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FAIR TREATMENT FOR EXPERIENCED PILOTS ACT—ALL GOOD THINGS REALLY DO COME TO AN END!

JEFF ORKIN*

IMAGINE WALKING into a casino to play one of the hottest poker games of the last few years: High Stakes No-Limit Texas Holdem. Prior to beginning the game, all players are informed of the rules, including the minimum and maximum buy-ins, the betting limits, and the ranking of poker hands to determine the winning hand for each deal. All nine players agree on the rules of the game. After a few hours of play, you have increased your starting stack by several hundred thousand dollars. Only one other player at the table has more money than you do, which is important to know because in no-limit poker games a player can only go broke on a particular hand if his opponent has more money than he does. You look down at your cards and see the Ace and King of Spades, a powerful starting hand in no-limit holdem. The action ensues and the flop brings the Ten, Jack, and Queen of Spades. You have just made a royal flush, the best possible hand in no-limit holdem. At this point, you are doing everything possible to get your opponent, the one with more money than you, to put all of his money into the pot. You have the nuts, a poker term for an unbeatable hand. Fortunately, your “big stacked” opponent puts all of his money into the pot. You cannot possibly be more excited because you are about to “double up,” and you will have more than one million dollars coming your way. You excitedly show the table your royal flush, but just as you start to mentally count your money, the dealer does a disturbing thing—he starts pushing the pot towards your opponent. Agitated, you ask the dealer why he is giving your opponent your money. The dealer says to you, “I’m sorry, sir. Didn’t you know that we changed the rules in the middle of the

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game? We are currently playing Razz.” Razz is a poker game in which the best low hand, not high hand, wins the pot. Poof, just like that your millions are gone!

On December 13, 2007, the U.S. Congress and President Bush enacted the Fair Treatment for Experienced Pilots Act¹, which changed the mandatory retirement age for commercial airline pilots from age sixty to age sixty-five.² This comment will demonstrate why this Act is ill-conceived and poorly implemented. The comment consists of several sections. The first section outlines the history of the so-called “Age Sixty Rule.”³ The second section evaluates the provisions of the Fair Treatment for Experienced Pilots Act and its implications for current airline pilots. The third section discusses possible reasons that, after close to fifty years, the mandatory retirement age was finally amended. Finally, an alternative implementation plan is discussed that would be a more balanced approach to this divisive issue for all airline pilots, not just the current cadre of pilots at the top of their respective airlines’ seniority lists.

I. HISTORY OF THE AGE SIXTY RULE

The age sixty mandatory retirement rule was enacted in 1959.⁴ There was no mandatory retirement age prior to 1959.⁵ The Federal Aviation Administration’s (“FAA”) initial justification for enacting the Age Sixty Rule was concern about the safety of air travel.⁶ The mission of the FAA is “to provide the safest, most efficient aerospace system in the world.”⁷ The policy rationale for the Age Sixty Rule was “to preserve safety while being as fair as possible to pilots’ interests.”⁸ Richard Reinhart, an aviation medical examiner, has stated that in trying to define a “truly safe pilot from a medical point of view,” age, and aging

¹ Fair Treatment for Experienced Pilots Act of 2007, 49 U.S.C.A. § 44729 (West Supp. 2008).

² *Id.*

³ Beatrice Kathleen Barklow, Comment, *Rethinking the Age Sixty Mandatory Retirement Rule: A Look at the Newest Movement*, 60 J. AIR L. & COM. 329, 331 (1994).

⁴ Airline Pilots Against Age Discrimination, History of Age 60 Rule, <http://www.apaad.org/history.htm> [hereinafter APAAD] (last visited July 28, 2008).

⁵ *Id.*

⁶ See Lester Reingold, *Laying Siege to ‘Age 60’; Professional Pilots Federation Lobbying to Allow Pilots Over Age 60 to Fly Commercial Routes*, AIR TRANSP. WORLD, June 1993, at 184, available at 1993 WLNR 3568979.

⁷ Federal Aviation Administration, Mission, <http://www.faa.gov/about/mission/> (last visited July 28, 2008).

⁸ Reingold, *supra* note 6, at 184.

in general, are factors, but a specific age is not necessarily a factor.⁹ However, until a reliable process exists to accurately assess a particular pilot's competency, a uniform retirement age is imposed.¹⁰

The FAA also supported the Age Sixty Rule because of a study that found that heart attacks and strokes, unable to be detected by the medical technology available when the rule was passed, were more frequent in men approaching sixty.¹¹ The study found that "[a]ging causes deterioration of important physical and mental processes related to degenerative arteriosclerosis (hardening of the arteries);" individuals age differently, thus predicting the effects of aging is impossible; age-related degeneration accelerates in the later stages of life, and sudden incapacitation results from aging.¹² Based on these factors, the FAA has maintained a position that "the risks of incapacitation and error could not be entirely screened out" and therefore, the age restriction cannot be eliminated without some degradation in the level of safety.¹³

Interestingly, while no pilot has ever been granted a waiver from the Age Sixty Rule, the FAA has granted medical waivers for many pilots for a variety of medical issues including heart conditions and alcohol abuse.¹⁴ The FAA has defended these actions by differentiating between pilots with known, specific medical issues and older pilots in general.¹⁵ The FAA has stated that those pilots "with specific health problems can be identified, tested, and monitored to prevent a compromise of safety."¹⁶

The FAA continued its support for the Age Sixty Rule because many airlines preferred that the rule remain in effect.¹⁷ Many

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 898 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).

¹² Barklow, *supra* note 3, at 333.

¹³ *Id.* at 333–34.

¹⁴ Steven Morris, *Grounded at 60: Pilots Cite Experience in Renewing Fight Against FAA Retirement*, CHI. TRIB., Mar. 1, 1992, (Transportation), at 1, *available at* 1992 WLNR 4119521.

¹⁵ Barklow, *supra* note 3, at 334.

¹⁶ *Id.*

¹⁷ *Federal Aviation Administration's Age 60 Rule: Hearing Before the Subcomm. on Aviation of the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 3 (2005) (statement by Airline Division, International Brotherhood of Teamsters), *available at* http://www.age60rule.com/docs/IBT_Submission_to_ARC_Panel.pdf.

airlines feared that a change in the rule could “disrupt pension plans, flight schedules, training costs and healthcare plans.”¹⁸ For example, Robert Baker, executive vice president of American Airlines, stated in 1993, that “extension of the retirement age would result in ‘significant’ costs for the carrier due to the way its pension plans are structured.”¹⁹

However, not all people believe that the FAA had as noble a goal in mind in enacting the Age Sixty Rule as aviation safety. Some people believe the rule was enacted as a political favor by General Elwood R. Quesada, administrator of the FAA in 1959, to benefit C.R. Smith, then chairman of American Airlines and a personal friend of General Quesada.²⁰ It was during this time period that the first-generation jet aircraft were delivered to the airlines.²¹

Traditionally, airline pilots bid for monthly flying assignments and status positions (equipment, domicile, seat position) based on their seniority with the company.²² Historically, the senior pilots at an airline opt to fly the largest airplanes that the company operates because the largest aircraft offer the most pay per flight hour.²³ C.R. Smith did not want to absorb the significant training costs for pilots that would only operate the new jets for a short period of time prior to their retirements.²⁴ Therefore, in an effort to force his pilots to retire at age sixty, he compiled some statistics from the American Airlines Boeing 707 training classes that tended to show that his oldest pilots required the most training and had the most difficulty passing the certification exams, and sent that information to his friend, General Quesada, in an effort to persuade the FAA to enact a mandatory retirement age of sixty years.²⁵ Notably, the new mandatory retirement rule was promulgated only months after Smith made

¹⁸ Robin Sidel, *U.S. Pilot Retirement Rule Faces Renewed Scrutiny*, REUTERS NEWS, Sept. 13, 1993, at 1.

¹⁹ *Id.*

²⁰ See APAAD, *supra* note 4.

²¹ *Id.*

²² Telephone Interview with Noam Alon, United Airlines Pilot (Jan. 20, 2008) [hereinafter Alon Interview].

²³ See, e.g., Airline Pilot Central, <http://airlinepilotcentral.com/airlines/leg-acy/american.html>.

²⁴ See Sidel, *supra* note 18, at 1 (quoting Delta Airlines spokesman Neil Monroe, “Training is one of the most expensive parts of pilot costs.”); see also Letter from C.R. Smith to Gen. Elwood Quesada (Apr. 30, 1959), available at http://www.age60rule.com/docs/smith_quesada.pdf.

