U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 January 2005

CASE NO.: 2004-AIR-11

IN THE MATTER OF

THOMAS E. CLEMMONS,
Complainant

v

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,
Respondents

APPEARANCES:

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

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

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

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

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

Complainant was employed by Ameristar Airways, Inc., (hereinafter "Airways" or "Respondent") from September 6, 2002, until his termination on January 20, 2003.[1] On April 14, 2003, Complainant filed a complaint with the Department of Labor alleging he was discriminated against for raising concerns to his supervisors and the Federal Aviation Administration (FAA) regarding violations of FAA Rules 121 and 125, inadequate maintenance of aircraft and issues related to the hours of duty for pilots. On January 20, 2004, following an investigation, the Regional Supervisor for the Occupational Safety and Health Administration (OSHA) found the complaint to have merit. (CX-67, 68, 78). Employer timely filed a request for a formal hearing pursuant to 49 U.S.C. § 42121 (B)(2)(a).

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

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

I. ISSUES

1. Whether Complainant engaged in protected activity as described in 49 U.S.C. § 42121;

2. If so, whether such activity was a contributing factor in Respondent's decision to discharge Complainant;

3. If so, whether Respondent has established by clear and convincing evidence that Respondent would have discharged Complainant absent his protected activity;

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

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

II. SUMMARY OF THE CASE

A. Company Structure and Personnel

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

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

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

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

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

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

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

B. Summary of the Evidence

1. Thomas Clemmons

Background

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

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

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

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

Director of Operations Position

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

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

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

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

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

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

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

Pilot Hiring and Training

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

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

All the pilots went through two weeks of ground school training shortly after their hire, as taught by Complainant, Barker and Hulsey. (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 to time consuming. (Tr. 527, 788). In a December, 2002, email, Muth, Manager of Dispatch, questioned Complainant's procedures for disseminating the information as the result of a crew calling in and requesting all charts be faxed to them as they were unsure what they had was current. (Tr. 702-03, 786; RX-12). Complainant testified he told Muth the procedures he

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

Revenue Flight

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

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

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

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

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

Pilot Pay

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

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

Duty-Time Issue

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

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

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

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

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

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

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

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

Maintenance Policy

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

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

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

Call Sign

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

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

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

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

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

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

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

Holding Out for Common Carriage

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

January 7, 2003 Meeting

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

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

January 13, 2003 Email to Pilots

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

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

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

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

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

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

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

Post-Termination

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

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

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

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

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

2. Billy Jo Sprat

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

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

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

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

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

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

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

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

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

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

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

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

3. Brent Wayne Barker

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Thomas Wachendorfer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Complainant's alleged inefficiency. In particular, Complainant's schedules let pilots off on different days, which resulted in insufficient coverage for the three planes. (Tr. 934-35, 937). With a Monday change day, Wachendorfer explained the pilots may work a few hours more or less, depending on when their replacement pilots showed up to work. He testified at the hearing the two weeks on, one week off schedule was 14 days on and 7 days off, plus or minus a few hours. However, he also testified two weeks equaled 14.5 days. In a June 9, 2003 filing with OSHA, he indicated two weeks was 15 days on, 6 days off. In his May 25, 2004 deposition, Wachendorfer testified two weeks was 14 days on, 7 days off. (Tr. 946-50; CX-48).

Wachendorfer testified the scheduling problems did not arise until January, explaining that in November the airline just started operating and there was not much business in December due to the holidays. He also stated Complainant's schedules should have been approved by Frazer, but he did not know if that actually happened. Either Frazer was not doing his job or Complainant was not following orders. (Tr. 936-39). Wachendorfer testified he talked with Frazer about the schedule process, so Frazer was aware of the problems and that the schedule did not work to his satisfaction. As Complainant's supervisor, Frazer was likely involved in the scheduling process before the problems arose. Wachendorfer saw him sitting at a desk writing out a schedule and indeed, Frazer informed him he had taken over Complainant's scheduling duties. Wachendorfer did not consider Frazer totally responsible for Complainant, but testified he expected Complainant to figure out the scheduling process, as the schedule ultimately rested on his shoulders. (Tr. 939-44, 951, 954). He further testified Frazer was never reprimanded or cautioned for schedule problems, even though he was effectively in control of Airways. However, Wachendorfer later stated his memorandum to Complainant and Frazer regarding the schedule problems constituted a penalty and discipline for both recipients. (Tr. 950-51).

Wachendorfer appointed Raymond to replace Complainant, although he did not know if Raymond had experience under Part 125 regulations. Additionally, Wachendorfer was not aware Raymond directed a pilot not to fill out a required FAA form regarding a flight when it happened; he only learned about this after the fact. Wachendorfer testified he had no knowledge Raymond created false records of Airways flights. He heard this may have happened, but he has not seen records, flight logs or heard recordings. (Tr. 901-03, 918). Recently, Wachendorfer heard there was a tape recording of a conversation between Raymond and a pilot, but he did not launch an internal investigation nor was he aware if Frazer investigated; he just assumed someone got to the bottom of the problem. Raymond was D.O. of Airways for 9 to 10 months and then returned to the chief pilot position at Air Cargo; he was never disciplined by Respondent. (Tr. 904-05). Wachendorfer testified he did not personally audit the pilot records at Airways, but he thought Raymond went back and straightened them out. He trusts both Raymond and Kent, the current D.O. at Airways, and if they say the records are complete, he believes them. (Tr. 906).

Wachendorfer testified Letters of Investigation are common in the aviation industry and are merely questions the FAA may have for an operator to answer. Between March 7, 2003 and July 11, 2003, Respondent received five letters of investigation, separate and apart from the investigation into common carriage violations. In each situation Respondent corrected the problem, and the FAA did not propose penalties. (Tr. 918-19; *See* CX-62-66).

5. Aurora (Lolly) Ann Diaz Rives

Ms. Rives has been in Human Resources since receiving her degree in 1985. She has been the Human Resources manager for Jet Charter since 1998. (Tr. 956-58). Her responsibilities included managing recruitment, hiring, interviewing, orienting, benefits administration and enrollment, worker's compensation program, reporting injuries to their workers' compensation carrier, random drug test administration, representing the company in front of the Transportation Security Administration, and maintaining employee files. (Tr. 957). Rives also provided Human Resources services for Air Cargo and Airways since their inceptions in 2000 and 2002, respectively. (Tr. 958, 1110). In early 2003, Rives was the only Human Resources employee for Ameristar's 160 employees; she did not have any help but responded to 50-60 unemployment claims and 30-40 workers' compensation claims. Complainant's claim was the first to result in a hearing before the Texas Workforce Commission. (Tr. 1119-21).

Rives testified the Ameristar managers met every Monday. In 2002, these meetings were attended by herself, Tom and Ted Wachendorfer, Biondo, Williams, Lassiter, Frazer and Muth. Hulsey only recently started attending these meetings, which are by invitation only. Complainant did not attend during his employment at Airways. (Tr. 960-62).

In her role as Respondent's Human Resources Manager, Rives maintained employment record files, personnel files, medical files, confidential files, I-9 employment eligibility verification files, and drug records on each pilot. The health file included a pilot's health insurance plan and enrollment information. The pilot personnel file included copies of pilots' licenses and certificates, health records, pay information, and any written warnings or discipline. If Rives was made aware of oral warnings, she made a notation in the file. She testified it is good practice to keep track of discipline and warnings, although she did not retain employee evaluations. (Tr. 962-64, 969-70). Complainant's personnel file did not contain any written disciplinary action and/or warnings. However, Rives acknowledged that Respondent did not have a written policy or informal process for disciplining managers. (Tr. 981, 1118; CX-35). Complainant's personnel file indicates he filled out a Jet Charter employment application on August 27, 2002 and submitted copies of his certificates for personnel file. Complainant was hired as the first D.O. for Airways on September 6, 2002 at $72,000 per year, before Airways began operating. This was authorized by Williams. (Tr. 908-81, 971-72, 1111). Rives further testified when employees missed work without using sick or annual leave, they could opt for a pay dock or to make up hours. Pay docks are noted in the employee's personnel file; Complainant's file contained no record of a pay dock. (Tr. 973, 982).

Rives began Complainant's confidential file shortly after he was hired. (Tr. 964-65; CX-34). It included BTI's background checks, which Respondent requires for all employees. Rives explained the employee fills out a form and BTI checks it out. Rives testified Complainant's new hire reporting form, required by the federal government, was filed through the state of Michigan. (Tr. 965, 967, 1137). Further, this form and all of Complainant's employment forms listed Jet Charter as his prospective employer. She explained that since Airways was a new entity, and she did not have time to prepare documents with the Airways logo, she had to use Jet Charter forms.

Since Complainant's hire, all of his paperwork and forms have the Airways logo. (Tr. 968, 1109-10). However, Rives further testified Complainant's paycheck, health insurance, retirement account, and 125 tax plans were always administered by Jet Charter, not Airways. Specifically, Complainant's health care was deducted pre-tax by Jet Charter; Jet Charter paid his salary and issued his W-4; Jet Charter also leased property to Complainant, including a van, apartment and corporate credit card. (Tr. 974-77, 1135). Jet Charter maintains the car insurance investigation forms, insurance policy, expense report policy, company vehicle policy, company communications assets policy and the policy regarding the El Paso Facility assessment. Additionally, Complainant participated in Jet Charter's drug program. (Tr. 977-79).

Rives testified she was at Complainant's termination meeting. It was attended by herself, Frazer and Complainant, and lasted only ten minutes. Upon being terminated, Complainant said "okay" and did not seem surprised. (Tr. 982-84, 1118). Rives stated Complainant was fired because Respondent lost confidence in his ability to manage a Part 125 operation. She acknowledged there were one or two other reasons for his termination, which she could not remember at the hearing. (Tr. 983).

Shortly after the meeting, Rives received notification of Complainant's unemployment claim. It had been mailed on January 22, 2003 and the deadline to respond was February 5, 2003. (984-87, 1121; CX-42). Rives was Respondent's spokeswoman to the Texas Workforce Commission (TWC), and although she did not oppose all unemployment claims filed against the company, she made the decision to oppose Complainant's claim. (Tr. 985-86). Rives testified her procedure in responding to unemployment claims was to contact the employee's supervisor, in this case Frazer. Because she was involved in Complainant's termination meeting she already had an idea how to respond to his claim, but she confirmed with Frazer and gave him an opportunity to edit her response before sending it in to the TWC. Rives testified she and Frazer talked but did not exchange documents prior to this first response. (Tr. 988-93, 1121-24, 1135). She explained that the claim was not opposed on the ground that Complainant was not an employee of Jet Charter. Rather, Respondent asserted Complainant exercised poor judgment in executing training plans and scheduling as directed by Frazer and failed in his responsibility for ensuring his flight currency did not lapse. Rives testified Frazer informed her Complainant did not do his flight currency properly when he had the opportunity in Minneapolis during pilot training. Rives copied this response in her March 31, 2003 response to Complainant's second claim for unemployment benefits. (Tr. 994-99, 1124-25; CX-43).

On April 4, 2003, Rives filed a response with the TWC subsequent to a phone conversation between herself and Ms. Sharp of the TWC. Rives testified she would have referred any questions to Frazer, who reviewed the filing before it was sent. (Tr. 1000-01, 1126; CX-44). The response stated, and Rives testified, Complainant was aware his job was in jeopardy and Frazer discussed with him his poor performance regarding the inefficient pilot schedules. Specifically, the filing detailed the loading problem Complainant had on his January 16, 2003 revenue flight. Rives testified she learned from Frazer that Complainant was to pick up 18 pallets but needed his supervisor's help to fit them all on the plane. Frazer informed Rives he helped Complainant and she indicated this in the TWC filing, but she has since learned it was Wachendorfer who helped Complainant. Even though she found out it was Wachendorfer who was involved in this event, Rives did not amend her filing with the TWC. (Tr. 1002-06). This

response did not specify any problems with Complainant's flight currency. Additionally, while Rives was aware Complainant trained pilots, she did not recall the problems with his execution of training plans. (Tr. 1001, 1007-08).

A hearing was held in connection to Complainant's unemployment claims on June 20, 2003. Respondent presented Frazer, Raymond, Hulsey and submitted documentary evidence; Rives was present for the entire hearing. The TWC found his claims to have merit and awarded him benefits. (Tr. 1009-10). On June 26, 2003, Respondent filed an appeal, requesting re-determination of the claim. In this filing Rives stated Complainant performed his job successfully until mid-November, 2002; she testified that anyone who said otherwise should not be credited. The appeal referred to Complainant's "neglect to duty," Rives testified she did not believe Complainant's actions were willful or predetermined. She stated Respondent did not receive any fines or lose its certificate as a result of Complainant's actions. (Tr. 1009-12, 1018-19, 1128-29; CX-45). The filing did not mention scheduling, maintaining flight currency or cargo loading problems. However, the filing asserted Complainant failed to maintain and document training records and manual updates, thus exposing Respondent to potential fines and jeopardizing its certification. The TWC finally ruled in Respondent's favor finding Complainant was discharged for misconduct. (Tr. 1129-30; RX-35).

Rives testified the June 26 appeal was the first time she raised the issue of the manuals and training records with the TWC; while she had not charged Complainant with such wrongdoing, Raymond and Hulsey both criticized Complainant's work with respect to the manuals and training records at the June 20 hearing. (Tr. 1013, 1015-16, 1020, 1026; CX-45). Rives relied on information from Hulsey and Raymond for her filing, as she did not have anything to do with manuals or pilot training records, stating she only knew the aircraft flight manual belonged on the aircraft. Rives testified the original manuals were drafted by Hulsey and Biondo in late summer, 2002, before Complainant was hired; they were not in final form when Complainant started. (Tr. 1013-15, 1111-12, 1088; CX-7).

