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The Civil Aeronautics Board Policy Favoring Subsidy Reduction to Local Service Carriers: Its Role and Implementation in the Decisional Process - Part Two: The Decisional Effectuation of the Cab Policy of Subsidy Reduction in Route Certification of Local Service Carriers

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THE CIVIL AERONAUTICS BOARD POLICY FAVORING SUBSIDY REDUCTION TO LOCAL SERVICE CARRIERS: ITS ROLE AND IMPLEMENTATION IN THE DECISIONAL PROCESS

PART TWO: THE DECISIONAL EFFECTUATION OF THE CAB POLICY OF SUBSIDY REDUCTION IN ROUTE CERTIFICATION OF LOCAL SERVICE CARRIERS

By Barre Hall

I. INTRODUCTION

T WAS demonstrated in Part One that, as a means of policy effectuation, the Board developed various implementation programs. Two of the most significant involved the use of the decisional process in local carrier mergers or route certification. Although the merger program was not expounded with absolute clarity by the Board, the various programs involving route certification have been clearly set out on different occasions. In 1966, they were gathered together by the Board in its annual report under the general heading of "realignment of systems."

The Board's system realignment program began to take form in 1965 and was outlined in the CAB's annual report for that year as a fairly specific form of program, virtually unique unto itself and designed to improve and extend the operating authority of the local service carriers. At that point it was labelled simply "route realignment." However, by 1966 the system realignment program had been clarified and greatly expanded to include five programs involving aspects of route certification, all of which had been enunciated previously by the Board in one form or another. The system realignment program was in reality a comprehensive program for strengthening the routes of local carriers. The concept of route strengthening implies improvement of routes, by various means, until a point is reached where the beneficiary is closer to "break-even" without subsidy than before the route was strengthened.

The stated objects of the CAB system realignment program are (1) the improvement of route structure to provide greater service, and (2) the continuation of the downward trend in Federal subsidy support. Only

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2 "Route realignment cases designed to improve and, in some instances, extend the operating authority of local service carriers. This could be accomplished through route extensions, first air service to cities, renewal and modification of temporarily certificated route segments, and possible deletion or further modification of route segments experiencing unfavorable economic results." 1961 C.A.B. Ann. Rep. at 16.
4 Id. at 4. These objects are not new to the Board. In 1966 Chairman Murphy had testified before the Senate Aviation Subcommittee that the Board's threefold objective for the local carrier industry was: continued improvement in service to the public; continued financial health for the carriers; and continued reduction in subsidy. Hearings on the Local Air Carrier Industry Before
the realization of the subsidy reduction objective will be explored in depth herein.

The five component programs of system realignment have been clearly set out by the Board as:

1. Granting more liberal operating authority through the removal of outdated operating restrictions;
2. Giving local service carriers more access to higher density, short, and medium haul markets, on a subsidy ineligible basis, even in instances where such an award may involve competition with trunkline service;
3. Transferring from trunklines to the local service carriers certain routes which are marginally profitable for the trunks but which can receive better service from the locals on a more economical and efficient basis;
4. Consolidating service to two or more points at a single airport where service convenience is improved and economies result;
5. Improving economies by eliminating service at certain points which have not shown, after a reasonable test period, that they can generate sufficient traffic to justify continued airline service.

The system realignment program was developed by the Board to realize its objectives through proceedings involving the realignment of whole local carrier systems. It was a "total" approach developed by the Board and premised upon the idea that broad proceedings are necessary to encompass all the problems present in realigning a local carrier route system. Questions involving route segments, operating authority, new routes, generation of traffic at particular points, route transfers, extra flights, and airport consolidation typically arise in the realignment of a local carrier's system.

As noted, it will be my purpose to explore each component program individually, not collectively as a single program. The reasons for adopting this approach are two. In the first place, the component policies have existed separately, in most cases, for quite some time before being gathered into the general system realignment program. Consequently, the individual programs each have evolved their own distinctive characteristics and surrounding bodies of doctrine which would tend to make their collective consideration less meaningful. Secondly, the system realignment program was designed to realize two objectives, namely, better service and lower subsidy. Since only the latter is integral to this consideration only component programs relevant to its effectuation need be considered. The separation of the objectives for examination, as best possible, will facilitate an individual examination of each component program and hope-
fully produce a more meaningful and useful consideration of the effectuation of the subsidy reduction policy.

The primary point of inquiry will be whether the CAB subsidy reduction policy has had any discernible effect on the Board route certification decisions. In this connection, decisions involving the various component programs will be examined.

Because the component programs have received varying degrees of attention in the Board's decisions they will receive varying emphasis in this analysis. Dense route certification decisions, because they involve the most significant component program, will receive primary attention.

The primary reason for the dominant importance of the dense route certification program is not difficult to determine. Dense route certification has much greater potential for increasing the local carriers' earnings, and hence reducing subsidy, than the programs of "use-it-or-lose-it," liberalized operating authority, route transfer, and airport consolidation combined. The top 115 short haul markets under 300 miles in length generated over 3 billion revenue passenger miles in 1964 (with only 14 per cent being handled by local carriers) whereas the entire local carrier industry flew little more than 1.9 billion. By contrast, the trunks flew over 37.5 billion revenue passenger miles. If the locals were certified en masse to the shorter dense routes they could conceivably double their revenue passenger miles, without significantly impairing the trunks, and thereby greatly decrease their subsidy requirements—perhaps even eliminate them. The great subsidy reduction potential of this program requires the most thorough examination to determine whether the policy of subsidy reduction is presently being effectuated by it. However, from a chronological standpoint it may be useful to give prior consideration to the other elements of the total program.

II. The Statutory Basis for Route Certification

Before discussing the various elements of the component programs, a brief consideration of the law applicable to route certification is pertinent to furnish a general background, especially for the dense route certification and route transfer programs in which certification plays a crucial role.

The Federal Aviation Act requires that before a carrier engages in any air transportation the Board must issue a certificate authorizing such air transportation. The certification requirement extends only to common carriers in interstate commerce. It does not reach private carriers. The term "common carrier" has been construed so broadly by the Board that almost all commercial carriers, with the exception of purely intrastate

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7 Hearings on the Local Air Carrier Industry supra note 4, at 147.
8 Id.
9 This opinion is shared by the Board. Id. at 16.
12 Hale & Hale, supra note 11, at 314.
The Board is instructed to issue a certificate "if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this chapter, rules, regulations and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise [the] application will be denied." The "fitness" requirement is satisfied upon showing (1) a proper organizational basis for the operation, (2) adequate financial backing, and (3) a plan for conducting the proposed operation. This showing rarely causes difficulty. The conformity to regulatory requirements is determined by an examination of the applicant's past performance, although since "need" is also a consideration, prior statutory and regulatory violations are unlikely to create an absolute bar.

In an early case before it the CAB enumerated the questions it would ask in determining the "public convenience and necessity" requirement of a proposed new route:

The primary questions to be considered in cases involving applications for new service are, in substance, whether the new service will serve a useful public purpose, responsive to a public need; whether this service can and will be served adequately by existing routes or carriers; whether it can be served by the applicant without impairing the operations of existing carriers contrary to the public interest; and whether any cost of the proposed service to the Government will be outweighed by the benefit which will accrue to the public from the new service.

Although the case involved trunkline service only, the standards set out remain generally applicable to certificate applications by local service carriers. The Board, of course, in its creation of the local service carrier industry decided against the operation of the local carrier routes by the existing trunklines thereby giving rise to a whole new level of certificated carriers. With this one exception and allowing for slight changes in the standards applied by the Board in light of the unique nature of the local service carriers and their more recent appearance in the air transport industry, the above questions remain applicable in determining public "convenience and necessity."

In the situation where there is more than one application for certification upon a given route, the CAB is required to hold a hearing to allow each applicant to contest the fitness and suitability of the other applicants for the route. This requirement is known as the "Ashbacker" rule, having
been enunciated in *Ashbaker Radio Corp. v. FCC.*

Once a certificate has been issued it may be amended or suspended if the public convenience and necessity so requires, but only after hearings have been held. However, temporary exemptions from the hearing requirements and changes in service pattern are authorized without hearing. The local carriers have almost complete liberty to add to or change their schedules, equipment, accommodations, or facilities for performing their service.

It is instructive to note that the Federal Aviation Act provisions regarding route certification are a substantial re-enactment of the predecessor statute, the Civil Aeronautics Act. One noteworthy exception, however, is that the Civil Aeronautics Act contained a "grandfather" clause automatically granting certificates to carriers operating at the time of the statute's enactment. Since the legislation has remained substantially unchanged since 1938, decisions reached under the old Act are not distinguishable from subsequent decisions on the basis of underlying legislation.

The foregoing capsule summary of the law governing route applications and certifications indicates the formidable control which the CAB exercises over the size and nature of the local carrier route systems. The importance of certification will be seen more readily in the consideration of dense route certification later in this Chapter.