²⁵ Letter from C.R. Smith to Gen. Elwood Quesada, *supra* note 24.

his pleas to Quesada.²⁶ The rule was enacted despite the fact that only one year prior to its enactment, a Flight Safety Foundation report, specifically considering the impact of the new jet aircraft, “specifically recommended no change[s] to the [then current] pilot medical certification standards.”²⁷

A. CRITICISM AND COURT CHALLENGES TO THE AGE SIXTY RULE

Critics of the Age Sixty Rule have existed since the rule’s inception. The biggest complaint that critics leveled against the rule is that the age limit is arbitrary.²⁸ Many critics of the rule claimed that the selection of a particular age was “based on ‘armchair guesswork and stereotyped thinking about the beginning of old age,’ not ‘chosen on the basis of scientific medical studies.’”²⁹

1. *Early Court Challenge to the Age Sixty Rule*

Nonetheless, all court challenges to the Age Sixty Rule have failed.³⁰ In *Quesada*, the plaintiffs, consisting of thirty-five individual pilots, the pilots’ union, and the union president, brought suit for a declaratory judgment that the recently enacted mandatory age sixty retirement regulation was null and void “because it was issued without the holding of adjudicatory hearings required by the Administrative Procedure Act.”³¹ The plaintiffs also claimed that “the regulation, by terminating their right to pilot planes in commercial service after age sixty, deprive[d] them of property in their pilots’ licenses without due process of law.”³² The district court denied the plaintiffs’ motion for a preliminary injunction and the plaintiffs appealed.³³ The Second Circuit affirmed the district court’s decision.³⁴ The court stated that the Federal Aviation Act vested power in the administrator of the FAA to promote the safety of flight by pre-

²⁶ APAAD, *supra* note 4.

²⁷ *Id.*

²⁸ Barklow, *supra* note 3, at 338; Don Phillips, *Study Has Good and Bad News For Airline Pilots Over 60*, WASH. POST, Sept. 18, 1990, at A2.

²⁹ Barklow, *supra* note 3, at 338.

³⁰ See, e.g., *Baker v. FAA*, 917 F.2d 318, 322 (7th Cir. 1990); *Aman v. FAA*, 856 F.2d 946, 957 (7th Cir. 1988); *Air Line Pilots Ass’n, Int’l vs. Quesada*, 276 F.2d 892, 898 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).

³¹ *Quesada*, 276 F.2d at 894.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

scribing reasonable rules restricting "the maximum hours or periods of service of airmen" and other reasonable rules the "Administrator may find necessary to provide adequately for national security and safety in air commerce."³⁵

2. *More Recent Court Challenges to the Age Sixty Rule: Aman and Baker*

The petitioners in *Aman* were twenty-eight pilots employed as captains or flight engineers by major airlines.³⁶ The petitioners had appealed to the FAA for exemptions from the mandatory age sixty retirement rule and the FAA denied the exemptions.³⁷ The court divided the petitioners' claims in to two main arguments.³⁸ The court explained the petitioners' first claim as being that pilots over age sixty that meet the psychological and medical standards as outlined in the protocol, as well as any additional medical or operational testing standards required by the airlines or the FAA, "are no more likely to cause accidents due to sudden incapacitation or undetected deterioration of piloting skills than are pilots below the age of sixty."³⁹ The court required the plaintiffs to demonstrate "that the FAA lacked substantial evidence for a finding that strict enforcement of the [A]ge [S]ixty [R]ule reduces age-related risks of incapacitation and undetected deterioration of piloting skills."⁴⁰

The FAA found "that granting individualized exemptions under the petitioners' standards would not ensure the level of safety achieved by uniform enforcement of the [A]ge [S]ixty [R]ule and therefore denied the requested exemptions."⁴¹ It concluded that the petitioners' proposed health protocol, even when coupled with additional screening, "cannot entirely screen

³⁵ *Id.* at 895.

³⁶ *Aman v. FAA*, 856 F.2d 946, 949 (7th Cir. 1988).

³⁷ *Id.* The exemption petitions "relied heavily on the recommendations of a six-member 'Age 60 Exemption Panel.'" *Id.* The panel was comprised of five physicians and a psychologist. *Id.* Their qualifications were in the fields of cardiology, aerospace medicine, and neuro-psychology. *Id.* The panel devised a "battery of . . . tests as a basic protocol for assessing the fitness of pilots over the age of sixty." *Id.* The panel stated that "this protocol, if properly administered and supplemented, where appropriate, by additional medical . . . and . . . operational tests . . . provided an adequate basis for exempting some older pilots from the [mandatory retirement] rule." *Id.*

³⁸ *Id.* at 952.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 949.

out the increased risks of incapacitation and error due to the deterioration of skills that comes with age.”⁴² The FAA further stated that “because the likelihood of sudden death, disability, or incapacitation due to previously undetected disease increases at an accelerating rate with each additional year of chronological age, granting exemptions would compromise, by some amount, the current level of safety.”⁴³ The court ultimately remanded to the agency (on the second claim) but it stated that the FAA did have substantial evidence in the record on which to base its decision.⁴⁴ The court stated, “[w]hen the question is whether the petitioners’ protocol eliminates *all* of the incremental risk associated with sudden incapacitation or undetected deterioration of skills among pilots over sixty, a substantial body of medical opinion continues to ‘doubt the feasibility’ of the project.”⁴⁵

The court was not as amenable to the FAA’s position as to petitioners’ second claim. The court explained the petitioners’ second claim as follows: “exemption[s] must be granted because older pilots who satisfy the protocol and existing operational [and medical testing standards] are safer than the average pilot because performance improves with experience.”⁴⁶ The FAA rejected this contention by stating that the petitioners failed to show that their request is in the public interest.⁴⁷ The FAA did not agree that it was in the best interest of the public to presume an increase in safety would result from using the services of pilots over age sixty.⁴⁸ The court stated that “the FAA fail[ed] to present findings of fact supported by substantial evidence . . . to justify its offhand dismissal” of the claim that experience enhances safety.⁴⁹ Since the FAA failed to justify its denial based on substantial evidence in the record, the court remanded to the FAA for an explanation concerning the deficiency.⁵⁰

⁴² *Id.* at 952.

⁴³ *Id.*

⁴⁴ *Id.* at 957.

⁴⁵ *Id.* at 954 (emphasis added).

⁴⁶ *Id.* at 952.

⁴⁷ *Id.* at 955.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 957.

3. *Baker v. FAA*

After the remand in *Aman*, the FAA again refused to grant exemptions to pilots seeking to continue to fly in commercial airline operations past age sixty.⁵¹ The court, on remand, stated that both parties relied on “flawed evidence” and ultimately affirmed the FAA’s denial of exemptions.⁵²

The petitioners relied on “anecdotal evidence of superannuated pilots performing heroic deeds.”⁵³ One showing demonstrated the superior airmanship of United Airlines Captain David Cronin.⁵⁴ At fifty-nine years of age, and on his penultimate commercial flight for United Airlines, Captain Cronin successfully landed his Boeing 747 after a cargo door blew open seventeen minutes after takeoff from Honolulu, Hawaii.⁵⁵ Captain Cronin and crew consulted the emergency procedures checklist, but based on his experience, he determined that, considering the nature of the multiple emergencies he faced, following the emergency procedures in the flight manual would cause his aircraft to lose too much altitude.⁵⁶ Instead, Captain Cronin saved the lives of those on board the doomed jetliner by manually operating the controls while constantly readjusting speed and altitude.⁵⁷ The court discounted this anecdotal evidence because the case before the court did not involve pilots who performed “aeronautical miracles.”⁵⁸ Thus, the court concluded it did not need to “consider the arguable entitlement of

⁵¹ *Baker v. FAA*, 917 F.2d 318, 319 (7th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991).

⁵² *Id.* at 323.

⁵³ *Id.* at 319.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 320.