Rives filed a response to Complainant's current AIR 21 claim with OSHA on May 9, 2003. She investigated the claim in May, 2003, and discussed her response discussed the response with Frazer, Hulsey, Raymond and Ted Wachendorfer. (Tr. 1021-22, 1127; CX-46). Rives asserted, on behalf of Respondent, that Complainant was fired for valid reasons, including his failure to revise and develop manuals, maintain accurate pilot training records, create an efficient pilot schedule, manage pilots, properly disseminate current navigational charts and his contribution to low pilot morale. (Tr. 1023; CX-46).

Rives testified Complainant was responsible for developing and revising operation manuals. However, she acknowledged that according to the job description in Respondent's General Operations Manual, the D.O. was not responsible for developing or executing manuals. (Tr. 1104; CX-46, EXH. B). specifically, the manuals were part of the "current operations specifications", which the D.O. was in charge of maintaining. Rives testified she learned of the manuals' deficiencies from Complainant's successor, Raymond, who indicated he had to rewrite the General Operations Manual. (Tr. 1023-24, 1084-85, 1115; CX-46, EXH I). In an email to Rives dated March 31, 2003, Raymond noted the extremely poor quality control of the original manual which was drafted by Biondo or Hulsey, not Complainant, and for which he faulted

Biondo or Hulsey. Rives later testified Hulsey drafted the General Operations Manual; she did not know how much, if any, experience Raymond had in Part 125 regulations. (Tr. 1086-88, 1105-06). However, she testified the deficiencies could be Complainant's omission, as he was responsible for ensuring the manuals were kept in proper order. She stated Complainant had a couple of months to make any changes necessary to keep the manuals updated; although, she did not know what Complainant actually did regarding the manuals or how much time he had. Moreover, when Raymond started as D.O. at Airways he had no training responsibilities and it still took him three months to update the manuals. Despite Raymond's concerns, Rives stated the FAA approved the General Operations Manual. (Tr. 1025, 1087, 1113-14, 1138-42). Rives testified this information was not available on January 20, 2003, when Complainant was terminated. She could not recall if Raymond came up with more items after his sent the March 31 email. Similarly, Rives did not know if the drafters of the manuals were held responsible for the deficiencies; however, she acknowledged Airways was not sanctioned or fined regarding its manuals. (Tr. 1084-85, 1088-89, 1092).

Rives testified Complainant was also responsible for hiring crew members, orienting them to Ameristar programs and air craft, as well as supervising and training the pilots. Specifically, Complainant had to interview and hire all the pilots for Airways; as of January 1, 2003, he hired 13 pilots. Rives indicated there were two classes of pilots hired, on September 23 and October 7, 2002; each class participated in three to six weeks of training. (Tr. 1026, 1139-40). To the extent Complainant's duties were performed prior to the beginning of November 2002, Rives testified he performed well. (Tr. 1026).

Rives further testified the FAA was not concerned with violations of flight and duty time restrictions, or maintenance rules. However, she stated she did not have evidence to support this or any personal knowledge of the fact. (Tr. 1027-28). With regards to the common carriage and holding out issues, Rives testified the industry was being re-evaluated and Respondent was compliant with the current regulations. She indicated she was not aware of any Letters of Investigation issued by the FAA in March, 2003, or that Respondent was charged with 112 violations of common carriage regulations. (Tr. 1029).

Rives also testified Complainant was terminated because he could not develop an efficient pilot schedule. To support this allegation, she submitted Attachment C to her filing with OSHA, an email from Wachendorfer to Frazer regarding the schedule over the 2002 Thanksgiving holiday, which did not mention Complainant at all. Rives explained "Bubba" referred to Barker, and Wanamaker was a pilot for Airways; she testified the email did not indicate Complainant let Wanamaker go home early. (Tr. 1030-31, 1055-57). Rives testified she discussed the substance of her assertions in the OSHA filing with Frazer, and at the time the response was filed on May 9, 2003, she did not know Frazer approved the Thanksgiving schedule, which Wachendorfer complained about. Wachendorfer was not involved in drafting the response to OSHA. (Tr. 1038-39, 1055).

Similar to the problems Complainant had with the schedule, Rives testified he was fired because he could not properly manage the aircraft crew. She stated that pilots not showing up to work could be a scheduling problem. (Tr. 1057-58). Specifically, Rives relied on an email from Wachendorfer to Frazer indicating one of the pilots did not show up for work to support the

complaint that Complainant could not manage his crews. (Tr. 1059; CX-46, EXH D). In the email, Wachendorfer expressed displeasure that pilot Humenick, was scheduled but did not show up for work; the scheduling department had already purchased him an air ticket. Complainant's name was not mentioned in this email. (Tr. 1059-61). Rives testified Muth ran the scheduling department, but she did not know if Muth bought the air tickets. Additionally, Rives did not know why Humenick did not show up to work. Rives testified she considered Wachendorfer to be a direct speaker; he did not mention Complainant in the email, although he discussed the scheduling and the Humenick situation in detail. Rives did not talk to Mr. Wachendorfer regarding fault. (Tr. 1061-66).

To further support Respondent's defense that firing Complainant was good business practice, Rives stated Complainant did not manage his responsibility to disseminate navigational and other information to crew members. She acknowledged this was not mentioned in the filings with the TWC. (Tr. 1066). Rives highlighted an email from Kevin Daniels, a third shift dispatcher, to Muth, regarding a pilot who questioned the currency of his information charts. (Tr. 1067; CX-46, EXH. E). As a result, Muth asked Complainant about his procedures for getting the charts to the crew member. Rives testified she did not know if the pilot's charts were current or not, only that the crew was concerned about their charts. She also did not know if Complainant answered Muth's email or what the answer was. Rives testified JET CHARTER and Air Cargo's procedures were for the D.O. or chief pilot to physically place charts on the aircraft or give them directly to the crew members. (Tr. 1067-70).

Rives further testified Complainant was fired in part because he instigated crew members and created morale problems, although she did not know this prior to her investigation in May 2003. At the hearing, she testified she did not know what she meant by "instigating crew members and lowering morale." (Tr. 1071-72, 1076). She submitted a January 9, 2003 email from Wachendorfer which indicated Complainant issued incorrect information to the pilots; specifically, that pilots needed a clear path to every point in the cabin. Wachendorfer stated he interpreted the rule differently than Complainant and wanted to discuss it with Frazer and Hulsey (Tr. 1072-73; CX-46, EXH. F). Rives did not know the result of those discussions. Furthermore, she had no personal knowledge Complainant ever gave the pilots this information. Generally, questioning a rule was not a ground for termination at Respondent. (Tr. 1072-74).

Rives also submitted two emails Complainant sent to the pilots on January 13 and 14, 2003 as evidence he instigated the pilots and lowered morale. She also submitted a March 28, 2003 email Wachendorfer sent to Frazer, Hulsey and Raymond; Rives did not recall when she received this email message. (Tr. 1076; CX-46, EXH. G). Rives testified she and Ted Wachendorfer gathered information for the investigation. She acknowledged Respondent's email system dates emails when they are sent, and Wachendorfer's March 28, 2003 email was sent two months after Complainant was terminated. (Tr. 1077-79). Rives also attached an email forwarded to her from Complainant's email address on April 25, 2003, containing Preuninger's resignation letter, which he had also forwarded to the other pilots on January 14, 2003. Rives acknowledged Complainant could not have sent this email to her on April 25, 2003, as it was after he was terminated. She stated she did not send it to herself from Complainant's account, but she did not know if Respondent's IT people sent it. (Tr. 10790-81; CX-46, EXH. H). Even though she printed out the email on April 25, the date on the email, Rives did not know when she

received it. She testified the emails were not included in the February response to the TWC or in Respondent's March 31 or April 4 filings. They were first mentioned in the May 9, 2003 filing with OSHA and the June 20, 2003 hearing in front of the TWC. (Tr. 1082-84).

Rives also testified Complainant's inability to keep accurate pilot training records was also a valid ground for his termination. She testified Complainant and Barker were both responsible for instructing the crew and documenting the training. Rives acknowledged that they are not always both at the same event, and whoever actually conducts the training has to sign off on the event; Complainant cannot sign off for Barker's training and vice versa. (Tr. 1092-93). During her investigation of the present claim, Hulsey informed Rives that he found three deficiencies in Airways' pilot records in his November 4, 2002 audit. However, Rives acknowledged that Complainant performed his job well until mid-November 2002, and Hulsey's audit was before that time. (Tr. 1093-98). On June 20, 2003, Rives stated to the TWC that Complainant was successful at pilot hiring and training. Rives testified Hulsey conducted a follow-up audit in January 2003 at which time the records were still incomplete. However, Hulsey did not mention the January 2003 audit in his email to Rives. (Tr. 1097-98).

Rives further testified Respondent first learned Foster failed his check ride from Ron Brown and Hulsey, not Complainant or Barker who were in charge of the training. Rives did not know if Frazer knew of the failed test. She testified a check ride was for the purposes of, and necessary for, becoming captain. (Tr. 1099-1101). Rives testified Barker conducted Foster's test and was therefore responsible for writing up the record, per FAA requirements. The certified aircraft ground training form included Barker's signature as the instructor; there was no signature line for the D.O. Additionally, Foster's personal diary regarding the captain upgrade test did not mention Complainant, though Barker was mentioned eight times. (Tr. 1102-03; CX-46, EXH. R, S).

As a final point, Rives testified Raymond and Hulsey both offered Complainant help in executing his job duties of developing and executing manuals, policies, stunts, and forms, but Complainant refused. Specifically, Hulsey offered Complainant advice regarding Skytech Parking for the aircraft and interview documents, which were not included in the manual. The attachment submitted in support of this contention does not indicate what advice was offered or whether Complainant accepted it. (Tr. 1104, 1107-08; CX-46, EXH. T). Additionally, Rives was not aware Raymond directed a pilot to falsify flight records Human Resources would be responsible for disciplining such activity and falsifying documents would normally result in counseling, suspension or termination, depending on the document. Rives was not aware that Raymond received discipline. (Tr. 1089-91).

Rives testified Complainant received worker's compensation benefits from January 2003 to June 2003, the same time he was also receiving unemployment benefits. When unemployment benefits were awarded, Respondent's unemployment benefits tax increased. (Tr. 1131-33).

5. Daniel Patrick Hulsey

Mr. Hulsey was born and raised in Texas where he currently lives with his wife and child. (Tr. 1162). He graduated from St. Louis University and has been in aviation for 39 years. (Tr. 1160-62). Hulsey flew DC-8, 747, 727 and 737 aircraft for Braniff Air Carriers in 1973. In 1984 he went to Braniff Two as a check airman where he was also the custodian of training records for 1,000 pilots. He then went to Braniff Three as Director of Training. Hulsey was also Director of Operations, chief pilot and director of training at Kitty Hawk. While at Kitty Hawk, he flew DC-9s, and helped develop their programs in the 1990s. (Tr. 1160, 1163).

In addition to his flying experience, Hulsey has participated in industry forums including hearings before the NTSB, RAA and ATA. He is currently serving on the 125 and 135 Aviation Rulemaking Committee (ARC), which has a three-year charter to change and improve rules of 135 to make them uniform and more compatible with higher level regulations, such as 121. (Tr. 1161, 1229). The ARC has also spent considerable time on 125 issues and is working with regulations on common carriage, as the existing rules are gray and there is little guidance as to how to follow them. (Tr. 1229-30, 1162). Membership on the ARC is both by a volunteer and a selection process. The ARC started meeting in June 2003, and while new regulations have not been drafted, there is plenty of time to do so before the charter expires. (Tr. 1229).

In 1982 Hulsey filed for bankruptcy and in 1983, when he was 32 years old, Hulsey was charged with filing false income tax returns. The case went to trial and he was convicted and imprisoned for 7 months. (Tr. 1160, 1214-15). Hulsey took a leave of absence from Braniff to serve his prison time, but was able to maintain his flight currency and did not lose his licenses. (Tr. 1214-16).

Hulsey joined Air Cargo in 1999 as Director of Operations, a position he still holds today. (Tr. 1159-61). Air Cargo was formed under Part 121 and is the sister company of Jet Charter and Airways. Hulsey does not hold a formal position with either sister company, although he played a support role in establishment of Airways, instructing some courses and providing data. (Tr. 1162-63). Hulsey testified his duties as D.O. included supervising personnel, including flight control, chief pilot, all pilots, flight attendants; maintaining manuals; training pilots; reporting to DOT and Canadian traffic; and acting as a liaison between Air Cargo and the FAA. He did not attend the weekly management meetings at Jet Charter for the first two to three years he was D.O. (Tr. 1164, 1168-69). Hulsey stated the D.O. was a member of management, vis-à-vis pilots, and was responsible for setting forth company policies. Hulsey had major role in policy-making decisions at Air Cargo; policies were worked out between him and Wachendorfer before being handed down to the pilots. Hulsey testified he reported directly to Wachendorfer. Ultimately, Wachendorfer made the decisions, but if Hulsey thought something violated the regulations they would discuss the issue until he was satisfied; sometimes this required him to go toe-to-toe with his boss to get regulatory compliance. (Tr. 1169-70, 1175, 1217). As D.O., Hulsey also resolved problems pilots raised regarding company policies and procedures; if he determined a change was warranted, he would discuss the problem with Wachendorfer. If he did not believe a change was needed he would explain why to the pilots. As such, Hulsey testified he considered himself both a supervisor and an intermediary between pilots and management. He clarified that he would never bad-mouth management to the pilots,

because he would be bad-mouthing himself. At the same time, Hulsey acknowledged pilot morale was important to company success, as happy people are better employees. He testified money and pay is a factor in morale, as well as working conditions. (Tr. 1169-71, 1176, 1218).

