

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 January 2005

CASE NO.: 2004-AIR-11

IN THE MATTER OF

THOMAS E. CLEMMONS,
Complainant

v

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,
Respondents

APPEARANCES:

Steven K. Hoffman, Esq.
James & Hoffman
For Complainant

Christopher E. Howe, Esq.
Kelly, Hart & Hallman, P.A.
For Respondents

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This matter involves a dispute concerning alleged violations by the Respondents-Employers, Ameristar Airways, Inc. and Ameristar Jet Charter, Inc., of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, *et seq.* ("AIR21" or "the Act") and the regulations promulgated hereunder at 29 C.F.R. Part 1979. This statutory provision, in part, prohibits an air carrier, or contractor or sub-contractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions or privileges of employment because the employee provided to the employer or

the federal government information relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration (FAA) or any other provision of federal law related to air carrier safety.

Complainant was employed by Ameristar Airways, Inc., (hereinafter "Airways" or "Respondent") from September 6, 2002, until his termination on January 20, 2003.¹ On April 14, 2003, Complainant filed a complaint with the Department of Labor alleging he was discriminated against for raising concerns to his supervisors and the Federal Aviation Administration (FAA) regarding violations of FAA Rules 121 and 125, inadequate maintenance of aircraft and issues related to the hours of duty for pilots. On January 20, 2004, following an investigation, the Regional Supervisor for the Occupational Safety and Health Administration (OSHA) found the complaint to have merit. (CX-67, 68, 78). Employer timely filed a request for a formal hearing pursuant to 49 U.S.C. § 42121 (B)(2)(a).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Hearings were held in Dallas, Texas, on July 27-30 and September 21-22, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their positions. Complainant testified, called Mr. Sprat, Mr. Barker, Ms. Rives and Mr. Wachendorfer and introduced seventy five (75) exhibits, which were admitted into evidence. Employer called Mr. Wachendorfer, Mr. Hulse, and Mr. Frazer, and introduced thirty-seven (37) exhibits which were admitted into evidence.

Post-hearing briefs were filed by the parties.² Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. ISSUES

1. Whether Complainant engaged in protected activity as described in 49 U.S.C. § 42121;
2. If so, whether such activity was a contributing factor in Respondent's decision to discharge Complainant;
3. If so, whether Respondent has established by clear and convincing evidence that Respondent would have discharged Complainant absent his protected activity;

¹ Respondent disputes the claim that Airways and Jet Charter were joint employers. After reviewing the testimony of Rives and the entire record, and as is discussed *infra*, I find the Respondents were in fact joint employers and both are properly joined in this action.

² Complainant submitted a 30-page, double-spaced brief on November 10, 2004. Employer submitted a 28-page, double-spaced brief on November 10, 2004.

II. SUMMARY OF THE CASE

A. Company Structure and Personnel

The Ameristar corporate family includes three airlines: Respondents Ameristar Airways (Airways) Ameristar Jet Charter, Inc. (Jet Charter) and Ameristar Air Cargo (Air Cargo). All three companies are owned by Thomas Wachendorfer and share office headquarters at 4400 Glen Curtis Drive in Addison, Texas. (Tr. 811-12, 819, 959, 1163). Personnel common to all three companies include Thomas Wachendorfer, President; Pete Lassiter, Chief Financial Officer; Lolly Rives, Human Resources; Stacy Muth, Dispatch; and Ted Wachendorfer, General Counsel. (Tr. 419, 811, 814, 819, 1175). Additionally, Lindon Frazer held positions at each company, serving as Director of Maintenance for Jet Charter, Director of Safety at Air Cargo and Vice President of Operations at Airways. (Tr. 420-21, 814, 819). Each Ameristar airline flies under a different certificate, including Part 121, 125 and 135. As a result, the airlines fly different planes and have different requirements for training and duty-time. The Part 121 certificate is considered more expensive than Part 125 in that it has stricter training requirements, more required management officials and manuals, and more flexible duty time than the Part 125 certificate.³ (Tr. 421-22, 423-24).

Jet Charter was formed in the early 1990s as a Part 135 charter company for both passengers and cargo; it flies Falcon 20s, Lear Jet Series 24 and 25, and King Air planes. (Tr. 811-12; CX-2).⁴ Thomas Biondo is the Director of Operations for Jet Charter, and Andrew Williams serves as chief pilot. (Tr. 814). In 1995, Jet Charter's Charparral Certification was suspended secondary to record-keeping problems, but it was reinstated 60 days later, during which time Jet Charter was able to fly under other certificates it held. (Tr. 813, 851-52). Jet Charter has had two fatal crashes in fifteen years, most recently in September, 2003, in Del Rio, Texas. Both crashes were investigated by the government and found to be caused by pilot error; neither occurred while Complainant was employed at Respondent. (Tr. 453-56, 816, 913-14, 926).

Air Cargo was formed in 1999 as a Part 121 air carrier flying Boeing 737s and providing the public with common carriage under its Part 121 certificate which became effective on September 5, 2000. (Tr. 817-18, 409; CX-1). Pat Hulsey is the Director of Operations for Air Cargo and Matt Raymond served as its chief pilot. (Tr. 819).

³ Wachendorfer testified an airline organized under 125 may have less overhead expenses, in that the regulations do not require as much training, a chief pilot, a director of maintenance or a pilot drug program, as are required under Part 121. (Tr. 820-24).

⁴ References to the record are as follows: Tr. (transcript pages); CX-__ (Complainant's exhibits); RX-__ (Respondent exhibits). Many of Respondent's exhibits such as RX-1 to 4, 8, 10-14, 17-20 were duplicates of Complainant's exhibits. Where the record contains duplicate exhibits, references are generally to only Complainant's exhibits.

Airways was formed in 2002, under Part 125 as a contract-only airline. (CX-3, 4, 5, 6). Under Part 125 Airways was prohibited from common carriage or holding out to the public; rather, it was restricted to private carriage for a specific number of customers. (Tr. 809, 409). Airways had three DC-9 aircraft and anywhere from 10 to 14 pilots, depending on turn-over. (Tr. 809). Despite the restrictions on common carriage and Airways assurance that it had no intention of common carriage, Airways was found by the FAA to have engaged in common carriage on 112 separate flights for freight forwarders from October 22 2002 to March 18, 2003 and fined \$123,000.00. (CX-24, 27-31).⁵

Flying operations commenced when customers were recruited by, or initiated contacted with Respondent's dispatch department to arrange for the transportation of cargo or personnel. In turn, dispatchers contacted schedulers to arrange flight details such as fueling and weather issues. (Tr. 442, 445). All three Ameristar companies shared common dispatchers and schedulers with the former having the primary responsibility for soliciting customer business and communicating with schedulers about flight planning and the latter managing and coordinating crew member activities with appropriate aircraft and trips. Home base for Respondent was Addison, Texas, and schedulers were responsible for getting crew members to the planes. Additionally, there was a common maintenance scheduler at Respondent, who was in charge of mechanics, inspections and working on the airplanes. (Tr. 443-45).

B. Summary of the Evidence

1. Thomas Clemmons

Background

Mr. Clemmons, Complainant, served as the Director of Operations for Airways until his termination on January 20, 2003. Currently, he is an aviation safety inspector with the FAA stationed in the American Airlines Certificate Management office. He has been the FAA liaison for American Airlines since September, 2003. Complainant was born in 1955 and is married with four kids. (Tr. 399). He has held numerous jobs in the aviation industry including jobs at an airplane propeller shop, as an instrument flight instructor, a multi-engine flight instructor and a commercial pilot. As a pilot, Complainant flew corporate flights on light and medium twin engines as well as commuter airlines and part 135 common carriage operations. (Tr. 400-01).

Complainant spent three years at Southeastern Airlines in the 1980s as the first officer of a DC-9 passenger plane operating under Part 121. He was part of the initial cadre captain class

⁵ The issue of common carriage is discussed in greater detail *infra* and was directly related to Airways use of Jet Charter's call sign which had the practical effect of acting as a cover for Airways common carriage operations.

at Legend Airlines before returning to Southeastern Airlines as an MD-88 captain. When Southeastern Airlines closed down, Complainant flew as a Part 135 charter pilot and was also a flight engineer at Express One International. He received ground school training to fly Boeing 737s and served as a DC-9 first officer before being promoted to captain. (Tr. 400-04). Complainant also flew with Express Jet, Inc., a Part 125 operation. When hired by Respondent Complainant held licenses in commercial pilot single-engine land flight instruction, single- and multi-engine land and instrument instruction, advanced and instrument ground instruction ratings and airline transport certification. (Tr. 404).

Director of Operations Position

Complainant heard from Ken Lance that Ameristar was starting a Part 125 operation. Complainant had no knowledge of Respondent but wanted to return to Texas, so in August, 2002, he called Ameristar and spoke with Andrew Williams who asked him to come in for a meeting.⁶ (Tr. 405-06). When Complainant stopped in to drop off a resume, Williams asked him to fill out an application and interview for a pilot position. Complainant discussed the DC-9 captain position with Rives and Williams, who also showed him the pilot pay schedule, took him around the Ameristar offices and introduced him to various people. Additionally he discussed the differences between Parts 121, 125, and 135 with Williams. Complainant was the first person to interview for a pilot position. (Tr. 408-10).

