Mandatory Retirement of Airline Pilots: An Analysis of the FAA's Age 60 Retirement Rule

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Mandatory Retirement of Airline Pilots: An Analysis of the FAA's Age 60 Retirement Rule

Under current Federal Aviation Regulation 121.383(c), the "Age 60 Rule," an airline pilot, at the age of 60, must discontinue flying aircraft used to carry passengers in airline operations. Thus, an airline pilot who reaches the age of 60 must retire without regard to his or her excellent health and continued ability to fly.

The tension caused by this conflict between the Age 60 Rule and an individual pilot's continuing desire and ability to fly is shown by the last flight prior to retirement of Captain Gene Hersche. During take-off, the aircraft Captain Hersche was piloting experienced serious difficulties. Hersche reacted promptly to the emergency and reduced the severity of the accident. Due to Captain Hersche's prompt reactions and skill, all but two of the plane's occupants survived the accident. Captain Hersche was retired immediately after the accident because this flight was his last flight before reaching the mandatory retirement age of 60.

The Age 60 Rule (the Rule) has been in effect, in various forms, since 1960. It has been the focus of congressional scrutiny, as well as numerous lawsuits and law review articles. This Comment explores

1. Airman: Limitations on Use of Services, 14 C.F.R. § 121.383(c) (1980).
3. The difficulties included a near simultaneous blowout of two tires, id. at 76, followed by the failure of a third tire and the malfunction of the braking system. Id. at 167.
4. Id. at 76. It was determined from the aircraft's flight data recorder (the so-called "black box") that Capt. Hersche reacted within 1.2 seconds.
5. Id.
6. Two passengers lost their lives because, contrary to instructions, they took the wrong direction after leaving the aircraft and died of burns and smoke inhalation. Id. at 107.
7. Id. at 170.
8. 24 Fed. Reg. 9768-69 (1959) (to be codified in 14 C.F.R. § 40.260(b)).
9. See Aviation Hearings, supra note 2.
10. See, e.g., Keating v. FAA, 610 F.2d 611 (9th Cir. 1979); Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979); Gray v. FAA, 594 F.2d 793 (10th Cir. 1979); Starr v. FAA, 589 F.2d 307 (7th Cir. 1978); O'Donnell v. Shaffer, 491 F.2d 59 (D.C. Cir. 1974); Air Line Pilots

[241]
various aspects of the application of the Rule to pilots flying aircraft for commercial airlines. It outlines the history of the Rule, beginning prior to the Rule's conception with the forced retirement of pilots pursuant to their employment contracts and ending with the Rule's promulgation and its subsequent administrative reviews. The Comment then examines the judicial treatment of legal challenges to the Rule, and the legislative attempts to change the Rule. Finally, the Comment suggests the revocation of the Rule in light of advances in medical and aeronautical technology.

Development of the Age 60 Retirement Rule

The aviation industry has been subject to federal safety regulations since the 1930's. These regulations were promulgated by the Civil Aeronautics Authority (CAA), the predecessor to the Federal Aviation Administration (FAA), to protect pilots and the traveling public. Although the CAA had various regulations pertaining to the physical well-being and flight proficiency of pilots, it had no regulations that prohibited a pilot from flying beyond a certain age. This was because the pilot's age was not considered relevant to flight safety.


12. The regulations provide for a number of different pilot licenses. See 14 C.F.R. § 61.5 (1980). Additionally, there are three general classifications of aircraft operations: general aviation, air carrier, and military. Each of these areas may be further divided. Specifically, air carrier operations include air taxi, commuter, air cargo, and commercial airlines. This Note deals only with commercial airline pilots.


14. Id.

15. Id. Until 1961, regulations required airline pilots to take proficiency checks at least every twelve months. 14 C.F.R. § 40.289 (1946). In 1961, the rules changed to require proficiency checks every six months. 14 C.F.R. § 40.303 (1961). Medical examinations were required every six months. 14 C.F.R. § 21.40(b) (1956).

16. The lack of regulations pertaining to a maximum age limitation was equally true for non-air carrier pilots, including charter, general aviation, and helicopter pilots. For these pilots, there have been no age limitation rules promulgated. Thus, only air carrier pilots currently are subject to any maximum age limit. But cf: Tuohy v. Ford Motor Co., 490 F. Supp. 258 (E.D. Mich. 1980) (although the court noted that the Age 60 Rule does not apply to corporate pilots, the FAA rule was used as evidence that a private regulation was reasonable).

17. In 1936, for example, the Air Line Pilots Association concluded that "retirement of airline pilots should be based on physical and mental condition only and not by any age limitations." Age Discrimination Against Airline Pilots: Hearings Before the Select Comm.
Contractual Development of Age-based Retirement

Prior to 1940, airline contracts did not have age-based mandatory retirement provisions. Most pilots were young; physical and flight proficiency requirements provided adequate safety margins.18

In the 1940’s, however, the airlines initiated pension plans. Under these plans, forced retirement and pension eligibility were predicated on age.19 The carriers took the position that retirement plans and pensions were not a mandatory subject of collective bargaining.20 Thus, many carriers unilaterally set 60 as the age at which forced retirement of pilots would occur.21 Until the mid-1950’s, airlines retired pilots pursuant to retirement provisions of these pension plans.22 Although perhaps reluctant to retire, pilots did not challenge the provisions.23

In 1957, grievances were filed by three American Airlines Pilots who had been forced to retire.24 The pilots alleged that retirement terminated their seniority rights and that, under their collective bargaining agreement, this manner of termination was not one of the three stipulated ways by which seniority could be lost.25 The American Airline System Board of Adjustment ultimately found that the company had violated its contract with the pilots,26 noting that neither the Air Line Pilots Association (ALPA) nor American Airlines had evidenced an intention to include in the collective bargaining agreement the attainment of age 60 as a circumstance by which to interrupt seniority.27 The Board of Adjustment ruled that forced retirement at the age of 60 was therefore a violation of the pilots’ contract, and ordered American Airlines to return the pilots to flight status if they satisfied the standard


18. Ruppenthal, supra note 13, at 529.
19. Id.
20. Id.
21. Id. at 533.
22. In 1950, Captain W.H. Proctor, a pilot for American Airlines, became one of the first airline pilots to reach a company-imposed retirement age of 60. Id. at 530.
23. Id.
24. Airline Age Discrimination, supra note 17, at 85. The pilots and the Air Line Pilots Association (ALPA) filed the grievances with the American Airlines System Board of Adjustment, pursuant to the collective bargaining agreement. The Board of Adjustment was a grievance board composed of four members and a neutral referee who heard employment disputes between pilots and the company. Ruppenthal, supra note 13, at 530-31.
25. The ALPA is an organization representing over 30,000 airline pilots. The ALPA acts as the pilots’ collective bargaining agent and as their legislative lobbyist with regard to matters such as the Age 60 Rule. Aviation Hearings, supra note 2, at 335.
26. Id.
27. Id.
physical and proficiency requirements. In subsequent cases, grievance boards consistently denounced age-based mandatory retirement and held that retirement should be based solely upon physical and flight proficiency standards.

