and service statistics for United States air carriers are available from numerous sources. See, e.g., CAB publications, *Handbook of Airline Statistics*, *Air Carrier Traffic Statistics* and *Air Carrier Financial Statistics*. The former publication currently appears biennially; the latter appear monthly and quarterly, respectively. Airport and aviation data are contained in FAA, *Statistical Handbook of Aviation*. A useful condensed source is Air Transport Association of America, *Air Transport Facts and Figures*, published annually. For data on a current basis throughout the year, see, inter alia, relevant issues of *Aviation Week & Space Technology*. Additional comparative data which are still relatively recent appear in U. S. Airlines: Into the Wild Blue What?, *Fortune*, May 1966, at 146 et seq.


\(^7\) Id.
However, it was not always so, because prior to World War II the local airlines industry did not exist. Service to a relatively limited number of points was provided by the trunk carriers which had obtained "grandfather" rights pursuant to the Civil Aeronautics Act of 1938. Communities not served by the trunk carriers received no certificated air service whatever.

Local service carriage largely developed during World War II. The number of communities desiring but not possessing air service, and the trunks' increasing preference for larger equipment and bigger markets, created the opportunity which the new carriers sought. Their objective was to render local and feeder service at smaller points which the trunks did not or no longer desired to serve.

The advent of these new carriers posed a problem for the CAB. It had never (and has never since) permitted a new carrier to enter the trunk-line industry directly. Moreover, the economic prospects of these new carriers were highly conjectural. Nonetheless, it was clearly apparent that this type of service was needed. Accordingly, the Board undertook, in 1943, to review the desirability of extending air service to smaller communities throughout the nation. The best-known of the early proceedings involving this issue, designated the Investigation of Local, Feeder and Pick-up Air Service, has come to represent the origin of certificated local air service in the United States. In language which established a precedent for future decisions, the Board recognized the "challenge" of this new form of air service and concluded, evidently with greater hope than optimism, that certification was justified "since the experiment may well result in public benefit beyond present expectations."

Because of the uncertain prospects of the "experiment," the Board imposed two strictures which subsequently assumed substantial importance as matters of regulatory policy. One of these—the temporary aspect of certification during a trial period—presented the local carriers with the recurrent difficulty of obtaining successive extensions of their certificates. This problem was obviated, from the carriers' viewpoint, by a 1955

---

8 Grandfather rights were acquired in accordance with Civil Aviation Act of 1938, § 401(e), 52 Stat. 977 (1938), repealed, 72 Stat. 806 (1958).

9 Although the terms "local" and "feeder" service are frequently employed interchangeably, the distinction is important as it relates to the pattern of service provided. Local service operates between points (most of them small and in relatively close proximity) within a limited geographic region; feeder service operates between one or more such points and an adjacent larger city where trunkline service is typically available. Depending upon the economic characteristics of a small community and the patterns of its transportation requirements, it may have a primary interest in one or the other (or frequently both) of these types of service.

10 Numerous commentators have made this point. See, e.g., R. Cavins, Air Transport and Its Regulators (1962), especially at 84 et seq. An earlier statement to the same effect appears by Westwood, Choice of the Air Carrier for New Air Transport Routes, 16 Geo. Wash. L. Rev. 1, 159 (1947-1948).

11 6 C.A.B. 1 (1944). The question of local, as distinct from through, service had been previously considered by the Board in All American Aviation, Pick-up, Delivery Service, 2 C.A.B. 133 (1940). See also Continental Air Lines, Texas Service, 4 C.A.B. 215 (1943), on reconsideration, 4 C.A.B. 478 (1943). In the latter case Essair, Inc. (one of the ancestors of Frontier Air Lines) was temporarily certified to perform local or feeder service on an experimental basis.

12 6 C.A.B. 1, 3 (1944). For more recent reference to the experimental genesis of the local service industry, see Subsidy Reduction Report 8.
amendment of the Act which provides for permanent certification,\textsuperscript{14} although the communities served by local carriers are sometimes heard to assert that as a practical matter the certifications are not as permanent as they ought to be.\textsuperscript{15} The other proviso announced in the Local, Feeder and Pick-up Service case was that the new operations should be restricted to those which show a "justifiable expectation of success at a reasonable cost to the Government."\textsuperscript{16} In these terms, the Board announced the policy of balancing the benefits of local service against its subsidy costs—an issue which the carriers, the communities and the Board have disputed ever since.

Once the principle of local service was established, the Board moved rapidly. During the late 1940's it proceeded, in a succession of decisions, to certificate numerous local carriers throughout the various regions of the United States.\textsuperscript{17} For present purposes, these decisions are notable in two respects. \textit{First}, in each instance the Board was compelled to consider whether the anticipated subsidy payments were justified by the service to be offered. Therefore, it inevitably began to evolve the criteria for measuring the need for service which today form the basis of the Board's articulated policy concerning this issue. \textit{Second}, the Board was faced at the outset with the contention by the trunk carriers that if local service were in fact required, they alone had the financial stability and operating experience to provide it. The Board's determination to award the routes to the new local carriers instead of the trunks was largely based on the presumed managerial efficiencies resulting from exclusive concentration upon local and feeder service.\textsuperscript{18} Although some of the original carriers have since disappeared, the Board's decisions in those early cases established the fundamental structure of the present local service industry.

In view of the Board's belief that local service differs sufficiently from trunkline service to require the specialized attention of management, the Board undertook to frame the local carriers' certificates in a fashion designed to ensure that they would not depart from that original objective. In terms of certification, the earliest distinction between local and trunk carriers was the fact that the former—unlike the trunks—were normally obliged to provide service to every point on each route segment over which they were certificated. In addition, the certificate of each local carrier con-

\textsuperscript{14} 69 Stat. 49 (1955), \textit{repealed}, 72 Stat. 806. The amendment provided limited grandfather rights for the local service carriers.

\textsuperscript{15} See discussion \textit{infra} in the text.

\textsuperscript{16} 6 C.A.B. 1, 4 (1944).

\textsuperscript{17} These decisions originated with Rocky Mountain States Air Service, 6 C.A.B. 695 (1946), which also has the distinction of being the Board's first "area" investigation (see discussion \textit{infra} note 37). They include such proceedings as Additional California-Nevada Service, 10 C.A.B. 405 (1949); Arizona-New Mexico, 9 C.A.B. 83 (1948); Middle Atlantic Area, 9 C.A.B. 131 (1948); Southeastern States, 7 C.A.B. 863 (1947); Great Lakes Area, 8 C.A.B. 360 (1947); Florida, 6 C.A.B. 756 (1946); West Coast, 6 C.A.B. 961 (1946); New England, 7 C.A.B. 27 (1946); Texas-Oklahoma, 7 C.A.B. 481 (1946); North Central, 7 C.A.B. 639 (1946). For a convenient summary of the authority awarded by this line of decisions, see Gurney, \textit{The Development and Progress of the Local Service Airline Industry}, 6 S. D. L. REV. 79, 80-85 (1961). A commentary regarding the Board's attitude towards competition as reflected in these early cases appears in Westwood, \textit{supra} note 11, at 5-11.

\textsuperscript{18} Rocky Mountain States Air Service, 6 C.A.B. 695, 736-37 (1946).
tains language which constitutes the rendering of short-haul service a condition of accepting the certificate. 19

These relatively rigorous standards to enforce the local character of local air service, which were initiated in the years following World War II, have been substantially modified by time. As an example, the Board has accorded the local carriers increasing flexibility to overfly—or even to delete—points originally named in their certificates. The problems which this trend poses for smaller communities are considered below.

Through the years additional factors have operated to alter the context of local airline regulation. The movement of population from rural to urban areas has reduced the traffic-generating capacity of a number of smaller communities and thereby made them less attractive to the carriers. Yet, the concomitant reduction in surface modes of public transportation (as passenger rail service is curtailed and buses tend to concentrate on express routings which by-pass smaller points) frequently renders these communities increasingly dependent upon air service. Conversely, the proliferation of our national system of high-speed highways has made the automobile a feasible alternative to air transportation over short distances. Also, the strenuous efforts of rural communities in recent years to attract new industry have considerably complicated the prevailing trends in population movement and economic growth. These factors, although extraneous to the airlines industry, nonetheless impinge upon it and significantly affect the course of its development.

C. The Changing Role Of Local Air Carriers

The foregoing observations are sufficient to suggest the extent to which the nature and environment of the local service airlines industry have altered in the years since the original certifications were awarded. The economic resources and operating experience of the local carriers have vastly increased; they have acquired aircraft of markedly different operating and economic characteristics; and the traffic patterns throughout their route systems have altered. The regulatory attitudes of the CAB have also been modified over the intervening two decades. Under these circumstances, especially in recent years, it is scarcely surprising that the role of the local carriers has been changing.

Certain aspects of this change are directly relevant to the present inquiry. By conditioning the attitudes of the communities, the carriers and the Board, they have substantially affected the formulation of 19Pt. 399.10 of the Board's Statements of Policy (14 C.F.R. § 399.10) specifies that the Board will include in the certificate of each local carrier a condition in essentially the following terms:

This certificate is issued pursuant to a determination of policy by the Civil Aeronautics Board that, in the discharge of its obligation to encourage and develop air transportation under the Federal Aviation Act of 1958, as amended, it is in the public interest to establish certain air carriers who will be primarily engaged in short-haul air transportation as distinguished from the service rendered by scheduled trunkline air carriers. In accepting the certificate, the holder acknowledges and agrees that the primary purpose of the certificate is to authorize and require it to offer short-haul air transportation services of the character described above.
policy regarding service at smaller communities. The most important of these factors from the viewpoint of the local carriers has been their increasing desire to enter the denser and longer-haul markets which promise greater profits. All of the locals appear to share this objective, although in differing degree. Their attitude has provoked a lively discussion regarding both the legal and the policy issues involved.

A related factor conditioning the attitudes of the carriers and the Board has been the technological innovation mentioned above. The advent of new aircraft has affected these attitudes in several respects, not all of them consistent. It is evident that the ability of the local carriers to acquire larger and faster equipment has reinforced their determination to seek denser and longer-haul markets. There is also a prospect that the carriers may seek to force the Board to award them these new markets by purchasing aircraft which cannot be operated economically over their present systems. The Board's understandable reluctance to be maneuvered into this dilemma is complicated by the fact that, since the local carriers are subsidized, uneconomic utilization of their equipment may increase the cost to the federal government. While the Board can decline to subsidize equipment acquisition policies of which it disapproves, the exercise of this prerogative may not resolve the practical problem of subsidy.