Hulsey testified Complainant was hired as Director of Operations for Airways in September 2002, one and one-half months before operations started. He stated Complainant and Wachendorfer were the only managers at Airways. (Tr. 1164, 1193).

Hulsey testified the amount of contact a D.O. had with the FAA would depend on what was going on at the airline. If the FAA was proving runs, conversations may take place daily. When the airline was not putting on an air craft or changing manuals, contact between the D.O. and FAA may only be a couple of times per week. Overall, Hulsey had fairly often and routine contact with the FAA. (Tr. 1172). He described the relationship as non-adversarial, although disagreements may occur. Hulsey described a team effort between airlines and the FAA. He testified interpretation issues come up regularly and it is not out of the ordinary for Directors of Operation to meet with FAA inspectors. (Tr. 1172-74). Hulsey explained that in dealing with the FAA, the principle operations inspector (POI) is the D.O.'s first point of contact. He did not know Abbott personally as he was never the POI for Air Cargo, but he was aware Abbott was the POI for Airways during start-up. Air Cargo has had four different POI's since 1999, including Brown in 2002-03; Hulsey knew Brown from working at Braniff. He testified Brown was the POI for both Air Cargo and Airways; generally, Hulsey knew when Brown was meeting with Airways' management. (Tr. 1232-34).

Hulsey testified he had a role in Airways' ground school, even though Complainant was D.O. at the time. Hulsey did not remember Complainant teaching ground school, although he may have. Hulsey learned a few Airways pilots had worked with Complainant in the past, including chief pilot Mr. Barker. (Tr. 1176-77). Hulsey taught pilots the hazmat portion of their training. Although he was involved in training Airways pilots, Hulsey was not disciplined for his work. (Tr. 1227-28). Indeed, in early January 2003 Frazer sent him and Raymond to observe Airways' pilots to help smooth out the operations. Neither Hulsey nor Raymond held any position at Airways; Hulsey testified he did not know why Complainant was not asked to make the tour. (Tr. 1243-45).

Hulsey testified the pilots at Air Cargo, who flew 737s, were paid more than the pilots at Airways; their pay was set by Wachendorfer. Hulsey explained there was a different economic environment in 2002 when Airways started than in 1999 when Air Cargo began; specifically, there were more pilots in market in 2002 due to furloughs at the major airlines. He stated that Airways pilots were partly paid based on the miles they flew; by way of comparison, Hulsey testified Air Cargo pilots flew 500-600 miles per year. (Tr. 1165-68, 1218-19). Hulsey instructed his pilots not to discuss their pay with Airways' pilots, but pilots talk and eventually the pilots at Airways found out they made less and had different schedules than their counterparts at Air Cargo. (Tr. 1220). Hulsey testified Airways pilots asked him about their pay structure and inquired about the Air Cargo pilots' pay; they did not explain why they were asking about the Air Cargo pay schedule. Hulsey testified he did not know what Complainant may have told the pilots. He directed all inquiries back to Complainant, explaining it was Complainant's responsibility as D.O. to explain any pay discrepancies to his pilots. (Tr. 1178-80, 1184).

Hulsey added that Air Cargo pilots had a better schedule than Airways pilots. Hulsey testified Air Cargo's rules were established in 1999 and had not changed. He explained that in a start-up airline the schedules are worse. (Tr. 1166-67).

Hulsey testified he had a role in creating Airways' manuals before Complainant was hired and before operations started. The manuals were needed for training, including the training manual, general operations manual and aircraft operations manual, cockpit operations manual and hazardous materials manual. The manuals are important because they provide a standardized platform for operations and safety structure; they are also a regulatory requirement. (Tr. 1186-89). Hulsey testified he gave Complainant the hazardous materials manual and aircraft and cockpit operations manuals, which included weights and balances information; he did not work on any other manuals. He compiled manuals to be submitted to the FAA for approval, but the only one he was personally involved in getting approved was the Hazmat manual. Airways had FAA approval to use Air Cargo's hazmat program, although Hulsey did not "broker" the deal, it developed during the approval process. (Tr. 1189, 1228). Hulsey knew the hazmat manual was approved by the FAA, but he was not sure about the other manuals. He stated he had nothing to do with general operations manual, but he understood it was accepted by FAA. The other manuals were handled by other people, including Biondo, but Hulsey testified he did not know the extent of Biondo's participation. He explained the Aircraft Flight Manual was created by the manufacturer of the plane. (Tr. 1189, 1221-22, 1257).

Complainant received some manuals before Airways was up and running, and some prior to ground school. Hulsey did not expect Complainant to report to him regarding the manuals because he did not have anything to do with Airways. He continued to work on the manuals, though, until the end of October 2002. (Tr. 1223, 1251, 1258). Hulsey further testified the manuals were subject to change in accordance with national guidance out of Washington and the advisory circulars. Hulsey explained the D.O. is responsible for ensuring that the airline's manuals are kept current. (Tr. 1189-91). He felt the manuals he gave Complainant were fairly well-developed, although he did not indicate to Complainant that the manuals were in perfect condition. (Tr. 1193, 1252). However, the only changes Complainant made which Hulsey saw were minor changes to the check list. Hulsey testified he did not know how long Complainant spent on the manuals; Complainant did not tell him about his work on the manuals or ask him questions. (Tr. 1252-53). Hulsey was not disciplined or counseled for his work on manuals, his pay was never docked, and he received no penalty at all from Employer. Similarly, he did not have knowledge of the FAA disciplining Respondent for the manuals. (Tr. 1222-23).

Hulsey offered Complainant assistance in performing his duties as D.O.; they had casual conversations regarding procedures for handling paperwork and Hulsey forwarded copies of per diems and reimbursements for Complainant to use as examples. Hulsey began sending Complainant information and documents on September 16, 2002 and continued through January 2, 2003. He explained that even though Part 125 was different, some concepts were transferable between the companies. (Tr. 1194, 1224). Hulsey stated he did not receive any response from Complainant even though their offices were in the same building; however, Complainant did ask Hulsey questions a few times. In general, Complainant was in the office between 9:30am and 3pm while Hulsey was there from about 8:30am to 6pm. (Tr. 1194-95). Hulsey stated he knew of one revenue flight Complainant flew. As D.O., Hulsey flew one to two revenue flights per

month because it was good practice for checking manuals, aircraft and pilot practices. (Tr. 1195-96).

Hulsey audited Airways' pilot records in early November, 2002, at the request of Wachendorfer and Frazer. Hulsey was the primary record keeper at Air Cargo. The inspection occurred in Complainant's office in the presence of both Complainant and Barker; it lasted ten minutes. (Tr. 1196-97, 1237, 1259). Hulsey testified a number of records lacked documentation; specifically two or three records had "consistently" the same deficiencies so he stopped, as he did not see a point in continuing. (Tr. 1197). Hulsey stated the records lacked documentation of ground school records in that they did not include certificates of completion for each segment of ground school completed. This was part of the training manual; Hulsey stated ground training occurred on September 20, 2002.[18] (Tr. 1198-1201, 1256). The records also lacked documentation of flight training, which occurred on October 15, 2002. Hulsey testified he knew there were two groups of pilot training. Specifically, the records did not document the number of approaches required for Part 125 training; certain types of approaches are required and need to be documented on the proficiency check form. (Tr. 1198-99, 1256). Additionally, the records lacked specific letters of competency. Under Part 125, the letter of competency authorizes pilots to fly aircraft; the letters are good for six months and serve to ensure the public that proper training was completed. (Tr. 1198).

Hulsey testified he did find documentation for check airmen certificates in Complainant's and Barker's files; he did not know of any other check airmen at Airways aside from Complainant and Barker. Hulsey also found Hazmat certificates. (Tr. 1201, 1254-56). Overall, though, he found the records to be "very incomplete" in early November 2002. This was not a big concern to Hulsey because he expected the deficiencies would be corrected. He discussed his findings and concerns with Complainant and Barker, and recalled them being agreeable; Hulsey did not remember them disputing his opinions about the deficiencies. Additionally, Hulsey showed them a blank form of the "check airman training" which he indicated needed to be in each pilot's file. (Tr. 1202-05, 1239, 1254-55; CX-46, EXH. O). Hulsey acknowledged that Respondent's June 26, 2003 letter of appeal to the TWC stated Complainant performed satisfactorily until mid-November 2002, and this audit took place before mid-November. (Tr. 1249-50; CX-45).

Hulsey stated he did not know whether Complainant went to Principal Operations Inspector (POI) to discuss the omissions in the pilot records, although this would have been proper procedure if he had concerns. Hulsey indicated the POIs must follow the regulations, but they can work with the airlines to get exceptions. Nevertheless, POIs are sometimes wrong. (Tr. 1239, 1259-61). If Complainant and Abbott's agreement was in writing, in the manual and in compliance with the regulations, Hulsey testified there would be no need for Complainant to make changes to the records. Hulsey stated he was not aware in November, 2002, that the FAA

[18] Hulsey acknowledged Airways' training manual was not admitted into evidence. The manual was approved by the FAA on October 15, 2002, and upgrades were approved on January 17, 2003, three days before Complainant's termination. The training manual officially changed in March 2003. (Tr. 1234-37; CX-56).

inspected Airways' records, he only found out later. He saw the POI's documents related to the inspection during trial preparations but had no idea what Abbot may have thought about the records. (Tr. 1205, 1240, 1243, 1262).

Hulsey reported the deficiencies back to Wachendorfer and Frazer. He was first asked to write a report of his November 2002 audit in April 2003, three months after Complainant was terminated, at the request of Rives. (Tr. 1207, 1245-46).

Hulsey reviewed Respondent's records again in January, 2003, a few weeks before Complainant was fired and at about the same time he was asked to observe Airways' pilots. Frazer asked him to do the inspection that same day, so he did not wait for Complainant to be present. Hulsey and Raymond looked at the records in Complainant's office in the early evening. (Tr. 1207-08, 1240). Hulsey testified he found improvements in the letters of competency and proficiency check forms but he was not satisfied with the documentation of approaches and there were some missing ground school records. Hulsey explained that ground school records were normally filled out contemporaneously with the completion of the course; he did not know why the forms were not completed. He indicated Complainant appeared to make an effort to correct some, but not all, of the deficiencies. (Tr. 1209-12, 1263). The fact that the same deficiencies existed in January was a big concern to Hulsey. He reported the deficiencies back to Frazer but did not discuss his findings with Complainant or Barker or ask them why the changes were not made. Hulsey testified Complainant did not contact him with questions about the deficiencies between the two audits. (Tr. 1212, 1241, 1255, 1262).

Hulsey testified he participated in the June 20, 2003 hearing regarding Complainant's claim for unemployment benefits. Rives and Raymond were present, but he could not recall if Frazer was there or not. Hulsey testified he talked about the review of training records at the hearing. (Tr. 1246-47).

6. Lindon Michael Frazer

Mr. Frazer has been a pilot in the aviation business since the early 1980s, having worked as an A&P mechanic, as well as fuel service and pilot training. He acquired his helicopter rating, worked R&D on helicopters before ending up at Global Helicopter Techn. in Texas. (Tr. 1267-68). Frazer was also a maintenance controller at the Department of Justice's DEA and worked as an overseas contractor for the Kuwaiti Air Force during the first gulf war. Frazer worked at Kitty Hawk Air Cargo at DFW airport before being hired at Respondent. (Tr. 1267). Frazer was hired as Director of Maintenance at Jet Charter in 1996; as Wachendorfer wanted to expand the company, Frazer was hired in other positions including Director of Safety at Air Cargo 5 years ago, and Vice President of Operations at Airways a few years ago; he currently holds all three positions. (Tr. 1265-66, 1354). As all three companies are owned by Wachendorfer, Frazer testified he has a high amount of loyalty to Wachendorfer and the companies. He acknowledged that harm to any of the three companies could threaten his job and livelihood, although he is not financially dependent on his job. (Tr. 1354-55, 1529). Frazer testified he was the Director of

Maintenance at Jet Charter when both fatal crashes occurred; he did not know if the NTSB issued a final report for September 2003 crash. (Tr. 1352-53).

> Frazer testified he also did work with various associations. He has served on the National Aerotransportation Association's maintenance committee for five years, participated in NTSB forum, and currently serves on the Part 125/135 ARC with Hulsey. (Tr. 1268). Frazer knew Hulsey at Kitty Hawk and then hired him to work at Air Cargo. Frazer testified that when he hired Hulsey he did not know Hulsey had been imprisoned for tax fraud and in fact did not know of Hulsey's criminal issues until this trial; he stated it does not affect his trust in Hulsey. (Tr. 1356-59).

Frazer testified Wachendorfer tapped him to lead the formation and start-up process of Airways; it was Respondent's first experience with Part 125. (Tr. 1266, 1355). Frazer testified the regulations were different in 125 than under Parts 121 or 135; specifically, Part 125 did not have as many required management positions, had fewer manuals as well as less-demanding training. Airways flew DC-9-15s, different aircraft from Jet Charter and Air Cargo. (Tr. 1267, 1355-56).