Regulatory Developments

Despite the resistance of pilots and the ALPA to age-based mandatory retirement, the FAA issued a Notice of Proposed Rule Making in 1959, in which the FAA indicated its intention to establish a maximum age for all air carrier pilots. The FAA's proposal was that no person who had reached the age of 60 should serve as a pilot on any aircraft engaged in air carrier operations. The FAA suggested four reasons why a maximum age limitation was needed to ensure aviation safety. First, the process of aging involves a "progressive deterioration of certain important physiological and psychological functions," resulting largely from the degenerative process of arteriosclerosis, resulting largely from the degenerative process of arteriosclerosis. Second, the effect of the aging process cannot be deter-

28. Id. Despite the Board of Adjustment's decision, American Airlines refused to comply. Id. at 533. This refusal became an issue in a pilot strike against American Airlines shortly after the Board's decision and, as a part of the strike settlement, American Airlines agreed to comply with the arbitration order. Id.

29. Id. In 1959, Western Airlines became involved in a similar complaint filed by one of its 60-year-old pilots. The carrier argued that the critical issue was one of safety, and as such was not properly a subject for the grievance machinery in effect at Western Airlines. Alternatively, Western Airlines argued that safety was so critical that any adverse effects the pursuit of safety had on working conditions were merely incidental. Id. The majority of the arbitration board, after hearing testimony about age and its relationship to safety, stated that, "there is no testimonial basis and no 'fact of life' of which we could be expected to take a kind of 'judicial notice' that supports the view that it is unsafe to let a pilot perform after the age of 60. This is not to say that there is not some age—say 90—when we would take judicial notice of physical impairment beyond all reason. It is enough to say that the evidence here does not support the theory that attainment of age 60 is in itself enough to disqualify a pilot." Id. at 535.


31. There is some indication that the FAA, under the guidance of its new Administrator, General Elwood R. Quesada, was under pressure to demonstrate that the FAA was doing its job. Since the beginning of his term in 1958, more people had died than ever before in aviation history, and the first civilian mid-air collision had occurred. "It was necessary for Mr. Quesada to make some kind of move to placate the public so he decided to prove that he was on the job by pointing his finger at the older pilots." Letter from Capt. L.E. Wagner to Senator Hubert H. Humphrey (April 25, 1960), reprinted in 106 CONG. REC. 9962 (1960).


34. Id. Arteriosclerosis is a generic term and includes a number of diseases of the
mined on an individual basis because each person is affected by the aging process to different degrees at the same point in life. Third, degeneration as a result of the aging process occurs at a faster rate the older one becomes. Finally, the result of age degeneration is most often sudden incapacity, disabling an individual without prior warnings or symptoms.

Along with other airline industry associations, the ALPA vigorously opposed the Age 60 Rule. The ALPA contended: (1) that the Administrator did not have the power to issue the proposed regulation; (2) that the proposal violated due process of law; and (3) that the Federal Aviation Act itself prescribed the sole means by which the Administrator might limit, suspend, or revoke a pilot's certificate. The ALPA also questioned the validity of the medical basis upon which the rule was premised.

In addition to these contentions, the ALPA argued that current regulations already fulfilled the intent of the proposed regulations: pilots were required to submit to FAA physical examinations every six months that, if failed, resulted in license suspension; each pilot was required to demonstrate flight proficiency every six months; the Administrator was empowered to take emergency action to suspend a pilot's license. The ALPA was joined by the Air Line Dispatchers Association, the Aircraft Owners and Pilots Association, the National Business Aircraft Association, and the National Aviation Trade Association. Ruppenthal, supra note 13, at 536.

The physical examinations for the First Class Medical Certificate required for airline pilots are intended to detect functional changes and disorders that increase the risk of sudden incapacitation or other conditions that might affect a pilot's physical fitness. The examination primarily tests hearing, vision, and the cardiovascular, neurologic, and endocrine systems. Division of Health Sciences Policy, Institute of Medicine, Airline Pilot Age, Health and Performance 28 (1981) [hereinafter cited as Pilot Age and Health]; see generally 14 C.F.R. §§ 67.1-31 (1980).

A pilot's proficiency is continuously monitored by other flight crew members and is examined at least once a year. There are, however, proficiency checks every six months comprising simulator flights and line checks on regularly scheduled flights. See note 150 infra. A pilot is required to pass each check. If a check is failed, the pilot must undergo additional training until he or she meets the minimum standards that are required by the FAA for safe operations. Pilot Age and Health, supra note 41, at 27; Proficiency Check Requirements, 14 C.F.R. § 121.441 (1980).
lot's certificate without a hearing if this result were warranted.\footnote{Ruppenthal, \emph{supra} note 13, at 535-36.} Furthermore, the ALPA indicated that through self-regulation individual airline carriers could adequately monitor pilot health. Management could decide that a pilot was not competent or fit to fly and should undergo further physical testing or proficiency training prior to resuming flight status.\footnote{Id. at 536.} Despite these arguments, the FAA promulgated the regulation,\footnote{The Rule was promulgated without the benefit of an evidentiary hearing, as had been requested by the ALPA, on the grounds that it would merely bring out information and argument that had been presented in written comment and opinion. 24 Fed. Reg. 9768-69 (1959).} and it became effective March 15, 1960.\footnote{The Age 60 Rule was originally intended to take effect on December 1, 1959. The Administrator, however, delayed the effective date to enable air carriers and the affected pilots to prepare for compliance without unreasonable hardship. The ALPA contended that such a delay negated any sincere concern for air safety on the part of the Administrator because, had safety been the critical issue, the Administrator would have taken “emergency action and grounded [the older pilots] immediately.” Ruppenthal, \emph{supra} note 13, at 543-44.}

