

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRANT O. ADAMS, et al.,)	
)	
Petitioners,)	
)	No. 07-1180
v.)	(consolidated with
)	Nos. 07-1194, 07-1226,
FEDERAL AVIATION ADMINISTRATION)	07-1326, 07-1366,
and DEPARTMENT OF TRANSPORTATION,)	07-1390 & 07-1447)
)	
Respondents.)	
)	

**REPLY IN SUPPORT OF MOTION TO DISMISS CONSOLIDATED CASES
AS MOOT IN LIGHT OF NEW STATUTE**

The petitioners' opposition to our motion to dismiss these consolidated cases as moot is long on constitutional objections to the new statute but short on support for the proposition that their objections save these cases from mootness. In fact, they have no support at all for that proposition.

Under the Fair Treatment for Experienced Pilots Act, the FAA's Age 60 Rule has "cease[d] to be effective," 49 U.S.C. 44729(d), and the FAA's orders under that Rule, which are challenged in the present cases, have also ceased to be effective. If the petitioners wish to be able to fly for commercial airlines, they must now do so under the new statute. If they are barred from doing so under the "nonretroactivity" provision, 49 U.S.C. 44729(e)(1), and they feel that the statute infringes their rights, as their opposition to this motion indicates they do, they may file a suit in district court challenging the validity of the statute.¹

The Court's jurisdiction in these cases arises solely from 49 U.S.C. 46110, which

¹ We will reserve discussion of those constitutional claims until an appropriate time.

permits a challenge to "an order issued by the Secretary of Transportation (* * * or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator)" and requires a person challenging such an order to file "a petition for review in the United States Court of Appeals for the District of Columbia Circuit" or an appropriate regional circuit. 49 U.S.C. 46110(a). In a petition for review of the FAA's action under 49 U.S.C. 46110, the court would be reviewing the agency's action, not Congress's enactment of a new statute. Section 46110 gives this Court no jurisdiction to entertain a plenary challenge to a new federal statute, when the order under review was not issued pursuant to that statute. Only the district court has jurisdiction over such a challenge, which would be based on general federal-question jurisdiction. See 28 U.S.C. 1331. Accordingly, once the new statute abolished the FAA's Age 60 Rule and mooted the underlying orders, there was no continuing Article III jurisdiction in this Court to address objections to those orders or any other matters.

As a fallback position, leaving aside their constitutional challenge, the petitioners contend that the case is not moot, on the theory that they would somehow benefit from a ruling that the FAA arbitrarily denied their request for an exemption from the abolished Age 60 Rule.² Since the new statute presumptively bars the petitioners from flying for commercial airlines unless they reapply, and makes no exception for people who are not currently

² The petitioners err in stating that "the government has replaced the old Age 60 rule with a new Age 60 rule." Opp. at 19. In reality, Congress has replaced the FAA's Age 60 Rule with a statutory Age 65 Rule. Not only are the sources of law different but the maximum age is different. This is more than the mere technical change the petitioners imply.

employed by the airlines, regardless of the reason, there is no relief that the petitioners could obtain from a determination that there was a defect in the FAA's order denying their request for an exemption from the abolished rule. Certainly, there is no authority to obtain the sort of money damages the petitioners imply they are seeking. See Opp. at 20 (referring to "compensation for the costs associated with the improper actions of the FAA"). Because there is no relief that the Court could give the petitioners here, these cases are moot.

We note in the context of potential relief that the courts of appeals have repeatedly upheld the FAA's practice of not granting exemptions from the Age 60 Rule.³

³ Under 49 U.S.C. 44701(f), the FAA may grant an exemption from any of its safety regulations and standards, if the agency "finds the exemption is in the public interest." A petitioner must show "why granting the exemption would not adversely affect safety" or how it would "provide a level of safety equal to that provided by the rule from which you seek the exemption." 14 C.F.R. 11.81(e). No petitioners were able to satisfy that burden with respect to the Age 60 Rule, and, thus, FAA denied all exemption requests. The courts of appeals repeatedly upheld those decisions. See, e.g., Baker v. FAA, 917 F.2d 318 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991); Keating v. FAA, 610 F.2d 611 (9th Cir. 1979); Gray v. FAA, 594 F.2d 793 (10th Cir. 1979); Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979); Starr v. FAA, 589 F.2d 307 (7th Cir. 1978). The courts also held that the FAA's policy of declining to grant exemptions from the Age 60 Rule was not an abuse of discretion. Yetman v. Garvey, 261 F.3d 664, 679 (7th Cir. 2001); Rombough, 594 F.2d at 897-900; Starr, 589 F.2d at 311-14.

CONCLUSION

For the foregoing reasons, these cases should be dismissed as moot.

Respectfully submitted,

MICHAEL JAY SINGER
(202) 514-5432

EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2008, I served the foregoing Reply in Support of Motion to Dismiss Consolidated Cases as Moot in Light of New Statute on the following by causing a copy to be sent by first-class U.S. mail, postage prepaid, with a courtesy copy by electronic mail, to:

Professor Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
jturley@law.gwu.edu

Edward Himmelfarb
Attorney for the Respondents