Start-up process for Airways began before Complainant was hired and involved pre-certification meetings with the FAA and the acquisition of planes and personnel. Hulsey and Biondo started working on the manuals for Airways, although Frazer testified he did not know the extent of their completeness when Airways started operations. (Tr. 1267-70, 1356). The original plan for Airways was to have Frazer be Director of Maintenance and Biondo serve as Director of Operations; however, the FAA objected due to the overlap of their positions between different companies. As such, the FAA based Airways' certification on its proposal of Complainant as D.O.; he was hired in early September 2002, about one month before operations started. Complainant reported to Frazer who was general manager at Airways and actually in charge of the company. (Tr. 1268, 1356, 1362-63, 1557). Although Frazer already held positions at Jet Charter and Air Cargo, Wachendorfer named him Vice President of Operations at Airways to be his "eyes and ears." His other positions jobs were required by regulation and took up 95% of his time; he only spent 5% of his time on Airways issues as Complainant was expected to be responsible for day-to-day operations. Frazer testified the FAA knew he was and how Airways was structured, but they did not file an amendment to the certification request indicating Complainant would be reporting to him. (Tr. 1272, 1363-64).

Frazer testified the role of a Director of Operations is one of manager, not a pilot representative; he emphasized a D.O. cannot be both. The D.O. is the first line management between the pilots and upper management and is in charge of ensuring the airline's compliance with FAA regulations. (Tr. 1275, 1388). Frazer testified that although Complainant was a manager at Respondent, he did not attend the weekly management meetings. Frazer attended said meetings, along with eight other people, including Wachendorfer, Muth, Rives, Biondo and Williams. He stated Hulsey did not attend the meetings until a few years after Air Cargo had started-up; Complainant was only at Airways a short time, and there was not enough going on with the certificate to warrant his attendance at the executive meetings. Frazer testified he was the only person directly affiliated with Airways to attend the meetings, although Muth also had

input with Airways' issues. Frazer further stated that Complainant's successor as D.O. of Airways, Raymond, also did not attend the meetings. (Tr. 1276, 1369-70, 1532).

Complainant had full control over hiring, training and supervising the pilots. He was in charge of explaining company policy and directives to the pilots because the more the pilots understood about the procedures, the more smoothly operations ran. (Tr. 1274-75, 1277). Frazer testified hiring and training pilots was Complainant's first priority, and the responsibility ran into November 2002. Airways hired two classes of pilots, totaling between 12-15 individuals. (Tr. 1274, 1558). Frazer initially testified Complainant recommended having a chief pilot at Airways, even though it was not required by the regulations, and he agreed. Frazer later testified he did not recall whose idea it was to hire a chief pilot, but that everyone was in agreement. He acknowledged that Airways proposed hiring a chief pilot in it certification application, filed with the FAA on August 30, 2002; as this was prior to Complainant's hire at Airways, Frazer conceded he could not have suggested hiring a chief pilot. (Tr. 1277, 1364-65; CX-4). Frazer testified, however, that he later learned Complainant previously knew most of the pilots he hired, including Barker who Complainant selected as chief pilot. (Tr. 1277).

Frazer testified his office hours were approximately 9:30am to 6 or 7pm in part because he was able to get more work done in evenings. As the D.O. position required more hours, especially in start-up operation, he expected Complainant to work a similar schedule. Frazer explained the manuals and pilot records needed to be worked on in office. (Tr. 1296-97, 1534). Frazer testified Complainant kept sporadic hours and he believed Complainant decided to work a minimal amount of time. He discussed Complainant's office hours with him because he did not think Complainant put in enough time to do his job. Frazer could not recall Complainant's response. (Tr. 1297, 1338-39).

Frazer testified the pay structure for the pilots at Airways was a base pay with additional mileage pay after a certain number of miles are flown. He did not know how many miles pilots would fly in a start-up operation such as Airways, and did not recall talking to Complainant about the number of miles pilots could expect to fly; Frazer made no guarantees to pilots about the number of miles they would fly. (Tr. 1279-81). In the fall or 2002, based on conversations with Air Cargo pilots, Frazer heard grumbling from Airways' pilots about their pay, specifically about the difference in pay structures between Airways and Air Cargo and the fact that Air Cargo pilots were paid more money. Frazer testified he was not concerned Airways pilots would find out the difference in pay, but acknowledged that pay enters into employee morale. He clarified that the pilots knew their pay before they were hired. (Tr. 1281, 1374-75). Additionally, Frazer explained when Air Cargo started in 1999 it needed to pay more money to attract pilots whereas when Airways started in 2002 the market was swamped with pilots so they could be hired for less money. (Tr. 1282, 1373). Frazer did not recall pilots complaining to him directly about the pay issue, or telling him they felt led on regarding their pay. He stated Wachendorfer decided the pay structure and did not discuss it with Frazer. Complainant raised the issue of pilot pay with Frazer, who testified it was part of Complainant's responsibility to bring the pay issue to his attention if the pilots continued to complain about it. (Tr. 1282, 1373-77).

On November 25, 2002, Frazer testified he received a letter from Complainant and Barker; it was sent to Frazer and Wachendorfer, although the letter addressed them as "sirs" and

not by their names. Frazer testified he considered this impersonal. Frazer stated the letter came only a few weeks after Airways started operations and was still ironing out the kinks. (Tr. 1282-84; RX-6). He did not recall discussing the letter, which only addressed the pay issue, or the proposal with Complainant or Barker. In the letter, Complainant and Barker proposed changing Airways' pay structure from one based on mileage to a flat guaranteed amount. Frazer testified this did not give pilots an incentive to fly and was not realistic or possible as business was not that good in the beginning. (Tr. 1283, 1288-91, 1377). Frazer testified he was surprised Complainant described himself as "representing the pilots" because his role was that of manager. He also stated the indication pilots would fly 800 hours per year was only a hope and was not a guarantee; Frazer testified it was unlikely pilots would make this after only a few weeks of operations. He further stated the pilots were not told they would be paid for loading/unloading, and they were not paid for these duties. (Tr. 1285-87). In the letter, Complainant and Barker expressed doubt at being able to maintain pilots without doubling their pay as suggested, informing Frazer and Wachendorfer that eight pilots would leave by January 1, 2003. Frazer did not recall discussing the prospect of losing pilots with Complainant, who he testified should have brought the issue to Frazer in person. Frazer testified he did not recall eight pilots leaving on January 1, 2003. (Tr. 1288-90). Further, Frazer did not recall discussing disconnects with Complainant, who as D.O. was responsible for ensuring no disconnects existed between the pilots and the company. Overall, Frazer perceived this letter as an ultimatum and did not think it was appropriate for the D.O. to send, but Complainant and Barker were not reprimanded for the letter. (Tr. 1292-93, 1378).

Frazer testified Preuninger's resignation letter indicated many pilots felt lied to about loading pay; specifically that they were told in ground school they would receive loading pay, but then did not. Complainant or Barker, were the only people who would have discussed pay with pilots at ground school. Although Frazer did not attend ground school, he testified that was their responsibility. (Tr. 1504-05). Frazer acknowledged Hulsey conducted the loading and unloading portions of training, which would have involved loading pay. Additionally, Frazer asked Hulsey whether he told pilots they would get loading pay, he did not ask Complainant. But, he testified that in all likelihood Complainant was the source of the misrepresentation. (Tr. 1505-06).

Frazer testified Hulsey and Biondo started working on the manuals for Airways during the certification process, and while he did not know the extent of their completeness when Complainant was hired, he stated the D.O. was responsible for ensuring the manuals were accurate and complete by the time operations started. Frazer testified Hulsey and Biondo had no position at Airways and were not responsible for the manuals after giving them to Complainant. (Tr. 1270, 1294, 1531). Rather, the manuals were only intended to help Complainant get Airways up and running; Frazer testified no person believed them to be complete or final and he expected Complainant to review the manuals to determine which ones needed updating.[19]

Frazer understood some of the manuals were not complete, although he acknowledged the general operations manual was submitted to and approved by the FAA. (Tr. 1361-62, 1531,

[19] Frazer explained the manuals were living documents which required constant updating based on new guidance. (Tr. 1270).

1557). He was not aware of any revisions that were made and testified Complainant did not produce a single work product on the manuals; but Frazer stated Complainant would not have submitted the revisions to Frazer anyway. He testified Complainant's failure to maintain and update the manuals was a reason for his discharge, even though the original drafters of the manuals, Hulsey and Biondo, received no discipline. Additionally, Frazer acknowledged Airways was never penalized by the FAA for its allegedly substandard manuals. (Tr. 1295, 1361-62, 1532). Frazer testified he did not personally review Airways' manuals, but relied on Raymond's review of the manuals after he took over for Complainant. In response to a request for information on the state of Airways' manuals, Raymond indicated they were a mess and that he had a lot of work to do on them when he took over. Frazer testified this information was gathered with the intent to use it as a defense to the present claim. (Tr. 1360, 1532).

Frazer testified D.O.s fly revenue flights periodically as a way to check procedures and make sure operations run smoothly. Complainant, however, only made one revenue flight during his time at Airways, and spent the rest of his time at the office, in training or in the simulator. Frazer testified that as Complainant's supervisor, he never instructed him to fly in line with pilots. (Tr. 1296, 1367). In fact, he instructed Raymond and Hulsey to fly with Airways pilots in January 2003 to get a feel for what was going on at Airways, even though neither pilot had any connection with Airways and this was the responsibility of the D.O. (Tr. 1367-68, 1520-21, 1554). Frazer first testified he did not recall the exact date in January, or whether it was before or after Complainant's January 13, 2003 email to the pilots, then later stated this event was before the January 13 email; nonetheless, he did not send Raymond and Hulsey because had already decided to fire Complainant nor did he think it sent the message Complainant was going to be fired. Frazer stated he did not instruct Complainant to fly because he did not know what Complainant was doing that day, but Frazer conceded he did not search for him. (Tr. 1368, 1520-21, 1554).

Frazer testified Complainant's single revenue flight occurred a few days before his termination. Frazer received a phone call from Wachendorfer in the middle of the night informing him Complainant could not load his plane without Wachendorfer giving him instructions. (Tr. 1341-44). While Frazer testified he did not know this to be untrue, he acknowledged the trip notes taken by the schedulers the conversations occur indicate Wachendorfer spoke with copilot Wanamaker and told him how to load the plane, not Complainant. Frazer testified it is the captain's duty to work with dispatch office to get correct charts and information but either the captain or the co-pilot can pick up the flight plan from the office. (Tr. 1516-18; CX-33). Nonetheless, the event concerned Frazer because if Complainant could not load a plane properly, there was a chance the pilots he trained could not load properly, either. Frazer explained the D.O. was responsible for ground school which dealt with loading and unloading cargo because that is "all the pilots do." He testified Hulsey did some of the training in loading and unloading[20] but the D.O. was ultimately responsible for teaching unloading/loading methods and for making sure pilots knew loading procedures. (Tr. 1277-79, 1344). Hulsey did not have an ongoing role in Airways after the training was complete. Although Frazer assumed Hulsey taught the pilots well, their questions would have been directed

[20] Frazer testified he did not recall Hulsey's testimony he did all the training for unloading and loading. (Tr. 1371).

to Complainant. Frazer conceded that since Complainant did not teach loading and unloading, he could not be charged with teaching it poorly; however, he still held Complainant responsible for the loading and unloading training. Frazer testified the fact that Hulsey and Biondo wrote the manuals and were not held responsible for them, but Complainant was responsible for training he did not teach, was not a double standard. (Tr. 1372, 1533).

Frazer testified the Director of Operations was responsible for keeping and maintaining various pilot records, including medical records, training records and check airman documents. Approximately two or three weeks after Airways started operations, Frazer asked Hulsey to check the pilot records in an attempt to gain confidence in Complainant's abilities to perform as D.O. Frazer had confidence in Hulsey and had worked with him for a few years. Frazer testified Hulsey found holes in the records which were incomplete and talked with Complainant and Barker about the problems, expressing confidence they would fix the deficiencies. (Tr. 1299-1301). Frazer did not talk to Complainant about records following this initial review. However, he asked Hulsey to recheck the records in January, 2003, prior to Complainant's discharge, at which time they were found to still be incomplete. Specifically, Frazer testified the ground school and training records were incomplete; the training had occurred in the fall of 2002. Frazer was concerned about a lack of records to prove Airways' pilots were qualified to fly, especially since the problems had been pointed out to Complainant in the past. (Tr. 1301, 1339-40). Frazer testified Hulsey's January, 2003 report came out about one week before Complainant's termination; Frazer did not doubt Hulsey's veracity. Frazer did not bring Complainant in when it was discovered the records were still incomplete; he acknowledged he did not discuss the issue at all with Complainant. Frazer testified he was not aware at the time that the FAA had checked Airways' records. (Tr. 1341, 1552-53).

Additionally, Frazer testified Complainant was responsible for pilot schedules and any issues or problems were to be brought to Frazer or Wachendorfer's attention.[21] Frazer explained the goal of the pilot schedule was to have four crews available at all times to cover three aircraft every day. Pilots were scheduled for a block of time per month; Complainant was instructed to schedule pilots two weeks on and one week off. (Tr. 1273, 1302-03). Frazer testified Complainant put together several schedules but never got it right so as to cover all the airplanes; he would schedule only two crews for Tuesday and Wednesday, but having five crews on Saturday. Additionally, pilots were scheduled less than two weeks on; Frazer viewed the problem as Complainant trying to please the pilots, who did not want to work two weeks at a time, not as incompetence. He testified it was not difficult to schedule crews for two weeks at a time. (Tr. 1304-06, 1336, 1543).