III. THE DECISIONAL EFFECTUATION OF THE CAB POLICY OF SUBSIDY REDUCTION BY MEANS OF THE COMPONENT PROGRAMS OF SYSTEMS REALIGNMENT

The major inquiry of this Part Two, as previously indicated, will concern whether or not the CAB subsidy reduction policy has had any discernible effect on route certification decisions involving local service carriers. It was demonstrated previously that the CAB recently had developed a "total" program, termed "realignment of systems," designed to realize the twin objectives of improvement of service and reduction of subsidy. The systems realignment program is itself composed of several programs developed by the Board in earlier periods. Since each component program involves some aspect of subsidy reduction and bears at least an indirect relationship to route certification, each will receive individual consideration regarding its role in effectuating the Board subsidy reduction policy.

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25 "No term, condition or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and demands of the public shall require ..." Federal Aviation Act of 1958, § 401(e)(4), 76 Stat. 143, 49 U.S.C. § 1371(e)(4) (1964).
27 Civil Aeronautics Act of 1938, 52 Stat. 988 (1938).
A. Airport Consolidation

The CAB program of airport consolidation relates only indirectly to route certification of local service airlines. The CAB has the authority to determine the terminal and intermediate points to be served on a route, and the specific airports as well; that is about the extent of airport influence on local service carrier route certification. The effect of airport consolidation upon route certification is thus indirect. Notwithstanding this indirect relationship the airport consolidation program was developed by the Board to reduce subsidy requirements and therefore merits consideration.

Prior to the development of the Board's all-encompassing "system realignment" the airport consolidation program existed independently. That program first arose in a joint Civil Aeronautics Board-Federal Aviation Agency press release, dated 2 May 1961. Therein airport consolidation was announced as a policy favoring unification of air terminals where such unification would improve financial as well as operational efficiency. The existence of this program was confirmed by the Board in its 1961 Annual Report. Therein the Board stated that the underlying considerations of the program were the need to conserve grants of Federal funds for new or enlarged airports and to conserve Federal funds needed to support subsidized operations.

An airport consolidation program was urged upon the CAB by President Kennedy in his message to Congress of 5 April 1962. Subsidy reduction and improved services were put forth as supporting reasons for such a program. The President's request gave rise to the CAB's airport consolidation program in 1963 when the Board reported to the President that the consolidation of airline services for two or more cities at a single airport would result in important savings and thereby reduce subsidy. It also suggested at that time that up to 44 airports would be eliminated by such a program.

The Board's airport consolidation program was developed primarily to cut costs and thereby reduce subsidy. Cutting costs was to be accomplished by consolidating some stops on a local carrier's route thereby eliminating expensive landings and takeoffs, and, providing service with fewer stops thereby generating more traffic and a greater load factor. Where practical, airport consolidations have been found to be capable of reducing costs

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28 Federal Aviation Act of 1958, § 401(e), 76 Stat. 143, 49 U.S.C. § 1371(e) (1) (1964). It has been held under the analogous provision of the Civil Aeronautics Act that the Board has authority to designate service to an airport as a point. City of Dallas v. Civil Aeronautics Board, 221 F.2d 501 (D.C. Cir. 1954), cert. denied, 348 U.S. 917 (1954).
30 Id. Referring to the joint press release.
32 KENNEDY, Special Message to the Congress on Transportation, Public Papers of the Presidents, John F. Kennedy, 1962 (1962) at 297-98.
33 Id.
See Civil Aeronautics Board, Report to the President on Airline Subsidy Reduction Program Pursuant to Transportation Message of 1962, (1963). [Hereinafter referred to as CAB Report to the President.]
34 Id.
and thereby reducing subsidy requirements. For example, in *Columbia and Jefferson City, Mo., Area Airline Service Airport Investigation*[^1], a recent application, the Board found that an airport consolidation, at a central airport midway between two cities, would result in greater traffic volume, decreased operating costs, increased revenues, decreased subsidy requirements totalling $193,000, and better service. The consolidation was accordingly approved.^[27]

However, in the *New Bern and Jacksonville-Camp La Jeune Service Case*, a proposed consolidation of two airports was rejected by the Board upon the Board’s finding that citizens in the town destined to lose its airport would be seriously inconvenienced.^[28] Even though the continued separate existence of the two airports would require an additional $61,000 annually in subsidy payment to the servicing local carrier, the Board denied a unification.^[29]

In a somewhat earlier decision, the *Eastern North Carolina Area Airline Service Airport Investigation*, a proposed consolidation of four airports into one area airport was rejected by the Board.^[30] In reaching its decision the CAB considered as factors: airport accessibility, airport capabilities, traffic and frequency of service, and cost to the local air carrier and community.^[31] Subsidy reduction was not mentioned by the Board although the Board did indicate that any cost savings realized by the servicing local carrier would be more than offset by lost revenues resulting from traffic loss.^[32]

The foregoing decisions adequately illustrate the various considerations made by the Board in deciding airport consolidations. From these decisions several conclusions may be drawn. First, airport consolidation is capable of increasing a local carrier’s net profit, thereby reducing its subsidy requirements. The Board has approved an airport consolidation which would reduce subsidy but which would also generate more traffic and result in better service. Second, the Board frequently balances several factors, including potential subsidy reduction, in reaching a decision regarding airport consolidation. Third, the Board has not classified by statement, the relation which its policy of subsidy reduction bears to other factors in its airport consolidation decisions. Nor are the Board’s decisions themselves helpful in this regard.

Thus, it can be said that subsidy reduction has been a controlling variable, but not the sole controlling variable, in some Board airport consolidation decisions.^[33] As such it has had a material effect upon the Board’s


[^2]: *New Bern And Jacksonville-Camp LeJeune Service Case; Docket Nos. 14,560 et al., Order No. E-23,516, 2 Av. L. Rep. § 21,624 (12 April 1966).*

[^3]: *Id.*

[^4]: *Id.*

[^5]: *Id.*

[^6]: *Eastern North Carolina Area Airline Service Airport Investigation, Docket No. 13,728, Order No. E-21,051, Av. L. Rep. § 21,486.01 (10 July 1964).*

[^7]: *Id.*

[^8]: *Id.*

[^9]: The Board did not directly discuss the materiality of quantum of potential subsidy reduction in any of the decisions examined. However it did prepare a detailed estimate of potential subsidy re-
decisional process. However, because the Board has not expanded upon the role of the subsidy reduction policy in its decisions, or the precise relationship of the subsidy reduction factor to the other public policy factors determinative of decisions, it cannot be determined whether the Board subsidy reduction policy has had any effect upon the decision. It must be concluded, then, that the Board subsidy reduction policy has not had a discernible impact upon airport consolidation decisions."

B. "Use-It-Or-Lose-It"

In the Seven States Area Investigation the Board first enunciated its "use-it-or-lose-it" policy. The policy was a liberalized one designed to offer communities of marginal traffic generation potential a chance to demonstrate an ability to support local air service. To retain the initial local service authorized by the Board, the community was required to meet a standard of enplaning a minimum average of five passengers per day over a test period covering the first 18 months of service. If that standard were not complied with the Board would commence proceedings, in the absence of unusual or compelling circumstances, on the issue of suspension or deletion of service.

From the foregoing it is readily apparent that the "use-it-or-lose-it" policy relates directly to certification of local service carriers in that it is capable of determining which marginal traffic points on a carrier's route shall retain certification and which shall not. Undoubtedly, the efficient certification of service points on a local carrier's routes will reflect in the overall economy of a carrier's operations. A strict application of "use-it-or-lose-it" could cut expenses and thereby reduce subsidy. It is the purpose of this section to determine whether the Board policy of subsidy reduction has had a discernible material impact upon the "use-it-or-lose-it" decisions.

In determining whether a smaller community could support local air service, it was given the benefit of the doubt during its first 18 months of service. Although the five passenger per day for 18 months standard of the "use-it-or-lose-it" policy at first appeared to be simplicity itself, the CAB's application of the standard was not so straightforward. The standard was difficult to apply directly in any given case because a myriad of exceptions in one case and did not hesitate to estimate the amount that subsidy would need to be increased in another case if the airport consolidation were not approved. Thus it can be seen that the Board was concerned with quantum of subsidy reduction which suggests that quantum played a material role in at least some of the Board's decisions.

No new "area airport cases" have been instituted by the Board since the New Bern and Jacksonville-Camp LeJeune Service Case. "Issues of this nature have been folded into the broader route realignment proceedings where they can be more adequately assessed with the overall need for strengthening the local carriers and improving route structure." 1966 C.A.B. Ann. Rep. 6. The accompanying interplay of the airport consolidation program with other component programs of system realignment cannot be expected to simplify any future attempts to determine the effect of the Board's subsidy reduction policy upon airport consolidation decisions pursuant to the system realignment program.


Seven States Area Investigation supra note 46, at 755.

Id. at 756.
ceptions based on "unusual and compelling circumstances" began to arise at the outset. In situations where the community involved did not meet the standard, deletion or suspension of service was frequently not realized because various exceptions prevented a strict application of the standard. Common bases for exceptions were: isolation and poor surface transportation; growing economic potential of the community; the attraction of more traffic that would soon result from the use of new equipment; carrier profits despite low usage; and, national defense. Not only do exceptions frequently frustrate the application of the direct standard but the application is further complicated by the converse situation of "overriding considerations." Briefly put, a community which meets the bare minimum standard is not guaranteed retention of its service where the coterminous service of another local carrier, close proximity of other airports, or, potential subsidy may override the community's compliance with the standard. In conclusion it must be said that the "use-it-or-lose-it" policy application is much more complex than its clear standard would imply.