**Administrative Review**

The Age 60 Rule has twice been the subject of administrative review by the FAA since its promulgation.\footnote{See Rombough v. FAA, 594 F.2d 893, 898 (2d Cir. 1979).} In each instance, however, the Rule was held to be valid. The first review occurred in October 1971, when, in response to petitions filed by several pilots and the ALPA requesting a public evidentiary hearing and the revocation of the Rule, the FAA conducted informal hearings.\footnote{Airline Age Discrimination, \emph{supra} note 17, at 86.} Subsequent to the hearings, the Agency entered an order denying the requests for revocation on the “sound medical basis” that it lacked the ability “to determine the physiological and psychological age of individual pilots.”\footnote{Id.}

The second review occurred in 1977 as a result of FAA Administrator Langhorne Bond’s promise at his Senate confirmation hearings personally to review the Rule.\footnote{Rombough v. FAA, 594 F.2d 893, 898 (2d Cir. 1979).} Although the Administrator did not change the Rule after his review, he did recognize that a change was possible if a method were developed to ensure that a pilot’s age did not adversely affect health and ability.\footnote{Administrator Bond forwarded the results of his review to several senators. He commented in his review that he “could be satisfied that a proven scientific basis exists and a feasible mechanism could be devised which could replace this rule while providing an equivalent level of safety.” Id.}
Legal Challenges

Air Line Pilots Association International v. Quesada

Before the Rule came into effect, the ALPA initiated an action seeking a preliminary injunction to suspend enforcement of the regulation until its legality could be determined. In Air Line Pilots Association International v. Quesada, the court of appeals upheld the validity of the regulation, despite the ALPA’s contention that the regulation was invalid because it was arbitrary and discriminatory and because it was issued without an adjudicatory hearing, thereby depriving the pilots of property rights in their licenses without due process of law.

The ALPA contended that the FAA violated section 609 of the Federal Aviation Act when it issued the regulation without a hearing, because the FAA was actually modifying pilots’ licenses, rather than engaging in rulemaking. The court held, however, that the procedure was rulemaking and that the Administrative Procedures Act did not require a hearing. Moreover, the court indicated that the regulation did not violate due process by modifying pilots’ rights without a hearing. “Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation.” Any other interpretation, the court reasoned, would unduly hinder the Administrator’s need to act quickly when the interests of safety required action.

In addition, the ALPA urged that the scheme of the Federal Aviation Act showed a congressional intent to provide pilots the greater protection of individual hearings before licenses could be modified. The court disagreed, however, stating that section 609 of the Act describes modifications to an individual’s certificate, and not to those of all pilots. As such, the hearing required by the section does not apply to the promulgation of rules affecting all pilots.

In response to the ALPA’s allegation that the rule was arbitrary
and discriminatory, the court ruled that the regulation had a reasonable basis and was therefore neither arbitrary nor discriminatory. Based upon evidence presented by the FAA, the court found that the rule did bear a reasonable relationship to safety. In addition, the court found no unreasonable discrimination in the Rule's application, although it applied only to pilots operating in air commerce. By addressing only the power of the FAA to issue the regulation and the manner in which the Rule was promulgated, the Quesada court avoided the more difficult question of whether the Rule itself was justified as a safety measure.

Subsequent Litigation

Immediately after the failure of the ALPA's Quesada challenge, the FAA began enforcement of the Age 60 Rule. Since its promulgation, the Age 60 Rule has repeatedly been the subject of litigation. In 1974, the ALPA again sought to challenge the Age 60 Rule in O'Donnell v. Shaffer. In that case, the ALPA attacked the validity of informal FAA hearings conducted in October 1971 that had resulted in the reaffirmation of the Age 60 Rule. The ALPA argued that the hearings violated procedural due process in that they were not evidentiary and lacked the opportunity for cross-examination. Arguing that due process requires "trial by ordeal of cross-examination" when the determination of complex technical issues affects a pilot's livelihood, the ALPA contended that the complex technical issue involved in the

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65. The court relied on the standard of review provided by statute, Federal Aviation Act of 1958, § 601, 49 U.S.C. § 1421 (1976), which required a showing that the Administrator had no reasonable basis for the exercise of judgment. 276 F.2d at 898. See American Trucking Ass'ns v. United States, 344 U.S. 298, 314 (1953).
66. 276 F.2d at 898. The evidence presented by the FAA indicated that (1) the senior pilots fly the largest and fastest aircraft; (2) the available medical studies show that incapacitation due to heart attacks or strokes becomes more frequent in older persons; (3) the current medical technology could not predict with accuracy when heart attacks or strokes might occur; (4) several foreign air carriers had retirement rules paralleling the Age 60 Rule; and (5) numerous experts advocate a maximum age of 60 or younger. Id. See also Ruppenthal, supra note 13, at 539-40.
67. 276 F.2d at 898. The court stated that "[t]he Federal Aviation Act contemplates just such distinction between the regulations governing 'air commerce' and those governing other air transportation." Id.
68. The Age 60 Rule had become effective March 15, 1960, one month prior to Quesada. 14 C.F.R. § 42.40(a) (1960).
69. 491 F.2d 59 (D.C. Cir. 1974).
70. Id. at 61. See notes 48-49 & accompanying text supra.
71. 491 F.2d at 61.
72. Id. at 62.
1971 hearings, whether current scientific evidence invalidated the FAA’s theory that medical science was unable to identify risks of pilot incapacity on an individual basis, required the FAA to provide procedural due process in its hearings. The court held, however, that an evidentiary hearing was not required, regardless of the complexity of the issues, reasoning that the Age 60 Rule did not single out any pilot in particular, but was rather an “across the board” regulation. Thus, the Rule was “not subject to the requirements of adjudications simply because of [its] inevitable effect on individuals.”

Until 1978, the cases challenging the Age 60 Rule were directed at the manner in which the Rule was promulgated and reviewed, and were not directed at the justification for the Rule. The courts have consistently and correctly held, however, that the FAA satisfied administrative and due process requirements in enacting the Rule.