Frazer testified Wachendorfer was not satisfied with Complainant's schedules. On January 9, 2003, Wachendorfer sent Complainant and Frazer an email indicating there were problems with the January/February pilot schedule which needed to be fixed immediately. Specifically, the schedule had the same problems as earlier, with not enough crews being scheduled to cover all the aircraft. (Tr. 1306, 1332-34, 1474; RX-17). Wachendorfer indicated

[21] Frazer explained that his office was only one floor above Complainant's office and he was available to Complainant to answer his questions, but Complainant only sought advice from Frazer a couple of times per week. (Tr. 1273-74).

pilots were only scheduled 44% to 51% of the month when they needed to work 66% of the month; Frazer testified he did not know if two weeks on and one week off resulted in work 66% of the month. Frazer testified he talked with Complainant about the two weeks on, one week off schedule. He explained that two weeks was not 14 days to the exact hour; it could have been 14 days plus six hours, or only 12 days. Either way, he stated it was not difficult to figure out. (Tr. 1304, 1335-36, 1486). Frazer testified two weeks was 14 days plus whatever it took to switch out the crews. The crew schedulers decided when to change out the crews, which usually occurred on the morning after the 14th day; resulting in pilots working 14 days on and changing out sometime on the 15th day. (Tr. 1337, 1486, 1541-42). Frazer testified Wachendorfer added a day to his schedule to make it 15 days on and 6 days off. Also, Rives filed a response to Barker's OSHA claim indicating the pilot schedule was 15 days on, 6 days off. Additionally, he was aware Preuninger described the schedule as 15.5 days on and 5.5 days off in his resignation letter; Frazer testified this was wrong as the schedule was never 15.5 days on and 5.5 days off. But, he acknowledged he did not have any reason to think Preuninger falsified information. (Tr. 1487, 1490, 1497-1500; RX-9).

Frazer conceded he did not find the scheduling problems on his own, but only discovered them when Wachendorfer rejected the schedules. As Complainant's supervisor, the schedules were occasionally passed to him before implementation. Frazer testified he may or may not have reviewed the schedules and did not notice any problems, despite the fact that the schedule was just a series of Xs on a chart. If he had seen a problem, Frazer stated he would have discussed it with Complainant. (Tr. 1474-75, 1563). However, after Wachendorfer complained about the schedules, Frazer did not start paying more attention to them; he did not see Wachendorfer's concern as requiring him to pay more attention to the schedules, even though Frazer was in charge at Airways. He explained Complainant needed to get the schedule right because Frazer did not have time to do it himself. (Tr. 1476). Nonetheless, Frazer testified he did not have confidence in Complainant's ability to create a working schedule per company desires; as a result, Frazer put together the January/February, 2003 schedule with two weeks on and one week off, and was able to cover all three aircraft. This schedule was not admitted into evidence. (Tr. 1302-03, 1336-37, 1564). Frazer had testified, though, that in early January 2003 the scheduling issues were resolved to his and Wachendorfer's satisfaction. Eleven days after Wachendorfer's January 9, 2003 email highlighting scheduling problems, Frazer discharged Complainant and testified scheduling problems were a factor in the termination. (Tr. 1332, 1338).

Frazer testified about two specific events which demonstrated Complainant was incapable of drafting a working schedule. The first was the November 26, 2002 email Wachendorfer sent to Frazer about the Thanksgiving holiday schedule which was short on crews, as well as the overall concern that the Airways' schedule was not working out and should be returned to two weeks on and one week off. (Tr. 1306-07, 1544; RX-8). Frazer testified the email was sent on Wednesday, the day before Thanksgiving, but that the schedule showing they were short crews would have been set well before date of email. Frazer stated he decided to go short on crews for Thanksgiving, but the schedule was to start Thursday, not on Wednesday. He did not recall changing schedule himself, but only that he and Complainant discussed going short over the holiday weekend; he testified it may have been a communication problem with Complainant. Either way, Frazer did not catch the problem when he looked at the schedule and did not tell Wachendorfer he approved the schedule. (Tr. 1478-82). Frazer did not know if

Airways missed any flights over weekend due to the schedule. He further acknowledged Barker, not Complainant, let pilot Wanamaker go home early; it was not a scheduling problem. However, because Barker worked for Complainant, Complainant was ultimately responsible. (Tr. 1482-85).

The second event occurred on or around December 2, 2002, when pilot Humenick did not show up for work. Frazer testified Humenick was on the schedule but he did not report to work that day. The email from Wachendorfer documenting this problem was not sent to Complainant and did not indicate the schedule was wrong. Nevertheless, he used the email as proof Complainant could not properly schedule pilots. (Tr. 1492-93, 1496; CX-50, Att. B). Frazer stated Complainant was responsible because he supervised Humenick. However, Humenick was not fired or even talked to. Additionally, as D.O. it was Complainant's responsibility to make sure pilots follow the schedule and are in the right place at the right time. However, of the crews scheduled on a given day, crew schedulers select a particular crew for a particular plane. Frazer did not know when the D.O. found out which pilots went where, but if a problem occurs the D.O. is contacted immediately. (Tr. 1493-95, 1545-46, 1567-68). Frazer testified, however, that no action was taken against crew scheduling, which was supposed to get Humenick to the proper place and he did not talk about this issue with Muth. Frazer testified he did talk to Complainant about the issue, although then he stated they did not talk about the issue. Frazer explained the problem was that the company had to buy expensive airline tickets for pilots who were not at their assigned base; though the email does not indicate Complainant bought the tickets or directed anyone to buy the tickets. Frazer did not investigate the situation to see who was actually at fault. (Tr. 1495, 1545, 1568-70).

Frazer testified the D.O. is responsible for getting new navigational and airport approach charts to the pilots; the charts include current information crucial for safety. Frazer did not know how often the charts change. (Tr. 1308). Frazer testified JET CHARTER and Air Cargo followed established procedures for getting charts to the planes, which were shipped by dispatch personnel to the planes as they came through Dallas. He explained that in a time crunch charts could be faxed, but this was not an ideal system because it was time consuming. (Tr. 1564). Frazer assumed Complainant would use the same system for disseminating charts to Airways' planes. (Tr. 1565). Frazer testified to one event in which the pilots were not certain they had current charts and dispatch had to fax the current charts up to the plane. This resulted in an email from Daniels, the dispatcher, to Muth to Complainant in which his procedures for getting charts to the planes was questioned. (Tr. 1309). Frazer was concerned that charts were not getting to the pilots in a timely manner, as Daniels indicated in the email that this was not the first time he had to fax charts to the planes. Frazer understood this was a recurring problem and believed either the charts were not getting to the aircraft or there was a miscommunication with the pilots. (Tr. 1310-12, 1540). However, Frazer testified he did not investigate the event or even ask Muth if the charts were current; he did not discuss this issue with Complainant. Frazer first testified the pilots did not have the current charts then stated he did not know if the charts were current. Although Frazer did not investigate the situation to determine what the problem was, he did not fault the dispatchers. Frazer testified he expected Complainant would do his job and take care of the airline and in the meantime they would just fax the charts. (Tr. 1461-66, 1565-66).

Frazer testified Respondent's maintenance policy was for pilots to record all discrepancies in the flight logbook. This was consistent with FAA regulations. (Tr. 1318-19). Respondent also required pilots to call the maintenance department each time they recorded a discrepancy because they wanted to know of all maintenance problems in order to fix them promptly. Frazer testified Respondent's maintenance policy did not require pilots to get permission to make maintenance write-ups. Frazer testified he had a conversation with Complainant about the policy requiring pilots to call maintenance when they made an entry, which Complainant agreed with, but calling before the entry was not the policy. (Tr. 1319-21, 1419). Frazer received an email about the maintenance policy from Complainant, but he testified he did not add the word "BEFORE" to the message; Frazer explained he would not use the word "before" but would have used a different word. Frazer did not recall talking to Complainant about the email after it was sent. (Tr. 1322-23, 1421). Frazer further testified he did not require Complainant to run emails past him before sending them out, although they did talk about emails before they were sent. Frazer testified Complainant would not send something out that was not policy. He then testified the email about the maintenance policy was sent to him for his review, but he did not edit it. (Tr. 1420-22). Frazer also testified he investigated allegations of repeat maintenance write-ups and found them to be un-substantiated. (Tr. 1433).

Frazer testified the Part 125 regulations limit duty time to 16 hours, with 8 hours of rest in any 24 hour period, there is no further explanation of duty time. Early on in Airways' operations, the issue of the duty-time rule arose and there was discussion about whether Part 125 Section B could apply to allow a variation of the 16-hour limit. (Tr. 1313-14). Additionally, there was a question of whether Part 121 duty time regulations, which allow flexibility in light of freight problems, weather, route changes, etc., could apply to Part 125. Frazer and Hulsey met with Mills of the FAA to request Part 121 addition to Part 125 duty time rule. Frazer testified he took Hulsey to the meeting because he was familiar with Part 121; he did not take Complainant even though he was in charge at Airways and FAA compliance was one of his duties as D.O. Frazer explained he did not know where Complainant was that particular day, but he did not bother to look; he never intended on taking Complainant, noting Complainant insisted the 16 hours could not be exceeded. However, Frazer testified he did not hold it against Complainant that he did not think the Part 121 regulations applied to Part 125. (Tr. 1316, 1388, 1397-98).

Frazer testified he did not request the FAA to let Airways require pilots to exceed 16 hours duty time if they received extra rest time. The proposal to change 125.37(B) to allow a crew to exceed 16 hours and then receive 9 hours rest instead of 8 was sent by Wachendorfer and constituted a business decision for the company. The request was sent to Mills at the FAA Flight Standards District Office (FSDO) who ultimately interpreted the rule as 16 hours maximum and did not allow Respondent to change the rules, informing them they could fly under either Part 121, 125 or 135. (Tr. 1314-15, 1317). Frazer testified Respondent did not see a need to change from Part 125. He did not require any more than 16 hours from pilots, stating the rule was 8 hours rest and only 16 hours duty. Frazer testified he did not recall duty-time being a problem after Complainant left as Raymond never raised it with him. (Tr. 1315, 1318, 1393-98; CX-21).

The issue of duty time was brought to Frazer's attention, although he did not recall discussing the duty time issue with Complainant face-to-face. Additionally, Frazer did not recall a particular email or conversation that Complainant raised duty-time rule with the FAA. He

knew Complainant talked to ALPA regarding the duty–time issue; he saw an email exchange between Wachendorfer and Complainant indicating Complainant met with retired FAA guy. (Tr. 1316, 1318, 1388-90). He received complaints that pilots were being pushed by dispatch to exceed 16 hours, but testified he was not aware pilots were ever forced to go over 16 hours of duty. Frazer similarly did not recall any conversations regarding schedulers interrupting the pilots' rest hours. As Vice President of Operations, he did not know to what extent the schedulers contacted pilots during their rest hours, although he was aware pilots were paged during rest hours he assumed it was only once. Frazer did not know if dispatchers were ever disciplined for their alleged duty-time violations. (Tr. 1389-91).

Frazer testified both the airline and the individual pilot can get in trouble for violating duty time rules. The only time pilots were asked to exceed 16 hours occurred when nobody showed up to meet plane when it landed; Frazer requested the pilots to stay with plane so as not to abandon freight. (Tr. 1315-16, 1391-92, 1396). The pilots agreed to stay with the plane and did not perform any pilot duties, though Frazer conceded they were not resting. However, if the pilots had left the customer would not have been able to retrieve the freight. Frazer explained that asking the pilots to stay did not affect safety, clarifying he did not ask them to stay because it was cheaper than having a ground person do it. (Tr. 1395, 1535, 1572).

Frazer explained a call sign is a computer identifier used to track airplanes, such as AJI532. He testified all Ameristar Companies have used the Jet Charter call sign, including Airways in the fall of 2002. (Tr. 1323-24, 1400). Frazer stated Complainant raised concerns about sharing Jet Charter's call sign with Frazer and dispatch, telling Muth they should not use the Jet Charter call sign for DC-9 planes. (Tr. 1324, 1398). Frazer received copies of the emails between dispatch and Complainant, but he did not talk to Complainant about it; however, he did instruct Complainant not to request a call sign for Airways indicating they would continue to use Jet Charter's call sign. (Tr. 1399-1400, 1402). Frazer testified Biondo wrote Complainant a letter giving Airways consent to share Jet Charter's call sign; Complainant then wrote to FAA seeking permission, which he received, to use Jet Charter's call sign. Frazer indicated Complainant did exactly what he was supposed to do regarding the call sign, which did not bother Frazer. (Tr. 1324-26, 1398; RX-15). He testified he did not ask Complainant who tipped of the FAA on the call sign clarifying he did not have a problem with the call sign and considered the issue raised and resolved. He added there was no regulatory requirement for getting permission to use another airline's call sign, and it was not safety related. (Tr. 1326-27, 1398).

Frazer acknowledged a call sign would not cost Airways much money, but Respondent wanted to use Jet Charter's call sign. He testified Jet Charter could engage in common carriage while Airways could not, but he did not know if using Jet Charter's call sign would allow Airways to do more business. (Tr. 1399). Frazer testified Airways entered into a consent order indicating it performed common carriage functions in 2002, violating its certificate requirements and Title 49; however, he stated the FAA did not fine Airways for operating "under cover" through Jet Charter. The violations were described as unfair and deceptive trade practices and unfair method of competition. Frazer testified Active Aero was a charter manager for Ford, General Motors and Chrysler, though he did not know who else Active Aero chartered for. The

112 violations of common carriage FAA charged Airways with "could have been" Active Aero flights. (Tr. 1400-03).

Frazer testified the consent order came as a result of the FAA's investigation into claims Airways "held out to the public." He explained that "holding out" was essentially extending one's general facilities and services to the public without holding back; it is not allowed under Part 125. (Tr. 1328, 1330). The order limited Airways from having more than three contracts; Frazer stated this was the first time the Department of Transportation (DOT) defined the number of contracts allowed. It also instructed Airways to cease and desist from all unlawful activity describing Airways' use of Jet Charter and Air Cargo employees to place bids on its behalf was impermissible, indirect holding out. (Tr. 1404, 1408-11). The DOT indicated that the relationship between Airways, Jet Charter and Air Cargo was a problem, but Frazer testified he was never told Airways was doing anything wrong despite the fact he informed the DOT on multiple occasions how Airways operated. Frazer did not tell the DOT that Airways used Jet Charter's call sign to give the appearance it could fly common carriage. (Tr. 1404-05).