⁵⁷ *Id.* Incidentally, another senior (age 57), United Airlines Captain, Al Haynes, performed heroically on July 19, 1989. Chris Kilroy, Special Report: United Airlines Flight 232, AirDisaster.com, <http://www.airdisaster.com/special/special-ua232.shtml> (last visited Oct. 1, 2008). United Airlines Flight 232 suffered a catastrophic failure of the number two engine. *Id.* The explosion caused the loss of all of the hydraulic systems on the aircraft, which resulted in the aircraft being almost completely uncontrollable. *Id.* The aircraft was only controllable by manipulating engine power on the two wing-mounted engines. *Id.* Amazingly, the crew manipulated the crippled aircraft to the Sioux City Gateway Airport, and managed to touch down on one of the airport runways. *Id.* Though 111 people perished in the crash, the heroic efforts of Captain Haynes and crew saved 185 lives. *Id.* In simulator trials recreating the accident scenario, other qualified DC-10 crews were unable to nurse the crippled aircraft to the airport. *Id.*

⁵⁸ *Baker*, 917 F.2d at 320.

such 'special' pilots to exemptions from the [A]ge [S]ixty [R]ule."⁵⁹

The court was likewise dissatisfied with the statistical record the petitioners presented.⁶⁰ The statistics relied on records from the National Transportation Safety Board showing "that pilots age sixty and older had a lower accident rate per 1,000 pilots than pilots in other age groups."⁶¹ The court noted that the statistics in the report "failed to account for exposure to risk in terms of hours of flight time."⁶² Thus, pilots who flew infrequently, and therefore incurred a reduced risk of accident, carried the same weight as pilots who flew regularly with the greater accident risks.⁶³ The court also noted that the petitioners presented evidence that allowing pilots over age sixty to continue to fly would increase, on average, crew experience, but they failed to show that lack of crew experience was a problem that needed correcting.⁶⁴

Though the court was not particularly enthralled with the petitioners' evidence, it does not mean that the court was pleased with the evidence the FAA relied on to deny the exemption petitions—age-categorized accident experience reports known as the Flight Time Study.⁶⁵ The study showed a higher accident rate for those over sixty, but the court noted that the major flaw in the study was that the under-sixty grouping included the millions of miles of accident-free airline flight time, while the over-sixty grouping only included general aviation miles and hours flown (because there were no over-sixty airline hours to include).⁶⁶ Thus, the court concluded that the under-age sixty accident rate was significantly understated and the over-age sixty accident rate was overstated.⁶⁷

Another flaw the court noted was the grouping of pilots in ten-year age brackets.⁶⁸ The court noted that, presumably, more exemptions to the Age Sixty Rule would be granted to pilots in their early sixties than in their late sixties.⁶⁹ Thus, the court con-

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 321.

⁶⁸ *Id.*

⁶⁹ *Id.*

cluded that "the cumulation of accidents caused by pilots in their late sixties with accidents caused by pilots in their early sixties may as a practical matter tend to skew the Study."⁷⁰

Nonetheless, the court determined that "it was the petitioners' burden to present persuasive evidence that granting exemptions would not impair [aviation] safety."⁷¹ The court recognized that it was not presented with compelling evidence that would indicate that exemptions would impair safety, but likewise, it was not presented with strong evidence that the experience of the over-sixty crowd "clearly overbears the danger of deterioration of piloting skills (or of sudden incapacitation) associated with the aging process."⁷² The court further noted that it would seek such a showing where crucial issues of public safety are at stake.⁷³ Absent any compelling evidence, the court deferred to the decisions of the expert agency.⁷⁴

The opinions in *Aman* and *Baker* summarize the positions of all the parties involved in the controversy. Pilots seeking exemptions need to provide compelling evidence that exemptions do not impair safety. The FAA needs to base its decisions on substantial evidence in the record. The courts, in the absence of sufficiently compelling evidence to the contrary, defer to the FAA, the agency in charge of carrying out the mission of the Federal Aviation Act.

The *Baker* court did note, at the close of its opinion, that the FAA should not take from the decision of the case "that the [A]ge [S]ixty [R]ule is sacrosanct and untouchable."⁷⁵ The court noted that the FAA must give serious attention to the growing body of opinion that the time had come to repeal the longstanding rule.⁷⁶

Though the court admonished the FAA to seriously consider changing the rule, the rule remained in place for another seventeen years. It was not until December 13, 2007, that the rule was changed.⁷⁷ Moreover, it took an act of Congress, as opposed to

⁷⁰ *Id.*

⁷¹ *Id.* at 322.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 323.

⁷⁷ Fair Treatment for Experienced Pilots Act of 2007, 49 U.S.C.A. § 44729 (West Supp. 2008).

a decision of the agency tasked with promoting and maintaining air safety, to amend the Age Sixty Rule.⁷⁸

B. SUPREME COURT CHALLENGE

Aman and *Baker* were both argued in the Seventh Circuit Court of Appeals. However, the Age Sixty Rule has been challenged at all levels, including the U.S. Supreme Court.⁷⁹ In *Criswell*, two airline captains sued the airline when the company denied their request to downgrade from captain to flight engineer as they each approached their sixtieth birthday.⁸⁰ The pilots sued under the Age Discrimination in Employment Act ("ADEA").⁸¹ The ADEA generally prohibits mandatory retirement prior to age seventy, but the ADEA does provide an exception "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."⁸² The mandatory age sixty retirement rule applied to pilots, but the rule was not applicable to flight engineers.⁸³ However, Western Air Lines did require all of its flight deck employees to retire at age sixty, ostensibly because age sixty was the retirement age defined in the company's retirement plan.⁸⁴

The district court found that since a flight engineer's duties are not critical to the safety of flight, except in emergency situations, there was no merit to Western's argument that a mandatory age sixty retirement for flight engineers was a BFOQ.⁸⁵ The Supreme Court evaluated the BFOQ question by using the test set forth by the Fifth Circuit.⁸⁶ The Court noted that "[t]he job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business."⁸⁷ To comply with this requirement, an employer could establish that "it had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to per-

⁷⁸ *Id.*

⁷⁹ *See, e.g.,* *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

⁸⁰ *Id.* at 405.

⁸¹ *Id.* at 405-06. *See* 29 U.S.C. §§ 621-634 (2000).

⁸² *Criswell*, 472 U.S. at 403.

⁸³ *Id.* at 404.

⁸⁴ *Id.* at 405.

⁸⁵ *Id.* at 408; *Criswell v. W. Air Lines, Inc.*, 514 F. Supp. 384, 389-91 (C.D. Cal. 1981).

⁸⁶ *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976).

⁸⁷ *Criswell*, 472 U.S. at 413.

form safely and efficiently the duties of the job involved.”⁸⁸ Alternatively, an employer could seek to “establish that age [is] a legitimate proxy for the safety-related job qualifications by proving that it is ‘impossible or highly impractical’ to deal with the older employees on an individualized basis.”⁸⁹ The Court stated, “[o]ne method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant’s membership in the class.”⁹⁰ Noting that other airlines were routinely operating their aircraft with flight engineers over the age of sixty, the Court rejected Western’s contention that a mandatory age sixty retirement for flight engineers was a BFOQ; however, the mandatory age sixty retirement was upheld as it pertained to pilots.⁹¹

II. THE DRIVE TOWARDS THE FAIR TREATMENT FOR EXPERIENCED PILOTS ACT

On September 11, 2001, the world changed forever. The terrorist attacks against the World Trade Center and the Pentagon devastated the airline industry. Despite the fact that the industry received a \$5 billion government bailout, the industry lost a combined \$7.7 billion in 2001 and approximately \$6 billion in 2002.⁹² Industry losses through 2004 have been estimated at over \$32 billion.⁹³ Thousands of pilots were furloughed from their respective airlines and as of the date of this writing, thousands of pilots remain on furlough.⁹⁴ Moreover, many airlines, including Delta, Northwest, US Airways, and United Airlines have filed for bankruptcy court protection.⁹⁵ Airlines

⁸⁸ *Id.* at 414.

⁸⁹ *Id.*

⁹⁰ *Id.* at 414–15 (quoting *Usery*, 531 F.2d at 235).

⁹¹ *Id.* at 423.

⁹² Steve Huettel, *Airlines Don’t See Relief Over Horizon*, ST. PETERSBURG TIMES, Sept. 7, 2002, available at http://www.sptimes.com/2002/09/07/news_pf/911/Airlines_don_t_see_re.shtml.

⁹³ Chris Isidore, *Delta, Northwest Files for Bankruptcy: Spike in Jet Fuel Sparks Filings, Putting Almost Half of U.S. Airline Capacity in Chapter 11*, CNN MONEY, Sept. 15, 2005, http://money.cnn.com/2005/09/14/news/fortune500/bankruptcy_airlines/index.htm.

