

2. At all relevant times, Respondent Airways has been an air carrier certificated by the FAA to operate under Part 125. Complainant's Exhibit 6 ("Exh. C6"). At all relevant times, Co-Respondent Ameristar Jet Charter, Inc. ("Jet Charter") has been an air carrier, certificated by the FAA to operate under 14 C.F.R. Part 135 ("Part 135"). Exh. C2.

3. Airways was formed to take advantage of the more liberal regulatory requirements of Part 125, which would enable Airways to operate more cheaply than Jet Charter and its 14 C.F.R. Part 121 ("Part 121") counterpart, Ameristar Air Cargo, Inc. ("Air Cargo"). Tr. 423-24, 822-25, 1194, 1356; Exh. C1.

JOINT EMPLOYMENT

4. During most of Clemmons' tenure at Airways, he was supervised by Lindon Frazer, who also served as Director of Maintenance for Jet Charter and Director of Safety for Air Cargo. Tr. 814, 819-20, 1135-36, 1265-66. Clemmons was also answerable to Thomas Wachendorfer, President and sole owner of the three Ameristar companies (Tr. 811, 959); "Lolly" Rives, Human Resources director for all three companies (Tr. 407, 958, 1119); Thomas Biondo, Director of Operations for Jet Charter (Tr. 814, 960-61); Pat Hulsey, Director of Operations for Air Cargo (Tr. 819); and Stacy Muth, Vice President for Dispatch and Crew Scheduling for all three companies (Tr. 484-85, 961, 1309, 1369). The three Ameristar companies also shared common financial, accounting and maintenance functions. Tr. 442, 444-45, 838-39, 959; Exh. C4 at Stamp C0055.

5. Although nominally hired by Airways, Clemmons actually applied for employment with Jet Charter, which also conducted his background check. Tr. 407, 965-66, 980. Jet Charter reported Clemmons as a new hire in its required government report on new hires. Tr.

967-68, 1137. His salary was authorized by a Jet Charter official and at all times paid by Jet Charter; his health and life insurance were provided by Jet Charter; he participated in Jet Charter's Section 125 tax savings plan and its 401(k) retirement program; he was provided with Jet Charter property to perform his job (including a Jet Charter corporate credit card); and was required to participate in Jet Charter's drug testing program. Tr. 970, 972, 974-79, 1134-35. All personnel records for Clemmons and for other employees at the three Ameristar companies were kept in a common location and were maintained by Ms. Rives. Tr. 187, 962-63.

CLEMMONS' JOB RESPONSIBILITIES AND PERFORMANCE

6. Although Clemmons was hired to direct the operations of Airways, he was given no authority over the actual operations of the carrier. Tr. 445, 462, 881-83. Clemmons was also excluded from the weekly meetings attended by the top managers of the three Ameristar companies. Tr. 424-25, 886-87, 962, 1276.

7. Although Clemmons was nominally charged with ensuring regulatory compliance by Airways, he was forbidden to issue compliance directives and was excluded from critical meetings with the FAA. See infra at Proposed Findings of Fact ("Facts") Nos. 21, 24, 29.

8. Although Clemmons handled certain portions of the ground school and flight training provided to new Airways pilots, Air Cargo's Hulsey taught cargo loading and unloading and the handling of hazardous materials. Tr. 58-59, 438, 1201-02, 1227.

9. Clemmons was not responsible for the development of Airways pilot manuals, Tr. 416-17, 533, 1025-26, 1104, 1117; Exh. C72, all of which were drafted or compiled by Air Cargo's Hulsey and Jet Charter's Biondo and updated by Hulsey. Tr. 320, 419, 874-77, 1015, 1112, 1189, 1224-27; Exh. C7 at 1-3. At no time did the FAA sanction Airways for the state of

its manuals. Tr. 393, 919-20, 1019, 1362. At no time did Hulsey or Biondo receive any internal discipline for the condition of those manuals. Tr. 878, 1222-23, 1360-61.

10. Clemmons was not included in the effort to revise Airways' pilot training manual to upgrade it from Part 125's lower requirements to Part 121's more stringent requirements. Tr. 544-45, 1235-37. The FAA only approved the upgraded training manual on January 17, 2003, three days before Clemmons' termination. Exh. C56 at Stamp 600191.

11. On or about November 4, 2002, Air Cargo's Pat Hulsey reviewed the pilot training records compiled by Clemmons and Airways' Chief Pilot Brent Barker ("Barker") (Tr. 173) and made certain suggestions concerning those records. Tr. 547-49. Clemmons and Barker adopted some of those suggestions but did not adopt others because they pertained to recordkeeping requirements of Part 121 rather than the applicable Part 125. Id.; Tr. 209, 711-13, 789.

12. In order to confirm the sufficiency of the records, Clemmons asked H.O. Abbott, the FAA's Principal Operations Inspector ("POI") for Airways, to review them; Abbott did so on December 10, 2002, found them to be in proper order and recorded that assessment on the FAA's computerized records. Tr. 211-12, 550-56, 1238-40; Exh. C77. At no point did Airways receive any FAA sanctions for the condition of its training records. Tr. 393, 1458-59.

13. After Clemmons' termination, however, his successor as Director of Operations, Matt Raymond, directed a pilot to falsify an FAA required flight record. Tr. 392, 901-04, 991, 1442. When the pilot reported the directive to the FAA, Raymond twice denied to the FAA that he had given the order. Tr. 1442-43. Although Raymond's illicit directive and false denials were exposed by a tape recording made by the pilot, Raymond was never disciplined by Ameristar

officials and is still employed as Chief Pilot of Air Cargo. Tr. 905, 1443-45.

14. Clemmons was never permitted to set pilot salaries at Airways. Tr. 408, 1373. Instead, Rives and Biondo provided incoming pilots with a grid to show the range of compensation they could expect based on the amount of flying they could expect to do. Tr. 49-50, 52-53, 140, 663, 782-83; Exh. C71. When the pilots discovered that Rives and Biondo had misled them about their compensation, their morale suffered. Tr. 61-64, 125, 167, 224, 291, 684, 782-83, 1374, 1582-83, 1598-99. During ground school, Pat Hulsey informed the pilots that they would be paid for loading and unloading aircraft. Tr. 53-54, 225, 783. When the pilots discovered that this was not the case, their morale suffered. Tr. 61-63, 125, 167, 670.