Frazer testified Airways discussed the holding-out issue with the FAA during the initial certification process, before Complainant was employed, so he did not think there was a significant problem. Frazer stated he did not recall discussing the issue with Complainant or any other employee while Complainant was employed. (Tr. 1328-29, 1411-12, 1414, 1536). He also did not recall Complainant asking him about the number of customers Airways had; Frazer testified he could not recall how many customers Airways had. He did indicate he discussed the number of Airways customers with the FAA during certification and talked about it with Biondo. (Tr. 1406-07, 1418). Frazer testified he did not recall any conversations with Complainant about what freight Airways transported, either; the PASOI stated Airways intended to transport auto parts but Frazer did not know when they started transporting other goods. (Tr. 1409, 1417). If Complainant saw a problem with holding out, Frazer expected he would have raised it. However, the FAA's charge, investigation and resulting consent order all occurred after Complainant was terminated. Frazer considered the consent order to be the end of the issue for Respondent. (Tr. 1330, 1410, 1414, 1536).

Frazer saw the January 13, 2003 email Complainant sent to the pilots within one week of Complainant's discharge; Wachendorfer showed it to him, although he could not remember if it was a hard copy or on his computer. In the message, Complainant indicated he re-submitted a schedule after January 9, 2003, but Frazer testified he had already taken over scheduling duties at this point. (Tr. 1345-46). Additionally, Frazer testified he was offended by the term "Wackmeoffendorfer" which he thought was a vulgar reference to Wachendorfer. Frazer testified Complainant's statement "I didn't make schedule, I'm sorry" undercut management and was evidence he was sucking up to his pilot buddies. He did not think it was appropriate for the D.O. to simply wash his hands of the pilot schedule and then blame management. (Tr. 1347-48). Frazer perceived the second paragraph of the email as a solicitation for pilot resignations and thought it served to incite the pilots; it was clear to him that Complainant fully supported pilots and did not understand his role as a manager or display any regard for the company. Frazer testified the email, which was sent to almost every Airways pilot, was inappropriate for a manager to send and would totally destroy pilot morale. He discharged Complainant within days of seeing this email. (Tr. 1347, 1349-50).

Frazer acknowledged the only copy of Complainant's January 13, 2003 letter is in the form of a forward from Wachendorfer dated March 28, 2003. Frazer testified this was not the first time he received the January 13 email, as Wachendorfer showed him a copy of it prior to Complainant's termination on January 20, 2003. (Tr. 1509-12). Frazer further testified Complainant apparently sent Rives an email with Preuninger's resignation on April 25, 2003, which he considered evidence he incited pilots to resign. However, there was no indication Complainant revised Preuninger's resignation letter; Frazer could offer no evidence to support the statement he made in his affidavit that Complainant was drafting resignation letters. Frazer did not recall when he saw Preuninger's resignation letter. (Tr. 1502-03, 1547, 1550; RX-19). He also stated the email was not mentioned in Respondent's first three filings with the TWC as defense to Complainant's claim for unemployment benefits. However, according to Frazer's affidavit, the loading problems and the January 13, 2003 email were the deciding factors in Complainant's termination. (Tr. 1513, 1519).

Frazer made the decision to fire Complainant, and did so on Monday, January 20, 2003. He did not go into details with Complainant about the reasons for the discharge because he did not want to get into an argument but he testified at the hearing that he lost confidence in Complainant's ability to manage the pilots. Frazer testified Rives was present at the termination meeting. (Tr. 1351, 1428). Frazer also made the decision to terminate Barker two weeks after he complained about an airplane fuel problem in Michigan, although Frazer did not recall the timeline of Barker's April 14, 2003 letter and when the fuel problem was fixed. He did acknowledge he had to send a fuel crew to Michigan to make the repairs. (Tr. 1429, 1432-33). Frazer testified he fired Barker because he made more money than the other pilots; however, per Sprat's testimony at the hearing, Sprat actually earned more than Barker. Frazer did not recall who decided which pilots would be laid off in April 2003; Hulsey and Biondo were not let go despite their work on the incomplete manuals. (Tr. 1434, 1442, 1537).

Raymond took over for Complainant as the D.O. for Airways; Frazer testified he was Raymond's supervisor, which contradicted Raymond's deposition testimony that he reported directly to Wachendorfer. Frazer clarified Raymond did not report to him on the schedule; he did not recall having any conversations about the pilot schedule after Complainant was terminated, except possibly about changing the schedule. Frazer maintained he was not removed from the scheduling loop. (Tr. 1560-62). Although Raymond was not qualified on the DC-9 at first, Frazer stated he could still teach ground school, then clarified he was not sure if this was possible. Nonetheless, he did not describe Raymond's job as just an office job, as Raymond could fly with crews and ride jump seats. (Tr. 1558-60).

Frazer testified pilot records are a great concern to him, but he did not fire Raymond after learning Raymond, as D.O., instructed a pilot not to fill out a form indicating he flew a flight. Frazer knew Raymond thought the pilot, Foster, was not eligible to fly and that is why he asked Foster not to record the flight; Frazer did not know Raymond was wrong and Foster was indeed eligible to make said flight. Frazer conceded that if this directive had been followed the records would have been false. (Tr. 1442-43, 1537, 1556-57). Foster reported the incident to the FAA, who investigated the event but Raymond denied it. The FAA did not sanction Raymond. However, Frazer heard a recording of the conversation between Foster and Raymond, thus he knew Raymond lied to the FAA. (Tr. 1443-44, 1538). Frazer testified he considered this poor

judgment on Raymond's part, but he did not fire Raymond, who continued as Airways' D.O. Frazer explained that Raymond made a mistake, received counseling and they moved forward. He thought Raymond did not intentionally lie but that it was an accident. Moreover, Frazer emphasized Raymond did not degrade the president of company, did not fail to complete pilot records, did not fail to update manuals and was not disloyal to the company. (Tr. 1444-45, 1539, 1555).

Frazer knew Complainant filed for unemployment benefits and that Employer decided to oppose. He testified Respondent won in Complainant's unemployment benefits claim in front of the TWC, though he did not draft anything for it. (Tr. 1331, 1383, 1452). Frazer stated Rives filed all of Employer's responses with the TWC; Frazer testified he did not recall discussing any substantive issues in responses with Rives, then testified they did discuss the contents of their response before filing. The TWC filings were run by Frazer before being filed, but he may not have read each filing; however, he and Rives conversed about the defenses to the claims. Rives was not an attorney and Frazer did not know her experience in answering legal claims. (Tr. 1331, 1378, 1453, 1514, 1535).

Frazer testified page four of CX-42 was the guts of the first TWC filing and he reviewed it before it was filed. It was dated February 5, 2003, two weeks after Complainant's termination; its purpose was to set out the reasons for dismissal. However, the initial filing did not mention the pay proposal, incomplete manuals or Complainant's January 13 email as a reason for his termination. (Tr. 1379-81). Frazer explained he did not write the response and did not know why the reasons were not included. Frazer did not recall talking to Rives about this filing because she was present when Complainant was fired. Frazer acknowledged Rives testified they discussed the reasons Complainant was fired but that Frazer did not go through the laundry list with Complainant in the meeting. (Tr. 1380-81). Rather, Frazer simply told Complainant he was being fired for not managing his pilots and that is all Rives heard at the termination meeting. The filing in CX-42 lists other reasons for the termination which were different than what Frazer listed as reasons. Frazer acknowledged the March 31, 2003, and April 4, 2003 filings with the TWC were the same as the first one and did not mention manuals, the pilot pay proposal or the January 13 email even though they were submitted two months after Complainant's termination. (Tr. 1382, 1384). Complainant's allegedly botched revenue flight was listed as a reason, but the information was wrong in that Frazer did not tell Complainant how to load the plane; Frazer testified he did not know where Rives got that information, but it was not from him. Complainant's sporadic office hours were also not mentioned in any of the TWC filings, nor were they listed in Complainant's personnel file. Frazer testified he imagined Complainant worked from home at night, but he did not know his hours. He did not recall ever asking Complainant or Barker why they left the office at certain times. (Tr. 1385-87). Frazer clarified he did not draft Respondent's answer to Complainant's OSHA claim. He also did not remember participating in June 20, 2003 hearing in front of the TWC, although he did participate in the OSHA hearing. (Tr. 1453, 1455).

Frazer's affidavit stated it was given under oath and based on personal knowledge however, he testified at the hearing as to several events described in his affidavit of which he actually had no personal knowledge. (Tr. 1455; CX-50). Specifically, Frazer did not have anything to do with the pilot training program and did not personally check the pilot records; he

relied on information from Hulsey that the records were incomplete. Frazer noted Airways was not sanctioned for records but maintained the airline was nonetheless exposed to sanctions. Furthermore, the fact that the FAA checked records did not mean there were not deficiencies. Frazer conceded he did not write-up Complainant in November, 2002. (Tr. 1456-59). Additionally, although Frazer indicated in his affidavit that Complainant failed to provide proper cockpit aids, he was not actually involved in transmitting paperwork to the aircraft, did not examine the flight aids Complainant sent out and had no personal knowledge of event. Frazer acknowledged his testimony was based off of Daniels' email to Muth, which only said the pilots did not know if they had current charts or not. (Tr. 1459-60, 1466). Frazer also faulted Complainant for failing to obtain FAA approval for several manuals, but Frazer did not personally review the manuals, relying instead on what Raymond told him about the manuals. He stated Hulsey worked out a deal with the FAA for Airways to use Air Cargo's hazmat manual, but Frazer did not know if Airways' hazmat manual was approved or not. Although Hulsey and Biondo made themselves available to Complainant for help, he understood Complainant did not ask for help with the manuals. (Tr. 1467-70, 1473). Finally, Frazer's description of the events surrounding Complainant's revenue flight was also not based on personal knowledge. Wachendorfer told him he had to personally instruct Complainant how to load the plane and Frazer does not know that this was incorrect, despite real-time trip notes to the contrary. (Tr. 1515; CX-33).

7. Brian Shortt

Mr. Shortt is employed by Airways as a DC-9 captain; he lives in Ypsilanti, Michigan. Shortt learned to fly in 1974 and was a private pilot before joining the military where he flew attack helicopters and utility helicopters for fourteen years. Following his service, Shortt worked as an independent flight instructor and was also a principal operations inspector for the FAA. (Tr. 1575-77). Shortt testified he resigned from the FAA to take a job with Avastar Aviation in Michigan. (Tr. 1609).

Shortt testified that after he left the FAA he received a letter informing him his airline transport pilot's certificate was being revoked for a period of one year. The letter, dated May 27, 1998, charged Shortt with issuing a false certificate and making fraudulent statements on an application for a certificate rating. (Tr. 1601-03, 1609). The alleged event occurred on May 17, 1998, when Shortt gave a multi-engine check ride to Steve Martin; Shortt does not dispute this. However, the letter charged Shortt instructed Martin to obtain a flight instructor's recommendation from Geronimo Terossi and then issued his multi-engine rating in exchange for $500 from Martin, knowing the instructor certification was false. Shortt denied the events in the letter, stating that even though his certificate was pulled as a result of the allegations, the FAA was wrong. (Tr. 1601-02, 1608, 1610). Shortt testified he raised the issue of a FAA inspector giving a check ride without being in the plane; this caused an upheaval at the FAA, so he resigned. Shortt contends the May 27, 1998 letter was generated in response to his actions; to support his argument he testified Martin, to whom he allegedly gave the false certification, did not lose his certificate. (Tr. 1609).

Shortt testified although he lost his certificate for one year, he earned it back and worked at two different companies before being hired at Respondent; as such, he did not credit Respondent with revitalizing his flying career, nor did he feel any unusual amounts of loyalty toward his employer despite being one of only four pilots to survive the April, 2003, reduction in force (RIF). (Tr. 1604). He stated Barker did not survive the RIF and while Respondent did not let Humenick or Sprat go in April, 2003, these pilots resigned shortly thereafter. This left only Shortt and another first officer at Airways; they were laid off for a short time before being brought back. (Tr. 1595).

Shortt testified Complainant called him to offer him a job with Airways in the fall of 2002. Shortt understood Airways was a brand new, start-up operation and that Complainant was the Director of Operations and Barker would be the chief pilot. (Tr. 1577-79). Complainant informed him the pilots would fly a lot, and Shortt accepted a position as a DC-9 first officer after this initial phone call. Shortt testified he did not previously know Complainant, but he did know Scott Preuninger who had given Complainant his name. (Tr. 1578, 1596). Shortt further testified he learned that Complainant and Barker worked together at Legend and Southeast Airlines, and that Complainant had known all but two pilots prior to their work at Airways. He stated that Complainant treated the pilots he knew previously as his friends, while he was stand-offish with Shortt and the other pilots he did not know. (Tr. 1580).

Shortt testified he was hired with the first group of pilots in the fall of 2002, but he went through ground school with the second group of pilots. He stated Airways had 13-15 pilots. (Tr. 1575, 1578-79, 1597). Ground school lasted six weeks, most of which was in Texas, including simulator training in Minneapolis, Minnesota. Shortt testified Complainant did not teach any part of ground school, which was actually taught by Hulsey. Shortt testified that in ground school he learned the base pay for first officers would be $2400; Hulsey never mentioned anything about loading and unloading pay. He never saw Respondent's pay schedule for captains during ground school, but he was not hired as a captain. (Tr. 1579-82, 1597; CX-71). Shortt testified he saw a pay schedule for the Jet Charter pilots in the hallway outside Complainant's office. Within a few months of starting, the Airways pilots learned they made less than the pilots at Air Cargo and they started complaining. Shortt testified the pilots were pretty agitated about the difference in pay, but he informed them that Airways was just starting up; the difference in pay did not bother him. (Tr. 1582-84).