⁹⁴ As of January 13, 2008, 2,287 American Airlines pilots remain on furlough. The author of this comment is one of the furloughed pilots and has access to a current copy of the airline’s pilot seniority list. The list is kept on file with the author [hereinafter Pilot List].

⁹⁵ Isidore, *supra* note 93.

extracted massive pay and benefit concessions from employee groups; American Airlines' pilots alone agreed to over \$660 million in contract concessions.⁹⁶ United Airlines' pilots had their defined benefit pension plans terminated.⁹⁷ US Airways also terminated its pilots' pension plans.⁹⁸ When the plan was terminated, the obligation was assumed by the Federal Pension Benefit Guaranty Corporation ("PBGC").⁹⁹ However, the PBGC was only responsible for \$600 million of the estimated \$2.5 billion shortfall in the plan.¹⁰⁰ Thus, a US Airways pilot who was expecting a retirement benefit of \$75,000 per year would now expect to receive a benefit of \$25,000 per year.¹⁰¹ The dramatic reduction in the estimated benefit is due to the PBGC's maximum-benefit rules, which are determined each year under the provisions of the Employee Retirement Income Security Act ("ERISA").¹⁰² To highlight, for pension plans ending in 2003, the maximum guaranteed amount was \$3,664.77 per month for workers who retired at age sixty-five.¹⁰³ The guaranteed amount is reduced if a worker retires prior to age sixty-five.¹⁰⁴ Thus, since commercial pilots were forced to retire at age sixty, the benefit amounts they were entitled to receive from the PBGC were below the maximum PBGC limits.¹⁰⁵

The financial impact on these pilots renewed the drive to overturn the mandatory age sixty retirement rule.¹⁰⁶ Allowing pilots to continue to fly commercially until age sixty-five would allow them to receive the maximum benefit awards available under PBGC guidelines.¹⁰⁷ Additionally, the pilots would continue to pay into the Social Security System and their own pri-

⁹⁶ Eric Torbenson, *Group of Pilots Accuses Union Chief of Insider Trading; APA President Calls Splinter Organization's Claim 'Completely False'*, DALLAS MORNING NEWS, Apr. 20, 2003, at 22A, available at 2003 WLNR 16479253.

⁹⁷ Michael Schroeder, *Looking to Keep Pension Agency Solvent, Congress Fears Backlash*, WALL ST. J., May 12, 2005, at A1.

⁹⁸ See Politics and Economy: Pension Pain (June 27, 2003), <http://www.pbs.org/now/politics/pensions.html>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Geneve Dubois, Comment, *The Age 60 Rule—It Is Time To Defeat It!*, 70 J. AIR L. & COM. 319, 322–24 (2005).

¹⁰⁷ See Pension Pain, *supra* note 98.

vate retirement accounts for an additional five years.¹⁰⁸ As one pilot noted in a letter to Senator Dianne Feinstein,

We are depending on these pensions earned over more than 30 years of each of our employments with UAL to pay for our retirement living . . . [since] the FAA forced me to retire at age 60[,] I was not able to delay my retirement and work any additional years to make up for any [additional] loss of pension income.¹⁰⁹

As will be discussed later in this comment, this statement is only partially accurate, and pilots such as the one that wrote this letter were seeking to profit off of the backs of all pilots on the United Airlines' pilot seniority list junior to themselves.

A. THE TIDE TURNS: OPPONENTS OF THE AGE SIXTY RULE FINALLY ACHIEVE SUCCESS

As mentioned above, it was a long fought battle to repeal the Age Sixty Rule.¹¹⁰ Opponents of the rule finally achieved victory on December 13, 2007.¹¹¹ The opponents of the rule were able to accomplish, via legislative direction, what they could not accomplish through administrative or judicial channels. Unfortunately, the recently passed Act is hypocritical, short-sighted, and contradictory, and it will damage the careers and earning potential of the majority of current commercial airline pilots.

Several provisions of the Act are deficient. This section explores those various provisions and explains why the Act is deficient.

As mentioned above, many people have claimed that the mandatory age sixty retirement rule had nothing to do with aviation safety.¹¹² Thus, Congress chose to amend the retirement age to age sixty-five.¹¹³ Yet, in the Act, Congress also chose to adopt the International Civil Aviation Organization ("ICAO") standard for international commercial operations.¹¹⁴ If the

¹⁰⁸ Dubois, *supra* note 106, at 322–23.

¹⁰⁹ *Id.* at 323.

¹¹⁰ *See id.*

¹¹¹ Fair Treatment for Experienced Pilots Act of 2007, 49 U.S.C.A. § 44729 (West Supp. 2008).

¹¹² *See* APAAD, *supra* note 4 and accompanying text.

¹¹³ 49 U.S.C.A. § 44729(a). "Subject to the limitation in subsection (c), a pilot may serve in multicrew covered operations until attaining 65 years of age." *Id.*

¹¹⁴ *Id.* § 44729(c). "A pilot who has attained 60 years of age may serve as pilot-in-command in covered operations between the United States and another country *only if* there is another pilot in the flight deck crew who has not yet attained 60 years of age." *Id.* (emphasis added).

mandatory age sixty regulation was not concerned with the safety of aircraft operations with pilots over sixty years old in command of the aircraft, this crew-pairing restriction is superfluous and unnecessary. This crew-pairing restriction indicates that the regulators are not as convinced as they claim to be that pilots older than sixty years of age are as safe as their under age sixty brethren.

The fact that the crew-pairing restriction applies only to international operations highlights another strange anomaly. The restriction in no way addresses the demands of certain types of airline operations. For example, a flight from Miami International Airport to Grand Cayman is only one hour and twenty-five minutes long,¹¹⁵ and it occurs in the generally pleasant and calm weather of the Caribbean. Conversely, an all night flight from Seattle to Miami is five hours and forty-five minutes in duration.¹¹⁶ According to the Act, the captain-in-command of the flight to Grand Cayman must be accompanied by an under sixty co-pilot; however, the all-night flight from Seattle to Miami can be flown by two pilots who are both over age sixty. If a pilot over age sixty is not deemed capable of commanding an aircraft between Miami and Grand Cayman without the aid of an under age sixty co-pilot, it is incredulous to believe that the same over sixty captain can handle the rigors of a backside of the clock, transcontinental flight.

More telling on the notion of safety is Section 44729(h)(3) of the Act. It states that within twenty-four months after the Act is enacted, a report must be filed with congressional committees describing the effect the Act has had on aviation safety.¹¹⁷ The passage of this Act unwittingly subjects all airline passengers to the role of “test passenger” on flights with pilots over sixty years of age. Congress should not subject the traveling public to any decreased margins of safety in the interest of helping one small

¹¹⁵ American Airlines, Book Flights, <http://www.aa.com> (last visited Jan. 13, 2008).

¹¹⁶ *Id.*

¹¹⁷ 49 U.S.C.A. § 44729(h)(3).

Not later than 24 months after the date of enactment of this section, the Comptroller General shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report concerning the effect, if any, on aviation safety of the modification to pilot age standards made by subsection (a).

Id.

group of senior airline pilots achieve a financial windfall at the expense of all other active pilots.

I stress the word "active" because the Act also contains a "non-retroactivity" clause.¹¹⁸ Thus, pilots who had the unfortunate experience of reaching their sixtieth birthday on or before December 12, 2007, do not enjoy the protections of the Act.¹¹⁹ In order to continue flying for their particular air carrier, they need to be "rehired" and start at the bottom of the seniority list. Talk about arbitrary. One of the major criticisms of the old rule was that it arbitrarily ended the careers of commercial airline pilots.¹²⁰ This provision, restricting the ability of a pilot to continue to fly if he or she celebrated his or her sixtieth birthday on or before December 12, 2007, while allowing the pilot whose birthday falls on or after December 13, 2007, another five years in the cockpit, is completely arbitrary. It is probably more arbitrary than the old rule itself. At least the old rule affected all current pilots equally because all pilots currently flying at the airlines were hired when the old regulation was in effect. However, in deference to Congress, this provision was probably a necessary concession to the airlines. Conceivably, it would be a significant administrative burden to "rehire" any pilot that has retired within the past five years. Plus, the Act as written seeks to protect airlines from the inevitable lawsuits that will be filed by pilots that were forced to retire because they turned sixty on or before December 12, 2007.¹²¹ This section of the Act is quite

¹¹⁸ *Id.* § 44729(e)(1).