Williams called Complainant in the beginning of September, 2002, indicating he planned to offer Complainant a job as captain. (Tr. 410-11). On September 4, 2002, Williams offered Complainant the Director of Operations (D.O.) position at Airways, even though they had not discussed this position previously and Complainant did not have any managerial experience. Complainant accepted the job, which paid \$72,000 per year, and started work on September 6, 2002. (Tr. 411, 415). Complainant later learned Respondent initially designated Biondo as D.O., but the FAA did not approve because Biondo held another position at Ameristar. Additionally, Respondent filed an amended Pre-Application Statement of Intent with the FAA (a document necessary in the certification process) on September 2, 2002, naming Complainant as Director of Operations, even though Complainant was not offered the job until two days later. (Tr. 412-14; CX-5).

When he started, Complainant was somewhat familiar with Part 125 regulations. However, he was not familiar with many management officials, other than Wachendorfer and Frazer, his supervisor. Complainant testified he did not know if Frazer had 125 experiences. (Tr. 419-23). Ameristar officials, including Wachendorfer, Rives, Biondo, Frazer, Williams, Hulse, and Raymond, met every Monday morning. Complainant was not asked to attend the meetings, which were by invitation only, and he was never criticized for not attending. Indeed, Complainant testified Williams told him specifically he did not need to attend the management meetings. (Tr. 424-26).

⁶ Complainant later learned Williams was the chief pilot at Jet Charter. (Tr. 406).

This was Complainant's first position as Director of Operations; his position as check airman only involved training and testing pilots. (Tr. 651-52). Complainant did not research what his duties would be, did not receive any training for this position, did not request training or even discuss his duties with Frazer. (Tr. 660-61, 416). His first duties were to settle in, learn the layout of the company, and get information on the certification process, which he testified was hard to find in the first weeks. Complainant did not initially work on any manuals or paperwork to be filed with the FAA. He filled out personnel forms, received a copy of General Operations Manual, and met with Ameristar management and FAA officials for the purpose of having the FAA receive his resume and accept him as Director of Operations. (Tr. 416-17, 426). Complainant's appointment was approved and he testified there was discussion among FAA officials as to who would manage Airway's certificate. (Tr. 417-18). Complainant reported to Biondo for a few weeks, and they discussed putting together a list of pilots and creating training records. (Tr. 660-61).

As Director of Operations, Complainant had to deal with routine operations issues and was on a telephone tether to both dispatch and the pilots. (Tr. 645). Theoretically, he had operational control over the release of airplanes from home base; however, in reality Complainant did not have control as he did not decide where or when the planes would go, or what freight they would carry. (Tr. 445). When he talked with Frazer in November or December, 2002, about his lack of involvement in the operation, Complainant indicated he did not mind being a "token D.O.", but he would not break the rules. Frazer told him to keep doing what he was doing but did not seem pleased with the conversation. (Tr. 445-47). Directors of Operations generally fly with various crews to check out pilot procedures and ensure operations are running smoothly, but Complainant left that duty to his chief pilot/check airmen and only flew one revenue flight. (Tr. 713-14).

The General Operations Manual for Airways, dated July 1, 2002 and submitted as CX-72 and RX-4, sets out the duties and responsibilities of the D.O. (Tr. 448). The following is a list of Complainant's duties and whether or not they actually applied to him: 1. Execute plans and policies (Complainant was not involved with policy making); 2. Coordinate check airmen (no); 3. Maintain knowledge of aircraft movement (yes); 4. Coordinate inspections with utilizations (no, it was a maintenance function); 5. Coordinate personnel action (yes); 6. Maintain current operations specifications (Complainant maintained what was given to him); 7. Distributed operation manuals to pilots (yes); 8. File accident reports (not applicable); 9. Record keeping under FAR 125.401 and .405, training/pilot records and trip records (yes); 10. Direct training activities (yes, with Mr. Frazer); 11. Similar to 10 (Yes); 12. Advise appropriate personnel of flight operations, training and crew member standardization (yes); 13. Prepare proficiency records; flight schedules, reports and correspondence regarding operations activities (no, Complainant not involved in scheduling and did not keep proficiency records); 14. Disseminate information to all crew members as it relates to routes, airports, NOTAM (notice to airmen), NAVAID (ground-based navigation device) and company policies (yes, but had problems with dispatch getting materials to pilots); 15. Submit reports to FAA (yes); 16. Designate sufficient check pilots (yes); 17. Schedule aircraft (no, but did flight crew schedules); 18. Post information regarding policy, routes, NOTAM, etc. (yes); 19. Provide adequate and current flight kit in aircraft (yes); and 20. Maintain current aircraft checklist (yes). (Tr. 449-69, 527).

Pilot Hiring and Training

Complainant's first task was to hire and train pilots. Complainant testified he was told to hire a chief pilot, but he did not know whose idea this was. Out of the resumes passed on to him, Complainant specifically sought pilots with DC-9 experience and who were trustworthy and safe. (Tr. 426-28, 436, 661). Wachendorfer gave Complainant the go ahead to hire pilots in late September. (Tr. 429). Complainant described the job as Part 125 freight operation with a pilot schedule of 14 days on and 7 days off, as he was told by Rives and Wachendorfer. Complainant also showed prospective pilots the pay schedule. Initially, Complainant wanted to hire 6-8 people; he did not run his choices by Frazer, but thought it was understood the company was looking for experienced pilots. Barker and Sprat interviewed with someone other than Complainant; management did not object to the pilots Complainant hired. (Tr. 430-32).

Complainant and Frazer jointly decided Barker would be chief pilot, although this was not a required position under part 125. As chief pilot, Barker was Complainant's right-hand man and was paid a set salary unlike other pilots. (Tr. 436, 661-62). Complainant testified Barker was a friend of his; they worked 3-4 jobs together prior to their work at Respondent. (Tr. 652-53). He further testified pilots form tight fraternities and some who he hired had been peers of his at Southeast Airlines or other companies. Combined, Barker and Complainant knew half of the pilots they hired at Airways. Out of the first group of pilots, hired September 23, 2002, Complainant only knew Barker and Sprat. The second group was hired on October 7, 2002, and Complainant personally knew Krutolow and Schneider; Complainant did not know any pilots hired in the third group, on October 30, 2002. (Tr. 652-53, 433-34).

All the pilots went through two weeks of ground school training shortly after their hire, as taught by Complainant, Barker and Hulse. (Tr. 437-39). After ground school, the pilots went to Minneapolis for simulator training, which was followed by three fly-alongs with either Complainant or Barker. (Tr. 439-40). The first pilot class ready to fly in mid-October, and started flying the third week of October, 2002. With pilots starting on three different dates, and three different training sessions to complete, training lasted well into November, 2002. (Tr. 441).

Pilot Scheduling

Complainant was also in charge of scheduling the pilots. He testified he drafted the schedule with Barker's help and then had it reviewed by Frazer. (Tr. 471-72, 691). Frazer was readily involved in the scheduling process and needed to approve the schedule before implementation. Barker did not sit in on scheduling meetings between Frazer and Complainant. While Wachendorfer also reviewed the schedules, Complainant did not deal with him directly and has had no more than five conversations with him. (Tr. 472-73, 656, 692). In order to create a pilot schedule, Complainant needed to know the pilots' names, months, and the number of days to work. The day pilots go home or go to work is called the "change day," which Frazer told Complainant should be every Monday. (Tr. 470-71, 474). Complainant drafted the schedule month by month and passed it on to the pilots and schedulers after it was approved; any changes

were made prior to implementation and remained unknown to the pilots. (Tr. 473, 475, 780).

Overall, Complainant had to schedule enough crews to cover the three aircraft. He testified he had a mathematical problem with a set schedule of 14 days on and 7 days off with a constant change day. As a result, he needed to modify the schedule at times by taking a day off or adding a day to accommodate the change day; upper management was not happy with the way he worked the schedule. (Tr. 692-93, 477-78, 496). In the beginning, he scheduled 13 days on and 7 days off to account for the change day, but this was unacceptable because he had the wrong change day. Complainant's schedules were rejected five or six times. (Tr. 693-94).

Additionally, Complainant stated the pilots complained about the 14 and 7 schedule, even though they knew at the time they were hired that this was the deal. Complainant discussed the possibility of a more flexible schedule with Frazer, who indicated they would revisit the issue when the operation was up and running; Complainant agreed with Frazer's response. (Tr. 476). The pilots wanted schedule like the Air Cargo pilots who worked 16-17 days per month, but Complainant thought they should get what they signed on for. (Tr. 694-695, 675). Complainant acknowledged that Airway's pilot schedule of 14 days on and 7 days off resulted in 21 or 22 days of work per month, which was more than other airlines. Complainant testified Southeastern Airlines had a pilot schedule of 18-24 days per month; nonetheless, pilots complained of feeling like second class employees. (Tr. 675-77).

On November 26, 2002, Complainant took a pre-approved vacation and left Barker in charge of the schedule. Complainant and Barker discussed having fewer crews over the holiday weekend, because traditionally there was less flying at Thanksgiving. Barker let pilot Wanamaker go home early, which left Wachendorfer displeased and worried that there were not enough crews to cover the three aircraft. (Tr. 478, 480; CX-10). Complainant heard about the issue when he returned from his vacation, but neither he nor Barker were disciplined or warned as a result. (Tr. 479-80, 501-02). Moreover, no freight was grounded because of Barker's decision. Complainant talked to Frazer about Wachendorfer's email, but did not talk to Wachendorfer directly. (Tr. 481-82, 700-01).