Shortt further testified Complainant would pop into the ground school sessions and tell the pilots he was going to talk to management about getting them a raise. Shortt stated Complainant did this about three times each week during training; each time he would come back and say the pilots were not going to get a raise because management did not care about them. Shortt testified he thought this was strange, as he considered Complainant a member of management. Although he never knew if Complainant actually talked to management about a pay raise, all of Complainant's efforts were fruitless and the pilots never got more money. Shortt testified Complainant's actions were negatively impacting pilot morale. (Tr. 1584-86, 1598). Additionally, Shortt heard Complainant use disparaging remarks when referring to Wachendorfer; he explained he did not remember the precise term used, but that it contained "Wack me off." (Tr. 1589).

Similar to the issue of pay, the pilots also complained about their schedule after discovering the Air Cargo pilots did not work as long. Complainant told the pilots he would talk to management about having the schedule changed, but he was unsuccessful. Again, Complainant would relay his lack of success to the pilots, indicating that upper management did not care about them, thus lowering pilot morale. (Tr. 1588-89). Shortt testified pay and schedule were hot button issues with the pilots from the beginning; he also acknowledged the pilots complained about these issues before Complainant tried to step in and get management to change the policies. (Tr. 1599).

Shortt testified he was never asked by dispatch to exceed 16 hours of duty in one day. He also explained Respondent's procedure for maintenance problems was to record the discrepancy in the log book and call operations to inform them of the problem. He testified this was important because maintenance needed to know what needed to be fixed so subsequent crews were not flying a plane with an open discrepancy. Shortt testified he was never told to call maintenance to receive permission to make a log book entry. (Tr. 1590-92). Shortt also stated he flew with Preuninger in the weeks preceding his resignation, but that Preuninger never discussed the reasons for his resignation. (Tr. 1592-93).

Around the same time as ground school training, Complainant informed the pilots that Southeast Airlines would be hiring in February 2003 and indicated if they wanted to apply he would provide them their training records. Shortt testified offering the training record was not unusual, as any new employer would want to see them; however, he thought Complainant's actions were unprofessional. (Tr. 1586-88). However, on cross-examination, Shortt testified, twice, that he received copies of his training records from Complainant during ground school in February 2003. Shortt testified he was not aware Complainant was fired on January 20, 2003. (Tr. 1597-98). He was similarly not aware Complainant filed claims for unemployment benefits and for wrongful termination as a whistleblower until the day of his hearing; Shortt testified he was not asked to participate in proceedings in front of the TWC or OSHA. (Tr. 1593-94).

III. DISCUSSION

A. Contentions of the Parties

Complainant contends Airways and Jet Charter acted as joint employers. Further, he argues Wachendorfer, Hulsey, Frazer and Shortt should all be discredited as witnesses due to their misrepresentations during the proceedings and their questionable histories including misrepresentations to the FAA, conviction for tax fraud, lying on affidavits and accepting bribes, respectively. Complainant further contends his voicing concerns about Respondent's maintenance policy, duty-time regulations, practices of holding out for common carriage and using Jet Charter's call sign constituted protected activity, as he had an objective and reasonable belief that Respondent's practices violated FAA regulations related to safety and operational procedures. Further, Respondent knew of Complainant's protected activity which contributed to his termination. Complainant argues Respondent submitted purely pretextual reasons as "just

cause" for his termination. As such, he contends he is entitled to back pay as well as costs of the litigation.

Respondent contends the Texas Workforce Commission's ruling that Complainant was fired for acts of insubordination bars his AIR21 claim now before this court on the basis of issue preclusion. It also asserts Complainant's fraudulent activity in receiving worker's compensation, unemployment benefits and regular wages at the same time should preclude him from now receiving back pay. In the alternative, it contends Complainant did not engage in protected activity as no formal complaints regarding Respondent's policies or practices were made. Rather, it argues raising questions about the policies constitutes a debate on the issues, not a complaint. Further, Respondent asserts it did not know of Complainant's protected activity prior to his termination, and thus it could not have contributed to his discharge. Nonetheless, any inference of retaliation is negated by the intervening cause of Complainant's January 13, 2003 email, which the TWC found to be an act of insubordination. Moreover, as Complainant failed in his most basic job duties, Respondent asserts he cannot prove by clear and convincing evidence he would not have been fired in the absence of his alleged protected activity. As a final alternative, if the undersigned does find retaliation occurred, Respondent contends Complainant shall only receive back pay until March 28, 2003, as it is undisputed that as of this day Respondent knew of the insubordinate email he sent, which was a legitimate ground for his termination.

B. Credibility Findings

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to evaluate the credibility of the witnesses and to weigh the evidence. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 466 U.S. 844 (1982). When the proof of one's case depends on subjective evidence, a credibility determination is a critical factor and the ALJ should explicitly discredit such testimony or the fact that the evidence is incredible must be so clear as to amount to a specific credibility finding. *Tieniber v. Heckler* 720 F.2d 1251, 1255 (11 Cir. 1983); *Bartlik v. Tennessee Valley Authority*, 88 ERA 15 (Sec'y Dec 6, 1991).

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit, [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it. *Indiana Metal Prod. v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3d Cir. 1975).

I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses. The transcript of the hearing in this case is 1,617 pages, comprised of the testimony of eight different witnesses: Tommy Clemmons, Brent Barker, Billy Sprat, Tom Wachendorfer, Michael Frazer, Patrick Hulsey, Lolly Rives and Brian Shortt. After reviewing the record, I find that

Complainant, Barker, Sprat were all credible witnesses, as their testimonies were on the whole consistent internally and vis-à-vis the entirety of the record. In general, I also find that Hulsey was a credible witness except for his assessment that Complainant's record keeping was "very incomplete" inasmuch as his initial assessment in early November, 2002, was contrary to Rives' assessment that Complainant had performed well at least through November, 2002. Further, Hulsey's assessment was contrary to the FAA Abbott's assessment on December, 10 2002.

Concerning Wachendorfer's testimony regarding the reasons for Complainant's discharge, I find such to be incredible. When questioned initially about the reasons for Complainant's discharge, Wachendorfer mentioned only one problem: Complainant's inability to load an aircraft on January 16, 2003. In fact, Wachendorfer did not talk with Complainant about the loading problem but rather the copilot. The inability to load all 24 pallets was moreover not Complainant's fault but rather, the customer who gave inaccurate pallet dimensions. Complainant and the copilot loaded as many of the pallets as could be transported for a total of 20 out of 24. Wachendorfer did not mention the second reason, a scheduling problem, except as an after thought when questioning had ceased. I find this constituted pretext as it contradicted Complainant's testimony and the dispatch notes, which provide a logical explanation for any loading difficulties, as discussed *supra*. Rives' testimony concerning Complainant's termination was also pretextual changing on numerous occasions as she presented Respondent's case before the Texas Workforce Commission and OSHA.

Finally, I find the testimonies of Frazer and Shortt to be inconsistent, illogical, contradicted by the whole of the record and thus incredible. Frazer's testimony was particularly dubious. As Airways' Vice President of Operation, he testified he did not know how many customers Airways had, could not recall talking with Rives about the substantive reasons for firing Complainant, was not aware of nor bothered by Hulsey's criminal record, provided conflicting explanation of how the pilot schedule should be drafted, and testified Raymond could teach ground school at Airways even though he was not qualified on the DC-9 aircraft. Frazer's testimony included many double standards, as he blamed Complainant for the Humenick situation, misrepresenting loading pay to the pilots, the short Thanksgiving schedule and failing to disseminate current charts to the pilots without conducting investigations or basic inquiries into the situations to determine who was actually at fault. However, as Complainant's supervisor, Frazer did not take the blame for any of Complainant's mistakes; he also did not terminate Raymond for asking a pilot to falsify flight records and then lying to the FAA. Furthermore, Frazer faulted Complainant with improperly teaching loading techniques, then acknowledged Hulsey taught loading and he faulted Complainant for the incomplete manuals even though they were drafted by Hulsey and Biondo and largely approved by the FAA. Frazer also provided Rives with the incorrect information that he assisted Complainant with loading during his revenue flight, not Wachendorfer. Finally, Frazer testified his affidavit, which was given under oath and based on personal knowledge, was in fact not based on personal knowledge of events. Given the many inconsistencies and patent double standards conveyed throughout his testimony, I find Frazer to be wholly incredible as a witness.

Similarly, Shortt's testimony lacked credibility, as put forth in his statement that he received his pilot records from Complainant during ground school in February, 2003; the record clearly indicates ground school took place in the fall of 2002 and Complainant was terminated on

January 20, 2003. Shortt testified he was unaware Complainant was terminated, which is wholly unbelievable in light of the relatively few pilots employed by Airways and the fact that as a pilot, Shortt would have had dealings with Complainant or his replacement, Raymond. Further, Shortt's testimony that Complainant did not teach any of the ground school is not consistent with other witness' testimonies. His depiction of Complainant as a buddy of the pilots and repeatedly undercutting management by stating they did not care about the pilots is also uncorroborated by the record and is gratuitously inflammatory and incendiary in nature. Given Shortt's history of having his pilots' certificate revoked for accepting bribes in exchange for issuing false certifications and his unconvincing demeanor at the hearing, I find his testimony as a whole is incredible.

C. Issue Preclusion/Collateral Estoppel

Respondent contends the TWC's determination that Complainant was discharged for his acts of insubordination in sending the January 13 email should preclude his AIR21 claim presently before this court. Specifically, Respondent contends the core issue in each of these claims is the same, the legitimacy of Complainant's discharge. As it has been litigated before the full commission of the TWC and used as a basis in its final determination, Respondent argues Complainant should not be allowed to re-litigate the issue here.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. U.S.*, 440 U.S. 147, 153 (1979)(*citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979)). Federal courts must give determinations of State agencies acting in judicial capacity the same preclusive effects as State Courts, if the issue was properly before the agency and the parties had adequate opportunity to litigate. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986). Federal courts have given preclusive effect to State Court decisions where the state in question would do so itself, and the proceedings satisfied the applicable requirements of due process. *Quinn v. Monroe County*, 330 F.3d 1320, 1329 (11th Cir. 2003).

To apply collateral estoppel, the issues presented in the two proceedings must be substantively the same; significant changes in controlling facts or legal principles, or other special circumstances may warrant an exception to the rules of preclusion. *Id.* at 155. However, "a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Id.* at 162 (*quoting U.S. v. Moser,* 266 U.S. 236, 242 (1924)(emphasis in original).

I find the TWC determination does not preclude Complainant from fully litigating his present claim. The claim for unemployment benefits involved the issue of whether Complainant was legitimately terminated, and thus ineligible for benefits. Following a hearing on June 20, 2003 the TWC found in Complainant's favor and awarded him unemployment benefits. In August 2003, upon Employer's appeal, the TWC reversed itself. It is not clear, however, that Complainant had a full and fair opportunity to litigate the issue on appeal. Moreover,

Complainant was not represented by counsel and his involvement in the proceedings is not apparent from the record. As such, the TWC determination on appeal should not have any preclusive effect in the present proceedings.

Furthermore, the issues in the present case are substantively different than that determined by the TWC. The present retaliation claim involves more complex elements and issues than the question before the TWC, which was simply whether Complainant's termination was legitimate or not. Here, Respondent is entitled to rebut a *prima facie* determination of retaliatory action by establishing through clear and convincing evidence that there was a legitimate nondiscriminatory reason for terminating Complainant. 49 U.S.C. § 42121(b)(2)(B)(ii). This standard of proof is greater than that in the prevailing federal nuclear and environmental statutes. *See Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ February 15, 2002). As Employer has not established the burden required by the TWC, I find the clear and convincing standard of AIR21 constitutes a significantly different legal principle thus rendering collateral estoppel inappropriate and inapplicable in the present case. Moreover, even if the TWC determination was given preclusive effect as to the specific finding that Respondent established a legitimate cause for the termination, Complainant would still have the ultimate burden to prove Employer acted with animus and in a retaliatory nature, including establishing pretext. As such, the TWC determination issued on August 5, 2003 does not serve to preclude the present claim because it has not been established that Complainant had a full and fair opportunity to litigate the appeal to the Commission, and significant differences in legal principle render collateral estoppel inapplicable.

D. Joint Employer Status

Complainant filed his present complaint against both Airways and Jet Charter, as joint employers. Although Respondent did not address this issue in its post-hearing brief, it was raised and discussed at the hearing and thus I will address it here. In *Radio and Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc.*, the Supreme Court addressed the issue of joint employer status in determining whether the National Labor Relations Board had subject matter jurisdiction. 380 U.S. 255 (1965). The State of Alabama exercised jurisdiction on the premise that defendant Radio Station WSIM's annual gross receipts did not meet the NLRB's minimum jurisdictional requirement of $100,000. *Id.* However, the Union appealed on the basis that WSIM was an integral part of a group of radio stations who together have a combined annual gross receipts in excess of $100,000. *Id.* The Supreme Court found in favor of the Union, stating the NLRB "considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise." *Id.* at 256. The controlling criteria include "interrelation of operations, common management, centralized control of labor relations and common ownership." *Id. See also Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072 (ARB Feb. 27, 2004).