In 1978, legal attacks against the Age 60 Rule changed focus as individual pilots sought personal exemptions from the Rule. In *Starr v. FAA*, Captain John Starr, a United Airlines 747 pilot who had been forced to retire under the Rule, sought review of the FAA’s denial of an exemption from the Rule. The issue on appeal was whether the FAA had abused its discretion in denying all exemptions from the Rule. Starr contended that the facts showed that he was physically fit to fly, and therefore that the denial of his exemption from the Rule was an abuse of discretion.

The court emphasized that its purpose was not to decide whether Captain Starr was fit to fly or whether the Rule itself was valid.

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74. 491 F.2d at 61-62.
75. Id. at 62.
76. Id.
77. Id.
78. 589 F.2d 307 (7th Cir. 1978).
79. Captain Starr had filed a petition for an exemption, asserting that his physical condition warranted such an exemption. Id. at 309. In addition, Capt. Starr had sought to disqualify the Federal Air Surgeon, Dr. H.L. Reighardt, on grounds of unalterable bias. The record indicated, however, that the person who had made the decision under review was not Dr. Reighardt, but rather was Mr. Scully of the Flight Standards Division of the FAA. The court found that, even if Dr. Reighardt had been “disqualified” as the determining physician, Mr. Scully might have been influenced by a document opposing a relaxation of the Age 60 Rule that had been authored by Dr. Reighardt. Therefore, the court determined that the failure to disqualify Dr. Reighardt was not prejudicial error. Id. at 314-16.
80. The decision in *Starr* turned on an analysis of § 601 of the Federal Aviation Act, 49 U.S.C. § 1421(c) (1976), which states: “The Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest.”
81. The basis of Captain Starr’s petition for exemption from the Age 60 Rule was that his excellent health and the favorable results of various medical tests indicated that he should have been granted an exemption. See 589 F.2d at 309, 311.
82. *See id.*
Rather, although the case concerned a single pilot, the real issue was the Administrator's per se denial of all exemptions from the Rule. Pursuant to this limited review, the court found that the FAA had not abused its discretion in denying Captain Starr's petition for exemption from the Age 60 Rule. First, the court noted that an exemption need not be granted merely because it was within the authority of the Administrator to grant the exemption. Second, the court noted the difficulties inherent in granting exemptions to a regulation such as the Age 60 Rule and suggested that it might be better to establish an explicit policy of no exemptions under the Rule. Finally, the court stated that in the future, it would not examine the issue of abuse of discretion absent a deliberate failure by the FAA to analyze new data and techniques.

In attempting to obtain review of his medical qualifications, Captain Starr relied on *Houghton v. McDonnell Douglas Corp.*, in which the court considered a pilot's physical fitness. In *Houghton*, the plaintiff, aged 51, had been terminated from the position of senior test pilot by McDonnell Douglas. McDonnell Douglas admitted that the

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83. *Id.* at 310.

84. The court reviewed the actions of the FAA under an “arbitrary and capricious” and “abuse of discretion” standard. Starr v. FAA, 589 F.2d at 310-11. The court indicated that an “abuse of discretion” standard is normally applied when an agency is authorized to take a particular action if found to be in the “public interest.” Conceding that the Federal Aviation Act requires review of findings of fact under a “substantial evidence” standard, 49 U.S.C. § 1486(e) (1976), the court defended the limited scope of its review by concluding that “nonfactual analyses and agency conclusions drawn from facts are generally reviewed under an abuse of discretion standard.” 589 F.2d at 310.

85. “[I]f the Age 60 Rule is reasonable, as it has been held to be, it is not abuse of discretion to reject any individual application for exemption . . . . The court will defer to . . . the FAA . . . even if on its own the court might have made different findings or adopted different standards.” *Id.* at 312-13.

86. *Id.* at 312.

87. The court stated that granting exemptions to a rule such as the Age 60 Rule would severely burden the Flight Standards Service of the FAA. Furthermore, exemption decisions would have to be based on voluminous medical records, which, according to the FAA, do not determine the risks of heart attack or stroke. Finally, allowing exemptions would create, rather than eliminate, anomalies and inequalities. *Id.*

88. The court suggested that “[i]t might be better to publish a no-exemption policy for the involved rule rather than leave a regulation on the books that seems to say exemption from any rule can be petitioned for.” *Id.* The benefits of such a policy include: (1) notice of the administrative hurdle to potential petitioners prior to their investment of time and money; (2) establishment of a standard to prevent ad hoc judgments based on trifling differences; and (3) elimination of the need for timely considerations of each individual petition for exemption. *Id.*

89. *Id.* at 312.

90. For arguments that the FAA is deliberately not analyzing new medical data, see generally *Aviation Hearings*, supra note 2, at 104-11 (statement of Dr. Stanley Mohler).

91. 589 F.2d at 309.

plaintiff had been terminated due to his age, but contended that age was a bona fide occupational qualification (BFOQ) under the Age Discrimination in Employment Act (ADEA)\(^9\) and was therefore a permissible basis for termination.\(^9\) The plaintiff presented considerable medical evidence showing that he was in excellent health.\(^9\) Although the district court ruled against Houghton and held that age was a BFOQ,\(^9\) the Eighth Circuit, on appeal, held that McDonnell Douglas failed to present sufficient evidence that Houghton’s age was a BFOQ.\(^9\) The Eighth Circuit thus ordered the district court to require the defendant to provide back pay, and to reinstate Houghton if he was still qualified.\(^9\)

By rejecting the contention that age is a BFOQ, therefore disallowing termination based on age, *Houghton* provides support for the contention that the Age 60 Rule is not valid. *Houghton*’s application to the Age 60 Rule may be distinguished, however, on three grounds: (1) the plaintiff in *Houghton* was not 60 years old, but was only 51; thus, the Age 60 Rule and its rationales\(^9\) would not apply to the plaintiff; (2) *Houghton* was brought under the ADEA,\(^10\) which is applicable to employers, but not to federal agencies,\(^10\) and is therefore an employment discrimination case rather than a direct challenge to the Rule; and (3) the plaintiff did not fly aircraft carrying passengers, but rather flew test...
aircraft; thus, the state of his health did not place passengers in jeopardy.