The introduction of new aircraft creates additional complications. On the one hand, smaller jets offer the possibility of economic service over shorter distances than the first generation of jet equipment would permit. More sanguine observers have concluded that the consequence will be to improve service at least to cities of intermediate size. But the new aircraft are economical only where traffic exceeds the levels which many smaller communities can generate. Moreover, the trunks also are acquiring the new equipment, with the result that they are regaining an interest in serving medium-sized markets which formerly they might have sought to transfer to the local carriers. The competitive implications of this

---

20 Some of the locals, like Frontier, have been vigorous advocates of a policy of new route authorizations which, if granted by the Board, would render these portions of their operations essentially indistinguishable from those of the trunks. See, e.g., Frontier's position in the Pacific Northwest-Southwest Service Investigation, CAB Docket No. 15459 et al. The energy with which Frontier has urged its views has brought it to the attention of the general press; an example is Bus. Week, 3 Sept. 1966, at 90 et seq. Other local carriers have proceeded somewhat more cautiously, arguing that although they should be strengthened by additional authority in lucrative markets, they should nonetheless retain their primarily local character to avoid disadvantageous competition with the trunks. See, e.g., Aviation Week & Space Technology, 7 Mar. 1966, at 185. The local carriers have identified a number of city-pair markets of less than 300 miles in which they desire nonstop authority; see Review of the Local Air Carrier Industry 19. Compare Barnes, Airline Subsidies—Purpose, Cause and Control, 26 J. Air L. & Com. 311 (1959); 27 J. Air L. & Com. 29 (1960), asserting that one method of reducing the subsidy dependence of local carriers must be to accord them increased access to denser markets.

21 See, e.g., Review of the Local Air Carrier Industry, 15, 19, 24. One aspect of the legal issue is reflected in the recent controversy concerning the Board's expedited procedure for granting local carriers nonstop authority not otherwise permitted by their certificates. See Reg. No. PR-104, effective 19 January 1968.

22 As a competitive matter, there are at least two reasons for the changing attitude of the trunks. One is the point made in the text, that the smaller jets may render some of these medium-
alteration in the attitude of the trunklines has troubled the Board, which has traditionally been skeptical of competition between the two classes of carriers.

Finally, the factors discussed above have a major impact on the attitudes of the smaller communities themselves. Those communities large enough to receive service by a trunk carrier, or with sufficient traffic to support the smaller jets, may be gratified by the prospect of being served by more efficient equipment. But communities which are uncertain whether their traffic-generating capacity will suffice for jet service—or possibly for any certificated service—are faced with the unattractive prospect of risking an extensive financial commitment in improved airport facilities to accommodate the new equipment, without the assurance of retaining service once the commitment has been made. Both small and medium-sized communities are frequently disturbed by the growing interest of the local carriers in the bigger and more lucrative markets, which they fear may tend to diminish the locals' interest in improving service over other portions of their route systems.

These uncertainties and divergent views are partially a product of the historical evolution of the airlines, and particularly of the local service airline industry. They derive from, and inevitably interact with, economic and technological factors which federal regulatory policy can often only indirectly affect. They form part of the frequently intractable context in which the Board must operate. It is therefore in this context that the Board's regulatory endeavors must be assessed.

sized markets profitable. The other is that typically a significant proportion of the traffic moving in these intermediate markets is bound for destinations beyond the city-pair in question. If the trunk serves the "beyond" portion of the routing, its retention of the initial portion gives it an advantage over its trunkline competitors in carrying the traffic throughout the entire journey.

Various estimates are available as to the cost of upgrading airports to handle more modern aircraft. The Association of Local Transport Airlines has made recent studies of this question, see Hearings on the Federal-Aid-to-Airports Program Before the Aviation Subcomm. of the Comm. on Commerce, 89th Cong., 2d Sess. 46 et seq., (2-3 May 1966), hereinafter referred to as Hearings on Federal-Aid-to-Airports Program. The Airport Operators Council estimates at 41 that airport improvements may require as much as four to ten years to complete. The Federal Aviation Administration advises that an aggregate investment of $300 million would be required to enable airports served by local carriers to accommodate the DC-9 equipment which both the trunks and the locals are currently placing in service:

Review of the Local Air Carrier Industry 71. The FAA had previously found at 70 that $75 million to $100 million would be required to upgrade those airports to handle turboprop equipment.

On the other hand, failure to enplane sufficient passengers to meet the Board's "use it or lose it" standards or to prevail in an airport consolidation proceeding (see discussion infra in the text) may result in the loss of certificated service despite the airport improvements. For a number of communities this is an unpleasant choice.

Expressions of community concern are too numerous to cite. They pervade the CAB's route proceedings and the periodic Congressional inquiries into the subject of certificated air service. Among the more recent spokesmen for these views is the Local Airlines Service Action Committee, hereinafter cited as LASAC, an association supported by a number of smaller communities throughout the nation.

As an example of the impact of one of these factors (the advent of new aircraft) upon regulatory attitudes, see Boyd, The Promotion of Civil Aeronautics and the CAB, 31 J. Air L. & Cos. 126, 128 (1965):

[T]he arrival of these planes will bring to a head extremely important policy choices for the CAB.

A large number of smaller points have been transferred from the trunklines to the
At the beginning of 1967, there were 64 separate route proceedings pending before the CAB. They included approximately 300 applications by carriers and communities. An additional 370 domestic route applications awaited initial action by the Board. Many of these proceedings are important to smaller communities across the nation. For some, they offer the prospect of new or improved service; for others, they pose the risk of reducing or deleting service which presently exists.

In view of the large number of communities and markets involved in these proceedings, it is not surprising that issues relating to air service arise in a diversity of forms. A single proceeding may require resolution of such distinct problems as the restructuring of a carrier's entire route system; the award of new or additional authority; the suspension, termination or transfer of existing authority; the competitive implications of proposed new authority as between local carriers, trunk carriers or both (not only with respect to selection between applicants but also with reference to prospective competition between an applicant and an established carrier); loss of service at a community through the application of either "use it or lose it" standards or airport consolidation policies; and the possible improvement or reduction in service to terminal or intermediate points which could result from granting increased operating flexibility to one or more carriers. Both the number and the interrelationships of these issues render such proceedings highly complex.

From the viewpoint of the communities concerned, four general categories of issues may be distinguished in CAB route proceedings. They relate to (1) new or additional service, (2) the adequacy of existing service, (3) the use of such service, and (4) the modification of service. The inter-

---


28 One survey has estimated that, as of early 1966, approximately 200 communities faced possible reduction or elimination of air service. These communities comprised 100 points which failed to satisfy or only marginally satisfied "use it or lose it" standards and another 100 points which were vulnerable to airport consolidation because they were located within 50 miles of another airport. See LASAC testimony, Review of the Local Air Carrier Industry 371. The three principal areas of concern to communities have been classified by LASAC as the "use it or lose it" policy, airport consolidations and the transfer of trunkline points to local service carriers.

29 In the last several years, the CAB has increasingly tended to institute proceedings which comprise a general review of the total route system of the local carrier principally involved. The Board has recently noted that the "major portion" of its activities relating to local service carriers is currently of this nature. See CAB, Annual Report for Fiscal Year 1966 4-5 (1966). This trend continued during 1967; see CAB, Annual Report for Fiscal Year 1967 7-8 (1967).
relationships between these categories are evident, and the classification of a particular issue may occasionally be arbitrary. Nonetheless, for purposes of present discussion the classifications are convenient.

A. The Issue Of New Or Additional Service

There are three general procedures by which the issue of new or additional domestic service may be raised. A carrier may file an application to provide such service pursuant to Section 401(a) and (b) of the Act and Part 201 of the Board's regulations. A community may apply to receive such service by invoking Section 401(g) of the Act, which authorizes the Board to modify a carrier's certificate "upon complaint" if the public convenience and necessity so require. In either case, the Board retains broad discretion as to the disposition of the applications. Finally, the Board may initiate a route proceeding upon its own motion where it deems such action appropriate.

The last of these procedures has assumed increasing importance in recent years. It accords the Board substantial flexibility in designing the investigation to conform to its concept of the issues requiring review. By this means, the Board may either select one or more pending applications for joint consideration, or initiate an inquiry where no application has been filed, or combine pending and new issues as it sees fit. As a formal matter, it may achieve this result by issuing either an order of investigation or an order to show cause.

Investigations involving new or additional service take one of two general forms. They may relate to service at specific communities or in specific geographic areas. Because of the scale and complexity of the "area" approach, any loss or diminution of air service is by definition a modification of service; yet the proceeding which produces that result may have been instituted because of doubt as to whether the service was being sufficiently used. Similarly, a community confronting a "use it or lose it" proceeding may often respond by filing a complaint concerning the adequacy of the service it has been receiving. Whether or not the issues are tried together as a formal matter, they are obviously interconnected in fact. As suggested previously in the text, route realignment cases have assumed increasing importance in recent years. The original "area" investigation was Rocky Mountain States Air Service, 6 C.A.B. 695 (1946). Numerous area proceedings have been conducted in the past several years. A recent illustration is the massive Pacific Northwest-Southwest Service Investigation, CAB Docket No. 15419, which—subject to certain pre-set restrictions—has examined the entire question of service between the Southwest and the Northwest, as well as traffic moving between the Northwest and beyond-area points in the Eastern portion of the United States.
AIR SERVICE TO SMALL COMMUNITIES

proach, there is some evidence that the Board is inclining towards more frequent use of proceedings confined to designated points and markets; yet the route realignment cases presently pending with respect to certain of the local carriers necessarily entail consideration of service throughout the geographic region in which the carrier operates.\(^{28}\)

One of the procedural issues which concerns communities seeking new or additional service is the lack of more explicit criteria regarding the Board's selection of applications for hearing. Since applications need not be heard in chronological sequence of filing, communities sometimes feel that they have no effective means of ensuring that their service requests will be acted upon.\(^{40}\)

B. The Issue Of Adequacy Of Service

Section 404(a) of the Act obliges every air carrier "to provide and furnish interstate . . . air transportation, as authorized by its certificate, upon reasonable request therefor . . . ."\(^{41}\) A community may seek to invoke

---

\(^{28}\) Regardless of the nature of the proceeding, substantial questions customarily arise at the outset regarding its scope. One of the most difficult involves the so-called Ashbacker problem, which derives its name from the decision of the United States Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). The Court there held, in effect, that where two applications are filed seeking the same authorization, considerations of procedural due process require that both be heard before either is granted. As applied to CAB route proceedings, the principle is frequently invoked by applicants desiring to have their applications consolidated for consideration in a pending proceeding. The applicants normally contend that Ashbacker requires such consideration because an award to another carrier would, as a matter of economic fact, preclude the authority they seek.