15. When the pilots complained to Clemmons and Barker that they had been misled on these subjects and threatened to leave Airways -- a potentially crippling blow to the carrier -- Clemmons and Barker proposed to top Ameristar officials that pilot pay be raised. Tr. 120, 226, 228-29, 305, 310, 316, 530-31, 684, 687-88; Exh. C9. Although Wachendorfer provided some additional compensation to the pilots, he chose not to bring Airways salaries in line with those paid by Air Cargo. Tr. 236, 311, 532, 785.

16. Although the Ameristar companies track and maintain files for employee discipline, counseling, warnings and the docking of pay for attendance problems, Clemmons' official files contain no record of any such action against him. Tr. 468, 963, 972-73, 981-82; Exhs. C34, C35.

CLEMMONS' WHISTLEBLOWING
DUTY TIME/REST TIME

17. Pursuant to 14 C.F.R. § 125.37(a), "Each flight crewmember and flight attendant

must be relieved from all duty for at least 8 consecutive hours during any 24-hour period.”

18. Interpreting the regulation in the so-called “Whitlow Letter,” the FAA’s Deputy Chief Counsel declared that the rule set an absolute daily maximum of 16 pilot duty hours, regardless of delays caused by weather, air traffic control, or maintenance. Exh. C20; Tr. 715, 790-93. As interpreted by the FAA, “duty time” includes the time a pilot spends monitoring a cell phone or pager if required by his employer to respond to such contacts. Exh. C20. Although certain air carriers sued to block enforcement of the Whitlow Letter, the D.C. Circuit Court of Appeals ruled against them on May 31, 2002. Air Transp. Ass’n of Am., Inc. v. FAA, 291 F.3d 49 (D.C. Cir. 2002).

19. Beginning with its very first revenue flight in October 2002 and in order to save money, Airways dispatchers and Lindon Frazer himself pressed Airways pilots to remain on duty beyond the 16 hour regulatory maximum, even though the individual pilot and the Company itself could be sanctioned for doing so. Tr. 66, 72-74, 240-41, 568-70, 572, 731, 793-94, 1315-16, 1391-92, 1396, 1571-73. Repeated pilot “pushing” remained a constant at Airways throughout the entire period of Clemmons’ employment and at least until May 2003. Tr. 75-77, 242, 595, 730, 793-94; Exh. C60. Top Ameristar officials, including Frazer and Clemmons’ successor Matt Raymond, made clear to Airways pilots that their jobs were jeopardized by refusals to violate the 16 hour rule when those refusals led to the cancellation of flights. Tr. 68-70, 90-91. No Ameristar dispatcher or crew scheduler was ever disciplined for pushing pilots to violate the 16 hour rule. Tr. 798, 1391. Also on a regular basis dispatchers interrupted the pilots’ required eight hour rest period by repeatedly paging and telephoning the Airways pilots. Tr. 67-68, 241-42, 573, 583-84, 594; Exh. C76.

20. In response to these problems, the pilots brought complaints to Clemmons. Tr. 65, 73-74, 242, 571, 580; Exh. C51. When Clemmons brought these concerns to Frazer, Frazer dismissed them, declaring that the FAA rules were bad for business and would be changed. Tr. 575-76, 585, 1338-39. Clemmons' concerns on the matter were similarly rebuffed by Andrew Williams, Jet Charter's Chief Pilot and the official who had hired Clemmons, and Thomas Biondo, Clemmons' initial supervisor. Tr. 576-79.

21. In an effort to ensure regulatory compliance, Clemmons discussed the regulation with FAA officials and others and also did research into the official interpretations of the rule; he reported his findings in writing to Wachendorfer and Frazer, making clear to them that he had broached the matter with the FAA. Tr. 580-82, 889, 892, 1315, 1390-91; Exh. C19. Unmoved by the presentation, Wachendorfer and Frazer, with Hulsey's assistance, developed an argument for avoiding the limitations, and Frazer met with the FAA to press the argument, a meeting from which Clemmons was excluded. Exhs. C19, C15; Tr. 586-87, 589, 796-98, 893, 1314-15, 1317, 1397-98. Although the FAA refused to permit Airways to exceed the duty time limit, Airways continued to push its pilots to do so. Tr. 90-91, 895-98; Exh. C21.

22. Indeed, even after Clemmons' termination, Barker and other pilots urged Raymond to seek a formal ruling from the FAA POI on the subject. Tr. 255-57; Exhs. C22, C59. Instead of seeking a ruling, Raymond issued his own interpretation, advising the pilots to be "creative" in tracking their duty time. Exh. C61 at Stamps C0014, C0017; Tr. 258-59, 261-62, 384-85. Although Barker was dissatisfied with Raymond's interpretation and the pilot "pushing" continued, Barker did not press the point further because it was common knowledge among the pilots that Clemmons' insistence on doing so irritated top management and led to Clemmons'

termination. Id.; Tr. 263, 387-88.

MAINTENANCE WRITEUPS

23. Pursuant to 14 C.F.R. § 125.323, a pilot in command of an airplane is required to enter all maintenance irregularities in the pertinent airplane log.

24. Early in Airways' operations and in response to what he deemed to be "excessive" maintenance write-ups by pilots, Frazer required that pilots seek permission from maintenance personnel before writing up such irregularities; and maintenance personnel pressured pilots to forego required write-ups. Tr. 77-84, 147-49, 504, 518, 598-600, 605. Because Frazer's rule was a clear violation of federal regulations, the pilots complained to Clemmons. Tr. 77-78, 735, 802, 1427; Exh. C51. But when Clemmons attempted to dissuade Frazer, Frazer angrily belittled the write-ups and brusquely dismissed Clemmons and his concerns. Tr. 505-06, 1419.

Thereafter, Frazer insisted that Clemmons include the write-up "rule" in one of his periodic email updates to pilots (all of which updates Clemmons was required to have approved by Frazer prior to distribution). Tr. 601-03, 606, 738, 799-800; Exh. C52 (same as Exh. R9).