Complainant continued to draw up schedules for 2 weeks on, 1 week off and a set change day. He received an email from Wachendorfer, dated January 9, 2003, which expressed concern there were not enough crews on the schedule; Complainant testified he did not know if the assertion was accurate, but stated it could have been on a change day or the result of a crew member shortage. (Tr. 482, 492-93, 755, 758; RX-17; CX-16). Complainant testified it was clear however, that Wachendorfer was not happy with the scheduling and was specifically unsatisfied with the January/February schedule. After the memo, a 15.5 day schedule was drafted, but Complainant was only told to do two week schedule and he did not seek clarification for the discrepancy. Frazer reiterated the instructions to draft a two-week schedule, which Complainant was already doing. (Tr. 494, 755, 759). Complainant then met with Muth, the head of dispatch, who told him two weeks equaled 15 days on and one week was 6 days off. She indicated to him that management thought he was an idiot for not figuring this out on his own. However, Muth also indicated Frazer did not know what Wachendorfer wanted, either; Complainant testified Frazer never mentioned a 15 and 6 schedule to him. (Tr. 497-98).

By January 9, 2003, Complainant was worn down by all the scheduling issues and problems. Additionally, he was fielding complaints about maintenance, pay, and constantly received phone calls in the middle of the night. He testified he never stated he would not do the schedule, but acknowledged he may have blown off steam with Barker. (Tr. 499-500). In response to Wachendorfer's email, Complainant put together a schedule and submitted it to Frazer and Wachendorfer on January 9, 2003. He did not receive notice that the schedule was unacceptable prior to his termination on January 20, 2003. (Tr. 500-01).

In an email dated December 2, 2002, Wachendorfer informed Frazer that Humenick, a pilot, did not show up to work when scheduled. Complainant heard about this incident after the fact, and testified it was a personnel problem, not a scheduling problem. (Tr. 483-84; CX-11). When he was finally able to talk with Humenick, Complainant told him to show up to work when scheduled or let someone know in advance he would not be there. Complainant did not receive any instructions from Frazer or talk to Wachendorfer regarding this incident, and he was never disciplined. (Tr. 485-86, 501-02).

Airline Manuals

Complainant testified Airways' manuals had been drafted by Biondo and Hulsey; he understood they were accepted and approved by FAA before he was hired. (Tr. 418-19, 683). In December, 2002, at Frazer's request, Complainant began streamlining the general operations manual. (Tr. 533-34). This was a time-consuming task, and though he worked on it when he could around his training responsibilities Complainant could not finish the re-write before he was terminated. However, he could not recall asking other management officials for help with the manual updates. (Tr. 534, 681-82). In addition to the general operations manual, Complainant also worked with an outside vendor on minimum equipment list, as directed by Biondo. He also modified the existing checklists to conform to the DC-9 aircraft and had them approved by FAA's Principal Operations Inspector, Abbott. (Tr. 464, 535).

Complainant testified that manuals needed to be updated and changed periodically. (Tr. 534). In his testimony, he listed the different manuals airlines were required to maintain, explained their significance and indicated which member of Ameristar management drafted the manuals for Airways. (*See also* CX-7). Complainant testified Hulsey drafted the general operations manual, the weight and balance manual, aircraft normal and emergency checklists, aircraft operating manual, cockpit operating manual, airport analysis and aircraft systems manuals, hazardous materials manual and operations specification. (Tr. 535-43). Biondo drafted the de-icing manual, minimum equipment list and training manual. (Tr. 538, 540, 543). The Airplane Flight manual is drafted by the airplane manufacturer, and generally includes weight and balance, de-icing, aircraft operating, cockpit operating and aircraft systems manuals, although Hulsey and Biondo performed in-house drafting's of these manuals. (Tr. 536-42). Complainant further testified he revised the Aircraft Normal and Emergency Checklists to apply to DC-9 aircraft and considered revising the Aircraft Operating Manual. (Tr. 538-40). He stated he was responsible for keeping manuals updated and submitting revisions to the FAA for approval. (Tr. 680). Complainant also used Biondo's training manual as a guideline for training the pilots; he had heard talk of upgrading the manual to be consistent with the more stringent

Part 121 regulations, but he never worked on aid upgrades and they were not implemented while he was Director of Operations. (Tr. 543-45).

Pilot Records

Part 125 also required Complainant, as D.O., to maintain pilot records. Complainant created Respondent's training records from scratch by keeping a binder on each pilot, which included certificates, licenses, job application, passport information, medical certification, proficiency checks, and ground school information. (Tr. 546, 678). Complainant testified he was not present for Hulsey's internal review of the pilot records in December 2002, but he discussed the results with him afterward. Although Complainant believed he was not missing any required documents from the files, Hulsey was concerned about the lack of letters of competency and inadequate ground school records. (Tr. 547, 710-13). Complainant stated requirements for record-keeping are different under Part 121 and 125, but even though he did not perceive Hulsey's proposed changes necessary, he did not think they could hurt so he added proficiency check forms, letters of competency and instrument approach procedures to the files. (Tr. 548-49). Complainant also checked with FAA, and on December 10, 2002 Abbott, the principal operations inspector (POI), reviewed the pilot records and told Complainant he did not find any discrepancies in either the pilot or trip records. (Tr. 712, 550, 554-55; CX-77).

Complainant testified he was never disciplined for his maintenance of pilot records, but he was not aware they were re-inspected in January, 2003. (Tr. 556). He stated Pete Foster and Gene Mercer went through upgrade tests to become captains; Complainant participated in the simulator tests in Minneapolis and did some support flying with the two pilots but Barker actually administered the tests, and thus, only he could sign off on the paperwork. (Tr. 556-57). Foster failed the third part of the test involving flying the aircraft, and Complainant testified he was aware Barker retained the records which he needed to secure another plane to re-administer the test. As Barker continued to fly revenue flights, so Complainant did not instruct him to return to Texas just to file paperwork. (Tr. 558-60, 708-10). Although Complainant saw Barker in January, he did not request the records. He knew Barker planned on filing the records when he came through Dallas, but Complainant admitted he did not know exactly where the records were when he was discharged. (Tr. 706-09).

Dissemination of charts

Complainant was also responsible for disseminating information to all crew members as it related to routes, airports, NOTAMs (notice to airmen) and NAVAIDs (ground-based navigation device) and company policies. (Tr. 458-59). He routinely checked with dispatch to make sure charts and information were sent out timely, but he had problems with dispatch getting materials to pilots. Complainant testified dispatch objected to faxing the information as it was too time consuming. (Tr. 527, 788). In a December, 2002, email, Muth, Manager of Dispatch, questioned Complainant's procedures for disseminating the information as the result of a crew calling in and requesting all charts be faxed to them as they were unsure what they had was current. (Tr. 702-03, 786; RX-12). Complainant testified he told Muth the procedures he

was instructed to use in getting charts to the aircraft, which had been devised by Biondo and not questioned in the past by either the pilots or Muth. (Tr. 704-05, 787). Complainant talked to the crew in question, but it turned out they did have current charts. Complainant was not sure if this was an isolated incident, but he also did not know what uncertainty Muth alluded to in her email; he did not change his procedures as a result of this incident. (Tr. 703-04, 706, 786).

Revenue Flight

In addition to his duties as Director of Operations, Complainant flew one revenue flight prior to his termination, when he filled in for a pilot.⁷ Complainant and his first officer, Wanamaker, flew to Indianapolis to pick up the freight. (Tr. 561-63). There was ice and snow in Indianapolis where the freight ramps were not clean; on his way to the office to take care of paperwork Complainant slipped and fell on the ice resulting in a bad headache.⁸ Complainant was in the office for approximately 45 minutes and when he returned to the plane he discovered 12 of 24 pallets had already been loaded; Wanamaker was concerned the other 12 would not fit. (Tr. 563-64). After calling headquarters in Dallas they discovered the pallets were bigger than the measurements originally provided by the customer, and not all of the pallets would fit on the plane. (Tr. 565, 724). Complainant testified Wachendorfer called the plane to find out what was going on, but he mostly talked with Wanamaker, as Complainant had been in the office during loading. Wachendorfer told pilots to just strap the freight down and go. (Tr. 565-67, 765). Complainant suggested overlapping the freight to fit more pallets, seeing as size, not weight, was the problem. Using this procedure they ended up fitting 20 of the 24 pallets on the plane, eight more than were initially loaded. Complainant testified he did not receive any indication that Wachendorfer was not pleased with his performance.⁹ (Tr. 566, 765-66).

As a member of management, Complainant testified he was obligated to represent the company in connection with supervising the pilots; he did not consider himself a representative of the pilots but he did have a duty to keep pilot morale up. (Tr. 656). Complainant did not hear many complaints from pilots in the beginning of operations, as Respondent was a start-up company who flew on-demand, and thus oftentimes on short notice. (Tr. 668, 673-74). However, by late November, 2002, morale became very negative. Complainant informed upper management of specific problems, including pay, schedule and compliance with duty time and safety regulations, but nothing was done to alleviate the problems. (Tr. 668-69, 784-86).

⁷ Although his training and license was current, since he had not flown since starting at Airways, Complainant flew to Wisconsin and did three landings with Barker. (Tr. 561).

⁸ Complainant's fall also resulted in two injured discs in his back, for which he received workers compensation benefits. However, Complainant later clarified his doctor only restricted him from lifting over 25 pounds and from flying; Complainant testified it was okay for him to work. (Tr. 564, 633).

⁹ Complainant and Wachendorfer had other discussions about aircraft loading via e-mail. (CX-13,14).