Within two years of *Houghton*, three other circuits decided cases involving issues similar to those presented in *Starr*. In *Rombough v. FAA*, the Second Circuit held that the FAA could not deny on its face an exemption from the Age 60 Rule, but did not invalidate the Rule. The basis of the *Rombough* court's decision was that the FAA was unable to determine an individual pilot's functional age, and that the plaintiff had failed to show that his proposed standards of fitness provided the public with a sufficient level of safety.

In finding no reliable physical or psychological tests to warrant invalidating the Age 60 Rule, the *Rombough* court relied on *Hodgson v. Greyhound Lines, Inc.* In *Hodgson*, the defendant's refusal to hire drivers older than age 35 was sustained because of the potential danger of accidents from driver error. The *Rombough* court relied on *Hodgson* for the proposition that changes due to age cannot be tested reliably enough to warrant the safety risk inherent in hiring an older employee. The *Rombough* court's reliance on *Hodgson*, however, is misplaced. First, the *Hodgson* court considered the use of age as a factor in hiring employees, not in retiring them. This distinction is important because, in retiring an employee, an employer takes away a vested interest in the job, while, in refusing to hire an employee, an employer merely withholds the job from one who does not yet have it. Second, whereas in *Hodgson* the court found that Greyhound lacked the ability to predict the health of drivers past the age of 35, the FAA has clearly demonstrated its ability accurately to predict health changes in younger pilots. The FAA, however, claims a lesser degree of accuracy in predicting health changes in pilots past the age of 60. Thus, the ability

102. *Rombough v. FAA*, 594 F.2d 893 (2d Cir. 1979); *Keating v. FAA*, 610 F.2d 611 (9th Cir. 1979); *Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979).

103. 594 F.2d 893 (2d Cir. 1979).

104. 594 F.2d at 897, 899. Furthermore, while the court stated that the Rule had "survived a number of challenges on both procedural and substantive grounds," id. at 898 (emphasis added), previous cases were based on whether the Rule was properly enacted and not on whether the Rule was warranted. See note 165 & accompanying text infra.

105. *Aviation Hearings*, supra note 2, at 38-39 (statement of Dr. H.L. Reighardt). In addition, the FAA is capable of recertifying pilots who have been heart patients. *Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978).


107. The *Rombough* court stated that "[o]ther courts faced with the issue have specifically found that psychological and physiological changes due to age cannot be tested with sufficient reliability to justify the safety risks involved in employing older applicants in jobs where their performance may jeopardize people's safety." 594 F.2d at 899.

108. *Aviation Hearings*, supra note 2, at 38-39 (statement of Dr. H.L. Reighardt). In addition, the FAA is capable of recertifying pilots who have been heart patients. *Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978).

109. *Aviation Hearings*, supra note 2, at 32, 35.
of the FAA to predict health changes is greater than that of the defendant in \textit{Hodgson}, although the FAA's claimed ability is not great enough to invalidate the Age 60 Rule. Third, \textit{Hodgson} involved a bus driven by only one person, while an aircraft has at least two pilots, both of whom are certified to pilot the aircraft,\(^{110}\) and generally a third crewmember who may fill in to relieve one of the other pilots if he or she becomes incapacitated.\(^{111}\) Thus, there are more safeguards on an airplane than on a bus.

Soon after \textit{Rombough}, the Tenth Circuit, in \textit{Gray v. FAA},\(^{112}\) affirmed the FAA's denial of the plaintiff's request for an exemption from the Age 60 Rule. In a break with precedent, however, the \textit{Gray} court indicated that, in the future, the FAA may be considered to "be capable of abusing its discretion by adhering to its policy of nonexemption from the Age 60 Rule."\(^{113}\) Nevertheless, noting that medical authority on the subject of aging is far from unanimous, the court stated that until the authority becomes stronger, the policy of the FAA could not be termed an abuse of discretion.\(^{114}\)

Recently, the Ninth Circuit, in \textit{Keating v. FAA},\(^{115}\) found that the FAA did not abuse its discretion by denying Captain Keating's exemption from the Age 60 Rule.\(^{116}\) Captain Keating was denied an exemption from the Age 60 Rule and subsequently brought suit, contending that the FAA's action was an arbitrary abuse of discretion.\(^{117}\)

Captain Keating's approach differed from the previously discussed "exemption cases"\(^{118}\) because he challenged the manner in which his petition was denied, rather than raising the issue of whether the FAA may per se deny all such petitions. While holding that the FAA's denial of Captain Keating's exemption was not an abuse of discretion, the \textit{Keating} court left open the possibility that a court may find that the FAA abuses its discretion by adopting a policy of per se denial of exemptions. The FAA argued in \textit{Keating} that Captain Keating had failed to provide two types of medical tests that the FAA deemed necessary in order to grant an exemption.\(^{119}\) Stating that it was not an

\footnotesize{\begin{itemize}
  \item \(^{110}\) Crewmember Qualifications, 14 C.F.R. \$ 121.432(a) (1980).
  \item \(^{111}\) See note 160 \textit{infra}.
  \item \(^{112}\) 594 F.2d 793 (10th Cir. 1979).
  \item \(^{113}\) \textit{Id}. at 795.
  \item \(^{114}\) \textit{Id}.
  \item \(^{115}\) 610 F.2d 611 (9th Cir. 1979).
  \item \(^{116}\) \textit{Id}. at 613.
  \item \(^{117}\) \textit{Id}. at 613. Capt. Keating relied on 14 C.F.R. \$ 11.25(b)(5) (1980), which requires that exemptions from the Federal Aviation Regulations be in the public interest, that they not adversely affect safety, and that there be a continued level of safety equal to that provided by the Rule.
  \item \(^{118}\) See notes 52-114 & accompanying text \textit{supra}.
  \item \(^{119}\) The two tests identified by the FAA were angiographic studies and psychophysiological functions tests. An angiography is a test through which it is possible to determine
\end{itemize}
expert in aerospace medicine, the court of appeals deferred to the FAA. This deference suggests that, had Captain Keating provided the tests required by the FAA, the court may have been more willing to find an abuse of discretion.