25. After Clemmons' termination, maintenance personnel continued to press the pilots to put off writeups. Tr. 81-84, 86, 1423. When Barker failed to convince Raymond to end the practice, he reported the problem to the FAA with the full knowledge of his superiors. Tr. 237-38, 271-75; Exh. C18. Within two weeks of doing so, Frazer terminated Barker even though Barker was the only person qualified to provide training to Airways pilots. Tr. 98-99, 174-75, 275, 1429-30. Frazer's only stated reason for the termination was that Barker was paid substantially more than the other pilots, a demonstrably false statement. Tr. 129-30, 277, 380-82, 1434. Barker filed a whistleblower complaint, and OSHA ruled preliminarily in his favor. Tr.

174; Exhs. C69, C70.

26. Ultimately the entire maintenance write-up and repair system became so corrupt that pilot Billy Joe Spratt summarily quit after he was misled into flying an unsafe aircraft. Tr. 103-07, 170. Despite his voluntary quit, Spratt won unemployment benefits because the quit had been triggered by a clear and present danger to his life. Tr. 108-09, 1143.

COMMON CARRIAGE/CALL SIGN

27. Part 125 expressly prohibits a Part 125 carrier from engaging in common carriage or from holding itself out as a common carrier, either directly or indirectly. Tr. 821-22, 836-37, 841, 848-49; Exhs. C4 at Stamp C0057, C80 at 2-3. This particular prohibition has a direct nexus with safety in that the FAA decided to reserve common carriage to carriers which met the stricter safety and training requirements of Parts 121 and 135. Exh. C78; Tr. 618, 623-24.

28. In order to convince the FAA to issue Airways an operating certificate, Wachendorfer repeatedly represented that Airways was being established in order to fulfill long term contracts with a small number of auto parts manufacturers to transport their products in private carriage. Tr. 831, 834; Exh. C4 at Stamps C0052, 54-55, 57. However, not long after Airways began operations, its pilots became concerned that they were transporting a wide variety of cargo having nothing to do with automotive parts, including dog food, computer parts and candy wrappers. Tr. 244-46. When the pilots brought their concerns to Clemmons, Clemmons unsuccessfully attempted to procure Airways' customer lists and also brought the matter to Frazer, who told him, in considerable annoyance, that such matters were none of his business. Tr. 247-48, 614-16.

29. Clemmons also became concerned when he learned that Airways flights were

being identified for tracking purposes with the “call sign” (AJI) issued to Part 135 common carrier Jet Charter and issued a directive to Dispatch to cease the practice. Tr. 248-50, 507-08, 608, 1323-24; Exh. C53. Clemmons also queried the FAA’s POI for Airways -- by then, Ron Brown -- on the subject, who informed him that Airways could not share the call sign without FAA permission. Tr. 343-44, 509, 609-10, 743-44, 748; Exh. C53. When Clemmons reported this information to Frazer (and Frazer reported to Wachendorfer), Wachendorfer sternly told Clemmons that Brown was “wrong” and directed Clemmons not to bring such matters to the FAA; Wachendorfer also forbade Clemmons from issuing such directives in the future without permission. Tr. 509-10, 613-14, 1401; Exh. C53. Frazer angrily questioned Clemmons about his contact with the FAA and refused to allow him to seek a separate call sign for Airways. Tr. 509, 610, 741, 803, 864. Frazer also repeated Wachendorfer’s directive that the FAA was not to be involved in such matters. Tr. 251, 511-12. Clemmons’ conversations with Wachendorfer and Frazer occurred at the end of the first week in January 2003, two weeks prior to his termination. Tr. 506, 512.

30. Ultimately, the FAA charged Airways with 112 violations of the prohibition on common carriage during the period October 22, 2002, through March 2003, and, finding that Airways had in fact committed the violations, levied fines on the carrier. Tr. 858-63, 923, 1404; Exhs. C24, C31, C80.

THE RON BROWN MEETING

31. During the first week of January 2003, Clemmons and Barker met POI Brown in Clemmons’ office at the Addison, Texas, headquarters of the three Ameristar companies. Tr. 251, 818-19. Because Clemmons’ office had a glass wall, the meeting and its participants were

clearly visible to anyone who passed by, and Wachendorfer did so during the course of the meeting. Tr. 782. At that meeting, Clemmons and Barker raised with POI Brown the duty time limitation problem, the call sign problem, and the common carriage concern. Tr. 243-44, 252, 619-20.

32. After Brown left, Wachendorfer came to Clemmons' office and angrily asked Clemmons and Barker who had been meeting with the FAA. Tr. 253, 622. When the two indicated that they had, Wachendorfer made clear once again that regulatory problems were to be handled in house and not brought to the FAA. Tr. 254. Both Clemmons and Barker immediately construed Wachendorfer's statement and manner as an indication that their jobs were in jeopardy. Tr. 254, 622.

CLEMMONS' TERMINATION

33. Within days of the Brown meeting and the call sign conversations, Frazer sent Air Cargo's Hulse and Raymond to evaluate Airways' pilots while they were on duty. Tr. 87, 1243-45, 1368, 1520-21. Although this was a normal task for a Director of Operations, Clemmons was not sent on the trip or asked to make such a trip. *Id.*; Tr. 1295-96, 1367.

34. During their conversations with the Airways pilots, Hulse and Raymond made clear that a management change was imminent at Airways and that Raymond would soon be the Director of Operations. Tr. 87-90. Billy Joe Spratt was informed of that fact on January 10, 2003. Tr. 89, 164. The news came as little surprise because he had long ago learned that Ameristar's highest officials disliked Clemmons' insistence on conformance with regulations, and Spratt duly reported the news to Clemmons. Tr. 90, 97, 163, 519.

35. Shortly thereafter, Clemmons was unexpectedly thrust into service as a line pilot

due to a shortage of pilots occasioned by two recent departures. Tr. 562. Clemmons used his cargo transport duties as a way to demonstrate his facility with takeoffs and landings and maintain his "currency" as a licensed DC9 pilot, thereby saving his employer the cost of a proficiency test on a flight simulator. Tr. 562.

36. On one of his flights, Clemmons fell on an icy tarmac and injured his back (an injury for which he subsequently received workers compensation benefits). Tr. 564, 1517. By the time he had recovered himself sufficiently and completed the required pre-flight paperwork, he returned to the aircraft to find that his co-pilot was involved in an argument with Dispatch and Wachendorfer over how many cargo pallets could safely be loaded on the airplane. Tr. 565-66, 1516-17; Exh. C33. Clemmons worked with the co-pilot to load additional freight on the aircraft, but no amount of re-loading could fit all of the waiting pallets, which had to be transported by an Air Cargo aircraft. Tr. 566-67.