Irrespective of the merits of these contentions in specific instances, the dilemma in which they place the Board may be very real. If it does not expand the scope of the proceeding to accommodate all applications that might otherwise be prejudiced, its failure to do so may be vulnerable upon subsequent judicial review. If, in order to avoid this risk, the Board imposes certificate restrictions upon any award of new authority, it may severely limit the usefulness of the new service to the public and its economic feasibility for the carrier. The procedural quandary in which the Board may find itself is illustrated by Delta Air Lines v. CAB, 228 F.2d 17 (D.C. Cir. 1951).

The courts have responded to this difficulty by according the Board some flexibility in resolving Ashbacker problems. See, e.g., Eastern Air Lines v. CAB, 243 F.2d 607, 609 (D.C. Cir. 1957), holding that "despite Ashbacker it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding." A recent decision to the same effect is Frontier Airlines v. CAB, 349 F.2d 587 (10th Cir. 1965), upholding the Board's refusal to consolidate certain of Frontier's applications into the Pacific Northwest-Southwest Service Investigation. See also National Airlines, Inc. v. CAB, 10 Av. Cas. 17,735 (D.C. Cir. 1968).

Apart from the Ashbacker issue, the Board possesses considerable discretion in controlling the scope of its proceedings. On the one hand, it is free to weigh the beyond-area benefits offered by the applicants, Delta Air Lines v. CAB, 275 F.2d 632 (D.C. Cir. 1959); Frontier Airlines v. CAB, 259 F.2d 808 (D.C. Cir. 1958); Eastern Air Lines v. CAB, 243 F.2d 607 (D.C. Cir. 1957). On the other hand, it may exclude issues from a proceeding in accordance with reasonable criteria for selection, City of San Antonio v. CAB, 374 F.2d 326 (D.C. Cir. 1967). In the latter instance, the Court concluded that the criteria for selection upon which the Board relied were reasonably related to the legitimate objective of the proceeding and that the case "had to be kept within manageable limits lest the Board be paralyzed in performing its function." The decision emphasized that the Ashbacker issue had not been raised by petitioners.

\(^{40}\) Frontier Airlines v. CAB, 349 F.2d 587 (10th Cir. 1965). The language of Section 401(c) of the Act, directing the Board to process applications "as speedily as possible," does not compel hearing in the sequence of filing. The Board's guidelines relating to priorities of hearings are set forth in 14 C.F.R. 399.60 (1967).

\(^{41}\) Some commentators have suggested that the absence of specific criteria controlling the sequence for hearing route applications, may not only disadvantage communities and carriers whose applications are passed over, but may also have the effect of relieving the Board of one incentive towards comprehensive route planning. See Jones, Licensing of Domestic Air Transportation, 30 J. AIR L. & COM. 113 (1964) and 31 J. AIR L. & COM. 89 (1965).

this statutory directive pursuant to the applicable provisions of the Board's economic regulations.\footnote{46}

Section 404(b) of the Act forbids an air carrier to give "any undue or unreasonable preference or advantage to any particular . . . locality" or to subject such locality to "any unjust discrimination or any undue or unreasonable prejudice or disadvantage . . . ."\footnote{47} Although Section 404(b) has more commonly been invoked in instances of alleged discrimination in fares and charges, it theoretically comprises a distinct basis for a complaint by a community which believes that it is receiving an unreasonably low standard of service relative to communities similarly situated.

In practice, communities have succeeded in invoking the foregoing statutory provisions only at the discretion of the Board. As a result, there have been very few adequacy of service cases\footnote{48} despite the fact that communities have filed numerous complaints.\footnote{49}

The issue of adequacy of service includes several aspects of concern to communities. One is the difficulty of defining and securing adherence to minimum standards of service. The Board's original policy was expressed in the Texas-Oklahoma case,\footnote{50} which announced the general rule that less than two round trips daily would not be considered adequate. Since that decision there have been a number of instances in which carriers have provided less than this specified level of service.\footnote{51} More recently, however, the Board has evinced an inclination to return to the original standard.\footnote{52}

A second aspect of service adequacy which concerns communities relates to a carrier's authority to overfly intermediate points. Although—as

\footnote{46}{14 C.F.R. § 302.700-05 (1967).}
\footnote{47}{72 Stat. 760, 49 U.S.C. § 1374(b) (1964).}
\footnote{48}{See, e.g., National Airlines v. CAB, 300 F.2d 711 (D.C. Cir. 1962); Capital Airlines v. CAB, 281 F.2d 48 (D.C. Cir. 1960); Washington-Baltimore Adequacy-of-Service Investigation, 30 C.A.B. 1211; Aff'd sub nom., 32 C.A.B. 239 (1960); Flint-Grand Rapids Adequacy of Service Investigation, 10 C.A.B. 1120 (1960); Toledo Adequacy-of-Service Investigation, 10 C.A.B. 169 (1969), Aff'd sub nom.; Fort Worth Investigation, 27 C.A.B. 260 (1958). For an unsuccessful attempt to rely on Section 404(b), see Reopened Charleston-Columbus Case, 26 C.A.B. 300 (1958), Aff'd sub nom., Greensboro-High Point Airport Authority v. CAB, 262 F.2d 689 (D.C. Cir. 1958).}
\footnote{49}{For a useful discussion of adequacy of service proceedings as they appeared several years ago, see Note, Adequacy of Domestic Airline Service: The Community's Role in a Changing Industry, 68 YALE L.J. 1199 (1959). Recent testimony of Vice Chairman Murphy implies that the Board will not be receptive to further adequacy of service cases; see Adequacy of Trunkline Air Service to Medium-Sized Intermediate Cities 37 et seq.}
\footnote{50}{For some attempt has been made by communities to avoid the procedural uncertainties of Section 404 by initiating complaints pursuant to Section 1002 of the Act. These complaints in effect allege noncompliance by the carrier with its statutory obligation to provide service. Although the Board has authority to issue compliance orders in accordance with Section 1002(c) of the Act, it is not clear that this alternative statutory device has proved particularly successful from the communities' point of view.}
\footnote{51}{7 C.A.B. 481 (1946).}
\footnote{52}{As of the date of the Subsidy Reduction Report 2, there were 42 points receiving less than this minimum service.}
\footnote{48}{Id., stating that the Board's policy will be "to require and subsidize a minimum of two daily round trips at practically every intermediate point." To the same effect, at 4, 9, 14, 21-22. The Report makes clear that the objective is limited to assuring each community this level of service in its major market. It also suggests that in certain instances a single round trip may (as in the past) be found sufficient. Id. at 17. To a similar effect see former Chairman Murphy's testimony, Review of the Local Air Carrier Industry 37.}
\footnote{49}{Normally the issue of service adequacy will be assessed in light of the service offered by other carriers, unless the carrier complained of has made no discernible attempt to provide service; see Capital Airlines v. CAB, 381 F.2d 48 (D.C. Cir. 1960).}
AIR SERVICE TO SMALL COMMUNITIES

noted above—local service carriers were originally expected to serve all intermediate points on each route segment, exceptions to this standard have been authorized with increasing frequency as conditions in the industry have altered. Authority to overfly intermediate points is, of course, a benefit to terminal-to-terminal passengers. But it may present a serious problem at intermediate points where service is thereby curtailed. The absence of a hearing with respect to this issue has also disturbed some communities, as have recent efforts by local carriers to obtain so-called “area” certificates which would provide greater flexibility in serving—or overflying—intermediate points within their route systems.

A third aspect of service adequacy involves the scheduling of flights. CAB route proceedings and legislative hearings contain extensive testimony by communities to the effect that, even where minimum standards of frequency are met, service may be rendered less than fully usable due to inconvenient scheduling. Complaints include scheduling at inconvenient hours, failure to coordinate schedules with connecting flights and frequent schedule changes without advance publicity. A related problem involves the operation of equipment too small to accommodate peak loads, especially on multi-stop routings.

There is an obvious correlation between the adequacy and the use of service. Communities which are concerned with maintaining the quality of their service are especially apt to be critical of service which they regard as inadequate to generate the traffic levels necessary to assure its retention. Indeed, the characteristic response of a community, faced with reduction or loss of its air service, is to assert that the carrier’s failure to provide better scheduling and more frequent flights has artificially decreased traffic.

While a carrier requires authorization from the Board to omit points at which its certificate would otherwise compel service, the “change of service pattern” procedure which the regulations provide for this purpose does not require a hearing. But notice must be given to all parties affected. 14 C.F.R. § 202.4 (1967). As noted supra note 21, the extent to which skip-stop authority may now be easier to obtain pursuant to recent modifications in the Board’s regulations, has been the subject of vigorous dispute between the locals and the trunks.

See, e.g., Central Airlines Route 81 Investigation, CAB Docket No. 16196.

For one of many illustrations, see Review of the Local Air Carrier Industry 432-33. A discussion of the principal components of scheduling convenience, as viewed by the Board, appears in Subsidy Reduction Report 13-16.

Examples are too numerous to cite in detail. A typical complaint appears in Review of the Local Air Carrier Industry 74 et seq., suggesting that the carrier’s deteriorating service to the community reflects its desire to delete the point from its certificate. See also Southwestern Area Local-Service, CAB Docket No. 10758; West Coast “Use It or Lose It” Investigation, CAB Docket No. 13415; Michigan Points “Use It or Lose It,” CAB Docket No. 14668.

An extensive enumeration of asserted service deficiencies on a point-by-point basis appears in testimony of the Airport Operators Council, Adequacy of Trunkline Air Service to Medium-Sized Intermediate Cities 158-67.

To remedy service deficiencies, a number of communities have joined in urging legislation which would require the CAB (a) to formulate standards of adequacy based on periodic reports of relevant factors, (b) to supervise these standards on a continuing basis and (c) to enforce compliance by the carriers through the mechanism of notices of deficiency. See Adequacy of Trunkline Air Service to Medium-Sized Intermediate Cities 113, 355-56.