Pilot Pay

Complainant testified the pilots received salary information from Rives, although Sprat and Barker each received copies of the pay scale at their interviews. Within the first few weeks pilots became concerned they would not earn the minimum amount guaranteed with the hours scheduled. Specifically, considering their other duties, the pilots did not know how they would fly 800 hours a year to get to the first tier pay level. (Tr. 782, 665, 528). The pilots voiced their concerns to Complainant, who talked with Frazer who ultimately decided to wait and see how business did before making changes to the pay schedule or pilot duties; Complainant thought this was a good idea, seeing as the pilots had not been guaranteed a minimum number hours. Complainant understood Respondent was a start-up airline with unpredictable business and that it would take time to get it running smoothly. He informed the pilots in ground school that it would take one month or more to figure out what their earnings would be long-term. Additionally, Hulseley commented in ground school that the pilots would never receive enough hours to get base pay. (Tr. 529, 662-65, 671, 684). Complainant also heard pilots learned the 737 pilots were paid higher wages, and they wanted the same pay. (Tr. 665, 67). The pilots also were upset about not getting loading pay, but Complainant acknowledged they were never promised loading pay and Respondent actually never intended to pay pilots for loading. (Tr. 670-71, 783).

The pilots remained very unhappy about pay, and on November 25, 2002, Barker proposed an increase to management; Complainant co-signed the memo because he thought the pilots deserved more money and was worried up to eight pilots would resign with out a raise. (Tr. 530, 685; RX-6; CX-9). Barker and Complainant discussed content of letter which Barker drafted and Complainant reviewed. They proposed doubling pilots' pay and having the salary be guaranteed, not based on miles flown. (Tr. 685, 686). Complainant testified he did not perceive the email to be an ultimatum, but wanted to convey the point that pay was important to pilots, without whom the company would not be able to operate. He did not discuss the proposal with any of the pilots, other than Barker. He received no response from Wachendorfer or Frazer, but the pilots started receiving more money following the letter. (Tr. 685-88, 531-32).

Duty-Time Issue

Complainant testified that under Part 125, pilots could not be required to be on duty more than 16 hours, and were entitled to 8 consecutive hours of rest in every 24 hours period. He stated that duty time became an issue as of the first flight and lasted several months. (Tr. 575, 568, 714). Each week Complainant received numerous calls from pilots complaining dispatch had a "hurry up and go" attitude and encouraged pilots to fix flight times to make trips within the 16 hour duty limit. Additionally, pilots complained they were being constantly paged during their eight hour rest time. In a November 18, 2002 letter to Complainant, Humenick stated he was constantly badgered by dispatch from time he is paged until he returns to hotel. Complainant testified he received numerous complaints similar to this each week, which he described as a safety issue. He did not know if pilots were disciplined for refusing to go over 16 hours. (Tr. 525, 571, 730-31, 734, 784, 793). Complainant also received calls from dispatch personnel notifying him pilots were refusing to do their job and fly over the 16 hour limit.

Complainant explained pilots were limited to 16 hours of duty, which included office work and non-flying duties. Complainant technically had the authority to instruct dispatch to stop interrupting pilots rest time and scheduling pilots over 16 hours per day. However, nothing changed despite his discussions with the dispatchers and Frazer. Indeed, after his termination Complainant received a letter from Mercer about dispatch pushing pilots to exceed 16 hours duty time. (Tr. 569-70, 573-74, 595, 714; CX-60).

In one incident, pilots Sprat and Krutolow refused a trip because it would exceed their 16 hour duty limit. Although Complainant admitted the pilots may have miscalculated the time, the freight was moved on an Air Cargo plane instead. Although Wachendorfer was reportedly upset about this incident, Complainant was not disciplined. (Tr. 568, 487-89, 501-02; CX-12, 14, 51). In another incident, pilots Humenick and Schneider landed their plane close to their 16-hour duty limit but no one from the customer was present to take the cargo. They had a number of conversations with Complainant and Frazer, who directed them to stay with the freight until it was unloaded. After much debate, the pilots did end up staying with the freight exceeded their 16 hour duty limit. (Tr. 572-73, 731-32).

Complainant testified the Whitlow Letter, an official interpretation by Mr. Whitlow of Aviation Flight Standards Office at FAA headquarters, described duty time as any duty time including monitoring pagers or phones when required to respond; it could not exceed 16 hours regardless of weather, maintenance or air traffic control issues. This interpretation was upheld by courts in various challenges made by airlines with the most recent ruling on November 3, 2002. (Tr. 575, 790-93). Complainant discussed this letter with Frazer, who indicated it was bad for airlines and businesses; Complainant agreed and found himself torn between wanting to be legal, but not upsetting upper management. (Tr. 575-76). Additionally, Williams stated the 16 hour limit was hard for freight companies because business was sporadic. He informed Complainant he had documentation from Washington giving freight operators relief from the duty time rule, but Complainant never saw a copy. Finally, Biondo informed Complainant if pilots wanted to keep pagers on during their eight hours of rest that was their business. Complainant testified he never told pilots to turn their pagers off because based on previous conversations with his superiors he did not think he had the authority to do so. Frazer informed Complainant he intended to speak with the FAA and request flexibility from the duty time rule. (Tr. 576-79).

On December 11, 2002, Complainant received an email from Wachendorfer describing situations where pilots could exceed 16 hours of duty in Part 121 operations. The exceptions applied to situations beyond the airline's control, including unexpected delays due to weather, holding patterns or freight problems. Wachendorfer used the "beyond our control" exceptions in Part 121 to justify exceeding the 16-hour duty limit in Part 125. (Tr. 586-88; CX-15). Complainant suggested certain changes be made in operations, such as expediting departures, to save money without exceeding duty time limits. In researching his proposal, Complainant talked with chief pilots, directors of operations, aviation attorneys, Aircraft Owners and Pilots Association, Airline Pilots Association (ALPA) and the FAA. Complainant's proposals only addressed the 16-hour duty limit, not the 8-hour rest period. The proposals were rejected by Wachendorfer, who suggested finding a way to change the rule. (Tr. 580-82, 585, 589, 722-23; RX-13; CX-19).

As a part of his research, Complainant spoke with ALPA's legal office, which advised that the 16-hour rule strictly applied to any duty, including monitoring a pager or phone when the pilot was required to respond; it was not just duty flying a plane. (Tr. 583-84; CX-20). Complainant wanted FAA's permission to exceed 16 hours of duty. He conducted the research because the rule in Part 125 only says pilots need 8 hours rest from all duty in every 24-hour period but it does not address what constitutes "duty." (Tr. 715-18). Complainant testified he believed ALPA's legal department to be objective; based on his research, he believed pilots could not legally exceed 16 hours of duty. (Tr. 723-24, 805). Wachendorfer, however, wanted to know if the research was recent and for part 125, asked Complainant for the names of the lawyers he spoke to, and indicated he would have it reviewed with a Washington attorney. Complainant felt Wachendorfer's questions were an indication he did not believe the research, or agree with it, and clarified in an email that indicated it was "for our operation" and under part 125. (Tr. 724-26, 729-30, 733, 794-95).

Complainant testified he knew Frazer was to meet with Mike Mills of the FAA to request an exception to the rule; he told Wachendorfer he hoped the meeting cleared things up so the company could move on and testified the company had a right to ask the FAA to change the rule. Even though he was the Director of Operations for Airways, Complainant was not involved or invited to the meeting between Frazer and Mills. However, Mills informed Complainant he would review the suggestions and get back to Respondent. (Tr. 590-91, 729, 733, 796-97). Complainant testified the rule never changed; moreover, his ideas and research was not followed up on, and dispatch still asked pilots to exceed 16 hours. (Tr. 593-94).

Complainant's last effort to resolve the duty time issue came when Ron Brown became Airway's POI. The Director of Operations is expected to be involved with FAA discussions on how to interpret the regulations and in January, 2003, Complainant asked Brown for clarification on duty time. (Tr. 596, 719-20). After his termination, Complainant learned Brown's opinion was that one page during the eight hour rest period was okay. (CX-21 to 23). Complainant acknowledged pilots could have turned off their pagers but chose not to; he testified he heard negative comments from dispatch about pilots not answering pages but did not know of a pilot being disciplined for such behavior. (Tr. 718, 721).

Maintenance Policy

Complainant testified company policy was for the pilots to call maintenance department before entering maintenance discrepancies in log book, which violated federal regulations. When Complainant discussed this with Frazer, Frazer "yelled" at him about pilots making what could be unnecessary write-ups and indicated he wanted to make sure entries pertained to legitimate problems. However, Complainant testified minor problems that are not addressed promptly can manifest into serious problems; he testified Frazer did not agree with his position. (Tr. 504-05, 599-601). In a November 15, 2002 email, pilots Sprat and Krutolow requested clarification of Respondent's procedure for writing up maintenance discrepancies. Early on, pilots were instructed to check with maintenance before logging discrepancies. (Tr. 597, 801-02; CX-51). In response, Complainant sent an email to all pilots directing them to call maintenance every time they logged a discrepancy. Prior to sending this message, Frazer reviewed it and

added the word "BEFORE" to the instructions.¹⁰ Pilots regarded this as an instruction to call first; Complainant thought it was reasonable to require pilots to contact maintenance about logbook entries, but not necessarily before making them. Even though he did not agree with email, he sent it out per Frazer's instructions. (Tr. 601-06, 738-41, 799-801; RX-9; CX-52).

Complainant also stated pilots were asked by maintenance to delay discrepancy write-ups however, he was not aware of pilots being disciplined for not doing this. (Tr. 742-43). Complainant was also aware Wachendorfer instructed pilots to make one landing and then change a tire. He did not do anything about it because it was a maintenance issue; he was not disciplined for it, either.¹¹ (Tr. 490, 501-02).