37. Upon his return to the office on Monday, January 20, 2003, Frazer terminated Clemmons, because, as Frazer put it, Frazer had lost confidence in Clemmons' ability to manage his pilots, the same pilots who had been raising regulatory complaints that Clemmons had long been pursuing -- without any success -- with upper management. Tr. 625-26, 984, 1268-69, 1428.

38. Clemmons timely filed his complaint of whistleblower retaliation on April 14, 2003, and OSHA made a preliminary finding in Clemmons' favor on January 20, 2004. Exhs. C67, C68.

CLEMMONS' JOB SEARCH

39. Following his discharge, Clemmons made regular and consistent efforts to find

work but, with the exception of a short consulting project paying \$800.00, did not procure fulltime employment until September 7, 2003. Tr. 633-34, 777; Exh. R37. Even then, his new job (with the FAA) paid far less (initially \$58,000, raised to \$60,000 in January 2004) than his Ameristar salary of \$72,000. Tr. 634-35; Exh. C36.

40. Through the end of July 2004, Clemmons had lost a total of \$56,746.23 in wages as a result of his termination, and his loss continues to mount at a rate of \$1,000/month since July 2004 (the difference between his Ameristar salary and his current FAA salary). Tr. 636-40; Exh. C79.

**RESPONDENTS ATTEMPT TO FIND LEGITIMATE,
NON-RETALIATORY REASONS FOR TERMINATING CLEMMONS**

41. Immediately after his termination, Clemmons applied for unemployment compensation with the Texas Workforce Commission ("TWC"). Tr. 984; Exh. C42. Because Clemmons had actually been employed by Jet Charter, his claim was properly lodged against Jet Charter. Tr. 987, 994, 1134. Ameristar learned of that filing within a week of the discharge. Tr. 986; Exh. C42.

42. In their first response to the claim on February 5, 2003 -- drafted by Rives and reviewed by Frazer -- Respondents cited only two reasons for the termination, allegedly poor judgment in executing training plans and work schedules and the use of an actual aircraft instead of a flight simulator to maintain flight currency. Tr. 987, 993-95, 1124, 1452-53; Exh. C42 at Stamp 700118.

43. The work schedule accusation is a particularly vivid example of Respondents' effort to advance as "reasons" for the termination problems that were not of Clemmons' making.

When Clemmons was initially hired, Frazer informed him that the pilots' basic work schedule was to be two weeks on duty, followed by one week off duty -- i.e., 14 days on/7 off. Tr. 145-46, 366-67, 430, 474, 695, 935, 1303-04. Clemmons and Frazer worked together to compose each schedule, with Barker providing additional assistance. Tr. 193-94, 471-72, 691. Each schedule went to Frazer for approval before it was implemented. Tr. 472-73, 936, 1305, 1475.

44. Clemmons soon discovered that it was mathematically impossible to create a schedule of 14 on/7 off with the same change day for every affected week. Tr. 477-78, 692. As a result, Clemmons and Frazer had to vary the 14/7 formula, giving some pilots somewhat more than 14 on and less than 7 off and others somewhat less than 14 on and more than 7 off. Tr. 478.

45. At a certain point, Wachendorfer began to complain about the schedules, and Clemmons and Frazer would re-work the schedule. Tr. 501-02. It was not until January 2003 that Clemmons discovered (in a chance conversation with Stacy Muth) that Wachendorfer actually contemplated a schedule of 15 days on/6 off (including the change day, the distribution was effectively 15½ days on/5½ off). Tr. 144, 497-98, 500, 947, 1490; Exh. R19. Ameristar has since admitted that the proper parameter was indeed 15 days on/6 days off. Tr. 946-47, 1516; Exh. C48 at Stamp 600025. However, both Frazer and Wachendorfer testified at trial that an acceptable schedule could be virtually anything from 12 on/9 off and above. Tr. 946, 948-49, 1304, 1486-87. Although Frazer did not give Clemmons the proper parameters, Frazer suffered no discipline for his mistake, but Frazer was removed from oversight of the scheduling system at Airways after Clemmons' firing. Tr. 498, 937-38, 940, 951, 1482, 1561.

46. When Ameristar made its second filing with the TWC on March 31, 2003, it asserted precisely the same purportedly "legitimate" reasons for terminating Clemmons. Tr.

1000; Exh. C43 at Stamp 700112.

47. When Ameristar made its third TWC filing on April 4, 2003 -- again, drafted by Lolly Rives and reviewed by Lindon Frazer -- the purported reasons for the termination had undergone a decided change. Tr. 1000-01; Exh. C44 at Stamp 700108. Although the filing again mentions scheduling, the flight currency and training plan issues are not mentioned, replaced by the January 16, 2003, cargo loading incident. Id.; Tr. 1001-02, 1007-08; see supra at Facts No. 36. As the filing expressly states, "This issue [the cargo loading issue] coupled with crew scheduling issues provided the basis for the decision to end [Clemmons'] employment." Exh. C44.

48. The filing's report of the cargo loading incident, however, not only misstates the number of cargo pallets involved but also asserts that Frazer, not Wachendorfer, became involved in the loading effort -- an error caused by the fact that Frazer falsely took credit for the incident. Tr. 1002-03. Ameristar never corrected the inaccuracies in its April 4, 2003, filing with the TWC. Tr. 1006. When questioned at trial, moreover, Wachendorfer admitted that no one other than Clemmons had ever been terminated for a problem in loading cargo. Tr. 931-32.

49. Respondents' next effort to provide "legitimate" reasons for terminating Clemmons came in its May 9, 2003, filing with OSHA in the instant action, which was drafted after Respondents conducted an "investigation" to find those reasons. Exh. C46; Tr. 1021-22, 1127. In this filing, three and one half months after the termination, the asserted "reasons" increased geometrically.

50. First, and for the first time, Respondents charge that Clemmons had a responsibility to develop manuals for Airways and did a poor job of it. Tr. 1023, 1026. That

charge, however, is belied by undisputed evidence adduced at trial. See supra at Facts No. 9.

51. Respondents once again include the work schedule issue in their OSHA filing, but attempt to prove it by reference to an email raising questions about decisions made by Frazer and Barker and not even mentioning Clemmons. Tr. 194-97, 481, 1030-31, 1055, 1057, 1480; Exh. C46 at Stamp 700035.