Proposed legislative language appears in testimony of the Airport Operators Council, Review of the Local Air Carriers Industry 333-34.
C. The Issue Of Use Of Service

The earliest cases involving local carriers treated this class of service as experimental and expressed the view that the service provided should be balanced against the resulting subsidy cost. But it was not until the following decade that the Board undertook to translate this principle into quantitative terms. In *Southwest Airways Company, Permanent-Certificate*, the Board concluded that if an intermediate point generates approximately 300 enplaned and deplaned passengers monthly it is defraying a reasonable portion of the cost of the service it receives. Although this standard was initially employed as a test for permanent certification of a point on a local carrier's routing, it was soon invoked to determine whether a point or route segment should retain newly certificated service. In this latter context, it became known as the "use it or lose it" policy. Technically, the standard provides that if a newly certificated local service point fails to originate an average of at least five passengers daily during the year following the initial six months of operations, the Board will institute proceedings to suspend or terminate the service in the absence of "unusual or compelling circumstances." In the case of a newly certificated route segment, the Board will take comparable action if the segment fails to generate at least five passengers per flight. As a practical matter, the Board has applied this standard to communities and route segments whether or not they are newly certificated. It has also made clear that maintenance of the minimum standard is not sufficient to assure continued service; in particular, a traffic level of five to seven passengers per day or per flight is vulnerable to suspension or termination proceedings at the Board's discretion.

Since the "use it or lose it" policy originated as a mechanism for balancing the need for service against subsidy cost, it is natural that whenever the Board is especially concerned with subsidy reduction it tends to emphasize the desirability of deleting service at points which do not meet the traffic-generating standard. A recent Chairman of the CAB has commented that approximately half of the recent shift in the operations of local carriers towards higher density markets has been due to the deletion of service at communities failing to meet the "use it or lose it" test.

Proponents of the policy approve it on the ground that it places upon the community the ultimate responsibility for justifying the service sought. Critics suggest, however, that unless flexibly applied, the policy may fail to recognize the dependence of traffic upon adequate service and the resulting ability of the carrier to affect the outcome of a "use it or lose it"
it" case. They also criticize the fact that the policy is formulated wholly in terms of passenger traffic, without reference to the volume of mail and cargo which the community may generate.

It has been mentioned that the "use it or lose it" policy permits exceptions in unusual circumstances. A number of such exceptions have been recognized by the Board. They include the isolation of the community, the inhibiting effect of prior inadequate service, the growth potential of the community, its continued profitability to the local carrier, the anticipated stimulative effect of improved equipment, national security considerations and a substantial history of service at the point.

D. The Issue Of The Modification Of Service

The three broad categories of issues summarized above all involve the modification of service in one or another form. There are, however, additional circumstances in which the Board may alter the service provided by a carrier. The basic statutory provision is Section 401(g), which authorizes the Board to "alter, amend, modify, or suspend" the certificate of any carrier if the public convenience and necessity so require. The Board has invoked this statutory provision on numerous occasions.

Certificates may be altered through abandonment by the carrier, upon notice and hearing, where such action is found to be in the public interest. The Board may also approve the transfer of a certificate from one carrier to another. The latter procedure is frequently invoked by agreement between a local and a trunk carrier, where the trunk wishes to terminate service at a point or over a routing and the local desires to acquire the authority. Finally, the Board possesses substantial authority to modify service through the exercise of its exemption powers.
From the viewpoint of smaller communities, one of the most significant forms of service modification is airport consolidation. In recent years, both the CAB and the Federal Aviation Administration have supported a policy of consolidating air service at regional airports which can be utilized by two or more smaller communities located in convenient geographic proximity. At least until recently, the CAB has reiterated its support of this policy on numerous occasions. Communities contemplating the transferral of their air service from an adjacent to a more distant airport frequently tend to take a contrary view. Although the number of area airport cases is limited, this issue often is included as part of the broader route realignment proceedings.

IV. Regulatory Policies In Theory And Practice

It has been suggested that the articulated and actual criteria employed by the Board in cases involving the public's need for air service do not always give primacy to that factor. This conclusion may best be tested by first reviewing the articulated standards, and thereafter by examining the results of the decisions in which these standards appear.

A. The Articulated Policy


The joint CAB-FAA press release dated 2 May 1961 (CAB Press Release No. 61-17, FAA Press Release No. 32), announced that both agencies favor airport consolidation where the communities involved can be conveniently served through one airport, and the use of two airports would tend to diminish service at each and would increase air travel costs. The release was followed by Greensboro/High Point/Winston-Salem, Service through a Single Airport, 34 C.A.B. 227 (1961), in which the Board ordered consolidation of service to the three points on the ground that "national interest in the development of a sound air transportation system" prevails over (although it includes) the interests of carriers and communities in regional airport cases. The Board's decision was affirmed in Airport Commission of Forsyth County v. CAB, 300 F.2d 185 (4th Cir. 1962), in which the court found "substantial evidence" to justify the result. To a similar effect, Outagamie County v. CAB, 351 F.2d 900 (7th Cir. 1966). But see judicial reversal of the Board on a comparable issue in City of Lawrence v. CAB, 343 F.2d 583 (1st Cir. 1965).

In a number of instances carriers have been authorized to serve one community through an airport located elsewhere. See 14 C.F.R. § 202.3 (1967), relating to airport notices and applications for permission to use an airport. The cases include, inter alia, Service to Springfield, 11 C.A.B. 747 (1956); Flying Tiger Line, Air-Trust Service, 30 C.A.B. 242 (1959); and Airport Notice Filed by Eastern Air Lines, CAB Docket No. 17424, CAB Order No. E-24132 (29 Aug. 1966).

See, e.g., Subsidy Reduction Report, supra note 8, at 2, 4, 23-24 and Appendix 2; testimony of Colonel John W. Dregge, Director of the CAB's Office of Community and Congressional Relations, Hearings on Federal-Aid-to-Airports Program 33-34.

Increasing traffic congestion at larger airports throughout the United States, and probably other factors as well, may be causing the CAB to modify its application of the "regional airport" policy. There are recent intimations that the existence of more than one airport within a region may be viewed by the Board as desirable to alleviate congestion at a single terminal.

See discussion between Alan S. Boyd, then Under Secretary of Commerce for Transportation, and Senator Monroney regarding the difficulties of persuading communities to accept the regional airport concept, Review of the Local Air Carrier Industry 26-27.

The CAB, Annual Report for Fiscal Year 1966 6-8 (1966), states that in a number of instances "issues of this nature have been folded into the broader route realignment proceedings where they can be more adequately assessed along with the overall need for strengthening the local-service carriers and improving route structure." One observer has also suggested that the carriers' preference as to choice of airports was an underlying factor in two of the adequacy of service cases decided in the past decade. See, R. Caves, supra note 11, at 443.

"Comparative cost analysis of the CAB and its predecessor, the RFC, was an underlying factor in many of the service to rural areas and small cities cases decided during this period," see supra note 11, at 441.
addressed by Congress to the Board. Essentially Section 102 requires the Board not only to regulate but also to promote air transportation. Its objectives are to achieve both "adequate, economical and efficient" air service and "sound economic conditions" in the airlines industry. The product of the regulatory process is to be an air transportation system commensurate with the "present and future needs of the foreign commerce of the United States" as well as of the postal service and the national defense.

Section 102 indisputably includes a concern for the needs of the traveling public. Yet it affords no precise guidance as to policy. Its standards are not only broad, after the fashion of many legislative preambles; they are also potentially inconsistent. The courts, therefore, have held that the Board's mandate pursuant to Section 102 is to balance the multiple statutory objectives in light of the public benefits to be derived.

Having sought to suggest in general terms the nature of the public interest with which the Board is to concern itself, the Act makes frequent reference to this standard. To cite only the provisions relating specifically to route authority, Section 401(d) (1) conditions the award of a certificate upon a finding both that the carrier applicant is competent to perform the service and that the service is required by the "public convenience and necessity." Section 401(e) (1) obliges the Board to include in the certificate such restrictions as the "public interest" may require. Section 401(e) (4) preserves the freedom of a carrier to alter schedules, equipment, accommodations and facilities insofar as such alterations accord not only with the carrier's business interests but also with the "demands of the public." Section 401(g) authorizes the Board to modify, suspend or terminate all or part of a certificate "if the public convenience and necessity so require." Section 401(h) forbids the transfer of certificates unless the Board finds such action "consistent with the public interest." The same is true of a carrier's request to abandon all or part of a route pursuant to Section 401(j). Section 404, varying the language but preserving the concept, requires the carriers to furnish air transportation "upon reasonable request therefor" and prohibits "undue or unreasonable preference or advantage" in the provision of such transportation.

The Act thus places major emphasis on the "public interest" and the "public convenience and necessity." Yet the language of Section 102 suggests that these terms, so frequently referred to by the legislative drafts-

---

76 See, e.g., R. CASES, supra note 11, at 127: "An economist is prone to notice immediately that policies designed to maximize or optimize the achievement of one of these goals may not achieve the same result for some or all of the others." This perception is not confined to economists.

77 Outagamie County v. CAB, 355 F.2d 900 (7th Cir. 1966); United Air Lines v. CAB, 198 F.2d 100 (7th Cir. 1952).


men, are intended to connote something more than, although they clearly include, attention to the requirements of the traveling public. As a result, while concurrent pursuit of the statutory objectives may generate occasional dilemmas, it also affords substantial scope in balancing these objectives.\[^{85}\]

The Board has availed itself of this latitude in numerous respects. It has, for example, construed the statute as directing that certificated air service be provided to more communities than the level of traffic could attract in a wholly unregulated and unsubsidized industry. It has also allowed itself considerable leeway in interpreting the statutory mandate concerning competition—although here its successive modifications of policy have sometimes tended to impede the consistent pursuit of other objectives.\[^{86}\]

Similarly, the Board's attitudes towards subsidy reduction have frequently affected other statutory goals.\[^{87}\]

In conducting its business pursuant to the Act, the Board has from time to time enunciated general standards of policy for the guidance of interested parties.\[^{88}\]

Three of these policy statements, which have been adverted to above, are relevant for present purposes. The first confirms the local character of local air service.\[^{89}\]

The second defines the quantitative standards by which the Board determines whether the use being made of air service by a community or over a route segment justifies continued subsidization.\[^{90}\]

The third summarizes the Board's criteria for determining the sequence in which it will assign pending matters for hearing.\[^{91}\]

All of these issues are of obvious concern to communities which seek to maintain or improve existing air service or to obtain new service.