Call Sign

Pilots informed Complainant that flight plans were being filed under the Jet Charter call sign, not under Airways' tail number, as was discussed in ground school. Complainant thought this was significant because Jet Charter could legally hold out to the public, whereas Airways could not. He was concerned Airways was clearing the way to do common carriage by using Jet Charter's call sign. (Tr. 507, 611). Complainant raised this issue with Frazer and Muth, requesting that Airways' flight plans be filed under the tail number. (Tr. 506, 508). She complied, but indicated the contract with Active Aero required the plans be filed under Jet Charter's call sign. Complainant responded that Airways would need to request permission from both Jet Charter and the FAA. (Tr. 506, 508-09, 608-09, 743; CX-53).

In an email dated January 6, 2003, Complainant informed Frazer he would get the ball rolling on requesting a separate call sign for Airways. He testified the process involved submitting a request to the FAA, which would take one to two weeks to be approved. Complainant did not see the problem with Airways getting its own call sign. (Tr. 745-46, 802-03; CX-14). While management wanted to borrow Jet Charter's sign, Complainant was concerned that Airways was using the call sign to be able to hold out to the public for common carriage, which it could not do under Part 125. However, Complainant acknowledged it was okay to borrow call signs with proper permission. (Tr. 803, 805). Complainant did not know of an FAA regulation dealing with call signs; but he testified there was a safety aspect to the issue. (Tr. 749-50).

When Complainant met with Brown on January 7, 2003, who specified Airways should not use Jet Charter's call sign until they had the necessary permission. He asked if Airways wanted to request its own call sign, instead. (Tr. 509-11, 609, 747-48). Complainant testified Frazer specifically told him not to request a call sign for Airways without explaining why. Complainant testified Frazer seemed mad that the FAA was "tipped off"; Frazer told Complainant they do not talk to the FAA but handle their issues "in-house." (Tr. 512, 610, 743).

¹⁰ Complainant testified he was instructed to have all outgoing emails reviewed and approved by Frazer first. (Tr. 602, 738, 799).

¹¹ Lack of proper maintenance continued to be a problem for pilots both during and after Complainant's termination. (CX-18, 62-66).

Instead, Frazer instructed Complainant to make a formal request to the FAA to use Jet Charter's call sign, which Complainant did at the January meeting; Brown did not indicate there would be a problem with this. (Tr. 613, 743-44; CX-13; CX-15).

After the email exchange about the call sign issue, Wachendorfer instructed Complainant not to send any more emails to dispatch without prior permission. Additionally, Wachendorfer informed Complainant the FAA was wrong about the call sign issue and he would straighten it out. (Tr. 510, 613).

Holding Out for Common Carriage

Complainant was concerned Airways was using Jet Charter's call sign as a cover to be able to hold out to the public. He asked Frazer for Airways' client list, but it was never provided to him. (Tr. 751, 614). As D.O., Complainant's name is on Airways' certificate; he had an interest in making sure Airways was not illegally holding out to public, as each violation is a separate penalty. (Tr. 615, 752). Complainant explained that under Part 125, Airways had to have a contract with each customer it hauled cargo for; in common carriage, no pre-existing contract is necessary. Additionally, because it is not public, the Part 125 safety standards are not as high as in Part 121. (Tr. 617-18). Complainant testified he reached a dead end with Frazer on the holding out issue. However, after he was discharged, Complainant filed a complaint with the FAA indicating that Respondent was holding out to the public. (Tr. 618, 750). Complainant testified there was no investigation prior to his discharge and he did not tell anyone at Respondent that he asked Brown about the holding out issue. Nothing was put in writing to the FAA prior to Complainant's termination. (Tr. 751).

January 7, 2003 Meeting

As Director of Operations, Complainant was Respondent's primary contact to the FAA; he communicated with the POI regularly by phone, letter and in person. On January 7, 2003, Complainant and Barker met with Brown in Complainant's office.¹² (Tr. 618-19, 644-47). Complainant did not tell anyone about the subject matter of the meeting, but they discussed the duty time rule, common carriage and call sign issues. The meeting lasted between 30 and 60 minutes. Brown did not answer Complainant's questions, rather indicating he would get back to them and requesting Complainant submits the issues in writing. Additionally, Brown stated the FAA would not pursue violations of the common carriage rule. Complainant submitted a letter requesting permission for Airways to use Jet Charter's call sign. (Tr. 619-21, 647-50). Complainant testified his office had a glass wall; he saw Williams, Rives and Wachendorfer walk by his office during the meeting. Afterwards, Wachendorfer asked Complainant "who had been meeting with the FAA?"; since he saw the meeting in progress, Complainant thought the question indicated he was not pleased. However, Wachendorfer did not yell at Complainant or tell him not to meet with the FAA. (Tr. 621-22, 650-51, 781-82).

¹² Complainant testified Brown was the POI for Air Cargo and had been to Respondent's offices many times before. Complainant had seen him around the offices before ever speaking to him. (Tr. 646-47).

January 13, 2003 Email to Pilots

In light of all the problems pertaining to maintenance, duty-time, call sign, and the schedule, Complainant testified he felt at the end of his rope. In an email sent to a group of pilots on January 13, 2003,¹³ Complainant purposely referred to Wachendorfer as "Mr. Wackmeoffendorfer"; he testified this was vulgar, rude and improper for a manager to do, but that he was frustrated and did not use good judgment in drafting the message. Complainant acknowledged this could have undermined Wachendorfer's authority, and he did not think about the consequences of sending the message. (Tr. 512-15, 657-59; CX-17; RX-20).

Complainant's email also described the schedule as 14 days on and 7 days off, as indicated when the pilots were hired, but it later changed to 15 days on and 6 days off. He told the pilots the schedule change was not his decision, but was effective immediately. (Tr. 515-16, 760). Complainant did not blame Wachendorfer directly; he testified the pilots had been unaware of schedule changes which he did not discuss with them before implementation. (Tr. 517, 760-61). Complainant also testified he asked pilots to give specific reasons for quitting, explaining that since pilot problems had fallen on deaf ears in the past, and management might start to pay attention if reasons were given in resignation letters. Complainant asserted he did not encourage pilots to resign; he testified he would never do this because the job market for pilots was horrible. Complainant did talk with some pilots about their desire to quit prior to January 20, 2003. (Tr. 517-18, 764).

Complainant testified he did say he would support pilots' unemployment claims if they gave valid reasons for resigning. Specifically, he would provide letters of recommendation and copies of training records, which he testified he would have to do anyway, if they left. Complainant sent some training records out, but could not remember who requested them. (Tr. 519, 770-71). He testified he heard from pilots Sprat and Krutolow that he was to be fired, so he included in email "hopefully I won't be here much longer." Complainant admitted the email was angry, unprofessional and he probably would not do it again. (Tr. 519-20, 771).

Complainant sent this email at 10:00 pm on January 13, 2003. One hour later, at 11:00 pm, Preuninger emailed Complainant his resignation and asked him to revise the attached resignation letter; Complainant did not change it. This email did not surprise Complainant, as Preuninger had discussed resigning since December, 2002. (Tr. 521-22, 763, 766-67, 804). Specifically, Preuninger complained he was pressured to hurry, which he feared would cause him to miss something on the pilot checklist before take-off; he felt dispatch was adversarial; he experienced problems with the distribution of data; and was unsatisfied with the duty time, schedule and pilot pay issues. (Tr. 525-28). Complainant sent Preuninger's email to his work address so he could print it out and pass on to Human Resources; he did not know when Rives

¹³ Mr. Wachendorfer forwarded this message to Frazer, Hulsey, Raymond and Ted Wachendorfer on March 28, 2003, when Complainant was in the middle of his unemployment claim against Respondent. (Tr. 513-14).

first received notice of the resignation. On January 14, 2003, he sent a copy of the letter to the rest of the pilots, at Preuninger's request and admittedly in poor judgment. (Tr. 523-24, 763-64; RX-19). However, Complainant clarified he did not send an email to Rives on April 25, 2003, three months after his termination, and he did not know how the email came to be. (Tr. 523-24).

Complainant was terminated on January 20, 2003, two weeks after meeting with FAA; two weeks after Hulse re-inspected pilot records; 11 days after Wachendorfer's email regarding the unacceptable schedule; one week after Complainant's email to the pilots; and 3 days after Complainant's only revenue flight. (Tr. 623, 773). He testified he was called in to meet with Frazer and Rives.¹⁴ Frazer indicated he lost confidence in Complainant's ability to manage people but did not offer further explanation for the termination. Complainant had heard from various pilots he would be fired and felt he was being disciplined for whistleblowing. (Tr. 626-27).

Post-Termination

Complainant filed an unemployment claim against Respondent within a few days of his termination. Respondent contested the claim, which was decided in Complainant's favor. Respondent appealed to the Texas Workforce Commission (TWC), which overturned the decision. Complainant testified the TWC found his January 13 email to the pilots an act of insubordination and justification for his termination. (Tr. 628-30, 659). However, Complainant stated that Respondent did not mention this email until the fourth filing they made with the TWC in the summer of 2003. (Tr. 630). The TWC paid Complainant a total of \$17,951.00 between January 17, 2003 and September 7, 2003; however, Complainant was required to return this money, as he was receiving worker's compensation benefits at the same time. Complainant's doctor restricted him from flying after his accident at the Indianapolis airport, *supra*. The TWC's notice to Complainant that he could not receive both unemployment and workers' compensation benefits indicated the workers' compensation was either for temporary total, temporary partial or permanent total disability but it did not specify which type Complainant actually received. (Tr. 631-33, 774, 776; RX-33; RX-34).