In 1963 it was announced by the Board that the "use-it-or-lose-it" policy was to be applied as a means of effectuating the more general Board policy of subsidy reduction. The Board stated in reference to its general overall program developed to reduce subsidy in compliance with the President's 1962 request:

This program presents objectives, policies and actions designed to ... reduce operating subsidy on a time phased basis for those segments of the air transportation industry that still require subsidy. ... The fourth most important saving will come from continued application of our present 'use-it-or-lose-it' station criterion of five passengers generated per day.

This announcement implies that the emphasis of "use-it-or-lose-it" would now be placed upon reducing subsidy rather than determining whether a community could support local service. Such a shift in emphasis would seem to portend a stricter application of the "use-it-or-lose-it" standard. The Board, however, stated that it aimed only to continue its 33 percent suspension record averaged by it in past cases.

A perusal of the Board's more recent decisions confirm that no significant change has occurred in the Board's application of "use-it-or-lose-it" since the announced shift in emphasis. In one recent case the Board deleted service when a local carrier failed to reach the minimum standard in the absence of unusual or compelling circumstances. In another case the Board refused to delete service which did not reach the standard in view of an exception based upon isolation and severe winter conditions experienced

40 See Dockser, supra note 29, at 513.
41 Id. at 513-14.
42 Id. at 514-15.
43 CAB REPORT TO THE PRESIDENT, supra note 34, at 2.
44 Id.
Finally, in a third recent case, the community involved reached the five passenger standard but because service was available at a nearby airport the Board concluded that the subsidy necessary to maintain the service was disproportionate to the public benefits. In view of this overriding consideration the Board deleted service to the community. 86

Several conclusions flow from the foregoing consideration. First, it can be said that the Board has expressed an intent to effectuate its subsidy reduction policy by means of the “use-it-or-lose-it” program. Second, the Board's decisions in “use-it-or-lose-it” proceedings, decided subsequently to the Board’s adoption of a subsidy reduction policy, do not indicate that the Board's subsidy reduction policy has had any effect whatever upon Board decisions dealing with “use-it-or-lose-it.” “Overriding considerations” have resulted in point deletions when the standard was complied with, and, exceptions based on “unusual or compelling circumstances” have maintained service where the standard was not satisfied. Such broad variations from the standard by the Board make it clear that subsidy is not being reduced by an application of the standard wherever possible. Of greater significance, however, is the Board’s own admission, in its 1963 report to the President, that its continued application of the “use-it-or-lose-it” standard in pursuit of subsidy reduction will only maintain its 33 per cent suspension record that was averaged in cases prior to the adoption of its subsidy reduction policy. 87 This admission by the Board strongly suggests that the adoption of a subsidy reduction policy has had no effect upon the Board’s use of “use-it-or-lose-it” proceedings as a means to further reduce subsidy.

Finally, the Board did not discuss the role of subsidy reduction or the subsidy reduction policy in any of the decisions examined. Hence, it cannot be determined authoritatively whether subsidy reduction has been a controlling variable in any of the decisions examined. On the other hand, the Board’s admission of its intended maintenance of a 33 per cent suspension record in these proceedings after its adoption of a subsidy reduction policy, is strongly suggestive that the Board’s subsidy reduction policy has not had a material effect on Board “use-it-or-lose-it” decisions. 88

C. Liberalized Operating Authority

The granting of more liberal operating authority to local carriers is another component program of the Board’s comprehensive system realignment program. Unfortunately the Board has not stated with precision

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86 Frontier-North Central Route Transfer “Use It Or Lose It” Investigation, CAB Docket Nos. 13,394 et al., Order No. E-22,290, 2 Av. L. REP. ¶ 21,366 (10 June 1961).
88 CAB REPORT TO THE PRESIDENT, supra note 34, at 2. The Board was referring to cases in which the communities involved received at least two daily round trips. Id.
89 The Board will not commence any “use-it-or-lose-it” proceedings in the future since issues of this nature, like airport consolidations, will be dealt with in the broader “route realignment” proceedings. 1966 C.A.B. Ann. Rep. 6.
exactly what the term "liberalized operating authority" encompasses.\textsuperscript{69} At first glance it could conceivably have reference to any of the questions to which the system realignment program is addressed.\textsuperscript{69} These questions concern: "segment consolidation, more liberal operating authority, new route authority, elimination of poor traffic generating points, airport consolidation, route transfers, and various other issues related to better, more economical service."\textsuperscript{69} Because all the above questions except segment consolidation are subsumed by various component programs other than liberalized operating authority, it would seem likely that the component program of granting more liberal operating authority is at least partially concerned with the question of segment consolidation.\textsuperscript{69} Because it has not been made clear by the Board what else, if anything, liberal operating authority is concerned with, this section will focus primarily upon segment consolidation.\textsuperscript{69}

Segment realignment is a broad term implying that a transfer of certificated points from one route segment to another can result in more efficient and economical operations. The realignment of a carrier's route segments through a judicious transference of certificated points from one route to another, a redesignation of various points, as well as a consolidation of route segments where feasible, can clearly lead to more efficient and economical operations for that carrier. This relationship was demonstrated in the 1966 Ozark Air Lines Inc., Renewal of Segments 12, 13, 14 and 15 decision which dealt partially with a segment realignment.\textsuperscript{69} Therein the Board decided that the transfer of two certificated points to a newly created route segment would connect the two points to their principal community of interest and allow them to demonstrate their true traffic generation potential, afford important operational and scheduling benefits, and, reduce subsidy.\textsuperscript{69} The Board estimated that subsidy reduction in excess of $35,000 annually would result from the transfer of the two points in the segment realignment. The Board did not elaborate, however, upon the relationship of subsidy reduction to the other factors of its decision, nor did it mention its policy of subsidy reduction.

It is clear that subsidy reduction was one of several controlling variables

\textsuperscript{69} It can, however, be achieved "through the removal of outdated operating restrictions." 1966 C.A.B. Ann. Rep. 4.
\textsuperscript{69} The Board's statement of its system realignment program is set out in Section A of this chapter.
\textsuperscript{69} This conclusion is strongly supported by the Board's indication in a recent case that liberalized operating authority may refer to resegmentation and removal of certain mandatory stop requirements. Mohawk Route 94 Realignment Investigation, Docket No s.16,133 et al., Order No. E-24,699, 2 AV. L. REP. \textbf{5} 21,695 (21 Feb. 1967).
\textsuperscript{69} It is possible that "skip-stop" service and dense route certification are contemplated to some extent by "liberalized operating authority" since both literally involve a liberalization of operating authority. The "skip-stop" program provides for intermediate points on a route segment to be overflowed upon compliance with certain provisions set out by the Board. Seven States Service Investigation, 28 C.A.B. 680, 758-62 (1958). Because "skip-stop" service between terminals is so closely related to dense route certification (for example, skipping intermediate points on a dense route is tantamount to being certificated non-stop on that dense route) it will be considered in conjunction with dense route certification at a later point.
\textsuperscript{69} Id.
in the Board's segment realignment decision. The Board did not, however, enunciate precisely what role subsidy reduction did play in its decision nor did it mention or elaborate upon its policy of subsidy reduction and its effect, if any, upon other Board decisions. Because subsidy reduction was only one of several controlling variables in the Board's decision, and because a connection between it and the Board's subsidy reduction policy cannot be established, it must be concluded that the Board's subsidy reduction policy has not had a discernible material effect upon this Board decision.

An examination of other recent Board decisions involving segment realignment reveals that the Board has treated subsidy reduction and the subsidy reduction policy much as it did in the Ozark Segment Renewal decision. The role of subsidy reduction is still vague, and the Board has not mentioned the effect of its subsidy reduction policy in these decisions. Thus, an effect upon segment consolidation proceedings by the Board policy of subsidy reduction cannot be established. The conclusion follows that the Board subsidy reduction policy has not had a discernible material effect upon decisions involving liberalized operating authority as developed through segment realignment.

D. Route Transfer And Substitution

Route transfer and substitution concerns the transfer of either whole routes, or individual groups of points, from one class of carrier to the other. To date the direction of change has been almost totally from trunk to local carriers. The transfer of routes to points to local carriers is closely related to the certification of these carriers on to dense traffic routes since points capable of heavy traffic generation are sometimes transferred to local carriers. The net effect of such a transfer is very similar to that of an outright dense route certification.

Route transfers can occur either pursuant to an agreement between the transferring trunk and the local carrier, approved by the Board, or in the usual manner of abandonment by the trunkline followed by CAB certification of a local carrier upon the route. Individual points, on the other hand, may be either suspended or deleted from a trunkline's routes and transferred to a local carrier for service. Since a route is merely a collection of certificated points, served by a carrier in some specified order, the close relationship between route and point transfer is evident. A marked

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64 See, e.g., Allegheny Airlines Inc., Segment Renewal And Route Realignment Investigation, Docket Nos. 16,474 et al., Order No. E-25,847, 2 Av. L. Rep. ¶ 21,748 (17 Oct. 1967); Mohawk Route 94 Realignment Investigation, Docket Nos. 16,133 et al., Order No. E-24,669, 2 Av. L. Rep. ¶ 21,693 (21 Feb. 1967). Quantum of potential subsidy reduction resulting from segment realignment was not explored by the Board in either of these decisions. When considered with the Ozark Renewal, supra note 64, it appears that the evidence is insufficient to support any conclusion regarding the materiality of quantum of potential subsidy reduction in the Board's decisions.