The language of the Board's decisions has similarly emphasized the needs of the traveling public.\[^{92}\]

We have seen that the earliest cases involving local air service undertook to identify some of the "public interest" factors which the Board will consider in deciding whether service should be instituted or improved.\[^{93}\]

These include the availability and comparative convenience or inconvenience of surface transportation, the distances be-

\[^{85}\] A former Chairman of the CAB has recently observed that the Board's three-fold objective regarding local air service (improved service, carrier strengthening and subsidy reduction) are difficult to achieve simultaneously. See Review of the Local Air Carrier Industry 28.

\[^{86}\] See references infra in the text. Judge Friendly has described the Board's various views concerning competition in The Federal Administrative Agencies: The Need for a Better Definition of Standards 1075 et seq. He remarks that "there would seem to be only three readings of [the statutory provision regarding competition] in any way meriting consideration; as we shall see, the Board, at various times, has employed them all, and perhaps others as well." Id. at 1075.

\[^{87}\] See discussion infra in the text.

\[^{88}\] These statements of policy are collected in 14 C.F.R. Part 399 (1967).

\[^{89}\] See note 19 and accompanying text.

\[^{90}\] 14 C.F.R. § 399.11 (1967); see text at note 34 and following.

\[^{91}\] 14 C.F.R. § 399.60 (1967); see text at note 39.

\[^{92}\] So also have the statements of Board members. See, e.g., former Chairman Murphy's testimony that the Board continues to have a "primary interest in how is the service going to be provided to the little towns and the loss points," Review of the Local Air Carrier Industry 45. A similar statement appears in a recent speech by Mr. Murphy to the Washington Conference on Business-Government Relations of the American University (17 Apr. 1967) in which he characterizes the Board's role as "guardian of the public interest" and concludes: "It sometimes happens that in the matter at hand no other party or participant is especially charged with protecting the public interest or urging us in that direction. In these cases, our special responsibility is very special indeed, and I hope we will never shirk it."

\[^{93}\] See text following note 17.
tween the community in question and the point or points comprising its principal markets, and any unusual circumstances which might tend to isolate the community from these points unless adequate air service is available.94

Through the years, the Board has expanded and refined these criteria in numerous subsequent decisions. As might be expected, it has considered them in conjunction with additional articulated standards to which it also frequently adverts. A review of the cases suggests that the relevant factors comprise four principal categories: The needs of the traveling public, the needs of the local service carriers, the needs of the trunk carriers and the subsidy factors involved.95

1. The Needs of the Traveling Public

The Board's discussion of the requirements of the traveling public may be classified under two general headings. The first consists of the various characteristics of the community at which air service is in issue. The second concerns the public need for service evaluated in light of these characteristics.

Foremost among the first group of factors is, of course, the level of air traffic generated by the community. The Board is accustomed to measure this factor in a variety of ways. It characteristically refers to the total volume of air passengers in the market or at the community in question.96 In "use it or lose it" cases, among others, it also cites the number of passengers enplaned at the community or over the relevant route segment.97 Where appropriate—for example, where a choice between local and trunk service is presented—the Board may discuss the average trip length of the passengers involved98 and the relative importance to the community of the markets in which service is being considered.99 In cases where the Board is concerned with the traffic potential at a community or over a route, it

94 Rocky Mountain States Air Service, 6 C.A.B. 695, 731 (1946). See also United Air Lines, Red Bluff Operation, 1 C.A.B. 778 (1940). For a brief review of the early cases (concluding that the "public benefit factor" is frequently subordinated to considerations of carrier strengthening and prevention of undue traffic diversion), see Note, Paramount Public Interest in Domestic New Route Cases, 14 J. AIR L. & COM. 117 (1947).
95 Because of the large number of decisions involved, and the relative continuity of the Board's articulation of the standards discussed in the text, citations can most conveniently be drawn from the more recent cases. Inclusion of the earlier decisions would not materially alter the discussion and would unnecessarily expand the footnotes. For present purposes, this somewhat arbitrary demarcation has the additional merit of emphasizing the cases decided subsequent to the Subsidy Reduction Report, which had a distinct effect upon the CAB's policy regarding service at smaller communities.
96 See, e.g., West Coast Airlines, "Use It or Lose It" Investigation and Route Realignment, CAB Docket No. 13413, CAB Order No. E-24614 (6 Jan. 1967); Reopened Service to Spokane, CAB Docket No. 9093, CAB Order No. E-24613 (6 Jan. 1967). The prior decisions are equally consistent in discussing this factor.
97 Mohawk Route 94 Realignment Investigation, CAB Docket No. 16133, CAB Order No. E-24670 (24 Jan. 1967). As in the case of total air traffic, references to enplaned passengers are equally numerous in the earlier decisions.
will also refer to traffic growth, either historical or prospective.\textsuperscript{100}

In addition to specific traffic data, the Board will occasionally cite economic characteristics of the community which relate to the question of traffic-generating capacity. One such factor is the community’s prior and prospective growth.\textsuperscript{101} Another is its status as a tourist or convention center, which the Board has in several instances recognized as tending to generate a greater requirement for air service than might otherwise be warranted by a population of comparable size.\textsuperscript{102}

There is occasional reference to factors which relate less to traffic-generating capacity than to specific need for service. An example is the isolation of the community, which has influenced the Board’s attitude since the earliest local service cases were decided.\textsuperscript{103} Similar examples are the presence or absence of alternative modes of transportation\textsuperscript{104} or an adjacent airport.\textsuperscript{105} The Board also frequently refers to the position taken by the community in the proceeding.\textsuperscript{106} Finally, unusual features of the community and its economy may be cited in instances where they appear to warrant special consideration.\textsuperscript{107}

In light of the foregoing factors, the Board will often note the number of passengers who would be benefitted or inconvenienced by the various service proposals advanced.\textsuperscript{108} It may also refer more specifically to the

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{100} Mohawk Route 94 Realignment Investigation, CAB Docket No. 16133, CAB Order No. E-24670 (24 Jan. 1967); West Coast Airlines, "Use It or Lose It" Investigation and Route Re-alignment, CAB Docket No. 13415, CAB Order No. E-24614 (6 Jan. 1967).
\item\textsuperscript{101} Service to Terre Haute, Indiana (Reopened), CAB Docket No. 13526, CAB Order No. E-21738 (1 May 1967).
\item\textsuperscript{102} Service to Lake Tahoe, California Investigation, CAB Docket No. 16132 (16 May 1966); Lower Rio Grande Valley Area Airport Investigation, CAB Docket No. 14303, CAB Order No. E-22732 (4 Oct. 1965); Mohawk Airlines "Use It or Lose It" Investigation, CAB Docket No. 14614, CAB Order No. E-21442 (26 Oct. 1964).
\item\textsuperscript{103} See text at note 94. Recent examples include Mohawk Route 94 Realignment Investigation, CAB Docket No. 16133, CAB Order No. E-24670 (24 Jan. 1967); Lake Central Airlines "Use It or Lose It" and Route Re-alignment Investigation, CAB Docket No. 14868, CAB Order No. E-22732 (27 Apr. 1966). Factor distinguished, Northeast Airlines Service to Millinocket, Maine, CAB Docket No. 8493, CAB Order No. E-20618 (6 Apr. 1964).
\item\textsuperscript{106} If a community believes that it will be affected by a pending proceeding, it will frequently undertake to make its views known either formally or informally. As a result, the Board often feels compelled to advert to these views in its decision, whether or not it follows them. No useful purpose would be served by citing the numerous cases.
\item\textsuperscript{107} National security factors afford an illustration. They have been relied upon by the Board as a principal basis for decision in several recent cases involving air transportation requirements of the National Aeronautics and Space Administration and the Department of Defense. See, e.g., Huntsville-New Orleans Nonstop Service Investigation, CAB Docket No. 11468, CAB Order No. E-21464 (22 Mar. 1966) and the award to Eastern Air Lines in Pacific Northwest-Southwest Service Investigation, CAB Docket No. 11459, CAB Order No. E-24970 (1 Apr. 1967).
\item\textsuperscript{108} Service to Terre Haute, Indiana (Reopened), CAB Docket No. 13602, CAB Order No. E-24672 (24 Jan. 1967); West Coast Airlines "Use It or Lose It" Investigation and Route Re-alignment, CAB Docket No. 13415, CAB Order No. E-24614 (6 Jan. 1967).
\end{itemize}
\end{footnotesize}
need for accommodating through passengers. It will then discuss, in virtually every proceeding, the type of service which it regards as appropriate to satisfy the needs of the traveling public.

2. The Needs of the Carriers

Although the substantive considerations involved in assessing the needs of the carriers will normally differ depending upon whether the carrier is a local or a trunk, at a verbal level the statements of the relevant issues are likely to be similar. For convenience and brevity, therefore, these issues may be treated concurrently in the present context, provided the reader recognizes (a) that the result reached by the Board in a specific proceeding will be significantly affected by the type of carrier involved, and (b) that where both types of carriers are parties to the proceeding, the resolution of the issues may be rendered considerably more complex despite their seemingly consistent verbal formulation.

Whether the carrier is a local or a trunk, the Board will frequently refer to its need for improved access to profitable markets or (if it is a trunk) its need to maintain or increase its volume of traffic. Similarly, the Board will often cite the carrier's need to be relieved of the obligation to provide service to a loss point, whether this issue arises in the context of proposals to delete trunkline service or to reduce or eliminate service

---


110 The decisions are too numerous to cite individually. Subject to exceptions in isolated instances, there appears to be general agreement among the carriers, the communities and the Board that the quality of air service ranks in the following order of ascending preference: interline connecting service, on-line connecting (single-carrier) service, and single-plane service. Quality of service is also considered to increase in direct proportion to frequency and appropriateness of scheduling (e.g., commuter service is preferred to one or two round trips daily) and in inverse proportion to the number of intermediate stops. Competitive service is normally thought to be of higher quality than service by a single carrier. In cases where single-plane service is at issue, the CAB's Bureau of Operating Rights has evolved a formula to measure quality of service by reference to the type of equipment operated, the frequency of service and the number of intermediate stops. See, e.g., CAB Docket No. 11563, Exhibit BOR-10.