Complainant filed a whistleblowing complaint with OSHA and an Aviation Safety Hotline Complaint because he wanted to continue to try to do something about the problems at Respondent. He stayed in touch with Barker and some of the other pilots at Respondent after his termination, receiving letters of support from pilots regarding his unemployment compensation claim and documents relating to Respondent's business; Complainant did not think this was a breach of confidentiality. (Tr. 623-24, 654-55, 779; CX-68). Complainant testified OSHA investigated his whistleblowing complaint and intended to levy a civil complaint against Respondent for common carriage violations. (Tr. 624-25; CX-78).

Complainant testified he is only seeking damages equivalent to his lost wages and expenses of proceeding; he does not want his job back. He stated he made constant job applications after he was fired and was employed at Avia Crew Leasing for a time. He did not

¹⁴ When Humenick missed work without telling anybody he was not called in by Frazer. (Tr. 625).

recall if he was receiving worker's compensation or unemployment benefits at the same time. Complainant's 1099 from Avia, indicates he earned \$800.00 during 2003. (Tr. 634, 643, 777-78; RX-37). Complainant started working at the FAA on September 7, 2003, earning \$58,000 initially; he currently earns \$60,000 per year. At Respondent, Complainant earned \$72,000 annually, or \$6,000 per month. (Tr. 634-37; CX-36). Complainant testified he earned \$3,888.77 at Respondent in January, 2003, resulting in a loss of \$2,111.33. He was not employed from January through August 2003, for a loss of \$6,000 per month. In September, 2003, he was unemployed for six days, resulting in a loss of \$1,200. Additionally, he earned less at the FAA than he did at Respondent, yielding a loss of \$934 from September 7 through September 30, 2003 and \$1,167.00 per month through the end of 2003. Complainant received his pay increase at the FAA in January, 2004, resulting in a loss of \$1,000 per month. Altogether, Complainant testified he has suffered a total salary loss of \$56,746.23. (Tr. 636-40; CX-79).

2. Billy Jo Sprat

Currently, Mr. Sprat is a 757 Boeing Captain at Trans Meridian Airlines, a 121 passenger operation supplemental. He has been so employed since October, 2003. Sprat has a wife and two kids. (Tr. 36-38). He graduated *cum laude* from the Florida Institute of Technology after which he worked as an instructor and flew with commuter airlines. He was furloughed by U.S. Airways after September 11, 2001. (Tr. 38). Sprat was then hired by Southeast Airlines where he was a MD-80 captain for 4 months, earning \$75,000 per year, before going to work at Respondent. He testified he has all pilot certificates and licenses available. (Tr. 39, 128).

Sprat heard about an opening at Respondent from Complainant in August, 2002. Sprat first met Complainant in 2002, four or five months before Complainant recruited him to work at Respondent. He testified he barely knew Complainant and Barker, and was not aware they were close personal friends. (Tr. 121-24). Sprat hesitated about applying to Respondent, because Ameristar had a bad reputation in the pilot community, which is very tight and close-knit. Sprat had heard from his friends that Respondent was particularly lax about safety procedures. (Tr. 40-43). He applied, however, in part because Complainant and Barker were greatly respected in the pilot community. He took a day to interview and talk with people at Airways before signing on. He was hired on September 15 or 16, 2002. (Tr. 44, 46, 169).

Sprat testified Complainant hand picked pilots based on their reputation in the aviation community and those he had come across in his career. Sprat began ground school indoctrination in September, 2002, and understood Complainant would be Director of Operations in control of Airways and Barker would be chief pilot. This was verified by Rives. However, in the beginning Complainant took directions from Hulse, Biondo and Wachendorfer. (Tr. 45, 47, 57, 60).

Pay, working conditions and Respondent's attitude toward regulations were important issues with the pilots at Airways. Pilots were shown the pay scale which was based on mileage and a schedule of 14 days on and 7 days off. According to the pay scale, the average wages would be \$84,000 annually and were expected to increase after the company was up and running. (Tr. 49-50). Sprat testified Respondent reneged on the proposed pay scale, even though he later

acknowledged the base pay in the schedule was only \$36,000 annually. As early as ground school, pilots were informed by Hulsey they would make \$3,000 per month, would be required to load up to 18,000 pounds of freight, and work 22 days per month. Sprat testified pilots were angered by the expectation they would load and unload cargo without extra pay for this duty; however, he acknowledged loading pay was never guaranteed in writing. (Tr. 54, 61, 134-36, 141). Due to the dramatic decrease in his pay, from the projected \$6,000 per month to only \$3,000 per month, Sprat had to re-mortgage his house. He clarified that in 2002 he actually earned \$3,000 per month, although in 2003 he earned \$5,416 per month as reported in his claim for unemployment benefits. (Tr. 62, 129-32).

Sprat testified the pilots wanted the money they were promised when recruited for Respondent. (Tr. 139-40). He explained they felt trapped into staying at Airways because they would not be able to get a job without logged flight hours as they had been in ground school. (Tr. 62-63). Additionally, there are roughly 8,000 pilots for 150-200 jobs in the industry, and their old employers had already hired new pilots to replace them. (Tr. 62-64, 139-40). Sprat stayed at Airways to log hours and hopefully be able to get another job, although he started applying for other jobs early on in his career at Respondent. (Tr. 64, 120).

Sprat testified that under the Part 125 duty time requirements the pilots were guaranteed eight hours of rest every day, but Respondent required them to be available and on-call 24 hours per day. Sprat testified he was chastised for refusing flights in the middle of the night after a full day of flying; when he discussed this with Frazer, he was told to take naps throughout the day to stay rested. (Tr. 66, 68, 70). Sprat also explained the time and duty requirements are different under Parts 121, 125 and 135. He continuously had problems with duty time at Respondent. He raised the issue with Wachendorfer who assured him it would be fixed, but nothing changed. (Tr. 74-77). When pilots refused to do something, schedulers and repairmen called Complainant to enforce company policy. Complainant told Sprat he should not fly without eight hours of rest, and that he would take care of it. In general, when pilots complained to Complainant, he would say "we'll deal with this, get out there and work hard." Sprat did not believe Complainant spearheaded for the pilots. (Tr. 73, 126, 146).

Sprat further testified Respondent's policy required pilots to call maintenance and request permission to make logbook entries. In his past experience, pilots always entered maintenance discrepancies in the logbook immediately and then notified maintenance. The aircraft did not move until the problem was rectified. (Tr. 78, 147). Sprat followed Respondent's procedure, but always entered maintenance discrepancies he felt should have been entered. (Tr. 148). He addressed this in a letter to Complainant dated November 15, 2002, requesting clarification of the maintenance policy in writing. He testified "require to consult," as stated in the maintenance policy was deemed the same as "required to get permission." (Tr. 64-65, 152-53; CX-51).

Sprat was greatly concerned Respondent did not fly safe airplanes, as evidenced by the fact the repairmen repeatedly tried to talk pilots into flying unsafe planes to a maintenance base because Respondent could not afford to fly repairmen out to the planes. (Tr. 79, 81). Sprat stated he talked to Raymond, Wachendorfer and Barker about maintenance problems. He indicated Raymond would "do anything for Respondent," regardless of relevant safety regulations. (Tr. 81, 86). Sprat testified Raymond observed him flying around January 10, 2003,

and indicated there were going to be big management changes. It was obvious to Sprat that Raymond would replace Complainant. Indeed, that did occur and Raymond made changes for the worse, he did not listen to the pilots' complaints as Complainant had. (Tr. 87-90).

Sprat received notice of Preuninger's resignation from Preuninger himself. He also received an email from Complainant referring to Wachendorfer as "Wackmeoffendorfer" which he thought was just a misspelling and did not perceive to be offensive. (Tr. 154-57; CX-19). Sprat testified Complainant's email also addressed the pilot schedule, which had been an issue since the start of operation. He stated the email did not contain instructions on drafting resignation letters. Further, Complainant did not advocate for pilots to resign, although he did state he would fully support the pilots' unemployment claims. (Tr. 159-61, 163, 170).

During Respondent's reduction in force (RIF) in April, 2003, Sprat was retained but Barker was let go despite his status as a senior pilot and his proficiency in flying. Sprat opined Complainant and Barker were fired for speaking out against the company, as no other reason for their termination was given. (Tr. 92-93, 96-98). After the RIF, Respondent had no pilots which were qualified to conduct training, so it contracted with Northwest Airlines for training. (Tr. 100-01). On Sprat's last flight he noticed a fuel spill under his right wing at the Ypsilanti airport, which was Respondent's maintenance base. The maintenance person told him it was a fuel spill, but when they arrived at St. Louis the co-pilot noticed fuel under the right wing again, which indicated there was a leak. Sprat testified the repairman was flippant and seemed not to care about what was a dangerous situation. As a result, on or around May 15, 2003, he "resigned due to unsafe practices." (Tr. 103-08, 169). Sprat filed a claim for unemployment benefits which Respondent contested, but the State of Pennsylvania determined he was working in a life-threatening situation and awarded him benefits. Although he complained to too many people, from dispatch to Wachendorfer, he did not consider himself to be the most vocal pilot. He contacted OSHA about the problems at Respondent, but did not contact the FAA. (Tr. 112-14, 116).

3. Brent Wayne Barker

Mr. Barker has been a pilot since 1975 and possesses an Airline Transport Pilot Certificate as well as a first-class medical certificate. He worked at Southeast Airlines flying DC-930 and MD-80 aircraft and also was a certified check airman, which qualified him to perform proficiency checks and train other pilots. Barker then worked as senior check airman at Legend Airlines, a Part 121 operation, before going to Express One international as a check airman for their DC-9, Part 121 operation. Barker flew freight at Express One. (Tr. 177-78). In June 2003, Barker was hired as an Aviation Safety Inspector for the FAA; he currently conducts surveillance and training for Southwest Airlines. (Tr. 72-73).