No person who has attained 60 years of age before the date of enactment of this section may serve as a pilot for an air carrier engaged in covered operations unless (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or (B) such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

Id.

¹¹⁹ *See id.*

¹²⁰ Barklow, *supra* note 3, at 338; Phillips, *supra* note 28.

¹²¹ 49 U.S.C.A. § 44729(e)(2).

An action taken in conformance with this section, taken in conformance with a regulation issued to carry out this section, or taken prior to the date of enactment of this section in conformance with section 121.383(c) of title 14, Code of Federal Regulations (as in effect before such date of enactment), may not serve as a basis for liability or relief in a proceeding, brought under any employment

prescient, because, in fact, a group of senior (in age, not necessarily in seniority) pilots dissatisfied with the Act as written, have already declared their intent to have the Act rewritten to allow them to return to active status.¹²² Jonathan Turley, lawyer for the Senior Pilots Coalition has stated that he will challenge the law on a variety of grounds including challenges based on Equal Protection, Due Process, the Bill of Attainder Clause, the Takings Clause, and interference with the right to contract.¹²³ Turley is specifically seeking to challenge Section 44729(e) of the Act, which contains the “nonretroactivity” and “protection for compliance” language.¹²⁴

B. CHANGING THE RULES IN THE MIDDLE OF THE GAME: STEALING FROM THE MANY TO BENEFIT THE FEW

The new rules for pilot retirement will have a devastating effect on the careers of those current commercial pilots who are not already in the highest paying positions at their respective carriers. Airline pilots operate in a seniority-driven industry.¹²⁵

law or regulation, before any court or agency of the United States or of any State or locality.

Id.

¹²² Press Release, Senior Pilots Coalition, Law Professor: Senior Pilots Coalition to Sue to Overturn Pilot Age Discrimination Law (Jan. 22, 2008), http://www.seniorpilotscoalition.org/pdfs/012208_SPC_Turley_statement_news_release.pdf [hereinafter Turley].

¹²³ *Id.*

The Fair Treatment for Experienced Pilots Act, recently signed into law as Pub. L. No. 110–135, will be challenged on a variety of grounds. Due to poor drafting and clearly unconstitutional components, the law, signed into law on December 13, 2007, presents something of a target-rich environment. Pilots will seek declaratory and injunctive relief under the Declaratory Judgment Act, 18 U.S.C. 2001 et seq. If successful, the law will be declared null and void.

....

Obviously, the best outcome would be a legislative fix. This law seems almost casual, if not conversational, in its language. Congress clearly enacted this law with little understanding of its implications or inevitable litigation. If struck in this lawsuit, the Act will cause further confusion and chaos as courts force companies to reverse measures implemented after its enactment. The first step, however, is to seek judicial relief. If legislative relief comes, it would be welcomed. Otherwise, we can seek our remedies from the courts.

Id.

¹²⁴ *Id.*

¹²⁵ Alon Interview, *supra* note 22.

The aircraft a pilot chooses, the domicile to which a pilot is assigned, the position a pilot enjoys (either captain or first officer), and the monthly flying assignments are all awarded based on seniority.¹²⁶ The senior-most pilot chooses what he or she wants and the process repeats throughout the remainder of the list until all active pilots have received an award.¹²⁷ Advancement up the seniority list only occurs when those senior pilots retire, thus creating vacancies in the system that are filled from below. Considering that no currently active pilot was flying in 1959, when the Age Sixty Rule was enacted, every active pilot benefited from the forced retirement of those senior to him. Each pilot knew the rules of the game when he or she was hired. The rules stated that no matter how smoothly one's career may go, when you reach sixty years old, it is time to step aside and let those that succeeded you enjoy their time in the senior-most positions with the company. All pilots had plenty of advanced warning that they should take responsibility for their financial security and to plan accordingly. Pilots such as the one who wrote Senator Feinstein¹²⁸ somehow feel entitled to remain for five extra years in the positions they have achieved precisely because of the forced retirement of those senior to them. In other words, they wanted to have their cake and eat it, too. This Act hands those pilots a great big slice of cake.

The junior pilots (and by junior I refer to any pilot who does not already occupy any of the highest paying positions at an airline) will suffer an enormous financial impact to both their career earnings and their retirement packages should they decide to retire at age sixty, the age at which they expected to retire when they were hired. Since the Act will cause another five years of stagnation, all pilots will remain in their current bid statuses for that period of time assuming that the airline will not increase capacity. (For example, presently, American Airlines does not plan to increase capacity in the near future).¹²⁹ Thus, a pilot loses out on the immediate raise in hourly pay due to promotion to a bigger aircraft. The pilot also loses the value of compounding the extra money that is placed in to the current versions of the retirement plans. For example, an American Air-

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Dubois, *supra* note 106, at 323 and accompanying text.

¹²⁹ Terry Maxon, *Traffic, Capacity Fall on American Airlines*, DALLAS MORNING NEWS, Jan. 3, 2008, at 1D, available at <http://www.dallasnews.com/sharedcontent/dws/bus/stories/010408dnbusaatraffic.6ea4493.html>.

lines Boeing 767 captain with twelve years seniority (or more as the pay scale tops out at twelve years) currently earns \$179/hour.¹³⁰ A Boeing 777 captain with twelve years seniority (or more) earns \$205/hour.¹³¹ American Airlines pilots are guaranteed sixty-four hours of pay per month.¹³² Thus, the 767 captain who is now unable to advance to the 777 due to the new retirement age loses a minimum of \$20,000 per year for the next five years. Also, a portion of the earnings are placed in the pilot's retirement account.¹³³ The financial impact is even more devastating when the compounded value of those lost dollars is calculated. The previous example only describes the impact to a relatively senior 767 captain. The results are even more devastating to the pilots who currently occupy the lowest paying positions in the company. The only way to recover, and in some cases there is no way to truly recover all the money that will be lost, is for the junior pilots to continue to fly past age sixty. Speaking from personal experience as a furloughed American Airlines pilot, flying beyond age sixty is not a palatable option. Moreover, while the senior pilot continues to earn a salary for the years between sixty and sixty-five, in a position that he knew was not available to him when he was hired, he prolongs the furlough of the junior members of the seniority list for another five years.

The Act also presents another problem for the pilot corps—scheduling. As mentioned previously, pilots bid for their monthly schedules based on their company seniority.¹³⁴ The senior pilots have the first choice of monthly trip selections and the process repeats itself until all the scheduled trips have been allocated to the pilots in the particular bid status (a bid status includes the type of aircraft, domicile, seat position, and in some cases a division qualification).¹³⁵ Monthly bidding is extremely important because it determines the schedule that a pilot will fly during the upcoming month.¹³⁶ There are a multitude of factors that affect a pilot's choice of which schedule(s) to bid for during the bid selection process. Suppose one pilot needs to be

¹³⁰ Airline Pilot Central, <http://airlinepilotcentral.com/airlines/legacy/american.html> (last visited January 13, 2008).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Alon Interview, *supra* note 22.

¹³⁵ *Id.*

¹³⁶ *Id.*

off on a particular day of the month because that day is his wedding anniversary or because it is his child's birthday. That pilot is likely to prioritize the monthly trip selections in a manner that affords him the greatest opportunity to achieve the desired result. Other pilots select monthly assignments based on trip destinations, monthly pay total (as not all lines of monthly flying pay the same), or numbers of consecutive days without flying. It is a pilot's seniority that determines how successful that pilot will be in being able to secure the monthly flying assignment that he desires. Since the Act has a crew-pairing restriction based on the age of the captain of the flight, the Act presents the possibility of abrogating seniority (it must be kept in mind that for each monthly flying assignment, two positions are awarded; the captain position and the first officer position must both be filled).

To highlight, suppose that the most senior 767 first officer desires to be off on the 15th of the following month. Since he is the most senior pilot in his bid status he always receives his first choice of monthly flying assignments. However, if the captain awarded the same flying assignment is over age sixty, the first officer will only be awarded that trip assignment if he is under age sixty.¹³⁷ Therefore, if the affected first officer is also over age sixty, his seniority is abrogated and he may not receive the day off that he desired, and was rightly entitled to, under a seniority-based system. The only protection the Act affords in this type of situation is outlined in Section 44729(f).¹³⁸ Basically, Congress is requiring all airlines affected by the Act to open negotiations on a very sensitive portion of airline agreements—monthly scheduling.¹³⁹ Considering the slow pace of negotiations between unions and airlines,¹⁴⁰ it is unlikely that these important issues will be resolved any time in the near future.