52. For the first time, the OSHA filing charges Clemmons with not managing “aircraft crewing” properly. Tr. 1057. This allegation is supported only by an email that does not even mention Clemmons and indicates only that a pilot scheduled to fly on a certain day simply did not show up for work and that the Crew Scheduling department, not Clemmons, paid too much for airline tickets to move the pilot into position to fly. Tr. 483-86, 1059-61, 1492-93, 1567; Exh. C46 at Stamp 700036.

53. The OSHA filing then, for the first time, accuses Clemmons of failing to provide navigational and other aids to pilots but bases that accusation solely on an email indicating that a particular pilot was not certain on one occasion that he had up-to-date information (in fact, he did). Tr. 458-60, 705, 786-87, 1066, 1068; Exh. C46 at Stamp 700037.

54. The OSHA filing then -- and again for the first time -- charges Clemmons with creating morale problems among the pilots, problems the Respondents declare they did not even know about before the May 9, 2003, filing. Tr. 1071-72. As “proof,” the filing relies on two emails -- one dated January 13, 2003, but only received by Wachendorfer in late March 2003, and another dated January 14, 2003, but not received by Lolly Rives until April 25, 2003. Tr. 514, 1076, 1078-81; Exh. C46 at Stamps 700039-41. Neither email therefore could have been

known to the Respondents until months after the termination they purportedly caused.¹ Indeed, neither had been presented with or even mentioned in Respondents' first three filings with the TWC. Tr. 1083-84, 1382-84, 1513; Exhs. C42-C44. To the extent pilot morale was low, moreover, it was because top Ameristar officials created poor working conditions for pilots and misrepresented compensation issues to them. See supra at Facts Nos. 14-15, 20, 22, 24, 28.

55. At trial, Respondents presented witness Brian Shortt to testify that Clemmons made remarks critical of management to the pilots. Tr. 1582-83, 1585. However, Respondents presented no witness to testify that any such remarks were communicated to management. Shortt's credibility, moreover, is subject to serious question. See infra at Facts No. 64. Shortt also claimed that Clemmons handed out pilot training records in February 2003 -- even though Clemmons had been terminated in January 2003. Tr. 1587, 1597.

56. The OSHA filing also raises for the first time a charge that Clemmons did not maintain pilot training records properly based on Hulse's November 4, 2003, "audit" of those records. Tr. 1093, 1245; Exh. C46 at Stamp 700052. Hulse's opinion, however, flies in the face of the FAA's approval of those records in December 2002, see supra at Facts No. 12, and was based largely on a training manual that Respondents never placed into evidence and which had been subsequently revised to conform to higher Part 121 standards. Tr. 544, 789-90, 1234, 1236-37; Exh. C56 at Stamp 600191.

57. Respondents' reliance on Hulse's early November 2002 review of training

¹ Frazer, a witness of dubious credibility, testified that he saw the January 13, 2003, email prior to the January 20, 2003, termination, but when asked at his deposition and again at trial to produce the earlier version, he could not do so, and no earlier version was offered into evidence at trial. Tr. 1345, 1509, 1512-13.

records was thoroughly disavowed by Respondents themselves in a June 26, 2003, filing with the TWC commenting on a June 20, 2003, hearing at which Hulsey testified. Tr. 1009-11, 1097-98, 1248-50; Exh. C45. As Lolly Rives admitted, any assertion that Clemmons performed anything but satisfactorily in early November 2002 would be inaccurate. Tr. 1018.

58. The OSHA filing also for the first time accuses Clemmons of mishandling training records because the results of a pilot's upgrade test were not in the files at a certain point in time. Exh. C46 at Stamps 700029-30. However, Barker, not Clemmons, conducted that training, and only Barker could complete the paperwork on the test. Tr. 208, 214-15, 217, 223, 556-57, 559, 1093, 1101-03; Exh. C46 at Stamps 700050, 700053-55. Further, Barker kept the paperwork with him for a period of time, intending to administer a retest. Tr. 329, 707, 709. Clemmons did not remove Barker from revenue flying to return to complete the paperwork earlier because any decision to disrupt revenue generation would have drawn censure from Clemmons' superiors. Tr. 217-18, 560.

59. Finally, the OSHA filing accuses Clemmons of not seeking help to revise manuals but bases that accusation solely on an exhibit proving only that Hulsey continued to revise manuals throughout Clemmons' tenure. Tr. 1108-09, 1224-27; Exh. C46 at Stamp 700058.

CREDIBILITY ISSUES

60. There was ample evidence adduced at trial to raise significant questions about the credibility of each and every one of the Respondents' witnesses.

61. It was established that Wachendorfer misrepresented to the FAA his intentions in forming Airways in connection with the common carriage issue. See supra at Facts No. 28. Moreover, although Wachendorfer represented to the FAA that the Airways Director of

Operations would have no affiliation with the other Ameristar companies, Frazer, who held management positions at the other companies, was at all times the principal operating authority at Airways. Tr. 420, 829, 842, 855-56, 880-81; Exh. C4 at Stamp C00055.

62. Pat Hulsey, who had served actual prison time for a crime of dishonesty (filing false federal income taxes), Tr. 820, rested much of his criticism of Clemmons' approach to training records on a training manual Respondents chose not to submit as evidence. See supra at Facts No. 56. Hulsey's views on the records, moreover, were directly disavowed by the Respondents in their June 26, 2003, filing with the TWC. See supra at Facts No. 57.

63. It was firmly established at trial that Lindon Frazer repeatedly lied in a sworn affidavit submitted to OSHA in an earlier phase in this case. Exh. C50; Tr. 1328, 1360, 1455-57, 1459-62, 1466-68, 1473, 1515, 1522-28. In addition, Frazer lied to Brent Barker when he told him he was terminated because he made significantly more money than the other pilots, lied at trial in claiming that it was Clemmons who suggested that Airways create a chief pilot position and even lied to Ameristar's own Lolly Rives when he told her that he, rather than Wachendorfer, had been involved in the January 16, 2003, loading incident for which Respondents blame Clemmons. Tr. 1277-78, 1365-67; see supra at Facts Nos. 25, 48.