Although the cases since Quesada have upheld the validity of the procedures used in enacting the Age 60 Rule, the recent cases involving the validity of the FAA's denial of exemptions from the Rule indicate a recognition by the courts that the FAA's "no exemption policy" may result in a finding of abuse of discretion. This recognition is reflected in the response of the Tenth Circuit in Gray to the FAA's failure to heed medical science, and more significantly, in the Keating court's possible willingness to find an abuse of discretion by the FAA had the plaintiff provided the results of the medical tests.

Legislative Reform

The controversy surrounding the Age 60 Rule peaked in 1979, when a bill was introduced in the House of Representatives to amend section 602(b) of the Federal Aviation Act to eliminate all age limitations imposed on air carrier pilots.

In addition to prohibiting federal officers and the airlines from refusing pilots over sixty the right to fly, the proposed bill called for an increased number of more stringent physical examinations if deemed necessary by the Secretary of Transportation. The bill also directed the National Institute of Health (NIH) to determine whether any mandatory age limitation for pilots was needed and whether physical examination standards were adequate.

abnormalities in the circulatory system by injecting a contrast material into the arteries, veins, or heart and then viewing its progress through radiological techniques. The Merck Manual of Diagnosis and Therapy 371 (13th ed. 1977).

120. 610 F.2d at 613.
121. See note 124 & accompanying text infra.
123. See note 124 infra.
124. The bill was entitled The Experienced Pilots Act of 1979 and will be referred to as such in this Note. The bill read in pertinent part: "(2) Notwithstanding any other provision of law or any rule, regulation, or order issued pursuant thereto, no Federal officer or employee shall—(A) refuse to issue any airman certificate to, or refuse to renew any airman certificate for, any person applying for the issuance or renewal of such certificate in order to serve or continue to serve as a pilot of any aircraft; or (B) require any air carrier to terminate the employment of, or refuse to employ, such person as a pilot on any aircraft of such air carrier; solely by reason of the age of such person, if such person is less than seventy years of age. (3) If the Secretary of Transportation determines on the record after opportunity for an agency hearing that in the interest of safety persons who are sixty years of age or older and are employed as pilots by air carriers to which the regulation set forth in part 121.383(c) of title 14, Code of Federal Regulations, applied prior to the date of enactment of this paragraph should be required—(A) to pass more frequent medical examinations than persons
Following the introduction of this bill, the Subcommittee on Aviation of the Committee on Public Works and Transportation held hearings in July 1979. As a result of these hearings, the original bill was modified extensively. As modified, the bill permitted pilots to continue working until the age of sixty-one and one half, or until a study to be undertaken by the NIH demonstrated that pilots should retire at an earlier age. The bill also required the NIH to conduct a study to determine whether the Age 60 Rule—or any age limit—is warranted, whether current FAA medical examinations are adequate, and the effect of aging on a pilot's abilities to perform his or her duties. Furthermore, the new law was extended to pilots not presently subject to the Rule, that is, commuter airline pilots, air carrier helicopter pilots, and air travel club pilots.

In response to these changes in the bill, many advocates of a change in the Age 60 Rule voiced their opposition to the bill reported out of committee. One opponent of the bill was the ALPA, which reported that the proposed law was "unacceptable to the total member-

who are less than sixty years of age and employed as such pilots, or (B) to pass more comprehensive medical examinations than persons who are less than sixty years of age and employed as such pilots, the Secretary, by regulation, may require such persons who are sixty years of age or older to pass more frequent or more comprehensive medical examinations in order to continue to serve as such pilots, except that in no case shall the Secretary require that such persons pass such examinations less frequently than four times a year or within ninety days of actual flight. Sec. 2. The Director of the National Institute of Health, in consultation with the Secretary of Transportation and the Secretary of Labor, shall conduct a study to review available medical data to determine whether an age limitation which prohibits individuals who are older than a particular age from serving as pilots of aircraft is medically warranted. Not later than January 1, 1982, the Director of the National Institute of Health shall submit a Report to the Congress which sets forth the results of such Study." H.R. 3948, 96th Cong., 1st Sess., 125 Cong. Rec. 2722 (1979).


126. Aviation Hearings, supra note 2, at 5-7.
127. Id.
128. Telephone interview with Capt. Jack Young, Eastern Airlines, Legislative Vice President, Pilots' Rights Ass'n (Oct. 20, 1980).
The bases of the ALPA's opposition were that: (1) the bill included an arbitrary age limit of sixty-one and one half; (2) it did not apply equally to all flight deck crewmembers because it did not apply to flight engineers; (3) the proposed eighteen month extension would interfere with existing contracts and pension plan rights; (4) the law did not prohibit the FAA from imposing more demanding or frequent physical examinations on other pilots; and (5) in the absence of medical evidence, any upper age limit was unjustified.

As a result of this opposition to the proposed law, an amendment to the proposed bill was suggested. This amendment, known as the Howard Amendment, essentially deleted all provisions of the proposed bill except those directing the NIH to conduct a study into the medical aspects of aging and flying. The Howard Amendment was enacted, in lieu of the originally proposed bill, on December 29, 1979.

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130. Id.
132. There is some question about whether a flight engineer is a "pilot" and therefore covered by the Age 60 Rule. In Monroe v. United Air Lines, Inc., No. 79 C 360 (N.D. Ill. Oct. 30, 1979), the court held that a flight engineer is a pilot for the purposes of the Age 60 Rule. Some carriers, however, will permit a captain to make a bid for a flight engineer position prior to his or her 60th birthday and then, when the captain reaches 60, will not retire him or her because the carriers do not extend the Rule to flight engineers. Interview with Robert Leonard, Captain, Pan American World Airways, retired, San Jose, California (May 1, 1981). As a result, it is unclear whether the Age 60 Rule applies to flight engineers, although it would seem that the FAA would not require flight engineers to relinquish their jobs because they do not actually fly the airplane. See 14 C.F.R. § 121.383(c) (1980).
134. Aviation Hearings, supra note 2, at 343 (statement of Capt. O'Donnell).
135. Id.
136. See note 137 infra.
137. 127 CONG. REC. H11,554 (daily ed. Dec. 5, 1979). Following the introduction of the Howard Amendment, there was substantial debate on the floor of the House. Some Representatives argued that allowing pilots to continue flying past the age of 60 while the NIH conducted its study was tantamount to using the flying public as guinea pigs. Id. at 11,550. Others argued that arbitrary limits serve political convenience rather than safety. Id. at 11,558. Finally, it was pointed out that the current regulation discriminates unfairly against airline pilots. Id. at 11,559.
138. Mandatory Age Retirement—Pilots, Pub. L. No. 96-171, 93 Stat. 1285 (1979). Although the law calls for the completion of the study within one year of enactment, the study has yet to be produced. The NIH contracted with the Institute of Medicine (IOM) of the National Academy of Sciences to compile available medical data and its findings. Letter from Patricia R. Harris, Secretary of Health and Human Services, to Congressman Thomas P. O'Neill, Jr. (Sept. 17, 1980) (on file with the Hastings Law Journal).