Barker heard about Ameristar Airlines through Ken Lance at Royal Aviation and Ron Brown at the FAA. He was interested in the company because he wanted to return to Texas, although he did not know anyone at Respondent. (Tr. 179, 181). Barker filled out a job application and interviewed with Williams and Rives. (Tr. 181-83). A few days later, in early September, 2002, he learned Complainant was hired as Director of Operations and he was

offered a captain position. (Tr. 184). Barker testified he worked with Complainant at Southeast Airlines and Legend Airlines, and they had talked about working together at Respondent; Complainant hired him as chief pilot and check airman for Respondent. He was offered the first year pay scale with guaranteed first-year pay of \$63,998. (Tr. 184-86).

Respondent terminated Barker on April 14, 2003. He filed a whistleblower complaint with the Department of Labor on April 29, 2003, claiming he was fired within two weeks of discussing problems with the FAA. The Department of Labor found his case had merit and set the trial for the week after Complainant's hearings. (Tr. 173-75; CX-69).

Barker testified Rives kept copies of all his certificates. As a check airman he helped teach ground school, gave professional checks in the simulator and flew planes with new pilots. As chief pilot, Barker helped Complainant and acted as a liaison between the pilots and management. Specifically, Barker testified he assisted with streamlining the procedure check list and worked to streamline the minimum equipment list to fit with Respondent's specific aircraft and operation. (Tr. 187-92). Barker testified he also assisted Complainant with pilot scheduling. They usually had three crews on at all times, but they only scheduled one crew on Thanksgiving as that was all that was needed. Barker was left in charge over the holiday weekend, and although Wachendorfer complained about the schedule, he was not disciplined. (Tr. 193-99; CX-10).

Barker also had input in hiring pilots; due to the short time frame, he and Complainant hired pilots with good reputations, DC-9 and cargo loading experience. He testified the jobs were not advertised to the public. (Tr. 200-01). Barker stated the first group of pilots was hired on September 22, 2002; he previously knew five of the eight pilots hired. Overall, Barker testified he did not personally know Preuninger, James McLean, Brian Short, Mitch Wanamaker, Pete Foster or Glen Blome before they were hired. (Tr. 203-04). Pilots went through four weeks of ground school taught by Barker, Complainant and Hulseley, followed by simulator training in Minneapolis, Minnesota. Barker testified training took up most of his time between September, and November, 2002. (Tr. 205-07). Although Hulseley reviewed Airway's training records in December, 2002, Barker testified he did not believe his suggestions were necessary under a Part 125 certificate. Barker and Complainant invited the FAA to review the pilot records on December 10, 2002, and they were found to be in compliance with the applicable regulations. (Tr. 208-12).

In January, 2003, Complainant and Barker conducted upgrade testing and training to promote two officers to captain status, as pilots were grumbling about leaving and they did not want to be short on captains. Gene Mercer and Pete Foster when through ground school and simulator training to be upgraded to captains, but Foster failed the flight portion of test. (Tr. 212-15). Barker testified he did not complete the paperwork filing on Foster because he wanted administer the flight test again. Additionally, Barker flew freight until Christmas, was home for the holidays and then flew twenty-five days in January, 2003. While his supervisor asked him to stop back in headquarters to finish updating the records, he was never ordered to stop flying. (Tr. 218). Barker updated Foster's records and signed documents related to ground school after Raymond took over as D.O.; Barker testified he knew it was not necessary to document ground school under Part 125, but did so anyway at Raymond's request. (Tr. 219-22; CX-58).

Barker testified pilots complained of pay and duty time. The actual pay they received was half of what was promised them in flight school. Specifically, captains earned \$36,000 and first officers received \$28,800; this was only the base salary of the pay schedule. Moreover, the pilots did not receive loading or unloading pay. (Tr. 224-25, 229). Barker testified at least eight out of fourteen pilots talked about leaving. As such, he drafted a memo to Frazer regarding morale and how it related to the pay issue. Complainant co-signed the memo, which proposed paying flat salaries of \$78,000 for captains and \$54,000 for first officers. (Tr. 226-31; CX-9). Barker testified he based his proposal on the salaries of pilots at Air Cargo and Jet Charter; he hoped solving the pay problems would lead to better service for customers. Frazer and Wachendorfer did not respond to the letter, but Barker testified pilots started receiving monthly bonus checks which helped the situation. (Tr. 234-37).

With respect to complaints about duty time, Barker testified pilots were regularly asked to exceed the daily 16-hour limit on duty. This issue was not resolved during Barker's tenure at Respondent. Barker testified he was personally asked to go over the 16 hour limit when the freight was late. Additionally, pilots were called and paged during their 8 hour rest period, which is prohibited under Part 125. (Tr. 240-41). Complainant and Barker met with Ron Brown in January, 2003, to make sure they were abiding by the regulations of Part 125, with respect to duty time. (Tr. 243-44). Barker testified duty time continued to be a problem after Complainant's termination and raised the issue with Raymond in an email. (Tr. 255, 257; CX-22).

Pilots were also concerned about holding out for common carriage and maintenance issues. (Tr. 237). Specifically, Barker testified there were repeat write-ups of the same maintenance discrepancies, which indicated to him problems, were not being fixed properly, if at all. He testified he informed Complainant who in turn informed management, but the maintenance personnel problem was not fixed. (Tr. 238-39).

With respect to holding out for common carriage, Barker stated Respondent contracted with anyone who needed freight moved, but in Part 125 you could not have more than four or five contracts to move freight. Essentially, he testified Respondent operated under the wrong certificate, as Part 121 and 135 are the common carriage certificates. (Tr. 245). In a Part 125 operation, common carriage is prohibited and could result in a pilot losing his license. Barker testified on one of his flights the customer asked him where the 737 was; this type of plane is used in a Part 121 common carriage operation and tipped Barker off that Respondent may be holding out. He testified Complainant talked to Frazer about this issue before meeting with the FAA. Barker further explained that a letter of investigation informs and airline of an FAA investigation. (Tr. 246-47, 257).

Barker testified Airways used Jet Charter's call sign, instead of the tail number assigned by the FAA. He explained that Airways did not have the proper authorization from Jet Charter or the FAA to do this. While Air Cargo also used Jet Charter's call sign, it had the necessary letters of authorization. (Tr. 248-50). Barker testified this was further indication to him that Airways was holding out for common carriage; freight shipments were usually put under a call

sign instead of a tail number. He stated Complainant went their supervisors about the issue, but he was told to butt-out. (Tr. 250-51).

Barker and Complainant met with Brown on January 6, 2003. They discussed the call sign, common carriage and duty time issues. Brown said he would get back to them. (Tr. 251-52). Wachendorfer showed up after Brown left, and appeared angry about the FAA meeting. He told Barker and Complainant "we don't talk to the FAA here, we keep our problems in-house." Complainant was fired two weeks later. (Tr. 253-54).

4. Thomas Wachendorfer

Mr. Wachendorfer is the president and sole owner of Jet Charter, Air Cargo and Airways.¹⁵ Airways was formed in 2002 under Part 125, which he understood prohibited common carriage, or flying for anyone and everyone; Part 125 operations must have a set number of pre-existing contracts for repeat trade. Violations could result in monetary fines and possibly the loss of the certificate. (Tr. 811, 820-22, 848-49).

In the Pre-Application Statement of Intent (PASOI) filed with the FAA on July 19, 2002, Wachendorfer informed the FAA he planned to apply for a Part 125 certificate, proposing Biondo as Director of Operations and Frazer the Director of Maintenance. (Tr. 825-27; CX-3). Wachendorfer testified he intended to replace Biondo after the application process was complete and would only use resources and personnel from Jet Charter and Air Cargo in starting up Airways. Frazer was placed in charge of the certification process with Biondo's help, though neither had Part 125 experience. (Tr. 828-29, 847). Wachendorfer testified the FAA expressed concern with the overlap of company officials and questioned Airways' plan for operations.¹⁶ He thought the FAA's concern centered around the time available to officials who held multiple position, not necessarily their affiliation to the three different companies. Even with the position of Director of Operations, he did not see affiliation as a problem. Wachendorfer stated there was no regulation preventing one person from holding more than one position and sharing personnel was common in the industry; additionally, one company can operate Part 121 and 135 certificates. (Tr. 829, 835, 842-44). Wachendorfer testified he was not clear what the FAA's specific concerns were, although he acknowledged they had lengthy discussions regarding Airways as a stand-alone operation. (Tr. 834-35).

Nevertheless, on September 3, 2002, Wachendorfer filed an amended PASOI naming Complainant as D.O. and Mr. Sheber as Maintenance Controller. He did not recall the date Complainant was hired, though it could have been September 6, 2002; Complainant was not previously employed by Respondent. Frazer continued to oversee Airways and supervised Complainant and Sheber. (Tr. 831, 853-56, 939). The amended PASOI stated Airways' mission

¹⁵ Wachendorfer was actively involved in Respondent's day to day operations including Frazer's discharge of Complainant. (CX-7, 8).