64. Respondents' last witness Brian Shortt had, not long before joining Airways, had his pilot licenses revoked by the FAA because he had engaged in a fraudulent scheme to sell pilot ratings to unqualified pilots. Tr. 1600-03; Exh. C81. Notwithstanding this background and his very junior status, he survived the April 14, 2003, reduction in force that even Brent Barker did not survive, and, after he, too, was subsequently laid off, was the only Airways pilot to be rehired – and then as a Captain. Tr. 1595-96. One can hardly escape the conclusion that Shortt's

testimony against Clemmons is his way of paying back his employer for the extraordinarily generous treatment he has received.

PROPOSED CONCLUSIONS OF LAW

1. In relevant part, the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century, 49 U.S.C. §§ 42121, et seq. (“AIR21”), provides as follows:

No air carrier . . . may discharge an employee . . . because the employee . . .

(1) provided . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States. . . .

49 U.S.C. § 42121(a)(1).

2. Clemmons is an “employee” under the terms of AIR21. 29 C.F.R. § 1979.101.

3. Co-Respondents Airways and Jet Charter are both “air carriers” under the terms of AIR21. Id.

4. At all times relevant to this action Clemmons was jointly employed by Airways and Jet Charter because the two entities amply manifest the “interrelation of operations, common management, centralized control of labor relations and common ownership” definitive of joint employers. Radio & T.V. Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965). Facts Nos. 4-5, 41.

5. In order to establish a claim under AIR21, the complaining employee must first establish, by a preponderance of the evidence, a prima facie case of a violation of the statute: namely, that

- (1) the employee engaged in protected activity or conduct;
- (2) the respondent knew, actively or constructively, that the employee engaged in the protected activity;
- (3) the employee suffered an unfavorable personnel action; and
- (4) the circumstances are sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. §§ 1979.104(b)(1)(i)-(iv); Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997); Parshley v. America West Airlines, 2002-AIR-10, 50 (ALJ Aug. 5, 2002); Lebo v. Piedmont-Hawthorne, 2003-AIR-25, 14 (ALJ Oct. 29, 2003).

6. An employee engages in “protected activity” when he reports to his employer or to the government, even informally, an act which he reasonably believes is a violation of the subject statute touching air safety and his belief is “objectively reasonable.” Parshley, 2002-AIR-10 at 51-52; Weil v. Planet Airways, Inc., 2003-AIR-18, 37 (ALJ Mar. 16, 2004); Fader v. Transp. Sec. Admin., 2004-AIR-27, 4 (ALJ June 17, 2004); Nichols v. Bechtel Constr., Inc., 87-ERA-44, slip op. at 6 (Sec'y Oct. 26, 1992); Lebo, 2003-AIR-25 at 16-17; Stoneking v. AVbase Aviation, 2002-AIR-7, 14 (ALJ Mar. 17, 2003). As long as the employee’s belief in the potential violation is objectively reasonable, “it does not matter whether the allegation is ultimately substantiated.” Lebo, 2003-AIR-25 at 16.

7. In this case, Clemmons engaged in protected activity when he reported to top officials in the Ameristar companies and to the FAA 1) his concern that Airways was violating Part 125 duty time/rest time rules, 14 C.F.R. § 125.37; 2) his concern that Airways was violating

Part 125's requirement that pilots in command enter all mechanical irregularities in the airplane's maintenance log, 14 C.F.R. § 125.323; 3) his concern that Airways was violating Part 125's prohibition on common carriage, 14 C.F.R. § 125.11(b); and 4) his concern that Airways was violating FAA rules by using Jet Charter's "call sign" without permission from the FAA or Jet Charter. Facts Nos. 20-21, 24, 28-29, 31-32.

8. All of the activities Clemmons reported -- most obviously the violations of duty time/rest time regulations and maintenance write-up regulations -- directly implicate air carrier safety. Clemmons' reports on the common carriage and call sign violations also bear directly on air carrier safety. Facts No. 27. Congress expressly required that when the FAA promulgated regulations for common carriers, it was to take into consideration such carriers' duty "to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A). As the FAA itself has indicated, because Part 125 carriers are not held to the strict training and safety standards of carriers permitted to engage in common carriage under Parts 121 and 135, "Part 125 was not intended to provide acceptable safety levels for common-carriage operations." Foreign Air Carriers and Operators of Certain Large U.S. -- Registered Airplanes, 52 Fed. Reg. 20,026 (May 28, 1987). Recognizing these differences, the Ninth Circuit upheld the FAA administrator's emergency revocation of a Part 125 carrier's operating certificate for engaging in common carriage because the Part 125 carrier's engagement in such activity constituted "an emergency," and "safety in air commerce or air transportation requires the immediate effectiveness of his [the administrator's] order." Go Leasing, Inc. v. Nat'l Transp. Safety Bd., 800 F.2d 1514, 1517-19 (9th Cir. 1986). Similarly, the Fifth Circuit upheld the revocation of a pilot's license for engaging in common carriage while operating under FAR Part

91, which also forbids common carriage, on the following ground:

FAR Part 91 specifically excludes common carriers from its coverage, leaving them subject to the more stringent safety standards of FAR Part 135. The policy behind this distinction appears to be that the general public has a right to expect that airlines which solicit their business operate under the most searching tests of safety.

Woolsey v. Nat'l Transp. Safety Bd., 993 F.2d 516, 521-22 (5th Cir. 1993) (emphasis added).

9. Clemmons' belief that Airways was violating safety-related statutes, orders or standards in reporting duty time/rest time limits was objectively reasonable because the rules were straightforward and Ameristar officials well knew what the rules were -- indeed, those officials even unsuccessfully requested that the FAA alter those rules. Facts Nos. 17-21. Clemmons' belief that Airways was violating rules regarding the report of mechanical discrepancies was also objectively reasonable because the rule is unambiguous, and Lindon Frazer devised a contrary company "rule" specifically designed to decrease the number of such reports. Facts Nos. 23-24. Clemmons' belief that Airways was violating the prohibitions on common carriage and "call sign" rules was objectively reasonable because the FAA ultimately found that Airways did in fact violate the former, and the FAA's Ron Brown expressly told Clemmons that Airways could not share Jet Charter's "call sign" without FAA and Jet Charter permission. Facts Nos. 27-30.