111 Even where general agreement exists regarding the relative qualities of various categories of service, the interest of one community or one group of passengers may conflict with that of another. To cite an example mentioned previously, the nonstop service whichbenefits terminal-to-terminal passengers necessarily by-passes traffic at the intermediate points.

The same conflict arises in a slightly different context where the interest of beyond-area through passengers moving via a trunk carrier is contrasted with the desire of within-area passengers to receive service from that carrier which would compel intermediate stops. These and similar examples are sufficient to suggest that in many route proceedings the "need of the traveling public" is not a unitary factor but rather a broad term which may tend to obscure conflicting or only partially consonant interests. Even without reference to the other issues discussed in the text, therefore, decisions which undertook solely to satisfy the public's need for service might often be difficult to formulate.

112 Service to Terre Haute, Indiana (Reopened), CAB Docket No. 13256 (I.D., 8 Mar. 1967); Service to Greenville-Spartanburg, CAB Docket No. 13823, CAB Order No. E-24672 (24 Jan. 1967); West Coast Airlines "Use It or Lose It" Investigation and Route Realignment, CAB Docket No. 13415, CAB Order No. E-24674 (6 Jan. 1967). Factor distinguished, Reopened Service to Spokane, CAB Docket No. 9093, CAB Order No. E-24613 (6 Jan. 1967); West Coast Airlines, supra this note (with reference to one market only).

by a local carrier.\textsuperscript{118} Particularly in the former instance, the cases may discuss trends in the trunk carrier's service and load factor experience at the community where deletion is at issue.\textsuperscript{114}

A second group of factors frequently mentioned relate to the impact of the decision upon the carrier's system as a whole. These include improving its route structure,\textsuperscript{115} increasing its average stage length\textsuperscript{116} or (particularly in the case of a trunk carrier) enabling it to introduce more modern equipment into its fleet.\textsuperscript{117} In the case of a local service carrier, the Board may emphasize the desirability of rendering its operations more flexible.\textsuperscript{118}

Regardless of which type of carrier is involved, the Board may cite its attitude towards providing the service in question.\textsuperscript{119} And where the carrier seeks new or increased operating authority, especially in competition with another applicant, the decisions frequently discuss the extent to which the carrier has previously been identified with the relevant market or geographic region.\textsuperscript{120}

The issue of competition, whether between local or trunk carriers, characteristically receives careful attention whenever it is present. Particularly where both local and trunk applicants are parties to the proceeding, the Board will normally advert to the perennial question of potential competition between the two classes of carriers.\textsuperscript{121}

\textsuperscript{118} West Coast Airlines, "Use It or Lose It" Investigation and Route Realignment, CAB Docket No. 13415, CAB Order No. E-24614 (6 Jan. 1967).


\textsuperscript{118} Trans-Texas Airways Segment 7 Renewal, CAB Docket No. 14828, CAB Order No. E-23297 (28 Feb. 1966).


\textsuperscript{120} Service to Greenville-Spartanburg, CAB Docket No. 13823, CAB Order No. E-24672 (24 Jan. 1967); West Coast Airlines "Use It or Lose It" Investigation and Route Realignment, CAB Docket No. 13415, CAB Order No. E-24614 (6 Jan. 1967).

3. Subsidy Factors

The intricacies of subsidy policy lie outside the scope of the present inquiry. Yet, it is not possible to read the Board’s decisions relating to service at smaller communities without confronting this subject constantly. For present purposes, it suffices to observe that there are few, if any, decisions which do not discuss the subsidy implications of the various service proposals at issue. The airlines and the more sophisticated communities are aware of the Board’s concern with this matter, and frequently address themselves to it in their presentations.\(^2\) We shall return to the question of subsidy in subsequent discussion of the extent to which the various criteria articulated by the Board are in fact determinative of its policies respecting service at smaller communities.

The language of the Board’s decisions thus makes frequent reference to the air transportation requirements of the traveling public. Those references might suggest that a reasonably direct correlation exists between these factors and the actual results of the decisions. This question will be considered hereafter. For present purposes, we may observe that, at least on a verbal level, it is difficult to discern that the Board places any special emphasis upon the needs of the traveling public in preference to other factors as a basis for decision.

In the first place, the cases indicate that a factor is much more likely to be cited if it tends to support the decision than if it does not. While this observation might imply a high degree of consistency in the Board’s use of the articulated standards, it may also be explained by an understandable reluctance to dwell upon factors which might appear inconsistent with the decision. The latter interpretation derives some support from the further observation that the presence of conflicting factors can sometimes be ascertained only by reviewing the records of the proceedings in which they appear.\(^1\)

In the second place, an analysis of the decisions reveals that certain of the foregoing considerations are cited with markedly greater frequency than others. In terms of the broad classifications heretofore suggested, the Board’s predominant reference is to the issue of subsidy. Furthermore, since 1963 there have been very few instances in which the objective of reducing—or at least preventing an increase in—subsidy payments has not been furthered by the result.\(^1\) By contrast, references to the attitudes

---

\(^2\) For an instructive recent example in which a community’s competent treatment of the subsidy issue was an instrumental factor in the result, see joint presentation of the County of San Joaquin, the City of Stockton and the Greater Stockton Chamber of Commerce in United-Pacific Transfer, CAB Docket No. 15574.

\(^1\) It is true that, among the cases decided since the beginning of 1964, there are instances in which the Board has acknowledged that one or more of these factors may not support a decision reached on other grounds. But it is rare indeed to find a factor which is not cited far more frequently because it confirms rather than conflicts with the decision. In the post-1963 cases, the factors discussed in the text have been asserted by the Board to support its conclusion in roughly four-fifths of the instances in which they have been mentioned.

\(^1\) If each issue of service in a market or at a point is considered separately, the general objective of limiting subsidy comports with the decision in more than 80% of the cases decided since 1963. Subsequent discussion in the text indicates that the correlation approaches 100% in trunkline deletion proceedings.
of the communities appear less than half as frequently in the decisions; and where they do appear, they conflict with the result nearly as often as they support it.

There are certain criteria of concern to communities which, when they are mentioned at all in the decisions, seem to furnish reasonably reliable guides to the outcome. These include the presence or absence of adequate surface transportation, the related issue of the community's isolation from its principal markets, its character as a tourist or convention center, and the existence of significant national security factors. The usefulness of these criteria in assessing the Board's policies is markedly reduced, however, by the fact that—as noted above—they are more likely to be cited where they support the decision, and by the further fact that the community in question may not concur in the Board's evaluation of them even where they are mentioned. On both the articulated and the substantive level, therefore, such criteria comprise an uncertain basis for analysis.

The foregoing considerations suggest that the attempt to evaluate the extent of the Board's concern with the needs of the traveling public by reference to the language of the decisions, is not a particularly fruitful enterprise. It remains to ascertain whether a review of the results of the decisions is more helpful in revealing the weight which the Board gives to these factors.

B. An Evaluation Of Policy In Action

The Board's decisions unquestionably reflect a continuing concern with the public's need for adequate air service. Yet it is difficult to escape the conclusion that, particularly during the past several years, route proceedings are frequently evaluated largely in terms of factors which relate more directly to the desire to limit prospective subsidy expenditures, to strengthen local service carriers or to conform to the Board's current views regarding appropriate competitive balance in the local airlines industry.

Decisions reached in accordance with these latter objectives are often consistent with the interests of the traveling public and the positions taken by the communities involved. An illustration might be the substitution of local for trunkline service in a predominantly local market. The result may be motivated principally by the Board's belief that the local carrier can operate at a profit and thereby reduce subsidy; the trunk carrier may concur because the market is unsuited to its larger equipment; through passengers may be gratified by the deletion of the intermediate stop; and the community at which service is transferred may believe that the local carrier will offer frequencies and scheduling better adapted to its traffic requirements. Similarly, selection among competing carrier applicants for a new route segment may turn primarily on the Board's view as to which carrier most requires strengthening or can best benefit from the award; yet the communities involved may support the decision because they believe that the successful applicant proposes the best service.

Unfortunately, the attitudes of the communities and the Board are not
always so well matched. Nor do the communities and the carriers always concur. There are reasons why a community may desire to retain trunk service, whether or not it also possesses local service. These reasons may cause the community to take a position at variance with the Board's assessment of relevant subsidy factors or the respective needs of the carriers. In "use it or lose it" and airport consolidation cases, the community's views are very likely to diverge from those of the Board and perhaps the carriers as well. And adequacy of service cases scarcely reflect an identity of interest between the airlines and the communities. In instances such as this, where a community's desire for service conflicts with the attitudes of the carriers or the objective of subsidy reduction, it is possible to discern more clearly the Board's views as to the relative importance of these factors.

The dominant theme, at least in the recent decisions, concerns subsidy. The Board's 1963 Report to the President on Airline Subsidy Reduction proposed a five-year program to decrease subsidy payments substantially. Although reductions of the magnitude suggested by the Report have not yet been achieved, subsidy expenditures have declined appreciably during the past several years. This trend reflects in large measure the Board's energetic efforts to place the operations of local service carriers on a more profitable basis.

The concurrent attempt to reduce subsidy and to promote air service at smaller communities entails an inherent conflict of policies. On the one hand, the Board has consistently taken the position that the purpose of subsidy is to provide service rather than to assist the carriers. But the desire to enable the carriers to operate successfully without financial assistance has caused the Board to reduce or terminate service at a number of smaller communities. There seems no doubt that the Board has pursued both policies conscientiously. It has also made some effort to harmonize

---

125 Supra note 8.
126 CAB, Subsidy for United States Certificated Air Carriers (Nov. 1967). Appendix I contains subsidy data annually by class of carrier for fiscal years 1954-1967; Appendix VI gives corresponding information for the individual local service carriers. The Report notes that total subsidy payments have been reduced from a maximum of $83 million in fiscal year 1963 to an anticipated $59 million in fiscal 1968. Of the latter amount, more than $53 million is attributable to local service operations (this figure includes $1.25 million for the service which Northeast provides locally in New England). The largest portion of the reduction has occurred in payments to the local carriers.