65 Since segment consolidation (i.e., liberalized operating authority) is now considered by the Board only as a component of systems realignment, any future attempt to determine the effect of the Board's subsidy reduction policy upon segment consolidation proceedings will prove even more difficult because of the interaction of the various other component programs.

66 Dockser, supra note 29, at 511.

degree of similarity will therefore be expected in the CAB’s treatment of cases involving each.

Early in the local carriers’ history the Board decided that a local route unnecessary to a trunkline’s operations should be operated by a local service carrier alone. This position of the Board was consistent with its earlier position that local carriers, being solely interested in providing local service, were better able to provide local service than were the trunkline carriers on whose list of priorities local service ranked low. The increased efficiency with which a local carrier could operate a local route could result in decreased costs and increased traffic (and revenues) leading in turn to subsidy reduction.

Although it is evident that the extra efficiency of local carriers in operating local routes can lead to a subsidy reduction for those carriers, after receiving new routes or points from a trunkline, it is important to note that such subsidy reduction is not inevitable. Route transfers can result in no change or even an increase in the subsidy requirement of a local carrier receiving transferred operating authority.

Proposed transfers of trunkline operating authority to local carriers which involved potential subsidy reduction for the local carrier have been viewed favorably by the Board although not necessarily approved on that ground. Conversely, proposed transfers which involved potential subsidy increases for the local carrier have been viewed with disfavor, and although such applications were sometimes denied on this ground, such was not invariably the case.

In the earlier cases subsidy reduction, or increase, was a factor considered by the Board in deciding route and point transfers but was infrequently determinative of the decision in itself. The most recent Board decisions involving route transfer indicate a somewhat different trend. In one route transfer case a trunkline route was suspended for three years and a local carrier selected to serve the points thereby deleted. The pertinent factors in the Board’s decision were maintenance of service to the communities involved as well as a general route strengthening of the local carrier without any increase in subsidy requirement. The same reasons were repeated in the Piedmont Case (Norfolk-North Proposals). The Board reached a similar decision in a third case, approving a four point substitution of a local carrier on the ground that better service would result without any increase in subsidy requirements. Taken together these decisions indicate that if a local carrier can either improve service to the points transferred, or strengthen its own routes, without additional subsidy being required in

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73 Id.
74 See Dockser supra note 29, at 509-11.
75 United Airlines, Inc. Deletion of Route 34 Points, supra note 69.
either case, the Board will approve the application for route transfer.
Subsidy reduction was not a controlling variable in any of the decisions considered and hence was not a material factor in the Board's decisions. Although some subsidy reduction, however slight, could likely be achieved by trunk-local route transfer, the Board has not sought to make affirmative use of this method to reduce subsidy. Thus, because the Board appears to have made no attempt to reduce subsidy in its route transfer decisions, it is clear that the policy of subsidy has had no impact on such decisions.\(^7\)

E. Dense Route Certification (And "Skip-Stop" Service)

On 28 February 1966, CAB Chairman C. S. Murphy tendered a statement to the Senate Aviation Subcommittee outlining the existing condition of the local service carrier industry, its problems, some suggested remedies, and the Board's objectives for the future.\(^9\) The main body of the statement was declared by Chairman Murphy to represent the consensus of the Board's thinking.\(^8\)

The statement commenced with a declaration of the Board's objectives for the future namely continued improved service, continued financial health for the carriers, and continued reduction in subsidy.\(^8\) It then proceeded to review extensively the course which local carrier subsidy had taken over the previous few years.\(^8\) It was observed that while subsidy per revenue passenger-mile flown and subsidy as a per cent of total revenues had both declined substantially in the 1952-1965 period, the total local service subsidy requirement had not peaked until the year 1963.\(^8\) The subsequent decline in subsidy from that year has not been great.\(^4\) The statement forecast that if past policies were continued total local carrier subsidy would remain near then-current levels.\(^8\)

Although not so stating, the context of the statement implied that the Board was not satisfied with maintaining the existing subsidy levels and reiterated its objective to reduce them, below the carriers' own forecasts, by increasing earnings. It suggested as means of reducing subsidy the future utilization of more efficient aircraft, and route strengthening by providing local carriers with access to higher density routes.\(^8\) Since the choice of aircraft depends entirely on the local carrier, pursuit of that method of subsidy reduction will continue to lie with the local carriers themselves. Potential dense route certification, however, is much more significant. For the first time the Board had announced in positive terms a position favorable to certificating local carriers into the more lucrative,

\(^7\) In 1966 the Board stated that it was incorporating route transfer into its all-embracing system realignment program and that no new route transfer cases, as such, would be heard by it. 1966 C.A.B. Ann. Rep. 6. This development could make detection of the effect of the Board subsidy reduction policy upon route transfer and substitution very difficult because of the multitude of different factors which will be involved in future decisions.
\(^8\) *Id.* at 41.
\(^8\) Id. at 28.
\(^8\) Id. at 38-39.
\(^8\) Id. at 31.
\(^4\) *Hearings on the Local Air Carrier Industry*, supra note 4, at 33 (1966).
\(^8\) *Id.* at 33, 35.
high density air traffic markets. The purpose of this step was clearly to accelerate a decrease in local carrier subsidy requirements through increasing earnings of these carriers.

A brief consideration of the Board's "skip-stop" program is pertinent at this point. In many respects the Board's "skip-stop" program has foreshadowed the dense-route certification program. First announced in the Seven States Area Investigation in 1958, its avowed objectives were to reduce the local carriers subsidy requirements and to improve service to the public. It provided, in the case of new route authorizations, that "skip-stop" service could be effected throughout the whole route segment, terminal-to-terminal if desired, after the local carrier had completed two daily round trips touching every point on the route segment. (Where trunkline carriers provided terminal-to-terminal service on the segment the local carrier would be required to make one, perhaps two, intermediate stops to prevent direct trunk-local carrier competition.) The initiation of such "skip-stop" service was left to management's discretion and the Board admonished that subsidy would not necessarily be supplied for such non-stop service. The local carriers had thus, in effect, become certificated to provide non-stop service on dense routes in cases where route terminals (or intermediate points separated by lengthy distances) were fair-sized population centers. Unlike direct dense route certification, however, the stop restriction discouraged direct local carrier-trunkline competition.

Even though it had not formally announced its local service subsidy reduction policy, the Board was at this time actively seeking to effectuate subsidy reduction. The Board had allowed management, the agency best qualified to make profit-loss decisions, to decide when extra service would be provided. The uncertainty of subsidy for any new service predisposed management to commence only potentially profitable and overall subsidy reducing service. Thus, "skip-stop" authority appears to have been given by the Board to the local airlines, at least partially, to effectuate subsidy reduction.

"Skip-stop" authority is still being used by the local carriers to achieve the Board's dual objectives of subsidy reduction and improvement of service, although some refinements have occurred. Intermediate points must still receive two round trip flights a day before being skipped, unless a departure from this requirement is shown to be warranted. However, local carriers are being allowed to compete, directly with trunks in some dense markets, for example, Baltimore-Indianapolis and Baltimore-Cincinnati.

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8 Id. at 759.
9 Id. at 758-59.
10 It is very difficult for carrier A to compete on a given route with carrier B if carrier A must stop at one or more intermediate points while carrier B has non-stop authority. There is a strong tendency, other factors being equal, for passengers to select the non-stop (and therefore quicker) carrier.
Such competitive "skip-stop" flights are invariably ineligible for subsidy however.2

"Skip-stop" authority provided the local carriers with a means to both reduce subsidy and improve service. Because it foreshadowed the Board's dense route certification program both as to objectives (subsidy reduction and improved service) and means (non-stop air transport on denser routes), no inquiry will be initiated concerning the impact of the Board's subsidy reduction policy on "skip-stop" proceedings. It will be sufficient to note, at this point, the resemblance of dense route certification to "skip-stop" authority.

The major question posed, however, is simply whether the Board, having adopted a policy of subsidy reduction and having announced a program of dense route certification for local service carriers, has actually effectuated its policy in dense certification cases. The answering of this question will determine whether or not the Board subsidy reduction policy has had a discernible material effect upon the Board's decisions involving dense route certification.