10. Respondents' officials clearly knew that Clemmons engaged in protected activity because 1) many of his reports on potential violations went directly to such top ranking Ameristar officials as Wachendorfer, Frazer, Biondo and Williams; 2) he indicated in writing to his superiors that he had discussed the potential duty time and call sign violations with FAA

personnel; 3) both Frazer and Wachendorfer directly confronted Clemmons about his discussions with the FAA and directed him not to have such discussions; and 4) both Frazer and Wachendorfer monitored and restricted Clemmons' in-house communications on these subjects. Facts Nos. 20-21, 24, 28-29, 31-32.

11. It is undisputed in this case that Clemmons suffered an unfavorable employment action when he was terminated from employment on January 20, 2003. 49 C.F.R. § 1979.104(b)(1)(iii).

12. In order to establish that an employee's protected activity was likely a contributing factor in an unfavorable employment action, the employee must establish that his protected activity was "any factor, which, alone or in connection with other factors, tends to affect in any way the outcome of [an unfavorable employment action]." Stoneking, 2002-AIR-7 at 12 (citing Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

13. A "contributing factor" need not be a "significant," "motivating," "substantial," or "predominant" factor in the unfavorable employment action at issue. Lebo, 2003-AIR-25 at 14-15 (citing Marano, 2 F.3d at 1140). And "a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent." Platone v. Atlantic Coast Airlines, 2003-SOX-27, 27 (ALJ Apr. 30, 2004).

14. A complainant can also satisfy his burden "if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action." 29 C.F.R. § 1979.104(b)(2); Michaels v. Planet Airways, 2003-AIR-8, 39 (ALJ Sept. 26, 2003) ("proximity in time is sufficient to raise an inference of causation"); Lebo, 2003-AIR-25 at 20 (same).

15. Clemmons repeatedly brought alleged violations of safety-related FAA orders, regulations or standards to his superiors and, with the knowledge of his superiors, to the FAA. On such occasions, Clemmons' superiors made clear their distaste for and even anger over the reports and on more than one occasion expressly directed Clemmons to keep such matters in-house and not take them to the FAA -- a directive Clemmons declined to follow. Facts Nos. 20-21, 24, 28-29. The final such incident, the meeting Clemmons and Barker held with the FAA's Ron Brown, triggered angry responses from both Wachendorfer and Frazer and occurred within two weeks of Clemmons' termination. Facts Nos. 31-32. The meeting also came mere days before it was made clear to Airways pilot Bill Joe Spratt that Clemmons' tenure at Airways was effectively over. Facts No. 34.

16. In light of these facts, Clemmons has established that his protected activity was likely a contributing factor in his termination. Along with his other showings, he has therefore established his prima facie case under AIR21.

17. Once an employee has established a prima facie case under AIR21, the burden shifts to the carrier to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action for legitimate reasons in the absence of the protected conduct. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.104(c); Michaels, 2003-AIR-8 at 39 (citing Yule v. Burns Int'l Sec. Serv., 1993-ERA-12, slip op. at 4 (Sec'y May 24, 1995)); Lebo, 2003-AIR-25 at 15.

18. If a carrier asserts a purported legitimate alternative reason, the employee may still prevail by demonstrating that the proffered reason is pretextual -- i.e., not the true reason for the unfavorable employment action. Michaels, 2003-AIR-8 at 40; Taylor v. Express One Int'l, Inc.,

2001-AIR-2, 34 (ALJ Feb. 15, 2002); Young v. Schlumberger Oil Field Servs., 2000-STA-28, 45 (ALJ Aug. 10, 2000).

19. In this regard, it is settled law that an “employer could not have been motivated by knowledge it did not have” at the time of the unfavorable employment action at issue.

McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 360 (1995).

20. Pretext may also be established if a complainant “demonstrates that the reasons given for [his] termination did not remain consistent, beginning at the time they were proffered and continuing throughout the proceedings” Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 284 (3d Cir. 2001); Thurman v. Yellow Freight Sys., 90 F.3d 1160, 1167 (6th Cir. 1996) (“An employer’s changing rationale for making an adverse employment decision can be evidence of pretext.”); Alvarado v. Bd. of Trustees of Montgomery Cmty. Coll., 928 F.2d 118, 122-23 (4th Cir. 1991) (fact that employer initially claimed that plaintiff’s discharge was due to lack of work and later claimed was due to poor work performance can support an inference of discriminatory intent).

21. It was firmly established at trial in this case that ever since Clemmons’ January 20, 2003 termination meeting, Respondents have presented an ever growing and ever changing list of purportedly legitimate reasons for the termination. Facts Nos. 41-59. The sheer variability in the reasons asserted constitutes evidence of pretext.

22. Moreover, as established at trial, most of the reasons asserted are self-evidently pretextual because they are based on the false statements of Frazer, Facts Nos. 48, 63; are based on “evidence” that has no relation to the reasons asserted, Facts Nos. 51-53; are derived from purported “duties” Clemmons never actually had, Facts Nos. 50, 54, 58-59; concern supposed

derelictions for which others were never penalized, Facts Nos. 43-45; or were expressly disavowed by Respondents themselves. Facts Nos. 56-57.²

23. Given these facts, the only proffered reasons even arguably pertinent are those that allegedly arose between the date of Clemmons' last protected activity on or about January 6 or 7, 2003, and his termination on January 20, 2003, because misconduct subsequent to protected activity can in certain circumstances rebut an inference of retaliatory motive. E.g., Swanson v. Gen. Servs. Admin., 110 F.3d 1180, 1188 n.3 (5th Cir. 1997); Michaels, 2003-AIR-8 at 47-49; Evans v. Washington Pub. Power Supply Sys., 95-ERA-52, 4 (ARB July 30, 1996).

24. Respondents assert four such "reasons": an alleged failure by Clemmons to produce an acceptable pilot working schedule on January 9, 2003; two emails dated January 13 and 14, 2003, that arguably insulted Mr. Wachendorfer and arguably instigated pilots to quit; and a January 16, 2003, loading incident.

25. The credible evidence adduced at trial supports the conclusion that Clemmons personally was not responsible for the problems in devising pilot schedules because he was provided the wrong parameters for accomplishing that task by his supervisor Frazer, who suffered no penalty for his errors with respect to the work schedules. Facts Nos. 43-45.