However, it has become clear that due to the "complexity of the study and the need to prepare a thorough, objectively analytical and in-depth report," id., the results will not be presented to the Congress until the fall of 1981, almost one year behind schedule. This delay
Lack of Justification for the Age 60 Rule

An alternative to the Age 60 Rule's absolute prohibition of pilots over the age of sixty should be developed to avoid the removal from duty of experienced, skilled pilots at age sixty without regard to each individual pilot's state of health.\textsuperscript{139} As the preliminary report of the Institute of Medicine noted, the age of sixty "does not mark the beginning of a special risk or a special increase in risk."\textsuperscript{140}

Proponents of mandatory age-based retirement argue that the system is needed to ensure passenger safety because medical science is presently unable to predict and measure physical and mental degeneration caused by aging.\textsuperscript{141} Medical researchers assert, however, that age alone has little predictive or diagnostic value with respect to functional and cognitive deficiencies of pilots. Because "[a]ging is a [process] characterized by adaptation or maladaptation to the environment . . . [t]he simple notion of deficit as either a descriptive or an explanatory variable for change in an older person is not legitimate."\textsuperscript{142} An individual's functional and cognitive deficiencies cannot be attributed solely to age with complete reliability until the individual is in his or her late eighties. More reliable indications of functional and cognitive decline include histories of cardiovascular disease and central nervous system disorders.\textsuperscript{143} In addition, Dr. Stanley Mohler is of the opinion that "[a]ge alone, as is the case with race or sex, gives no information about an individual's competency or health."\textsuperscript{144} According to Dr. Mohler, the three critical determinants of pilot fitness are: (1) freedom from an impairing disease; (2) the ability to perform; and (3) the desire to continue flying.\textsuperscript{145}

\textsuperscript{139} By retiring pilots at age 60, the Rule becomes unrealistic and detrimental to passenger safety. Stanley R. Mohler, M.D., The Aging Process, Diseases, and Pilot Career Longevity 16-17 (Sept. 11, 1980) (Presented at the 28th Int'l Congress of Aviation and Space Medicine, Montreal, Quebec, Canada) [hereinafter cited as Mohler]. It has been demonstrated that, as a pilot's age and experience increase, accident rates decrease. \textit{Id.} at 19.

\textsuperscript{140} \textit{Pilot Age and Health, supra} note 41, at 3.

\textsuperscript{141} \textit{See generally Aviation Hearings, supra} note 2, at 30-104 & 218-329.

\textsuperscript{142} \textit{Aviation Hearings, supra} note 2, at 100 (statement of Dr. Donna Cohen of the University of Washington).

\textsuperscript{143} \textit{Id.} at 103.

\textsuperscript{144} Mohler, \textit{supra} note 139, at 2.

\textsuperscript{145} \textit{Id.}
With respect to the first criterion, while it is evident that the Age 60 Rule was designed in part to obviate the increased threat of heart attack in older pilots,\(^{146}\) recent medical research indicates that heart problems can be reliably predicted prior to a heart attack, even in older pilots.\(^{147}\) Thus, the primary impairing disease, heart attack, may be predicted with some accuracy.\(^{148}\)

In addition to being free from impairing disease, a pilot must be able to perform.\(^{149}\) Proponents of the Age 60 Rule argue that pilots past the age of sixty lose some of their skill and thereby present a greater danger to the public. Ability to pilot an aircraft, however, does not necessarily decrease as a pilot's age increases. Many pilots above the age of sixty have greater skill and experience than their younger colleagues.\(^{150}\)

Recent technological advances in flight simulators facilitate the testing of a pilot's ability to perform. Thus, the argument that the airlines cannot accurately detect the deterioration of skills in older pilots loses force in light of the advances in simulator technology. Air carrier pilots must currently pass a proficiency flight check every six months.\(^{151}\)

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146. See notes 32-37 & accompanying text supra.
147. Mohler, supra note 139, at 15.
148. Predictive testing is based on detection of the following four risk indicators: 1) positive family history of cardiovascular disease, hypertension, hypercholesterolemia, and cigarette smoking; 2) ischemic ST depression; 3) chest pain; and 4) duration of exercise of less than six minutes. The last three risk factors are determined with symptom-limited treadmill testing of maximal exercise (the Bruce protocol). According to Dr. Bruce, the risk of coronary heart disease in men 55-69 years of age who have less than two of the above predictors is less than 7% per year. Of this possible group of people, less than one out of five cardiac events is fatal. Aviation Hearings, supra note 2, at 91-93. See also Bruce, DeRouen & Hossack, Value of Maximal Exercise Tests in Risk Assessment of Primary Coronary Heart Disease Events in Healthy Men, Five Years' Experience of the Seattle Heart Watch Study, 46 AM. J. CARDIOLOGY 371 (Sept. 1980); Harrison & Smith, Age Trends in the Cardiovascular Dynamics of Aircrewnmen, 50 AV. SPACE & ENV'TL MED. 271 (March 1979).
149. See note 145 & accompanying text supra.
150. Mohler, supra note 139, at 18.
151. 14 C.F.R. § 121.441 (1980).
As a result of the increased sophistication of simulators, the FAA has amended the regulations governing the use of simulators in proficiency testing, making it possible for pilots to perform their required flight checks in a simulator rather than in an aircraft. If an older pilot can handle the myriad of complex emergencies generated by a simulator as well as, or better than, younger pilots, then it is difficult to argue that the older pilot cannot react with the speed and accuracy of a younger pilot, or that the older pilot does not fly as well as a younger pilot.