It should first be noted that in 1966 the local carriers requested the Board to strengthen their systems through the use of two related methods of route certification: "by relaxing present route and operating restrictions, by allowing them to compete with trunklines in denser markets, and by awarding them new operating authority over potentially profitable routes."3 The Board responded that it favored this avenue of subsidy reduction and would henceforth pursue it on a case-by-case basis.4

The program thus specified by the Board to reduce local carrier subsidy could alter drastically the nature of the local service carriers, if implemented. It could also blur many of the critical distinctions separating local and trunk carriers. The main distinguishing characteristics of local carriers previously had been (1) their aversion to direct competition, with trunklines, or, other local carriers; (2) the multistop local or feeder nature of their routes; and (3) their objective of providing service to small communities at the expense of making profits and becoming self-sufficient.5 It is clear that implementation of dense route certification of local carriers would alter their character toward a trunkline nature. Competition with local and trunk carriers would result, service would be preponderantly non-

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2 Id.
3 Id. at 35, 36. This appears to be the first time that the Board stated affirmatively that it favored route strengthening for local carriers through competitive dense (and profitable) route certification on a case-by-case basis. The Board's very response that "[t]his avenue for strengthening the local carriers... is one which the Board views with favor and which it plans to pursue on a case-by-case basis," suggests that up to this time (28 February 1966) the Board had not been relying on such a program but intended to resort to such in the future. However, the dense route certification program was foreshadowed to some extent by the Board in its 1965 Annual Report wherein it was noted that in certain realignment cases improved route authority had been granted some local service carriers. 1965 C.A.B. Ann. Rep. 16-19. By 1966 the dense route certification program had become a component program of the more comprehensive system realignment program. See 1966 C.A.B. Ann. Rep. 3-9.
4 See C. FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION 192-94 (1961). The distinguishing features of trunk and local carriers were discussed in detail in Chapter 1(B) (2) supra.
stop, and profit would tend to displace service as the theme of operations.

Any attempt to determine whether the Board is actually effectuating its subsidy reduction policy by the certification of local carriers on dense routes necessarily involve consideration of route certification decisions rendered prior to the Board's adoption of its subsidy reduction policy and those rendered subsequent to it. The object of such consideration is simply to detect differences in decisions and supporting rationale indicative of the implementation of dense route certification directed toward subsidy reduction.

The foregoing approach requires the establishment of at least an approximate date for the coming into force of the dense route certification program. Since the Board first unequivocally announced its dense route certification program on 28 February 1966, though Board Chairman C. S. Murphy, (who was announcing the views of the Board), this date would seem to be appropriate as a tentative date for the program's initiation.

It can be expected that subsequent to the Board's development of its dense route certifications program, approval of dense route certification applications will be increased since the Board ought to be using this program to reduce subsidy requirements of the local carrier applicants.

It is clear that a primary consideration of the Board in dense route certification cases brought subsequent to the Board's dense route program will be potential subsidy reduction for the applicant local carrier. The Board stated that potential subsidy reduction must be present, through the applicant's sharing in the denser more lucrative traffic, for the Board to consider certificating a local carrier on a dense route.

The Board has also announced as conditions precedent to certification the adequate serving of the travelling public's interest and the avoidance of impairing other air carriers. Although these standards are somewhat vague and potentially in conflict it would seem reasonable, in view of prior discussion throughout this paper, to theorize that if there is no decrease in service or quality the travelling public's interest would be satisfied and that only traffic diversion of a substantial nature would impair another carrier. The Board also noted that dense route certification would be effected almost entirely on a non-subsidy basis.

In seeking to determine whether the CAB is effectuating its subsidy reduction policy by dense route certification of local carriers, decisions rendered both prior and subsequent to the Board's adoption of a subsidy reduction policy will be examined. From the prior decisions we might surmise that the Board would place heavy emphasis upon the traditional local carrier objectives of providing primarily local and feeder air transport services. Hence the Board would be expected to avoid local carrier certifi-

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86 The CAB policy of subsidy reduction for local service carriers was adopted on or about April 5, 1962. Its origin was discussed in greater detail in Chapter I(B)(4) supra.
87 See note 94 supra.
88 See Hearings on the Local Air Carrier Industry, supra note 4, at 36.
99 Id.
100 Id. The Board did not specify when and where exceptions would be made. It merely indicated reluctance to award new operating authority to local carriers for the purpose of "route strengthening" unless the carriers were willing to accept it on a non-subsidy basis.
cations involving dense routes, non-stop authority, and competition with other carriers, certificating only multistop, sparsely populated non-competitive routes. Deviations from such a certification pattern would be expected only under exceptional circumstances accompanied by a valid explanation. On the other hand, to the extent that the Board is effectuating its subsidy reduction policy in decisions rendered subsequent to the adoption of its subsidy reduction policy we would expect that the long-cherished local carrier characteristics would be less significant in the Board's deliberations. Instead the emphasis would shift to decreasing subsidy by increasing the local carriers' traffic carried without increasing the costs of carriage proportionately. Non-stop, dense route, competitive service, without subsidy eligibility, would necessarily characterize the form of the new local carrier dense route service. Decisions rendered subsequent to the Board's dense route certification program would be expected to reflect the new emphasis more intensively than those rendered prior to it.

An examination of dense route certification decisions rendered by the Board prior to its adoption of a subsidy reduction policy indicates that very few dense route applications were approved. In the Piedmont Local Service Area Investigation proceeding the Board did not award any dense, non-stop routes, although it did award or extend some dense, multistop routes. The Board gave potential diversion as the reason for refusing one dense route application. The Board did not mention potential subsidy reduction in its decision, nor did it reveal any connection between subsidy reduction and dense route certification. In the Piedmont Local Service case the Board appeared primarily interested in balancing Piedmont's routes and providing local and feeder service to the communities on those routes.

In the Great Lakes Local Service Investigation the Board demonstrated that its primary concern was properly balancing the local carrier's route system and providing local and feeder service. In that case the Board denied a route extension of dense route proportion (urged by a city intervenor) on the ground that it would turn the local carrier into a "regional trunkline carrier" which would not be consistent with the Board's concept of local service and trunkline authorizations. In this connection subsidy reduction was not mentioned.

In some cases, however, the Board did certificate local carriers on dense routes prior to its subsidy reduction policy. In Mohawk Airlines, Inc., the Board renewed Mohawk's non-stop, dense route, Syracuse-New York authority for an indefinite period without subsidy. Although the Board noted that Mohawk could expect a profit on this route it did not mention potential subsidy reduction.

101 Piedmont Local Service Area Investigation (Final Portion), 31 C.A.B. 586 (1962).
102 Id.
104 Supplemenatal Opinion, supra note 103, at 437.
105 The Board has refrained from certificating local carriers on dense routes in many other route certification proceedings.
107 Id.
In the Pacific-Southwest Local Service Case, however, the Board granted a dense, Los Angeles-Las Vegas, non-stop route to Bonanza, a local carrier, because it could provide the necessary service and its subsidy requirements would be reduced. The Board did not discuss subsidy reduction in depth but did satisfy itself that Bonanza would be able to make a profit on the route. It appears, then, that quantum of subsidy reduction was not a significant consideration in the Board’s decision although subsidy reduction in itself was.

In conclusion it can be said that prior to the Board’s adoption of a subsidy reduction policy the Board did not approve many applications of local carriers for dense routes. Nevertheless it did approve some, and in the Pacific-Southwest Local Service Case anticipated subsidy reduction was a controlling variable in the Board’s decision. It must be concluded, then, that prior to the Board’s adoption of its subsidy reduction policy, subsidy reduction was a material factor in some dense route certification decisions of the Board. Thus, in Board dense route certification decisions rendered subsequent to the Board’s adoption of its subsidy reduction policy, the mere existence of subsidy reduction as a material factor of decision cannot be taken, in itself, as indicative of a material effect of the subsidy reduction policy upon the Board’s decision.

Unfortunately, in the first three decisions examined above, the Board did not mention subsidy reduction. In the final decision, the Pacific-Southwest Local Service case, subsidy reduction was a controlling variable in the Board’s decision but the Board did not elaborate on its role in the decision. Thus, it is not possible to determine precisely what role subsidy reduction played in the Board dense route certification decisions prior to its adoption of a subsidy reduction policy.

Having examined particular dense route certification decisions rendered by the Board prior to its adoption of a subsidy reduction policy for the purpose of determining the role of subsidy reduction in pre-subsidy reduction policy cases, attention is now focused upon Board post-policy decisions. In this connection decisions rendered subsequent to the Board’s dense route certification program will receive primary consideration.

Subsequent to its announcement of a dense route certification program for local carriers the Board declared that pursuit of such a program required a case-by-case approach in view of the substantial and diverse interests of the parties involved. The Board also stated that in each case it would be necessary to determine “whether the proposed action will in fact improve the position of a local carrier, whether the interest of the travelling public will be adequately served and whether the condition of another carrier will be unduly impaired.” It appears, then, that in con-

109 In view of the fact that the dense route certification program was designed to realize subsidy reduction for the local carriers, dense route decisions pursuant to it would most likely reflect the Board’s effectuation of its subsidy reduction policy. Hence, any effect of the subsidy reduction policy on dense route certification decisions would most likely occur in those decisions.
110 Hearings on the Local Air Carrier Industry, supra note 4, at 36.
111 Id.
sidering a local carrier application for a dense route certification those three questions will be posed by the Board, after, of course, the need for service upon the route has been ascertained. The first question, concerning the improvement of the local carrier's position, would seem to require a likely improvement in subsidy position by the applicant local carrier upon assumption of a given dense route. The answering of this question in the affirmative would seem to be a condition precedent to any certification since one of the primary objectives of dense route certification, as stated by the Board, is improvement in the local carriers' subsidy position. There would be little point to certificating local carriers on dense routes without any subsidy improvement.