¹³⁷ See Fair Treatment for Experienced Pilots Act of 2007, 49 U.S.C.A. § 44729(c)(1) (West Supp. 2008).

¹³⁸ *Id.* § 44729(f).

Any amendment to a labor agreement or benefit plan of an air carrier that is required to conform with the requirements of this section or a regulation issued to carry out this section, and is applicable to pilots represented for collective bargaining, shall be made by agreement of the air carrier and the designated bargaining representative of the pilots of the air carrier.

Id.

¹³⁹ See *id.*

¹⁴⁰ See Terry Maxon, *Airline Rejects Pilots' Request For Federal Mediator: American Says Talks Would Go Faster Without a Federal Mediator*, DALLAS MORNING NEWS, Jan. 15, 2008, at 1D (noting that the current round of collective bargaining began in September of 2006 and little progress has been made).

Admittedly, the above mentioned scenario is only an issue if both the captain and first officer are over sixty years old. Since the older than sixty first officer is reaping the benefit of the Act in this scenario, he may not be particularly upset that he has been bid-denied due to the crew-pairing restriction. But, since it is the captains who receive the biggest windfall under this new law, one solution to the problem illustrated above would be to award the first officer his desired line and bid-deny the captain. This notion is contrary to a seniority system. Thus, a more likely solution is to remove the first officer from the affected trip, pay-protect the affected pilot, and allow that that pilot to enjoy the day(s) off he desired and would have been entitled to had there been no crew-pairing restriction in the Act.

Another criticism of the Act is probably the most obvious. The main argument of the opponents of the recently defeated Age Sixty Rule was that the age limit was arbitrary.¹⁴¹ The Act changes the retirement age from sixty to sixty-five. Age sixty-five is just as arbitrary as age sixty. If safety is truly not an issue, then there should be no mandatory age limit at all. Surely there are octogenarians that can pass the medical tests and simulator evaluations required of commercial airline pilots. Interestingly, air traffic controllers are required to retire at age fifty-five.¹⁴² However, one study showed that controllers in their sixties performed as well as or outperformed controllers in their thirties on complex, real-world simulations.¹⁴³ The authors of the study concluded that it may be time to revisit "the whole notion of when we need to retire people, since their ability to do these complex tasks resists decline."¹⁴⁴ However, the same study did show that the older controllers did not perform as well as the younger ones during standard lab tests evaluating reaction speed, attention, and memory.¹⁴⁵ Reaction speed and attention are critical during the high workload phases of flight, which include take-off and landing. Thus, I am not suggesting that there should be no age limit for pilots. I am suggesting that Congress' statement that age sixty was arbitrary but somehow age sixty-five is not is fallacious. It is absolutely hypocritical of Congress to claim that no solid reason exists to maintain the age sixty retirement rule and then implement a law with a restriction that is

¹⁴¹ Barklow *supra* note 3, at 338; Phillips, *supra* note 28.

¹⁴² Sharon Begley, *The Upside of Aging*, WALL ST. J., Feb. 16, 2007, at W1.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

just as arbitrary as the law they repealed. It would be refreshing if Congress, just one time, would admit that the purpose behind the rule change is not to protect “experienced” pilots, as all pilots flying at major airlines are very experienced, but to redistribute wealth from one group of affected pilots to another.

Furthermore, another section of the Act belies the statements made by proponents of the Act that over age sixty pilots are just as safe as those under age sixty.¹⁴⁶ Section 44729(g) of the Act, entitled Medical Standards and Records, indicates that the regulators are not as certain that the over-sixty pilot group is every bit as safe as the under-sixty group.¹⁴⁷ Currently, every airline pilot, when exercising the privileges of his Airline Transport Pilot certificate, must maintain a first-class medical certificate.¹⁴⁸ On April 10, 2007, the FAA issued a Notice of Proposed Rulemaking (“NPRM”) that would increase the duration of first-class medical certificates for pilots younger than forty years of age.¹⁴⁹ The NPRM would extend the period of validity of first-class medical certificates from six months to twelve months.¹⁵⁰ Ostensibly, the FAA proposed this rule because it has not reviewed medical duration standards since 1996.¹⁵¹ The FAA stated that an extension of the medical certificate validity period would not decrease safety because such individuals, those younger than forty years of age, are much less likely to suffer medical incapacitation (therefore acknowledging that the older crowd is more likely to suffer a devastating, catastrophic medical event).¹⁵² In the NPRM, the FAA acknowledged that it “has no experience extending the duration of first-class medical certificates beyond the current 6-month limit.”¹⁵³ However, the FAA developed its proposal based on a review of relevant medical literature, its own aeromedical certification data, and accident data.¹⁵⁴ Moreover, “the FAA considered the long-standing International Civil

¹⁴⁶ Fair Treatment for Experienced Pilots Act of 2007, 49 U.S.C.A. § 44729(g) (West Supp. 2008).

¹⁴⁷ *Id.*

¹⁴⁸ 14 C.F.R. § 61.23(a)(1) (2008) “Except as provided in paragraphs (b) and (c) of this section, a person . . . [m]ust hold a first-class medical certificate when exercising the privileges of an airline transport pilot certificate.” *Id.*

¹⁴⁹ Modification of Certain Medical Standards and Procedures and Duration of Certain Medical Certificates, 72 Fed. Reg. 18,092, 18,093 (Apr. 10, 2007).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Aviation Authority (ICAO) standard requiring revalidation of medical certification annually for airline transport and commercial pilots in multi-crew settings.”¹⁵⁵ The twelve-month duration period for first-class medical certificates became effective July 24, 2008.¹⁵⁶

Notwithstanding the above, the Act requires over age sixty airline pilots to continue to receive first-class medical exams every six months.¹⁵⁷ Additionally, despite the fact that the FAA’s NPRM tacitly admits that older pilots are more vulnerable to an incapacitating episode,¹⁵⁸ the Act specifically prevents older pilots from being subjected to more rigorous medical testing standards, at least in the absence of data requiring additional testing, which can only be developed after the enactment date of the Act.¹⁵⁹ If safety were truly not an issue, there would be no need to require the older pilot corps to receive medical exams more frequently than the younger pilot population. Also, the Act specifically acknowledges that older pilots may require additional or more invasive testing to detect latent medical problems, but the Act specifically prohibits such action for a period of time, with devastating possibilities to unsuspecting, innocent passengers in the interim.¹⁶⁰ Again, the traveling public deserves better than to be treated as test passengers as the gov-

¹⁵⁵ *Id.*

¹⁵⁶ 14 C.F.R. § 61.23(d)(1) (2008).

¹⁵⁷ Fair Treatment for Experienced Pilots Act of 2007, 49 U.S.C.A. § 44729(g)(2) (West Supp. 2008).

No person who has attained 60 years of age may serve as a pilot of an air carrier engaged in covered operations unless the person has a first-class medical certificate. Such a certificate shall expire on the last day of the 6-month period following the date of examination shown on the certificate.

Id.

¹⁵⁸ Modification of Certain Medical Standards and Procedures and Duration of Certain Medical Certificates, 72 Fed. Reg. 18,092, 18,093 (Apr. 10, 2007).

¹⁵⁹ 49 U.S.C.A. § 44729(g)(1).

Except as provided by paragraph (2), a person serving as a pilot for an air carrier engaged in covered operations shall not be subject to different medical standards, or different, greater, or more frequent medical examinations, on account of age unless the Secretary determines (based on data received or studies published after the date of enactment of this section) that different medical standards, or different, greater, or more frequent medical examinations, are needed to ensure an adequate level of safety in flight.

Id.

¹⁶⁰ *See id.*

ernment tries to determine the wisdom of its new policy of allowing older pilots to continue to fly in commercial operations.