Some observers have predicted that several of the local carriers will be able to operate without subsidy by 1970; see, e.g., AVIATION WEEK & SPACE TECHNOLOGY, (7 Mar. 1966), at 185. At the dedication of Bonanza Air Lines' Phoenix headquarters (21 June 1966), former Chairman Murphy observed that "for the first time in the history of the local service industry, the carriers appear to be approaching an attainable break-even load factor."

127 See former Chairman Murphy's statement to this effect, Review of the Local Air Carrier Industry, 33, 34. CAB, Subsidy for United States Certificated Air Carriers 2 (Nov. 1967), states that "although the carriers receive the subsidy, it is, in effect, the smaller communities that are its direct beneficiaries."

128 The Board has recognized that reducing subsidy may cause the local carriers to serve fewer points. See testimony of former Chairman Murphy, Review of the Local Air Carrier Industry, 46. Former Chairman Boyd has recommended terminating service at small traffic points as a means of limiting subsidy payments, Id. 17-18. CAB, Annual Report for Fiscal Year 1966 (1966) states that maintenance of the declining trend in subsidy payments is largely responsible for deleting trunkline service, consolidating airports and eliminating service at communities which fail to generate sufficient traffic. The 1966 Letter to Mayors, supra note 55, admonishes communities that local service is expensive and observes that the Board "encourages" carriers to seek suspension where a community does not adequately utilize subsidized service."
them, by suggesting that a principal means of increasing the profitability of the local carriers is to award them more lucrative routes.120

Whatever the abstract logic of this explanation, it is clear that the objectives frequently clash in practice. Within limits, one consequence of the Board’s continuing emphasis on subsidy reduction is likely to be a gradual decline in the extent of air service at smaller communities.121 Experience suggests that the dimensions of this trend will be determined, not by theoretical efforts to rationalize the two policies, but by the willingness of the executive and legislative branches to maintain subsidy payments under varying political conditions.122

The dominance of subsidy considerations is reflected in numerous decisions rendered by the Board. Where applications for new service are concerned, the Board characteristically inquires into the subsidy expense to be anticipated from each applicant’s proposal and seeks to ascertain which applicant is in a position to provide a maximum of service either at the least subsidy cost or on a subsidy-ineligible basis.123 Similarly, the Board may withhold new service, regardless of the preference of the community, if it appears likely to have an adverse effect upon the subsidy position of an existing carrier.124

The trunkline deletion cases afford an illustration both of the impact of subsidy considerations and of the Board’s concern for competitive conditions within the local airlines industry. Regardless of the extent to which the opinions may advert to service needs, it is difficult if not impossible to discover an instance since 1963 where the consequence of a decision has been to increase subsidy.125 In a number of proceedings, there is no

---

120 See CAB, Subsidy for United States Certificated Air Carriers 4 (Nov. 1967), ascribing recent subsidy reductions in part to “improvement by the Board of route structures through the award to these carriers of more profitable routes and more flexible operating authority.” The premise of such an approach is, of course, preference for internal rather than public subsidization.

121 The dilemma has been succinctly summarized by Senator Monroney in his introductory statement, Review of the Local Air Carrier Industry, 1: “Most of the problems in the industry are caused by the harsh economics of short-haul air transportation and any suggested changes must come to grips with the hard dollar cost of providing this type of air service.” CAB, Annual Report for Fiscal Year 1966 4 (1966), emphasizes the extent to which the Board’s treatment of route cases is conditioned by the objective of reducing subsidy.

In this connection, it is instructive to observe that the Board, in exercising its prerogative to disallow expenses of local carriers for the purpose of computing subsidy payments, has historically exercised its authority largely to eliminate the subsidy incentive to offer more than a minimum level of service. See R. Caves, supra note 11, at 259-61. The Subsidy Reduction Report, continues this approach by formulating a descending scale of subsidy payments in proportion to daily round trips offered in a market.

122 R. Caves supra note 11, at 254, has observed that “broadly speaking, the Board’s practice has been to authorize as much service as a politically acceptable level of subsidy would finance.”

123 For a recent illustration, see, Service to Terre Haute, Indiana (Reopened), CAB Docket No. 13216, CAB Order No. E-25078 (1 May 1967) affirming the Examiner’s Initial Decision which, inter alia, relied on projected revenue and expense data as a reason for selecting Lake Central in the Terre Haute-St. Louis market and the Indianapolis-St. Louis nonstop market on a subsidy-ineligible basis.

124 See, e.g., Delta Air Lines Service to Huntsville, CAB Order No. E-20226 (3 Dec. 1963), in which the Board declined to award unrestricted Huntsville-West authority to Delta largely because of the anticipated subsidy impact on Southern.

125 Prior to 1963 (and the Subsidy Reduction Report), there were several cases in which the Board deleted or retained trunkline service despite an anticipated increase in subsidy. See, e.g., Southern Rocky Mountain Area Local-Service, 38 C.A.B. 301 (1963); Southwestern Area Local-Service, 37 C.A.B. 469 (1965); Pacific Northwest Local-Service, 29 C.A.B. 660 (1919); Southeastern Area Local-Service, 30 C.A.B. 1318 (1919); Seven States Area Investigation, 28 C.A.B. 680 (1918).
doubt that the result has also benefited the traveling public; but neither this factor nor the community's support for the Board's action appears with comparable consistency in the record.

Moreover, the cases decided since 1963 reflect an established policy of avoiding competition between trunk and local carriers, particularly where the consequence would be to increase subsidy expense for the local carrier's operations. As the prior discussion has suggested, the cases also reveal an increasing attempt on the part of the Board to diminish subsidy requirements by permitting local carriers to enter the more dense and presumably more profitable markets. In accordance with this objective, the Board's policy has been to award such authority whenever possible on a subsidy-ineligible basis. Conversely, where it appears that the local carrier will not be able to operate successfully in the new market, subsidy considerations typically cause the Board to deny the authorization.

The Board's treatment of the economic interests of trunk carriers in trunkline suspension and transfer cases displays a corresponding pattern. If the Board favors deletion, it will advert to any economic detriment that the trunk might suffer by remaining in the market. But if competitive or subsidy considerations persuade the Board to retain the trunk, it will characteristically do so regardless of the latter's economic preference.

136 Supplement 4 to CAB, Historical Review of Trunkline Suspensions and Deletions at Points Served by Local Service Carriers, reports increases in both service and traffic at a large majority of trunkline suspension points. While these are relevant factors, they do not measure other aspects of service need, such as the volume of long-haul traffic which may be forced to use interline connections as a result of the cessation of trunkline service.

137 This has traditionally been an argument effectively invoked by the trunks. See, e.g., Wiggins Renewal Investigation, 16 C.A.B. 483 (1972). It accords with the Board’s historical view that the two classes of carriers should have inherently different roles. Trans World Airlines, Peoria Deletion, CAB Docket No. 15187, CAB Order No. E-22469 (24 June 1965). But see, Eastern Air Lines, Redesignation of Philadelphia, Pa.-Wilmington, Del., CAB Docket No. 14493, CAB Order No. E-22981 (8 Dec. 1961).


139 For recent illustrations of subsidy-ineligible awards, see, CAB, Annual Report for Fiscal Years 1966 and 1967; Review of the Local Air Carrier Industry, 47-49.

140 See, e.g., TWA/Allegheny/Mohawk Transfer, CAB Docket No. 13527, CAB Order No. E-20661 (7 Apr. 1964). The trunk carrier's need to modernize its equipment is also frequently cited as a basis for deleting its service at local points, although a question arises as to whether the Board's current willingness to permit deletion may not comprise an additional incentive to the trunks to purchase these modern aircraft.

This result is consistent with the Board's subsidy policy, since trunkline service, unlike local service, costs the Government nothing; it is also consistent with the Board's apparent desire for internal rather than public subsidization.

The conclusions derived from the trunkline deletion proceedings are reinforced by the experience with adequacy of service complaints. It has been previously noted that several adequacy of service cases were heard by the Board between 1958 and 1960. There is no doubt that these decisions established relatively high standards of service. In the Washington-Baltimore case, for example, the Board directed that the equipment, frequency and scheduling of flights operated at Baltimore should be improved in a large number of markets. The Board relied on estimates of potential traffic which included not only an annual growth factor, but also the stimulative effect of improved service and the anticipated diversion of an additional twenty percent of the Baltimore air passengers who were believed to be moving through Washington because of service inadequacies at their own airport. The Board also announced specific standards regarding the quality of service to be provided in markets having a designated volume of potential traffic.

The promise which smaller communities may once have expected to find in Washington-Baltimore and the other adequacy of service cases has not been fulfilled. As noted above, the Board is no longer inclined to utilize this procedure, and there have been no further proceedings. Recently, in fact, the Board has denied motions to consolidate adequacy of service complaints with "use it or lose it" proceedings involving identical facts.

The previous discussion indicates that the "use it or lose it" decisions lead to substantially the same conclusion. Although the small volumes of traffic normally distinguish these decisions factually from trunkline deletion proceedings, there is implicit in each "use it or lose it" case the issue of service adequacy. As a result, the number of instances in which service has been terminated pursuant to the "use it or lose it" formula, despite a relatively low level of service, suggests that the Board's principal concern in these cases is to eliminate loss points from the route systems of subsidized carriers.

There are, however, contrary trends which may afford smaller com-
munities some encouragement. These primarily include the exceptions to the "use it or lose it" policy which the Board has permitted under the doctrine of "unusual or compelling circumstances." There are also at least two recent cases which have more directly addressed the issue of service adequacy inherent in "use it or lose it" and similar proceedings. In Eastern Air Lines, Redesignation of Philadelphia-Wilmington, the Board denied Eastern's request to delete Wilmington from its Washington-Boston route and instead advised it to improve its service in order to realize Wilmington's traffic potential. In the related Allegheny Segment 8 Renewal case, the Examiner certificated Allegheny permanently in the same market and recommended a minimum of two round trips daily, despite the fact that the carrier preferred only temporary certification to enable it to assess the impact of Eastern's competition. The significance of this pair of cases as precedent for a higher standard of service is uncertain, however, because in combination they present the additional issue of local versus trunkline competition. It will be interesting to observe the Board's reaction if appreciable competition in fact develops between the carriers.

