

**U.S. Department of Labor**

Office of Administrative Law Judges  
Heritage Plaza Bldg. - Suite 530  
111 Veterans Memorial Blvd  
Metairie, LA 70005



(504) 589-6201  
(504) 589-6268 (FAX)

**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.<sup>1</sup> 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.<sup>2</sup> 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;

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> (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, Leer Jet Series 24 and 25, and King Air planes. (Tr. 811-12; CX-2).<sup>4</sup> 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).

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<sup>3</sup> 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).

<sup>4</sup> 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).<sup>5</sup>

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

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<sup>5</sup> 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.<sup>6</sup> (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).

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<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> (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).

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<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> 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