The last provision of the Act which will be discussed is Section 44729(h), curiously entitled "Safety."¹⁶¹ It requires that the over-sixty crowd be subjected to line evaluations every six months in order that a pilot's performance be evaluated.¹⁶² A line check is a procedure whereby a company training pilot (also known as a check airman) either flies as a co-pilot for the captain being evaluated on a regularly scheduled trip, or the check pilot occupies the observer's seat in the cockpit and only monitors the performance of the crew during a regularly scheduled operation. This provision of the Act is ridiculous. The point behind the Age Sixty Rule is that it worked. Everybody still acknowledges that there is no precise way to measure when a particular pilot is no longer capable of operating safely in the demanding world of commercial aviation. Being subjected to a line check every six months will not, in any way, contribute to the determination that a pilot is on the precipice of an incapacitating episode. This provision of the Act, though entitled Safety, does absolutely nothing to contribute to the safety of the traveling public. The only definite way to maintain the current level of safety is to repeal the Act and reinstate the rule that we know worked so well for close to fifty years.

¹⁶¹ *Id.* § 44729(h).

(1) Training.— Each air carrier engaged in covered operations shall continue to use pilot training and qualification programs approved by the Federal Aviation Administration, with specific emphasis on initial and recurrent training and qualification of pilots who have attained 60 years of age, to ensure continued acceptable levels of pilot skill and judgment. (2) Line Evaluations.— Not later than 6 months after the date of enactment of this section, and every 6 months thereafter, an air carrier engaged in covered operations shall evaluate the performance of each pilot of the air carrier who has attained 60 years of age through a line check of such pilot. Notwithstanding the preceding sentence, an air carrier shall not be required to conduct for a 6-month period a line check under this paragraph of a pilot serving as second-in-command if the pilot has undergone a regularly scheduled simulator evaluation during that period.

Id.

¹⁶² *Id.*

III. POSSIBLE REASONS FOR THE ACT'S PASSAGE

The Act brings U.S. commercial pilot retirement rules in line with the rules promulgated by the ICAO.¹⁶³ This section will evaluate some possible reasons that, after close to fifty years of failure, those opposed to the mandatory age sixty retirement rule were finally able to achieve success.

A. OPEN SKIES

Air transportation in the United States and around the world is subject to many regulations and restrictions. As sovereigns, nations enjoy exclusive territorial jurisdiction, which also includes jurisdiction over the air above its land.¹⁶⁴ This right has long been recognized and has been codified in various international agreements.¹⁶⁵

The Paris Conference, in 1919, was the world's first multilateral attempt to provide a framework for international aviation.¹⁶⁶ Though no comprehensive international regulatory agreements were achieved, the Conference did draft the Convention for the Regulation of Aerial Navigation, "under which exclusive sovereignty of a state over the airspace above its territory was firmly established."¹⁶⁷ Under Article 16 of the Convention, "a state is authorized to favor its airlines 'in connection with the carriage of persons and goods for hire between two points in its territory.'"¹⁶⁸

The next major international effort came at the Chicago International Civil Aviation Conference ("Chicago Conference") in 1944.¹⁶⁹ During the conference, the United States proposed multilateral recognition for five "freedoms of the air."¹⁷⁰ The freedoms included the rights of a country's civil aircraft:

¹⁶³ On November 23, 2006, new ICAO retirement rules became effective, which permit one pilot to be over age sixty (not to exceed sixty-five) if the other pilot is younger than age sixty. See FAA's Age 60 Rule Homepage, <http://www.age60rule.com/#ICAO> (last visited July 28, 2008).

¹⁶⁴ Ved P. Nanda, *Substantial Ownership and Control of International Airlines in the United States*, 50 AM. J. COMP. L. 357, 357 (2002).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 358.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 359; see also Convention Between the United States of America and Other Governments Respecting International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180 [hereinafter Chicago Convention].

¹⁷⁰ Nanda, *supra* note 164, at 359.

1) to fly over the territory of another without landing, provided there is advance notice and approval; 2) to land in another state's territory for non-commercial technical reasons, such as refueling or maintenance; 3) to carry traffic from its country of registry to another; 4) to carry traffic from another country to its own country of registry; and 5) to carry traffic between two countries outside its own country of registry provided the flight originates or terminates on its own.¹⁷¹

The attendees at the conference could not agree on a consensus to accept the freedoms proposed by the United States, which would have formed the core provisions of a multilateral treaty governing international civil aviation.¹⁷² However, the Convention did reaffirm that each nation is a sovereign entitled to control of the airspace above its land.¹⁷³ It was the purpose of the Convention and the proposals of the United States at the convention to foster the growth of the international civil aviation industry.¹⁷⁴ Since the attendees failed to reach a multilateral international civil aviation agreement, the United States strictly enforced cabotage restrictions.¹⁷⁵

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Chicago Convention, *supra* note 169. Chapter 1, Article 1 states: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." *Id.*

¹⁷⁴ *Id.* The preamble states:

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

Id.

¹⁷⁵ Nanda, *supra* note 164, at 363. Cabotage is defined as the "exclusive right of a country to operate the air traffic within its territory." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004), available at <http://dictionary.reference.com/browse/cabotage>.

The first U.S. statute to enforce cabotage restrictions against foreign airlines was the Air Commerce Act of 1926.¹⁷⁶ The U.S. Federal Aviation Act of 1958¹⁷⁷ reaffirmed the provisions of the 1926 act by banning cabotage privileges for foreign carriers.¹⁷⁸ It was the policy of the United States to strictly implement the prohibition against foreign cabotage until the late 1980s.¹⁷⁹

As U.S. airlines were suffering financially in the early 1990s, the U.S. policy position on cabotage began to change.¹⁸⁰ The government became less concerned with negotiating so-called bilateral agreements with other nations and began pursuing a new initiative known as "Open Skies."¹⁸¹ The Department of Transportation ("DOT") stated, "the Open-Skies program represents a further progression along the path toward a truly open environment for international aviation services, an environment in which all the participants . . . will reap genuine and lasting benefits."¹⁸² The DOT listed the elements that it believed should be a part of any Open Skies agreement.¹⁸³ For the United States, the purpose behind these potential Open Skies

¹⁷⁶ Air Commerce Act of 1926, ch. 344, 44 Stat. 568; Nanda, *supra* note 164, at 363.

¹⁷⁷ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

¹⁷⁸ *Id.* § 1108(a). "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high sea." *Id.* "Foreign aircraft, which are not a part of the armed forces of a foreign nation, may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States." *Id.* § 1108(b).

¹⁷⁹ Nanda, *supra* note 164, at 364.

¹⁸⁰ *Id.* at 373-74.

¹⁸¹ *Id.*

¹⁸² U.S. Dep't of Transp. Order No. 92-8-13, 1992 DOT Av. Lexis 568, at *3 (Aug. 5, 1992).

¹⁸³ *Id.* at *4-*11. The elements include: 1) "Open entry on all routes;" 2) "Unrestricted capacity and frequency on all routes;" 3) "Unrestricted route and traffic rights, that is, the right to operate service between any point in the United States and any point in the European country, including no restrictions as to intermediate and beyond points; change of gauge, routing flexibility, coterminization, or the right to carry Fifth Freedom traffic;" 4) "Double-disapproval pricing in Third and Fourth Freedom markets, and price leadership in third country markets to the extent that the Third and Fourth Freedom carriers in those markets have it;" 5) "Liberal charter arrangement (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);" 6) "Liberal cargo regime;" 7) "Conversion and remittance agreement;" 8) "Open code-sharing opportunities;" 9) "Self-handling provisions;" 10) "Procompetitive provisions on commercial opportunities, user charges, fair competition and in-

agreements was to ensure a strong and competitive domestic airline industry.¹⁸⁴ The U.S. government, in the early 1990s, felt that the system of achieving bilateral agreements was “no longer sound” to meet the needs of the new global trade environment.”¹⁸⁵

It did not take long for the United States to succeed in its new endeavor. The United States reached its first Open Skies agreement with the Netherlands in 1992.¹⁸⁶ That first agreement was only the beginning. The United States has reached Open Skies agreements with at least fifty-five countries.¹⁸⁷ “Open Skies Agreements are usually a precursor to airline partnerships.”¹⁸⁸ The recent alignment of the U.S. commercial pilot retirement age requirement with that of the ICAO standard is another step which makes it easier for the United States to obtain Open Skies agreements with more nations. It will also make it easier for the United States to justify relaxing rules on foreign ownership and control of U.S. airlines. As we move towards more seamless operations and regulations between U.S. carriers and foreign carriers, the United States inches closer and closer to its original goal of a deregulated international civil aviation market.