If subsidy reduction appears likely, then the next step for the Board would be an evaluation of the interest of the travelling public and the potential hinderance of the certification upon other air carriers. Since the travelling public's interest must be limited to air service provided, and since the most serious impairing of other air carriers stems from diversion of traffic, service and diversion must be the two other factors requiring consideration by the Board in dense route certification application. Because improvement of service is one of the Board's stated primary objectives in its dense route certification program, it is likely that this requirement will also form a condition precedent to a local carrier's dense route certification. Lack of diversion of traffic, however, would likely not be a condition precedent to a favorable Board dense route certification because only reduction of subsidy and improvement of service are primary objectives of the program. It would seem reasonable to assume that in assigning weight to this factor in its dense route decisions the Board will allow some diversion from other carriers but the amount allowable will depend at least partly on the size of the potential subsidy saving. No deterioration of service or lack of improvement in subsidy would likely be tolerated, though, because each is a primary objective of the Board program. The reason for this disparity of treatment is that any route certification will result in some (however slight) diversion of traffic from other carriers; but it would not seem reasonable for the Board to deny a potential subsidy-reducing, service improving, certification if the diversion were of a de minimis order. Therefore the Board will be forced to carefully evaluate any diversion as to extent and then weigh it against the potential subsidy reduction realizable.

The former Board guidemark of requiring local carriers to provide only local and feeder service to the smaller communities, which service by nature was not competitive with trunklines, nor necessary on dense routes, will not be relied upon by the Board at all in rendering a route certification decision because dense route service and local and feeder service appear to be mutually exclusive.

In conclusion, then it can be stated that if the Board is affectuating its policy of subsidy reduction by means of its dense route certification of local carriers program it will approve applications for dense route certifi-
cation where the potential subsidy reduction and service improvement is sufficient to outweigh any diversion of traffic from other carriers. The lack of local service character of the dense route service will not enter any consideration by the Board.

An examination of all the Board dense route certification decisions rendered subsequent to the announcement of its dense route certification program reveals that a vast majority of decisions have been favorable to dense route certification of local carriers. Six decisions will be considered herein since that is sufficient to exemplifying any determination of whether the Board is effectuating its policy through dense route certification. 118

On 3 April 1966 the Board decided the North Central Airlines, Inc., Madison-Chicago Nonstop Service case, an application by a local service carrier, North Central Airlines, regarding removal of a one stop requirement on its 108 mile Chicago-Madison route. 119 In rendering its decision the Board referred to its own order of five years previous allowing North Central to operate non-stop flights in its own discretion after first providing two round trips per day to each of two intermediate stops on separate routes connecting Chicago and Madison. 114 This provided a rare opportunity for the Board to examine the results of non-stop service by a local carrier on the dense, competitive route in question, before deciding the application. The Board noted that such non-stop ("skip-stop") "latitude," although directly competitive with Northwest Orient, a trunkline, had benefitted the travelling public, improved North Central's financial situation, improved the carrier's pattern of service, and worked no hardship whatever on Northwest. 115 On this basis the Board approved the application thereby certificating the local carrier non-stop on the route without subsidy eligibility. 116 The Board did not elaborate further upon the results of such a competitive, dense route certification but its reference to its previous decision must be taken as incorporated into the rationale of its decision.

The Board had, in effect, approved the non-stop dense route in view of its power to aid North Central's financial position (and thereby potentially to reduce subsidy) while at the same time improving the local

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118 The Board has decided many applications involving dense route certification since it developed its dense route certification program. It is felt that the six decisions considered at this point are fairly representative of the entire class of decisions involving dense route certification because they involve the vast majority of factors considered by the Board in reaching decisions regarding dense route certification applications.

119 North Central Airlines, Inc., Madison-Chicago Non-stop Service, Docket No. 12,137 (Order Serial No. E-23,465), 2 Av. L. REP. 5 21,620 (3 April 1966). It appears from the decision that originally North Central was subject to a condition requiring it to provide service to one intermediate stop between Chicago and Madison on all flights made. This condition was modified in 1961 by order E-17,286 to allow North Central to provide non-stop service between Chicago and Madison after Milwaukee on segment 1, and Beloit-Janesville on segment 5, each received 2 round trips daily. In the present proceeding North Central sought complete deletion of the original condition to allow it to service Chicago-Madison non-stop on all trips. (Hence it can be seen that for the five year period, 1961-1966, North Central was able to fly non-stop, after four one stop round trips per day, two stopping at Milwaukee, two at Beloit-Janesville, in direct competition with Northwest between Chicago and Madison.) Id.

114 Id.
115 Id.
116 Set Id.
carrier's pattern of service and overall service to the travelling public without any diversion of traffic from the trunkline. All the positive factors for rendering a favorable decision appear to have been present. The conclusion is suggested that subsidy reduction and service improvement were the controlling variables in the Board's decision. Of course the service to the point deleted was not improved but seemingly eliminated. This factor was not sufficiently weighty to override the other considerations.

The Board did not directly mention subsidy reduction in its decision. It did not discuss the relation of subsidy reduction to improved service or traffic diversion, or its expected quantum. Nor did it comment upon the role of the subsidy reduction policy in the decision. In view of the foregoing considerations it must be concluded that the Board policy of subsidy reduction has not had a discernible material effect on this particular dense route certification decision.

In the reopened New York-Florida Renewal Case the Board certificated Allegheny, a local carrier to provide non-stop service in the Boston-Washington and Boston-Philadelphia markets for which the carrier would be ineligible for subsidy. The Board found that such certification would "strengthen Allegheny's system in conformance with the Board's policy as to local service carriers" which suggests that the Board anticipated a reduction in subsidy requirement. The Board also found that a useful service would be provided to the travelling public, that the soundness of Allegheny's local routes would not be jeopardized thereby, and that no "serious" diversions would affect the numerous trunklines already serving the market. Since some diversion must occur when a new carrier is certificated into a competitive market the Board hedged its position somewhat by adding "serious" to the diversion requirement. It seems then that diversion only becomes an offsetting factor of weight in the Board's deliberations when it has reached the "serious" level.

The Board did not directly mention subsidy reduction in the New York-Florida Renewal although its presence as a factor of decision is suggested. Neither did it elaborate on the relationship of the factor of "strengthen[ing] Allegheny's system in conformance with the Board's policy as to local service carriers" to the other factors of decision. Quantum of potential subsidy reduction and the role of the subsidy reduction policy

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117 A thorough examination of all the Board decisions regarding dense route certification of local carriers, made subsequent to the Board's announcement of that program, reveals that the Board has never certificated a local carrier on to a dense route unless it has satisfied itself not only that no deterioration in service to the travelling public would result but also that the service would actually improve, at least slightly, overall. This result is consistent with the twofold objective of the Board policy underlying its dense route certification program, namely, to reduce subsidy and to improve service. This suggests that the Board is scrupulous in certificating to local carriers only dense routes which improve overall service to the travelling public as well as reduce subsidy requirements. Thus the process used by the Board is one of balancing the pertinent factors to arrive at a decision. Unfortunately, however, without some elucidating discussion by the Board concerning service improvement and subsidy reduction in a given decision, it is virtually impossible to apportion the motivating force provided by each factor in the decision. Meaningful conclusions concerning the effect of the subsidy reduction policy on Board decisions thus are more difficult to reach.


119 Id.
was not mentioned. Although the presence of subsidy reduction as a material factor in the decision is suggested, it is not possible to determine the role played by the subsidy reduction policy.

In the Pacific Northwest-Southwest Service Investigation, the Board noted the potential subsidy reduction and benefit to the travelling public of a non-stop certification of Frontier, a local carrier, on the dense Denver-Kansas City-St. Louis route. It then noted that although no serious diversion would result to the nearby carriers, Braniff, Continental and TWA, what diversion there was would be outweighed by the benefits of certifying Frontier, and, in any event, would be more than offset by new authority awarded these carriers in the same proceeding. Frontier was certificated.

Subsidy reduction and improved service to the public were the controlling variables in the Board's decision. The Board did not discuss quantum of potential subsidy reduction but was content to satisfy itself that Frontier's operations would be profitable. The Board did not discuss the role of its subsidy reduction policy in the decision, nor the relationship of subsidy reduction to improved service. Thus, although subsidy reduction was a material factor in the Board's decision, the Board's policy of subsidy reduction has not had a discernible material effect upon the decision.

Some local carrier applications for dense route certification have been denied by the Board. Such denials fall into two principal categories. The first concerns denials resulting from certification of another local carrier on to the dense route in question. In the Detroit/Erie-Toronto Case, Allegheny was awarded the Erie-Toronto route, on a non-subsidy basis, over Lake Central since, of the two applicants, it was able to provide the most complete service in terms of equipment, flight frequencies and passengers carried, and also because "Allegheny's proposed service plan will be considerably more profitable than Lake Central's." The Board noted that over the long run it anticipated a substantial subsidy reduction for Allegheny and that Allegheny's certification would not be detrimental to any other carrier.