¹⁶ Wachendorfer testified the three Ameristar companies shared personnel in dispatch, flight control, scheduling, maintenance, accounting/billing, administration and Human Resources. (Tr. 838-40).

was to transport automotive supplies and parts under long-term contracts with a few automotive-related companies. Wachendorfer testified he had potential contracts lined up and just needed the certificate to make it go; without certification and operation specifications Airways could not operate. The application mentioned "private carriage of automotive parts and supplies" three times. (Tr. 831-34). Wachendorfer testified Airways flew freight for companies in the auto parts industry; although he could not say what exactly they flew or if it included dog food, computer equipment, candy bar wrappers, or telephone parts. He did state Airways flew cloth, which is a material for the automotive industry. (Tr. 857-58).

Wachendorfer testified the FAA was concerned about Airways holding out for common carriage, but he stated the company did not market or hold out to the public, either directly or indirectly. He explained Part 125 operations could not directly hold out to the public by offering services to anyone and everyone to the full extent of one's abilities, such as in trade shows and advertisements. Nor can they hold out to the public indirectly, either by hiring an individual to engage in direct solicitation or by contracting to transport the cargo of another freight company who is capable of holding out to the public. This latter scenario is referred to as "freight forwarding." (Tr. 836-37, 841). Despite the FAA's concerns, Airways received its Part 125 Certificate. (Tr. 873).

Wachendorfer testified he did not think Airways held out for common carriage; rather, it had standing contracts with United American Freight Services, Active Aero Charter, d.b.a. USA Jet Airlines, Eagle Global Logistics and Leading Edge Air Logistics. Active Aero was the charter manager for Ford Motor Co., General Motors and Leading Edge, but the Department of Transportation indicated Respondent could fly for Active Aero. (Tr. 858-61, 916). However, after nine months of investigation the FAA charged Airways with 112 violations of common carriage, in which it made flights for freight forwarders who in turn contracted for work with many different companies. The violations occurred between October 22, 2002 and March 18, 2003. Wachendorfer disagreed with the FAA that the companies Respondent contracted with were freight forwarders; while Airways did end up flying for different "ultimate customers," they were not unlimited in number. Nonetheless, on December 31, 2003, the FAA levied a \$1,100.00 fine for each violation. (Tr. 858-61, 865, 916, 923-24; CX-24).

Muth, Manager of Flight Control and Dispatch, informed Complainant and dispatch that flights for Active Aero needed to be filed under the Jet Charter call sign. Wachendorfer did not think the fact that Active Aero required the use of a call sign meant Airways was acting as a common carrier. However, he acknowledged the list of flights which the FAA claimed violated common carriage rules frequently involved Active Aero flights. He testified Jet Charter had the only call sign out of Respondent's three companies which Air Cargo and Airways could use; thus, Airways did not need its own call sign. Wachendorfer testified Airways did not need FAA permission to use Jet Charter's call sign; he stated Frazer did not raise it as an issue and Complainant did not indicate it was a problem. Wachendorfer did not know if Complainant raised the issue with Frazer. (Tr. 862-67, 925, 952-54; CX-31; RX-14).

Wachendorfer testified he was aware of the FAA's investigation into Respondent's common carriage violations as early as March 12, 2003, as indicated by Mr. Lambert's (the FAA supervisor in Dallas) written summary of their phone conversation. (Tr. 868; CX-27).

Wachendorfer clarified he did not know of any Letters of Investigation issued while Complainant was still working, even though Lambert's note referred to the Letter of Investigation he received. Additionally, he did not recall reporting other airlines to the FAA. (Tr. 869, 915). However, on March 13, 2003, Wachendorfer sent a letter to Lambert requesting clarification on the separate entity issue with respect to Kalitta Charters II; he testified this was sent in response to Lambert's request for additional information. (Tr. 870-71; CX-29). Wachendorfer sent a second letter to Lambert regarding the holding out investigation on March 31, 2003. By December, 2003, the investigation was over. (Tr. 871-72; CX-30).

In a March 1, 2004 letter to Respondent, the FAA referenced the December 31, 2003 letter as a civil penalty. (See CX-28; CX-24). Wachendorfer testified Respondent requested a formal conference with the FAA, which has not yet taken place. The common carriage issue has not been resolved at time of this hearing and Respondent still faces charges of 112 violations. (Tr. 872-73). Wachendorfer testified that the entire airline industry is struggling with common carriage issue. A committee of industry leaders was formed to meet with the government regarding rewriting Part 135 and 125; Frazer and Hulsey both serve on the 40-person committee. However, Part 125 has not yet been re-written. (Tr. 914-15, 920-22).

Wachendorfer testified Respondent submitted the general operations manual, training manual, maintenance program and minimum equipment list to the FAA for approval. Frazer and Biondo were involved with submitting the manuals which were necessary for approval and certification of the airline. (Tr. 874). Specifically, Biondo drafted the general operations manual, deicing manual and minimum equipment list while Hulsey drafted the air normal and emergency checklists, weight and measure manual, aircraft operation manual, cockpit operation manual, ATOGS, aircraft systems, hazardous materials manual and the FAA operation specifics. (Tr. 876-77; CX-7). Complainant was responsible for keeping the manuals up to date and getting updates approved by the FAA. (Tr. 917). Wachendorfer testified he was not aware the FAA issued any Letters of Investigation regarding Airways's manuals. He had confidence in Biondo and Hulsey, and did not discipline them for any problem with the manuals; nor was he aware if Frazer criticized or disciplined them for their work on the manuals. (Tr. 878, 919).

Wachendorfer testified he and Frazer jointly hired Complainant as D.O. for Airways. He also decided to have a chief pilot before Complainant was hired, even though it was not required in Part 125 operations. Wachendorfer and Frazer also jointly hired Barker as chief pilot; he did not recall talking to Complainant about hiring Barker. (Tr. 823, 846, 879-80; CX-4). In general, Wachendorfer talked to Frazer about Airways issues, but he did not talk with Complainant. Complainant did not decide what cargo Respondent would carry or for whom they would carry it, where or when. Ultimately, the customer decided where, what and when the cargo was delivered. Additionally, Complainant did not decide the price charge or where to store planes waiting for cargo; typically this was dispatch's responsibility. Wachendorfer testified Complainant did have hiring authority, subject to Frazer's approval; however, Wachendorfer and Frazer set the pilots' pay. (Tr. 881-84). Wachendorfer also testified that Jet Charter management and officials met regularly in 2002; Air Cargo and Airways personnel were not represented at the weekly meetings. Specifically, Hulsey did not attend and Williams only attended later in his tenure at Air Cargo. He stated that Complainant was never invited to attend the meetings, even

though they occasionally addressed issues pertaining to Airways. However, Raymond and Kent did not attend when they were D.O. of Airways. (Tr. 884-86, 917).

Wachendorfer recalled duty time was an issue, but he did not recall who raised it; however, he acknowledged receiving emails from Complainant about his research on the duty time regulations. Complainant informed Wachendorfer over email of his research results, including where he got the information from; he concluded Airways could not ask its pilots to exceed the 16-hour limit on duty time. (Tr. 888-90; CX-19). In his emails, Complainant acknowledged Frazer was to meet with Mills about changing Airways' operation specifics. Even though the basic duty of a D.O. is to handle FAA compliance issues, Wachendorfer stated Frazer had the authority to exclude Complainant from the meeting, and in fact did not take him to the meeting with Mills. (Tr. 890, 893-94).

Wachendorfer testified he discussed changes of the duty time rule with Frazer and proposed 125.137(b) which essentially buried the 16-hour limit. He explained the operation specifics, "ops specs," is a legal document which can differ from general FAA regulations with FAA approval; Airways' ops specs did not include 125.137(a), the stand alone regulation providing for the 16-hour duty limit. (Tr. 891-92). In a letter to the FAA, Wachendorfer proposed adding language to the ops specs extending the duty time limit in circumstances which are beyond the pilot's control, such as weather, cargo or maintenance delays. Without the ops specs, and until the proposal was accepted, the normal FAA regulations govern. (Tr. 895-97; CX-21). The FAA rejected Respondent's proposal on January 30, 2003, on the basis that it was undefined and provided numerous provisions for exceeding the basic 16-hour duty limit. Wachendorfer testified he accepted the rejection, as he did not want to switch Airways to Part 121 or 135. (Tr. 898-99).

Wachendorfer testified it was Frazer's idea to fire Complainant, and he concurred. Wachendorfer met with Frazer to discuss Complainant's discharge a day or so before the termination; no one else was present at the meeting which was not recorded or memorialized in writing. Wachendorfer was not present when Complainant was fired and did not tell Frazer what to say, but acknowledged he acted on behalf of Airways. (Tr. 900-01, 929-30). When asked the reasons for letting Complainant go, Wachendorfer stated he was concerned about Complainant's inability to load an airplane.¹⁷ Specifically, on his only revenue flight Complainant initially loaded only 30% of the cargo, but after Wachendorfer got involved he was able to load 90%. Wachendorfer testified no other pilots were fired for not loading planes properly. (Tr. 930-32).

Initially, Wachendorfer could not think of any other reason for firing Complainant; however, after questioning ended he interjected they also fired him for scheduling problems. Specifically, Complainant was unable to create a workable schedule for a few months. (Tr. 932-34). Wachendorfer testified he sent him a memo about the schedule and talked to Complainant personally about going back to the original schedule of 2 weeks on and 1 week off. Additionally, Wachendorfer moved the change day from Saturday to Monday to allow pilots time home on the weekends. This schedule, however, was never implemented due to

¹⁷ In an affidavit Wachendorfer claimed he instructed Claimant on how to properly load the aircraft whereas Respondent's records and Complainant's credible testimony showed that Wachendorfer talked to copilot, Wanamaker about loading procedures. (CX-32, 33).