B. PILOT SHORTAGE

Another possible reason for the sudden success in raising the mandatory retirement age for commercial pilots is the forecasted shortage of qualified pilots available to U.S. airlines.¹⁸⁹ Currently, at least for legacy carriers, there is no shortage of qualified pilots.¹⁹⁰ However, regional carriers are feeling some pain. American Eagle airlines had to cancel some flights in 2007 because of a shortage of flight crews.¹⁹¹ In fact, to attract enough pilots, American Eagle has lowered its minimum experi-

termodal rights;” 11) “Explicit commitment for nondiscriminatory operation of and access for computer reservation systems.” *Id.*

¹⁸⁴ See Nanda, *supra* note 164, at 375.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (noting that some of the nations the United States has reached agreements with include twenty European countries and Sri Lanka, Morocco, and the Philippines).

¹⁸⁸ *Id.* at 376.

¹⁸⁹ Scott McCartney, *The Middle Seat: Airlines Lower Bar to Fill Pilot Ranks—Worsening Shortages Force Some Small Carriers to Hire Younger, Less-Experienced Flyers*, WALL ST. J., Dec. 18, 2007, at D1.

¹⁹⁰ Pilot List, *supra* note 94.

¹⁹¹ McCartney, *supra* note 189, at D1.

ence requirements for new hire pilot applicants.¹⁹² The airline has lowered its total flight hours requirement to 600 hours, down from 800 hours, and the airline acknowledged that it will interview applicants with as few as 500 total hours of flight experience.¹⁹³ American Eagle is not the only carrier lowering its experience requirements. Trans States Airlines, a St. Louis-based regional airline that operates flights on behalf of American, United, and US Airways, recently lowered its minimum flight-time requirements to 500 hours, down from 1,500 hours just a few years ago.¹⁹⁴ This is a particularly scary proposition considering that these regional carriers operate jet aircraft that are every bit as sophisticated as the jets operated by legacy carriers.¹⁹⁵

However, as a method of controlling the pilot shortage, changing the mandatory retirement age is woefully inadequate. At best it is a stop-gap measure that can only hope to stem the shortfall for, at most, five more years. Additionally, it does not address the root cause of the shortage. The root cause of the shortage is pilot pay and benefits. Airline managements have, over the past few years, successfully cut labor costs (pilot wages and benefits) to the point that young people no longer view piloting airplanes as a desirable career choice.¹⁹⁶ Starting salaries at many of the regional carriers are as low as \$24,000 per year.¹⁹⁷ Not many people want to pay over \$54,000 to receive the training necessary to “land” a job that pays only \$24,000 per year.¹⁹⁸ Thus, to truly address any lingering pilot shortage, the govern-

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ The American Eagle aircraft fleet includes the Embraer 145 family of aircraft and the Bombardier CRJ 700 aircraft. American Airlines, American Eagle, <http://www.aa.com/aa/i18nForward.do?p=/footer/eagleOverview.jsp#Fleet%20Information> (last visited July 28, 2008). The ERJ 145 operates at a maximum speed of Mach 0.78. Embraer Commercial Jets, ERJ 145 Performance Summary, http://www.embraercommercialjets.com.br/english/content/erj/erj_145.asp?rela=summary (last visited July 28, 2008). By way of comparison, the Boeing 737-800 typically cruises at a speed of Mach 0.785. Boeing, Commercial Airplanes, 737 Family, http://www.boeing.com/commercial/737family/pf/pf_800tech.html (last visited July 28, 2008).

¹⁹⁶ See Torbenson, *supra* note 96, at 22A; Schroeder, *supra* note 97, at A1.

¹⁹⁷ McCartney, *supra* note 189, at D1.

¹⁹⁸ Airline Transport Professionals advertises its Fast Track Airline Career Pilot Program at \$57,495. ATP Flight School, Airline Training Programs, http://www.atpflightschool.com/airline_training_programs/index.html (last visited Jan. 20, 2008).

ment should encourage the airlines to pay a decent wage to their employees rather than concoct half-baked schemes that only partially address systemic problems and will actually end up hurting more people than the stop-gap measures help.

IV. CONCLUSION

The Fair Treatment for Experienced Pilots Act is a poorly constructed, ill-advised piece of legislation. It amounts to an enormous financial windfall for a relatively small group of senior airline pilots, while at the same time is financially devastating to the remaining pilot group. It will potentially cause five years' worth of seat and pay stagnation. Therefore, a majority of pilots will not be able to recoup the dollars lost because of this legislation.

Every pilot currently working at a U.S. airline was hired under the old, mandatory Age Sixty Rule. Every current captain benefited, in terms of seniority and seat progression, from the old rule. For the current group of senior pilots to claim that it is unfair for them to have to retire at age sixty and let the pilots junior to them progress through the ranks, just as they were able to, is selfish and disingenuous. The only fair and equitable way to change the retirement age would have been for Congress to grandfather all active pilots under the old rule and apply the new retirement rule to those pilots hired after the enactment date of the statute.

Furthermore, the claim of some senior pilots that this law was necessary because they needed to keep working is half-truth and spin. The old rule did not prevent retired U.S. airline pilots from finding gainful employment as a pilot; it only prevented them from continuing to fly for domestic commercial airlines. The retirees were always free to continue their aviation careers with charter companies, corporate flight departments, and foreign flag carriers, among other alternatives. In fact, some pilots have found that starting a career with a foreign carrier is more lucrative than the positions they held with their U.S. airline.¹⁹⁹ One former US Airways pilot stated that flying for Emirates Airlines allows him to spend more time at home now than he did

¹⁹⁹ Susan Carey, *Outbound Flight: With Jobs Scarce, U.S. Pilots Sign On at Foreign Airlines—Global Travel Boom Yields Tempting Pay For Expats; Concerns About Safety—A Captain's New Life in Dubai*, WALL ST. J., May 5, 2006, at A1 (noting that a former US Airways pilot now flying for Emirates Airlines enjoys a total compensation package that is superior to the package he enjoyed while employed with US Airways).

while flying for US Airways, and he has better housing and health care, retirement, and vacation plans.²⁰⁰ Thus, for senior pilots flying for domestic U.S. carriers to state that they need to continue in their current positions in order to make up for any lost retirement money does not state a true and accurate picture. Lucrative aviation careers do exist elsewhere. Arguably, in most instances, one should not have to seek employment on the other side of the world, but in this case, it is the fairest option. Trying to remain in their current positions long after the time they knew they would have to retire negatively impacts an enormous group of pilots for the short-term benefit for a comparatively smaller group of pilots.

Finally, as a stop-gap measure to mitigate the effects of an impending pilot shortage, the Act is woefully deficient. If there truly is a coming shortage, then the Act, at best, delays the inevitable for five years. It does absolutely nothing to address the root causes of a shortage and offers no real solutions to the problem. The only true way to address any potential shortage is to transform piloting airplanes in to an attractive career alternative for the youngsters of this nation. Airline pilot pay and benefits have declined steadily since deregulation of the industry in 1978.²⁰¹ Stemming the decline and actually reversing the trend will go a long way toward relieving any potential pilot shortage that looms on the horizon.

The Fair Treatment for Experienced Pilots Act offers a solution to a problem that does not exist. It provides a windfall for the senior most airline pilots of today at the expense of those pilots junior to them on their airlines' respective seniority list. It was passed under the guise of a desire to assist those pilots whose pensions were terminated either consensually between the airline and the union or in bankruptcy proceedings. However, the negatively affected pilots do have the opportunity to continue lucrative careers elsewhere.

²⁰⁰ *Id.*

²⁰¹ For example, a United Airlines B737 captain earned \$100,000 per year in 1978. David C. Koch, Captain Icarus?, http://www.landings.com/_landings/stories/captainicarus.html (last visited Feb. 5, 2008). Adjusting for inflation, that same pilot should be earning \$282,000 per year in 2003 dollars. *Id.* However, in actuality, the current United Airlines B737 captain earns \$106,080 per year in 2008 dollars. See Airline Pilot Central, United, <http://airlinepilotcentral.com/airlines/legacy/united.html> (last visited Feb. 5, 2008). As can be seen, United Airlines B737 captains have essentially not received a raise in terms of real wages since 1978.

Another justification for the Act is that the old rule was arbitrary. However, as noted above, many provisions of the Act are just as arbitrary as the old Age Sixty Rule itself. Plus, the Act will do nothing to contribute to aviation safety. The point behind the old rule is that it worked. It was simple to implement. It treated all pilots equally. The Fair Treatment for Experienced Pilots Act provides a glaring example of what happens when legislators legislate concerning issues with which they have little familiarity.