It is clear that subsidy reduction was a controlling variable (as was improved service) in the Board's decision to award the relatively dense Erie-Toronto route to a local carrier. Because the Board also considered

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121 Id.
122 The foregoing two decisions, Pacific Northwest-Southwest, and New York-Florida, indicate that the Board will tolerate the slight, inevitable diversion which results in a great many new carrier certifications. However, it cannot be concluded on this basis alone that the Board will only tolerate slight diversion. Since no dense route cases have been decided involving more than minimal diversion of traffic from other carriers, it is not possible to determine what degree of diversion the Board will tolerate in certificating local carriers on dense routes which will lead to improved service for the travelling public and subsidy reduction. It can be seen that diversion is a factor given some consideration by the Board in its dense route certification decisions, although its precise role is not clear. If its role in the decisional process were somewhat clearer it could be helpful in determining the role of subsidy reduction in the decisional process and hence the effect of the Board policy of subsidy reduction upon the decisional process.
124 Id.
potential profitability (which likely would flow through to subsidy reduction in large part) as the dominant factor in choosing between Allegheny and Lake Central as operators of the route, it would seem likely that quantum of subsidy reduction was a material factor in the Board's decision. Again, however, no mention was made of the Board's subsidy reduction policy, or its role in this decision. Nor was the relationship of service improvement to subsidy reduction discussed. Thus, although subsidy reduction was significant in both aspects of the Board's decision, it must still be concluded that the Board's subsidy reduction did not have a discernible material effect upon this decision.

The second category of denial concerns inadequacy of service provided the travelling public. An example is provided by the Los Angeles/Chicago-Toronto Service Case in which the Board refused to certificate North Central on to the dense Chicago-Toronto route even though it declared that such a certification would result in substantial subsidy reduction for the local carrier.\(^{125}\) (Traffic diversion was not in issue since the Board was committed to certificating a second carrier for this route.\(^{126}\)) The Board stated that it was denying North Central's application because it could not provide travellers with single plane or single carrier service west of Chicago as could the successful trunkline applicant, United.\(^{127}\) That is to say, North Central's possible service was not adequate and therefore would not adequately serve the interest of the travelling public. Furthermore, United had a greater historic participation in Toronto traffic. For these reasons the Board selected United for the route.

Thus, improvement of service and historic participating in the market were the controlling variables in the Board's denial of North Central's application and its award of the dense route to United. Although the Board did note that the award of the route to North Central might well reduce North Central's subsidy, this factor was not a material factor in the Board's decision. Quantum of potential subsidy reduction was not mentioned and neither was the Board's subsidy reduction policy or its role. Thus, it must be concluded that the Board's policy of subsidy reduction did not have a discernible material effect upon the Board's decision.

Of late the Board has developed a comprehensive program termed "system realignment" which is designed to realign entire local carrier systems and, in so doing, deal with questions of segment consolidation, more liberal operating authority, transfer of points, airport consolidation, and dense route certification.\(^{128}\) The objectives of system realignment are the improvement of service and the reduction of subsidy. Cases involving system realignment vary considerably in the number of questions which

\(^{126}\) Id.
\(^{127}\) Id.
\(^{128}\) For a more complete discussion of the policy underlying system realignment and a description of the program itself see part A of this chapter.
are treated in the decision. By no means can it be said that every system realignment case deals with all questions which the system realignment program embraces. Rather, a typical system realignment case will deal with only a few of the questions encompassed by the system realignment program.

The Mohawk Route 94 Realignment Investigation furnishes a useful decision for examining dense route certification as a component program of the system realignment program. In that case the Board approved liberalized operating authority by removing certain mandatory stop provisions in Mohawk’s certificate, thereby bringing the carrier into direct competition with American Airlines, a trunk carrier, and to a lesser extent with Allegheny, another local carrier. The Board also approved liberalized operating authority in the form of resegmentation. In reaching its decision the Board stated that Mohawk’s financial position would be strengthened, service to the public would be improved, and no harmful diversion would occur. The new authority would be subsidy ineligible.

It can be seen that the Board decision involved the related component programs of dense route certification and resegmentation. While the Board considered both aspects together its greatest emphasis, by far, was placed on the dense route authority and specifically potential competition with American. Because the Board did not separate its considerations of dense route authority and resegmentation it is somewhat difficult to determine which considerations apply to each program.

While the Board stated at the outset that “[t]his investigation was undertaken by the Board as a means of strengthening Mohawk Airlines, Inc. (Mohawk) and reducing its dependence on subsidy . . . ,” it did not mention quantum of subsidy reduction. The Board did concern itself with the expected operating profit which Mohawk would earn on the route ($1,414,000) of which some portion would undoubtedly flow through to subsidy reduction.

The Board also concerned itself deeply with allowing Mohawk to compete with American for fear that American’s competition would be too much for it. The Board decided that on the basis of its record Mohawk could compete well with American and that on balance Mohawk should be allowed the new authorities because they would improve services and Mohawk could “explore their potential for bettering its financial position. . . .”

131 It would seem here that the liberalized operating authority in the form of removing certain mandatory stops would amount to permission to fly non-stop on dense routes. In this regard the Board did not specify which routes Mohawk would be flying when the mandatory stops were removed but it did state that the markets in issue “are relatively dense, shorthaul, commuter markets.” It also noted that Mohawk could provide non-stop service under its new authority. Id.
132 Id.
133 After mentioning resegmentation the Board did not return to discuss it in the case. Id.
134 Id.
The controlling variables in the Board's decision were improvement of service and improvement of the local carrier's financial position (with consequent subsidy reduction). The policy of subsidy reduction, however, was not mentioned. Thus, subsidy reduction appears to have been a material factor in the decision. However, because the Board did not articulate the role of its subsidy reduction policy in this decision, and because the evidence does not permit a conclusion in that regard, it must be concluded that the Board subsidy reduction policy has not had a discernible material effect upon the decision.

On the basis of the Mohawk Route 94 Realignment Investigation, it appears that the principal effect of the system realignment program on dense route certification decisions has been the complicating effect of introducing additional complicating component programs (for example segment realignment) into the Board's considerations. It appears then that the system realignment program has not influenced the effect of the Board's subsidy reduction policy in dense route certification decisions.

D. Conclusions

In the Board's airport consolidation decisions it was seen that while potential subsidy reduction was a controlling variable in some decisions, in others it was not. Because subsidy reduction was never a sole controlling variable, and because the Board did not mention the precise role of subsidy reduction, or the subsidy reduction policy, in its decisions, it was concluded that the Board's subsidy reduction policy had not had a discernible, material effect upon the Board's airport consolidation decisions.

In the Board's "use-it-or-lose-it" decisions it was demonstrated that no evidence indicated that subsidy reduction was a material factor in the Board's decisions. Further, the Board's intended adherence to its pre-subsidy reduction policy suspension record of 33 percent, after its adoption of a subsidy reduction policy, strongly suggested that the subsidy reduction policy had not had a material effect upon these proceedings. The conclusion followed that the Board subsidy reduction had not had a discernible material effect upon the Board's "use-it-or-lose-it" decisions.

With regard to the Board decisions involving liberalized operating authority, as developed through segment realignment, it was demonstrated that subsidy reduction was capable of acting as a controlling variable, along with other controlling variables, but that no connection between the Board's subsidy reduction policy and the role of subsidy reduction in the Board's decisional process could be established. Therefore, the conclusion followed that the Board policy of subsidy reduction had not had a discernible material effect upon decisions involving liberalized operating authority

125 The fact that two component programs of the system realignment are being applied in this case does not make its analysis any easier, in fact it tends to complicate it. It is evident that in decisions involving more than two component programs, determination of the effect of the Board's subsidy reduction policy would be made more difficult because of the increase in factors involved in the Board's decision. Unless, of course, the Board considered each component program's application to the decision individually. This course would seem to defeat the purpose of the system realignment program, that is, to provide a comprehensive program for strengthening the routes of the local carriers.
as developed through segment realignment.

In the Board route transfer and substitution decisions examined, it was demonstrated that subsidy reduction was not a controlling variable and thus not a material factor in the Board’s decisional process. It was concluded, therefore, that the Board policy of subsidy reduction had not had a material impact upon the Board route transfer and substitution decisions.

It was demonstrated, upon examining several dense route certification decisions, rendered by the Board prior to its subsidy reduction policy, that few local carrier dense route applications were approved during this period. However, some dense route applications were approved and in one decision potential subsidy reduction was the dominant controlling variable. Thus it can be said that even prior to the Board’s adoption of a subsidy reduction policy, subsidy reduction was capable of having a material effect in the Board’s decisions. Unfortunately, however, neither the role of subsidy reduction nor quantum was discussed by the Board in its pre-policy decisions. Thus, in a comparison between the role of subsidy reduction, or quantum, in decisions rendered before the subsidy reduction policy and decisions rendered after it, it would be extremely difficult if not impossible to detect significant changes in the latter decisions which might indicate an effect of the subsidy reduction policy upon those decisions.