In the same connection, mention should be made of the ambivalent result in the Salisbury-Wilmington "Use It or Lose It" case. In both the Wilmington and the Salisbury portions of the proceeding, the Examiner concluded that—although the issue of adequacy of service was not technically involved—the communities were capable of generating sufficient traffic to warrant the retention of Allegheny if the carrier would improve service in the respective markets. Allegheny sought review only of the portion of the Examiner's Initial Decision relating to Wilmington. The Board reversed and deleted Allegheny, largely for subsidy reasons. The carrier did not seek review of the Examiner’s ruling regarding Salisbury, and in fact improved its service there.

A closely related line of decisions involves the convenience or inconvenience of service through an alternative airport. If these cases are evaluated without reference to the dominant issues such as subsidy reduction and carrier strengthening, it is difficult to find a consistent pattern in the results. In some instances, service through a neighboring airport has been held inadequate where the distance involved has been little more than thirty miles and the driving time appreciably less than an hour. At what is probably the other extreme, the Board has held that a drive of one and one-half to two hours under frequently adverse weather conditions is not

147 Supra notes 59-65 and accompanying text.
so inconvenient as to justify airline service at the community in question.\textsuperscript{125} Plainly the convenience of service through another airport is not the unifying rationale of such cases.

The Board’s present attitude towards trunkline competition places the local service cases in contrasting perspective. Because of the absence of subsidy considerations, it is not surprising that the prospect of competition between the trunklines evokes a different response than does competition among locals or between the two classes of carriers. Numerous commentators have traced the history of the Board’s policies towards this issue since the early years of regulation.\textsuperscript{126} For present purposes, it suffices to observe that the Board became markedly more receptive to such competition when trunkline subsidy terminated. In a sense, it has substituted competition for subsidy as a mechanism for regulating this portion of the industry.\textsuperscript{127} It is currently seeking to introduce new trunk carriers into monopoly and semi-monopoly markets which have a reasonable prospect of accommodating them.\textsuperscript{128} The Board is now less concerned with trunkline strengthening as a means of “balancing” the industry and achieving economies of scale.\textsuperscript{129} As a result, where trunk carriers alone are involved, the Board may be more disposed to emphasize the service requirements of the traveling public. Unfortunately, for the smaller communities, however, neither monopoly nor competitive trunkline markets are those with which they are typically concerned.

The foregoing discussion has suggested that the decisions in cases involving service at smaller communities have tended to be primarily responsive to subsidy considerations, the desire to strengthen local carriers and the Board’s concern regarding competition among local carriers or between the locals and the trunks. The needs of the traveling public have been satisfied insofar as they have conformed with these objectives. Such needs have probably assisted to persuade the Board in instances where the primary factors were in balance. But, in recent years it is doubtful that they have constituted the controlling basis for decision.

\textsuperscript{125} Northwest Airlines, Service to Millinocket, Me., CAB Docket No. 8493, CAB Order No. E-20658 (6 Apr. 1964).

\textsuperscript{126} See, e.g., Westwood supra note 11; also R. Caves, supra note 11, at 191-231. The successive shifts in the Board’s policies in this respect have also been discussed by Hector and Judge Friendly, supra note 2. For an earlier analysis, relating to the period when the trunklines were still subsidized and arguing that “serious consideration be given to reducing parallel airline competition” among the trunk carriers, see, Bluestone, The Problem of Competition among Domestic Trunk Airlines, 20 J. AIR L. & COM. 379 (1954); 21 J. AIR L. & COM. 50 (1954).


\textsuperscript{128} See, e.g., address of John G. Adams before the Aero Club of Washington, 28 Feb. 1967 (“I for one intend to urge the Board to set down new cases to explore the need for competition in the many monopoly or semi-monopoly markets which still exist, and where traffic figures seem to support such action.”). The CAB staff takes the same view; see Answer of the Bureau of Operating Rights in Southern Tier Competitive Nonstop Investigation, CAB Docket No. 18257, asserting that “The size of these monopoly markets themselves, without any consideration of the quality and quantity of service being provided, would justify an inquiry into the possible need for competitive authority . . . . [T]he Board in following a policy of competition versus monopoly in past cases has made it abundantly clear that the fact that the existing service in a market may be adequate within the meaning of section 404 of the Act by no means precludes a competitive award.” (Emphasis the Bureau’s.)

\textsuperscript{129} For a recent statement of this view, see remarks by A.M. Andrews, supra note 27. A more technical discussion appears in Caves, supra note 11.
It is nonetheless relevant to observe that the various aspects of service need do not have equal weight with the Board. Continued legislative support for local service, as manifested by the subsidy program, has caused the Board to take a particular interest in short-haul service in the principal markets of smaller communities. Regardless of the result of its decision, the Board is likely to point out that local service will not be adversely affected. By contrast, long-haul service tends to receive relatively less emphasis. In instances where subsidy and similar factors suggest that trunkline service should be discontinued, the Board is apt to be easily persuaded that the community's needs will be adequately met by a local carrier's connecting service.\(^\text{157}\)

The extent to which the reasoning of trunkline suspension cases prior to 1963 may still influence the Board is conjectural. In several of those proceedings, long-haul needs received greater attention than the preceding paragraph would suggest. But the requirement for long-haul service may have been more persuasive in the earlier decisions. A leading example is afforded by the Florida markets in the *Southeastern Area Local-Service* case.\(^\text{158}\) These markets were found to be especially dependent upon tourism. They therefore had a particular community of interest with the principal sources of tourist traffic in the Northeast and the Midwest. For these reasons, the Board retained trunk service in the Florida markets where it already existed, and certificated an unwilling trunk carrier in an additional market. Similarly, in the *Pacific Northwest Local-Service* case,\(^\text{159}\) the Board retained trunk service at a point where the average length of passenger trip confirmed the predominantly long-haul character of the traffic.

Therefore, despite the general trend of the recent cases, it is conceivable that a community with a persuasive requirement for trunkline service may still prevail today where subsidy reduction and avoidance of local competition do not too strongly dictate the opposite result. In certain instances, a community which can demonstrate the necessary "unusual or compelling circumstances" may succeed in retaining certificated service despite a marginal level of traffic. Finally, it is possible that a community, where the quality of service has been poor, may be able to invoke this circumstance in defense of its service, despite the Board's current unwillingness to allow the issue to be raised directly. But the decisions strongly suggest that, however important it may be to a community to apprise the Board of service needs, it should also formulate its presentation on the

\(^{157}\) The Board is not always unanimous with respect to this issue. See, e.g., the Houston-New Orleans Local Service Investigation, CAB Docket No. 13708, CAB Order No. E-23296 (28 Feb. 1966), in which Trans-Texas was substituted for Eastern at four intermediate points over the dissent of Vice Chairman Murphy, who urged that these "major industrial cities, generating hundreds of passengers each day" deserved trunkline service.

One commentator has suggested that "considerations of passenger inconvenience are no longer proper arguments against trunk abandonment in view of the modern equipment entering local service." Dockser, *Airline Service Abandonment and Consolidation—A Chapter in the Battle Against Subsidization*, 32 J. Air L. & Cont. 496, 511 (1968). This conclusion may be consistent with the objective of reducing subsidy, but it discounts aspects of the need for trunkline service which may be of major importance to communities.

\(^{158}\) 30 C.A.B. 1318 (1959).

\(^{159}\) 29 C.A.B. 660 (1959).
basis of the subsidy and carrier considerations which primarily determine the Board's decisions.

V. Conclusion

Both by statutory directive and as a matter of common sense, one of the principal objectives of airline regulation is to provide adequate air service to the traveling public. The importance of this objective is not lessened by the presence of other regulatory purposes, nor by the potential inconsistencies which may in some measure exist between them.

By one test, at least, the Civil Aeronautics Board has given this objective preference over conflicting political and economic goals. There is no doubt that more small communities receive air service today than would do so in the absence of regulation. This result has been achieved despite substantial subsidy expense to the Federal Government.

Yet the public's need for air transportation is not the principal criterion by which the Board characteristically assesses the appropriateness of service. Other factors frequently have greater influence in the decisional process. Whether or not they appear explicitly in the Federal Aviation Act, these factors also have their source in established national policy.

In appraising the Board's treatment of the problems of service at smaller communities, it is necessary to recall that the majority of such decisions must be formulated in the context of complex factual issues, partially inconsistent regulatory objectives and widely divergent interests of the participants. The Board must harmonize these factors as best it can. The guidance which Congress has furnished is instructive but not precise. Nor is the Board's mission simplified by the statutory mandate to promote as well as regulate.

Subject to these qualifications, and with due recognition of the magnitude of the regulatory task, the question nonetheless arises as to whether the Board has given sufficient emphasis to the service requirements of the smaller communities. The number of such communities receiving service by a certificated carrier has been declining in recent years. Unless there is a major change in regulatory policy, this trend will continue. Yet in the absence of more reliable methods to assure realistic standards of minimum service, the marginal levels of traffic at many smaller communities do not per se appear to constitute sufficient evidence that service is unjustified. Similarly, the consistent emphasis upon subsidy reduction in trunkline suspension cases may impose real hardship on a community whose economic prospects partially depend upon long-haul air transportation. And the Board's current disenchantment with adequacy of service cases normally leaves a community without effective means to initiate a determination of its need for improved service.

From the viewpoint of the traveling public, these results are unfortunate. Whether they are compelled by economic and political considerations remains open to question. The presence of subsidy imposes restrictions which are partially extraneous to the regulatory process. Yet it does not neces-
Air Service to Small Communities

It is important to recognize that these restrictions are immutable.

A number of corrective measures have been proposed in recent years. Certain of these measures, such as suggestions concerning the potential role of third level carriers, affect the structure of the industry itself. Others include recommendations to relate subsidy policy more directly to service need in order to utilize subsidy dollars more efficiently. Some commentators have urged the development of a more sophisticated methodology to ascertain community of interest and resulting air service requirements. Irrespective of the merits of specific proposals, these and other possible solutions deserve study.

In large measure, however, the weight which the Board gives to the need for air transportation will depend upon the communities themselves. Despite the prevailing concern with subsidy reduction and carrier strengthening, effective participation by communities in CAB proceedings can increase the Board's awareness of service needs and thereby significantly affect decisions. At least in this sense, it is appropriate that a major share of the responsibility for maintaining or improving air service should rest with the communities directly concerned.

100 For one example, see, Swaine, A Proposal for Control of Local Service Subsidies, 31 J. Air L. & Com. 181 (1965). See also, R. Caves, supra note 11, especially chaps. 11 and 18.

101 Supra note 52.