Under Dr. Mohler's test, the fitness to fly finally requires the desire to continue flying. Although many pilots look forward to retirement, others desire to continue piloting subsequent to reaching the mandatory retirement age. An option preferable to the forced retirement imposed by the Age 60 Rule would be to give an airline pilot the choice to continue his or her career or to retire.

In light of the above, it is evident that the three prerequisites of the fitness to fly, as established by Dr. Mohler, can be satisfied by the present state of the art. Not only can medical science detect the presence of impairing disease, but with the use of sophisticated simulators, the airlines can reliably detect any significant deterioration in the skill of pilots. Allowing pilots to fly after age sixty presumes their desire to continue piloting; those pilots who wish to retire upon reaching age sixty should still be able to do so. Accordingly, justifications for the Age 60 Rule no longer outweigh the evils prescribed by the Rule; the Age 60 Rule can be amended with no diminution in passenger safety.

Alternate Solution

The Age 60 Rule should be repealed in its entirety. Although the repeal of the Rule arguably is the only action necessary to cure the drawbacks of the Age 60 Rule, because the current recertification pro-


153. See note 145 & accompanying text supra.


155. See note 145 & accompanying text supra.

156. The airline industry is generally opposed to changing the Age 60 Rule. Aviation Hearings, supra note 2, at 218-19. Although all opponents to change premise their conclusions on concerns for safety, other possible motives include wage negotiation leverage by unions, career advancement for younger pilots, avoidance of the considerable costs to the government of changing the Rule, and a natural resistance to change. Mohler, supra note 139, at 23.
cess removes unqualified pilots from command, it is apparent that the elimination of age-based retirement, without more, would not satisfy Congress or the FAA. Therefore, a change in regulations must be accompanied by additional safeguards.

If the Age 60 Rule were repealed, air carrier pilots who have reached the age of sixty should be required to submit to more frequent FAA medical examinations, including tests similar to the Bruce protocol. These examinations should take place at least every three months, twice as often as currently required. In addition, pilots who have reached the age of sixty should be required to take simulator proficiency checks more frequently. By requiring increased frequency in both types of testing, a sudden onset of disease or a decline in proficiency could be quickly detected. As an additional benefit, increased testing would produce more complete information regarding a pilot's health and proficiency than is currently available for the study of trends of health and performance in older pilots.

To avoid many of the pitfalls encountered by the proposed Experienced Pilots Act of 1979, which the House of Representatives rejected, a suggested alternative to the Age 60 Rule should have a more limited application. Thus, this alternative should involve only those pilots who have reached the age of sixty, imposing no additional requirements or testing on younger pilots. Additionally, by applying to all flight deck crew members, it should avoid all differentiation between the piloting positions of captain and copilot, and the support po-

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157. See note 44 & accompanying text supra.

158. These limitations are only suggested as a means of countering any opposition to the proposal advocated by this Note and are not to be construed as acknowledging any frailties of older pilots.

159. See notes 148-50 & accompanying text supra.

160. As a practical matter, it may be necessary to impose several other limitations on pilots over the age of 60. For example, in order to appease the fears of those concerned about having an entire flight crew of pilots over 60 years old, it might be necessary to require that no more than one member of a flight crew be over the age of 60. As a temporary measure, it may be necessary to bar pilots over 60 from serving on the flight crews of current production aircraft requiring only two crewmembers because, although such aircraft are capable of being flown by a single pilot in an emergency, too much of a workload falls upon the remaining pilot when one becomes incapacitated. Recently, however, the President's Task Force on Aircraft Crew Complement concluded that new, highly sophisticated aircraft such as the Douglas DC-9-80 and the Boeing 757 and 767 can be operated safely by two crewmembers. Report of the President's Task Force on Aircraft Crew Complement (July 2, 1981). In light of the possible reduced crew complement, there would be no age limitation with respect to the new generation of aircraft.

Finally, if medical evidence indicates that older pilots have reduced stamina, it might be necessary to apply a variegated maximum hours per flight standard that would assign older pilots a more protective standard than the current eight-hour maximum. See 14 C.F.R. § 121.471(b) (1980).

161. See note 128-35 & accompanying text supra.
sitions of flight engineer and navigator. Finally, it should apply only to those pilots currently subject to the Age 60 Rule, excluding those not currently covered.

Conclusion

Since 1960, the FAA has required airline pilots to retire when they reach the age of sixty. The requirements of the Age 60 Rule have been termed arbitrary and discriminatory by opponents of the Rule. Nevertheless, the FAA remains convinced that the Rule is justified and necessary and, as a result, has refused to change the Rule or grant any exemptions from it.

The courts have upheld the manner in which the Rule was promulgated and affirmed the position of the FAA in its refusal to grant exemptions from it. Despite this judicial acceptance, the courts have not ruled on the issue of whether the Rule is itself warranted, but have deferred judgment on that issue to the FAA.

Due to recent advances in medical science and simulator technology, however, it is now possible to determine the likelihood of whether a pilot will suffer an incapacitating disease and test his or her abilities as a pilot. In addition to these advances, recent court opinions in Gray and Keating suggesting judicial displeasure with the FAA’s blanket denial of all exemptions of the Rule indicate that the Age 60 Rule should be abolished.

Repealing the Rule will allow pilots to continue their careers until they choose to retire or are no longer qualified to fly. By subjecting pilots over the age of sixty to more frequent physical examinations and flight proficiency checks, the FAA and the airlines will be able to ensure that pilots maintain their health and their flight skills, and, even more importantly, that the nation’s air travelers will be flying with the most experienced pilots in the aviation industry.

R. Michael Kasperzak, Jr.*

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162. See note 132 supra.
163. There are currently no regulations that require pilots in other operations, such as air taxi, commuter, travel club, personal, or helicopter, to retire at a specified age. However, as a result of several recent commuter airline accidents, the National Transportation Safety Board has made a formal recommendation to the Administrator that an upper age limit be specified for commuter pilots. No rulemaking process has been initiated to date. National Transportation Safety Board, Safety Recommendation A-80-36 & 37 (1980). See also note 16 supra.
164. See notes 78-120 & accompanying text supra.
166. See notes 119-20 & accompanying text supra.

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