Upon examination of several dense route certification decisions, rendered by the Board subsequent to its adoption of a subsidy reduction policy, several conclusions emerged. In every decision examined either financial improvement (and potential subsidy reduction) or subsidy reduction itself was a controlling variable and hence a material factor in the decision. However, the Board did not mention or discuss the precise role of financial improvement or subsidy reduction in its decisions. Nor did it mention quantum of subsidy reduction or the role of the subsidy reduction policy in the decisions examined. Thus, because it was not possible to compare the role of subsidy reduction, or quantum, in the decisions rendered after the subsidy reduction policy with those rendered before, and because the role of the subsidy reduction policy in the subsequent decisions was not mentioned, the conclusion was required that the subsidy reduction policy had not had a discernible material effect on the Board’s dense route certification decisions.

Because subsidy reduction was a material factor in at least one Board dense route decision rendered prior to the subsidy reduction policy, it is not possible to conclude that subsidy reduction was only a material factor in decisions rendered subsequently and that the subsidy reduction policy, being the only significant variable, had had a material effect on the latter decisions. On the other hand, the relatively small number of dense route decisions involving subsidy reduction as a material factor prior to the subsidy reduction policy, and the relatively large number rendered subsequent to the policy, mildly suggests the possibility that the subsidy reduction policy did have some material effect in the decisions rendered subsequently. However, because factors other than subsidy reduction typically
enter the Board's consideration in dense route certification decisions, a causal connection could not be established. The suggested possible material effect ought not be accorded significant weight therefore. Thus, it must be concluded that the Board policy of subsidy reduction has not had a discernible material effect upon the Board's dense route certification decisions.

V. CONCLUSIONS TO PART ONE AND TWO

The first overall conclusion which can be drawn concerns the Board's adoption of its subsidy reduction policy and implementation programs. Since these areas have been examined in depth previously it is sufficient to note that the Board did not formally announce its subsidy reduction policy for local service carriers but rather it responded on 3 July 1963, to a request from the President of 5 April 1962, to formulate a subsidy reduction program. It appears then, that the actual date of the subsidy reduction policy's adoption is not absolutely clear. Similarly with regard to some of the programs designed to implement the subsidy reduction policy (namely, the favoring of local carrier mergers, and dense route certification), the Board did not indicate their existence until 28 February 1966, nearly four years from the President's request for subsidy reduction. Even then, the Board's merger favoring program was not stated unequivocally but was mentioned in such a way as to amount to little more than a predisposition toward this approach. Finally, the Board did not specifically explain the relationship of its subsidy reduction policy to its implementation programs. Thus, it must be concluded that the Board has not unequivocally enunciated its subsidy reduction policy, nor has it precisely related some of its implementation programs to its subsidy reduction policy.

The Board's decisional process resembles that of an appellate court in many ways. The Board hears the various parties, applicants, corporate and community intervenors, and the Bureau of Operating Rights representing the public interest, in an adversary proceeding. It also considers its hearing examiner's recommended decision and then prepares an opinion making findings of fact, discussing law, and some policy, making a decision and setting out an order. Since the CAB writes reasoned opinions like a court, its opinions can be treated much like a court's would be.

In the Board's consideration of the various merger and route certification applications, and applications related to route certification (such as "use-it-or-lose-it" and airport consolidation) it will be recalled that the merger and route certification applications were subjected to legislative standards of consistency with the public interest (and non-creation of monopoly) and requirement by the public convenience and necessity, respectively. Applications only related to route certification were subjected to legislative standards only so far as actual point certifications were concerned, although some, such as "use-it-or-lose-it," were also concerned with relevant Board standards. In all three categories of decision, however, the Board evaluated and weighed various factors before arriving at a de-
The balancing of the various factors was critical to the approval or denial of an application.

In deciding a merger application the Board typically would consider such factors as financial benefit, or subsidy reduction, service improvement, traffic integration, connection of related trade areas, resulting trunk-line character, diversion (and monopoly). In dense route certification applications such factors as financial benefit, or subsidy reduction, service improvement and diversion bear the Board's greatest consideration. Similarly, various factors are considered in the applications related to route certification. However, when the Board is balancing factors in reaching a decision it rarely discusses or elaborates upon the precise roles and significance of the various factors considered in connection with the final decision. The Board typically notes only those factors which it found favorable to its decision. It is possible to detect the controlling variables which are having a material effect in the decision but not possible to determine precisely what their effect is. Occasionally the Board mentions factors unfavorable as well as factors favorable. It has not however made any attempt to ascribe a weight to the various factors of a decision for the purpose of indicating more precisely their roles and significance. The foregoing analysis holds true for all three categories of Board decision examined herein. Further, there does not seem to have been substantial variation between cases examined.

The Board is even less lucid when it comes to the role of its various enunciated policies in its decisions. Whereas the Board did occasionally discuss some of the factors in its decisions, it rarely, if ever, mentioned the role or significance of its own specific policies in any of the three categories of decision examined. Thus, a discussion of the Board's subsidy policy did not appear in any of the merger, dense route certification or related decisions examined. It would seem then, that in avoiding elaboration upon the roles and significance of the various factors of decision, and the Board's own relevant policies, the Board has managed to "keep its options open" for future decisions. It is now able to alter directions with minimal resistance from its previous decisions.

With the exception of some decisions related to route certification, in which subsidy reduction was absent as a material factor, or in which the Board revealed the significance of subsidy reduction to its decision (as, for example, the Board did concerning airport consolidation) it is extremely difficult, if not impossible, to determine the precise role and significance of the subsidy reduction factor, and the Board's policy of subsidy reduction, by an examination of decisions in the three categories. Therefore, it must be concluded that it is not possible to determine, from an examination of merger, dense route certification or many related decisions, themselves, what effect the Board policy of subsidy reduction is having on the decisional process.

In a further attempt to determine whether the Board subsidy reduction policy was having a material effect upon the Board's merger and dense
route certification decisions, decisions rendered in each category prior to the subsidy reduction policy and subsequent to it were examined. The object was to examine opposite decisions containing similar factors with the existence of the subsidy reduction policy being the only material variable. This technique proved effective in considering merger decisions although the presence or absence of important factors detracted from the significance of most comparisons. The presence of subsidy reduction as a controlling variable in dense route certification decisions rendered prior to the subsidy reduction policy, however, effectively prevented the determination of its role, or that of the subsidy reduction policy, in decisions rendered subsequently. Since subsidy reduction was a controlling variable in decisions prior to the subsidy reduction policy, and decisions subsequent to it, it could not be the sole material variable in decisions compared. Thus, even a comparison of dense route certification decisions was unable to discern any material effect of the subsidy reduction policy upon those decisions. It must be concluded that, even in comparing merger or dense route certification decisions, rendered prior and subsequent to the subsidy reduction policy, it is difficulty to determine whether the subsidy reduction policy has had a discernible material effect upon the Board's decisional process.

As noted previously, in deciding merger, dense route certification and related applications, the Board typically balances several factors. The balancing process also reflects various Board policies such as the subsidy reduction policy, continued improvement in public service, and continued financial health for the local service carriers. Thus, it can be concluded that subsidy reduction, or any other factor of public policy, will not likely serve as the sole determinant of Board decisions in any of the three categories examined. Nor will the subsidy reduction policy likely be the only policy capable of exerting a material influence upon Board decisions.

In conclusion, it can be said that the subsidy reduction policy can be detected as having a discernible material effect on the Board's decisional process in merger applications. However, it cannot be detected as having a discernible material effect upon dense route certification and related decisions. In all categories of Board decision examined, determination of the presence or absence of a discernible material effect of the subsidy reduction policy was difficult. It is hoped that the following recommendation will be constructive in suggesting some improvements for the Board's decisional process.

In view of the previously discussed conclusions regarding the enunciation of the Board's subsidy reduction policy, and merger and dense route certification implementation programs, the following suggestions are advanced. First, in the future, the Board should clearly and unequivocally enunciate its policies in a regular, formal publication such as the Federal Register or other appropriate publication. Second, the Board should also clearly set out in such publication any programs of implementation which it intends to use to implement its policy as well as clearly explaining the
relationship of the implementation programs to its policy. As new programs are developed they should also be set out in this manner. Finally, the Board should set out all its policies announced over a given year in its annual report, along with any implementation programs, policy objectives, and the dates of policies and implementation program announcements. The effectuation of the above recommendations would clarify future Board policies, objectives and means of implementation, and allow parties affected by Board policies to prepare their positions accordingly.

With regard to the conclusions discussed previously, concerning the Board's decisional effectuation of policy, the following suggestions are advanced. First, the Board should discuss in some depth the various roles and interaction of the factors determinative of compliance with the appropriate legislative standard. In this connection it would be helpful if the Board indicated the relative weight accorded each factor. Second, the Board should also elaborate upon the roles and significance of the various policies relevant to its decision. The implementation of the above recommendations would clarify the role and significance of the various factors involved in the balancing process of the Board's decision, as well as explaining the relationship of Board policies to the decisional process. Thus, the recommendations would facilitate effective comparison of Board decisions and thereby provide affected parties with the best possible opportunity for effective preparation.

It can be said that the Board's subsidy reduction policy has been detected as having a discernible material effect in some Board decisions but not in others. Refinements in the Board's decisional process, as suggested by the above recommendations, would result in more sensitive determinations of the role of Board policy in the decisional process with accompanying advantages for those parties affected by Board policy.