

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

COLGAN AIR, INC.

Appellant

v.

WEST VIRGINIA HUMAN RIGHTS  
COMMISSION, RAO ZAHID KHAN

Appellees

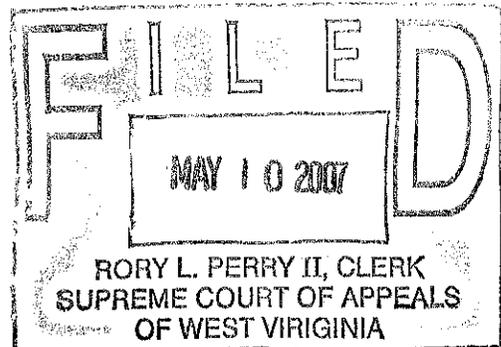
33355  
APPEAL NO. 070285v  
(West Virginia Human Rights Commission  
Docket No. ERRELNOANCSREP -391-02)

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**AMICUS CURIAE BRIEF  
OF  
THE REGIONAL AIRLINE ASSOCIATION**

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## **I. INTRODUCTION AND NATURE OF PROCEEDING AND RULING BELOW**

This amicus curiae brief is filed by the Regional Airline Association (RAA), a national association that represents U.S. regional airlines, as well as the manufacturers of products and services that support the industry, before the U.S. Congress, the U.S. Department of Transportation, the Federal Aviation Administration, and other federal agencies. RAA has 44 member airlines and 246 associate members.

The regional airlines that RAA represents carry more than 90 percent of the passengers traveling on regional airlines. There are more than 14,000 regional airline flights each day, and more than one in every five domestic airline passengers now travel on regional airlines. The regional airline fleet comprises more than 2,700 aircraft, nearly 40 percent of the total U.S. commercial airline fleet.

The RAA files this brief in support of Colgan Air, Inc.'s appeal of the Final Order of the West Virginia Human Rights Commission in this matter. The Commission's Final Order reinstating Mr. Khan must be reversed because federal law preempts state interference with an airline's air safety decisions.

## **II. POINTS AND AUTHORITIES AND DISCUSSION OF LAW**

The Commission's action in reinstating Mr. Khan is preempted by the Federal Aviation Act of 1958 (the "Act")<sup>1</sup> and the Federal Aviation Regulations promulgated by the FAA, which establish a comprehensive and exclusive regulatory framework governing aviation safety in the United States. For example, the FAA dictates and reviews airport operations (14 CFR pt. 139), all aspects of commercial flight operations and pilot qualifications and fitness (14 CFR pts. 91, 121), and the standards for the design and manufacture of aircraft (14 CFR pts. 21, 25, 33).

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<sup>1</sup> Pub. L. No. 85-726, 72 Stat. 731 (1958), codified at 49 U.S.C. § 40101 et seq.

The legislative history of the Act states

[A]viation is unique among transportation industries in its relation to the Federal Government – it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.

S. Rep. No. 1811, 85<sup>th</sup> Cong. (1958). The scheme of federal regulation governing aviation is pervasive. See Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973) (holding local aircraft noise ordinance invalid based on preemption). Regulation of aviation safety is the exclusive province of the federal government. See Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 795 (6<sup>th</sup> Cir. 2005); Abdullah v. American Airlines, 181 F.3d 363, 371 (3d Cir. 1999); Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960).

The Act's preemptive effect protects the ability of an airline to make decisions, free from state interference, as to whether an individual is fit to serve as a pilot. See World Airways v. International Brotherhood of Teamsters, 578 F.2d 800, 803 (9<sup>th</sup> Cir. 1978) (discussed below); Northwest Airlines v. Gomez-Bethke, 34 Empl. Prac. Dec. (CCH) p. 34,561 (D. Minn. 1984) (federal regulation of pilot qualifications preempts use of state statutes to permit chemically-dependent pilots to return to flying duty); French v. Pan Am Express, 869 F. 2d 1, 6 (1<sup>st</sup> Cir. 1989) (discussed below). See also Aldendifer v. Continental Airlines, 1978 U.S. Dist. LEXIS 7011, \*20 (C.D. Cal. 1978) (where acting in good faith and upon a rational basis, an airline's judgment as to the qualifications of flight crew members must be accepted).

In World Airways, the court affirmed the district court's decision that federal aviation law preempts an arbitrator's ability to: 1) require an airline to retrain a pilot who had been

demoted for using poor judgment; and 2) require the airline to provide the pilot with an opportunity to re-qualify as a pilot-in-command. Id. at 801. The court noted

[F]ederal law places the responsibility upon the airline to determine whether or not a pilot possesses the judgment to serve as a pilot-in-command ... Although the federal policy of resolving labor differences by arbitration is strong, there is also a strong federal policy in ensuring the safety of air travel.

Id. at 803.

Similarly, in French, a pilot who was terminated for refusing to take a drug test sued on the basis that the request violated state law. The court held that the pilot's claim was preempted because applying the state statute would conflict with federal policy and an airline's responsibility under federal law. Id. at 6, n. 2. The court stated

The intricate web of statutory provisions affords no room for the imposition of state-law criteria vis-à-vis pilot suitability. We therefore conclude, without serious question, that preemption is implied by the comprehensive legal scheme which imposes on the Secretary of Transportation the duty of qualifying pilots for air service.

Id. at 9. The court further noted that the field of aviation safety and pilot fitness is occupied completely by federal regulations including those related to pilot training and the evaluation of pilot performance. Id. at 9-10.

Thus, where an airline terminates a pilot based on air safety concerns (whether due to a failed proficiency check, the airline's judgment as to the fitness of the pilot, or other reasons), a state is not permitted to second guess that decision or order that the pilot be reinstated. Accordingly, the Commission's Order reinstating Mr. Khan must be set aside.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Scott Caudill, counsel for The Regional Airline Association, certify that service of the foregoing Amicus Brief has been served on the other parties, by U.S. Mail, postage prepaid, on this 10<sup>th</sup> day of May, 2007, as follows:

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