26. As for the two emails in question, the credible evidence establishes that Respondents did not even receive the emails until months after Clemmons' termination; indeed,

² Further, Respondents failed to enter into evidence the training manual that purportedly would establish Clemmons' alleged derelictions with respect to training records, a failure that warrants a negative inference that the evidence would not support Respondents' claim. E.g., UAW v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.")

Respondents did not even mention the emails in their first three filings with the TWC. Facts No. 54. Thus, as a matter of law, the emails could not have been any reason, much less a legitimate reason, for the termination. McKennon, 513 U.S. at 360.

27. That leaves the January 16, 2003, loading incident. Assuming that Clemmons is the one to be held responsible for this problem (and there is evidence to indicate that it was the First Officer who was actually responsible and had to be instructed by Wachendorfer), Wachendorfer admitted that no pilot had ever before been terminated for difficulty in loading an airplane. Facts Nos. 36, 47-48. Moreover, the January 16, 2003, incident came six days after Airways pilot Billy Joe Spratt learned that Clemmons' removal was imminent. Facts No. 34.

28. Accordingly, Respondents have failed to establish by the requisite clear and convincing evidence -- or by any evidentiary standard -- that the loading incident or any of the other proffered "legitimate" reasons either caused or would have justified Clemmons' termination in the absence of his protected activity.

29. In view of the applicable law and the evidence presented, including credibility determinations, which weighed heavily against Respondents, Clemmons has carried his burden to establish that he was terminated by Respondents in violation of AIR21.

30. Having successfully established liability, Clemmons is entitled to the remedies permitted under the statute -- reinstatement to his former position, backpay, compensatory damages (if any) and all costs and expenses (including attorneys' and expert witness fees) reasonably incurred in connection with this case. 49 U.S.C. § 42121(b)(3)(B).

31. Clemmons has not sought reinstatement or compensatory damages, so his award can be limited to backpay during the period he was unemployed (January 20, 2003, to September

7, 2003) and additional backpay continuing during the period in which he receives less compensation at his current job than when he was employed by Respondents.

32. As was established at trial, through the end of July 2004, Clemmons experienced a backpay loss of \$56,746.23, and is entitled to that sum plus an additional \$1,000 per month after the end of July 2004. Facts Nos. 39-40.

33. Against that sum must be set off a total of \$800 in interim earnings from Clemmons' alternative employment. Facts Nos. 39-40. The amounts Clemmons received in unemployment benefits (which he is repaying to the State of Texas in any case [Tr. 631]) or in the worker's compensation he received in connection with his workplace injury, see Facts No. 36, constitute collateral benefits and therefore cannot be used as a setoff against damages.³

³ Unemployment benefits are not a setoff from a backpay award. Artrip v. Ebasco Servs., Inc., 89-ERA-23, 4-5 (ARB Sept. 27, 1996). Worker's compensation benefits may be a setoff when those benefits are solely intended as compensation for lost wages. Williams v. TIW Fabrication & Machining, Inc., 88-SWD-3, slip op. at 7 n.6 (Sec'y June 24, 1992). Questions of intent are determined by reference to the law of the jurisdiction awarding the benefits, in this case Texas. Id. (examining Ninth Circuit and California law to determine whether California temporary disability payments should be offset from whistleblower recovery). The Texas Workers' Compensation Act is aimed primarily at compensating workers for on the job injuries (and thereby displacing tort claims). See, e.g., Payne v. Galen Hosp. Corp., 28 S.W.3d 15, 17 (Tex. 2000) (purpose of Act includes relieving "employees injured on the job of the burden of proving their employer's negligence and to provide them prompt remuneration for their on-the-job injuries"); Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex., 136 S.W.3d 643, 652 (Tex. 2004) (workers compensation system was created with the "evident purpose of compensating injured workers and their dependents"); Richards v. Tex. A&M Univ., 131 S.W.3d 550, 557 (Tex. App. 2004), petition for cert. filed, 73 U.S.L.W. 3216 (U.S. Sept. 22, 2004) (No. 04-427) ("The Act's social and economic purposes include simplifying and rationalizing compensation to employees for workplace injuries, and limiting tort liability for employers."); Jones v. Ill. Employers Ins. of Wausau, 136 S.W.3d 728, 742 (Tex. App. 2004) ("[C]ourts have frequently interpreted that the primary purposes of the Workers' Compensation Act is to benefit and protect injured employees, and to expedite settlement of meritorious claims."). Thus the worker's compensation benefits Clemmons received should not be a setoff against his backpay award.

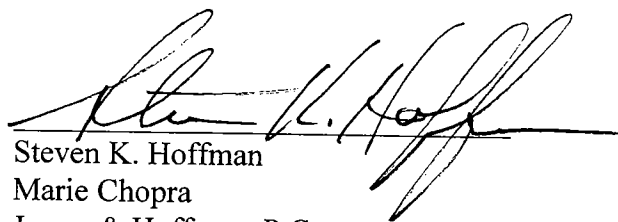
34. Pursuant to 49 U.S.C. § 42121(b)(3)(B)(ii) and 29 C.F.R. § 20.58(a), Clemmons is entitled to interest on his backpay from the date the payments were due as wages (January 21, 2003) to the actual date Respondents satisfy their backpay obligation. Lawson v. United Airlines, Inc., 2002-AIR-6, 48, 52 (ALJ Dec. 20, 2002). The current interest rate, as specified by the Internal Revenue Code, 26 U.S.C. § 6621, is 5%.

35. Finally, Clemmons is entitled to his reasonable costs and expenses, including attorney fees, in pursuing this action. Within thirty (30) days of the date of judgment in this case, Clemmons should submit a petition setting forth those costs and expenses, including attorneys fees.

CONCLUSION

For the reasons set forth above, Complainant Thomas Clemmons is entitled to judgment in his favor as against his joint employers Ameristar Airways, Inc., and Ameristar Jet Charter, Inc., and also to the remedies indicated above.

Respectfully submitted,



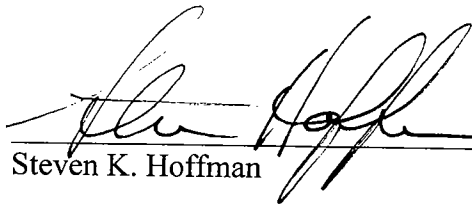
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Date: November 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Proposed Findings of Fact and Conclusions of Law was served on November 9, 2004, via first-class mail on the following counsel:

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