I find the criteria for establishing joint employers, as set forth by the NLRB and the Supreme Court, have been met in this case. It is undisputed that both Airways and Jet Charter have common ownership, as they are both owned by Thomas Wachendorfer. Interrelation of operations exists as the same dispatch, scheduling and maintenance departments service both

companies under the same corporate policies and procedures. Although Frazer testified different people in each department may work with a specific certificate only, I find this is not enough to establish separate operations. Frazer testified Jet Charter and Air Cargo established common procedures for disseminating charts to pilots and aircraft, and he assumed Complainant used the same procedures at Airways. Moreover, in connection with Complainant's revenue flight when Airways' aircraft was not big enough for the cargo, a Jet Charter plane was used to transport the remainder; when Airways' pilots timed out, an aircraft from Air Cargo was sent to finish the trip. (CX-14). Thus, it is clear that interrelation of operations existed. The two businesses also had common management, in that Complainant was required to report to Frazer, who also held managerial roles at Jet Charter and Air Cargo.[22] There was also a weekly management meeting which, although not attended by Complainant, addressed issues related to each of the three Ameristar companies. Additionally, the companies had common corporate counsel and chief financial officer, which I find attributes to common management and interrelated operations. Lastly, centralized control of labor relations is established here per Rives' testimony that Respondent had but one Human Resources department. Rives also stated Complainant's paycheck, health insurance, retirement account, and 125 tax plan were always administered by Jet Charter, not Airways. As such, the evidence in record is sufficient to meet all the criteria for a joint employer relationship. Thus, both Airways and Jet Charter are properly included as respondents in the present claim.

E. Pertinent Provisions of AIR21 and Burdens of Proof

The employee protective provision of AIR21 is set forth at 49 U.S.C. § 42121. Subsection (a) proscribes discrimination against airline employees as follows:

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be 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;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation

[22] Frazer also enlisted Hulsey and Raymond, who worked for Jet Charter, to fly with and evaluate Airways' pilots, check Airways' pilot records, and attend meetings with the FAA to request amendments to Airways' operations specifics.

Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(Emphasis added).

The evidentiary or burden of proof requirements of the complaint procedure embodied in subsection (b)(2)(B) of the Act require Complainant to establish ". . . a *prima facie* showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." An employer is then required to demonstrate ". . . by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." The criteria established for a determination by the Secretary is "that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." *See also Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ February 15, 2002).

If Complainant presents a *prima facie* case showing that protected activity was likely a contributing factor in the unfavorable personnel action, then Respondent has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 29 C.F.R. § 1979.104(c). Thus, Respondent may avoid liability under AIR21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ February 15, 2002); *Yule v. Burns Int'l Security Service*, 1993-ERA-12 (Sec'y May 24, 1995). If Respondent meets this burden, the inference of discrimination is rebutted and complainant then assumes the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Overall*, at 13.

1. *Prima Facie* Case of Discrimination

No employer, subject to the provisions of the AIR21 Act "may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because the employee . . . engaged in any [protected activity]." 29 C.F.R. § 1979.102(a) (2004). Accordingly, to establish a *prima facie* case of discrimination under AIR21, the complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;
2. The complainant engaged in protected activity as defined by the act;
3. The employer took adverse action against the employee;

4. The employer knew or had knowledge that the employee was engaging in protected activity; and
5. The adverse action against the employee was motivated by the fact that the employee engaged in protected activity.

See Peck v. Safe Air Int'l., Inc., ARB 02-028 (January 30, 2004) slip op at 8-9; *Svendsen v. Air Methods, Inc.*, ARB 03-074 (August 26, 2004) slip op at 7; *Taylor,* 2001-AIR-2, slip op at 33. Here, the first and third elements are not disputed by the parties, who agree that Respondent is subject to the Act, Complainant is covered under the Act and Respondent took adverse action against Complainant by terminating him on January 20, 2003. As such, the only issues are whether Complainant engaged in protected activity, whether Respondent had knowledge of said activity and if the termination was motivated in part by the protected activity.

a. Complainant's Protected Activity and Respondent's Knowledge

A protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government.

Svendsen, 2002-AIR-16 (ALJ Mar. 3, 2003), slip op. at 48. *See also Weil v. Planet Airways, Inc.*, 2003-AIR-18 (ALJ Mar. 16, 2004)(finding the FAA's announced intention to implement a rule is sufficient to establish protected activity). Additionally, protected activity under AIR21 must raise safety definitively and specifically. *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-7 (ALJ Feb. 9, 2004), slip op at 22; *Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004)(violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud did not involve safety and did not constitute protected activity under the Act). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation." *Peck*, ARB No. 02-028, slip op at 13, *citing Clean Harbors Envtl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Leach v. Basin 3Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003).

Complainant contends he engaged in protected activities when he raised concerns to Respondent's management and the FAA regarding potential violations of duty-time, maintenance write-up policy, common carriage and Airways' use of Jet Charter's call sign without proper authorization. Respondent contends these concerns were raised in the context of discussions amongst management and were not formal complaints to the FAA, thus they did not constitute protected activity. Respondent also contends the issue of common carriage and the use of Jet Charter's call sign were not related to safety, thus they were not protected activity.

Initially, I note that raising safety concerns internally constitutes protected activity; there is no requirement that a person needs to file a formal complaint with the FAA to be protected by

the Act. *See Peck*, ARB No. 02-028. Complainant testified duty time was an issue from the beginning, as dispatch pushed pilots to exceed the limit of 16 hours duty within a 24 hour period. It is not disputed that this is a safety issue, as requiring pilots to fly past their regulated duty time may result in tired pilots overlooking possibly serious problems. This issue was corroborated by Sprat and Barker who were asked to exceed 16 hours and whose 8 hours of rest were interrupted by multiple pages, and Frazer who testified he received complaints from pilots that dispatch pushed them to go over the limit. Complainant testified he discussed this problem with Frazer, as he believed Respondent's practices were in violation of Part 125's limit on duty-time. Although Frazer did not recall meeting with Complainant on the issue, Complainant's testimony was corroborated by Sprat and Barker who stated Complainant informed them he "would take care of it" in response to their complaints about duty time. Further, Complainant had an exchange of emails with Wachendorfer in December 2002 on the topic of Part 125 duty time limits and whether Respondent could legally ask pilots to exceed 16 hours or interrupt their 8 hours rest. I find that Complainant's discussions with Wachendorfer and Frazer about the issue of duty-time constitute protected activity, as he was raising concerns about Respondent's violations of Part 125's time restriction on duty. I further find, Complainant was reasonable in believing Respondent violated Part 125 as Frazer and Wachendorfer approached the FAA to amend Airways' ops specs to make the duty time rules more flexible. Thus, on this issue Complainant engaged in protected activity when he raised concerns about duty time to his superiors, and that his superiors had actual knowledge of this activity. Complainant's discussion of duty time with Ron Brown on January 7, 2003 wherein he requested a clarification of duty time was also protected activity in that it related ultimately to Respondent's unsafe practice of pushing pilots to violate the16 hour rule while allowing dispatchers or schedulers to repeatedly interrupt their rest period with pages.

Respondent's maintenance policies were also an issue which was directly related to safety, as damaged aircraft are clearly unsafe to fly. Complainant testified pilots were instructed early on in training to consult with maintenance before entering maintenance discrepancies in the flight logbook. Sprat corroborated this testimony, as evident in his testimony that he considered the policy's "requirement to consult" as essentially requiring pilots to gain permission to make logbook entries; this was a violation of FAA maintenance regulations and created unsafe flying conditions. Sprat also testified maintenance tried to talk him and other pilots into flying unsafe planes to maintenance bases to avoid the expense of sending a repairman out to the aircraft. I note Sprat eventually resigned from Respondent over maintenance and safety issues. Further, his November 15, 2002, email to Complainant requesting clarification of Respondent's policy corroborates the confusion around the maintenance policy. (*See* CX-51). Complainant testified he emailed the pilots a copy of the policy in November 2002, but first it was edited by Frazer to specify pilots had to call maintenance "before" making any entries. Although Frazer denied editing the email, he testified he reviewed the email and that Complainant would not have sent out information that was not part of Respondent's policy. Complainant also testified he talked with Frazer about the policy, which prompted Frazer to angrily explain he did not want pilots making unnecessary write-ups. I thus find Complainant's discussions with Frazer, both in person and over email, concerning the legitimacy of Respondent's maintenance policies constituted protected activity which Respondent clearly had actual knowledge of.

Complainant also testified he was concerned Airways was illegally using Jet Charter's call sign for the purpose of being able to hold out to the public for common carriage; this resulted in a violation of the FAA's call sign procedures and Part 125's prohibition of common carriage. Barker substantiated Complainant's testimony, stating Airways' use of the call sign indicated to him that Airways was holding out to the public; he explained freight shipments in common carriage businesses are normally filed under call signs, not tail numbers. Additionally, Muth informed Complainant all flights for their client, Active Aero, needed to be filed under a call sign. It was later revealed that Active Aero was a charter manager who held out for common carriage, and Airways was charged with common carriage violations for engaging in freight forwarding with respect to its flights for Active Aero. Barker further testified on one of his flights the company man asked him where the 737 aircraft was; as Air Cargo flew 737s and engaged in common carriage under its Part 121 certificate he believed this was further proof Airways was engaging in common carriage by using Jet Charter's call sign. The issue of illegally holding out for common carriage is implicitly related to safety as Part 125 has less rigorous training, record-keeping, safety, and maintenance requirements than its counterparts 121 and 135 which allow public common carriage. I accordingly find Respondent used Jet Charter's call sign to engage in common carriage, and it follows that there is a safety aspect to this practice.

Complainant raised the call sign issue in an email to Muth, which was copied to Frazer, asking her to file Airways' flights under its tail number, not Jet Charter's call sign, explaining Airways did not yet have the proper authorization to use the call sign. In an email dated January 6, 2003, Complainant informed Muth he talked to Brown who advised him to stop using the call sign until authorization was received. Complainant also informed Muth in an email that Frazer instructed him not to request a separate call sign for Airways. (*See* CX-53). Frazer emailed Complainant informing him all three Ameristar companies use Jet Charter's call sign, and that Biondo would issue a letter of approval and Frazer himself would talk with Brown to gain FAA approval. The emails from Frazer and Hulsey to Complainant, and the exchange between Complainant and Muth clearly establish that Airways was using the call sign without proper authorization and in violation of FAA policy. Frazer was aware that Brown had been alerted about the call sign issue and was also aware that Complainant had brought the issue to Brown's attention and rebuked Complainant for alerting Brown.

I find these discussions constituted protected activity on Complainant's part, as he raised concerns about the illegal use of a call sign which was indirectly related to safety. As the concerns were raised directly to his superiors, I find Respondent had actual knowledge of this activity. Further, Complainant testified he talked with Brown about the call sign issue at the January 7 meeting, at which time he submitted a letter to Brown for FAA's approval to use Jet Charter's call sign; I find this constitutes protected activity.

Similarly, Complainant engaged in protected activity when he raised the issue of Airways holding out for common carriage with Frazer. Specifically, Complainant testified he "reached a dead end with Frazer" on this issue, ultimately asking for a list of Airways' customers to verify the company was not holding out. Barker corroborated this testimony by stating Complainant talked to Frazer about holding out before his meeting with Brown on January 7, 2003. I find this is a reasonable conclusion to make, as the evidence has established Complainant and Frazer talked about the call sign, which is interconnected with the issue of holding out for common

carriage. Complainant also discussed the common carriage issue with Brown, and similar to the call sign topic, the proximity of his discussions with Frazer and meeting with Brown lead me to conclude this constitutes protected activity, of which Respondent had constructive knowledge.

Thus, I find Complainant engaged in protected activity, of which Respondent had actual knowledge, when his raised concerns about duty time regulations, Airways' maintenance policy, the use of Jet Charter's call sign and Airways' involvement in holding out for common carriage with his superiors. I also find he engaged in protected activity when he discussed the call sign, duty time and common carriage issues with Ron Brown.

b. Contributing factor; Respondent's retaliatory intent

Where allegations of retaliatory intent are founded upon circumstantial evidence, it is necessary to "carefully evaluate all evidence pertinent to the mindset of the employer and its agents regarding the protected activity and the adverse action taken" to make a determination of whether retaliatory intent has been established. *Timmons v. Mattingly Testing Services, Inc.*, 95-ERA-40 (ARB June 21, 1996), slip op. at 5; *Frady v. Tennessee Valley Authority*, Case Nos. 92-ERA-19, 92-ERA-34, (Sec. Oct. 23, 1995), slip op. at 7-10; *see also Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)(in employee discrimination cases, "[t]he presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive"), *quoted in Mackowiak*, 735 F.2d at 1162. The United States Supreme Court has specifically noted that in an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, there will rarely be "eyewitness" testimony concerning an employer's mental processes. *U.S. Postal Service Bd. of Gov. v. Aikens*, 460 U.S. 711, 716 (1983); *Timmons*, slip op. at 7.

Rives testified, definitively, that Complainant performed his job satisfactorily through the first part of November. In early December, Complainant raised issues about the maintenance policy and had discussions with Frazer and Wachendorfer about duty-time regulations. (*See* CX-15, 19, 51, 52). Following the voicing of his concerns to his superiors, Wachendorfer seriously questioned the authenticity of Complainant's research on duty time, questioning his view that pilots could not legally exceed 16 hours per day in Part 125. Further, Frazer did not take Complainant to the meeting with the FAA to request an exception to the duty time rule, even though the Director of Operations is an airline's primary contact for the FAA. In January, following the discussions on the call sign and common carriage issues, and within days of Complainant's meeting with Brown, Frazer directed Hulsey and Raymond to fly along with Airways' pilots, a job which is generally assigned the D.O. Sprat testified on his evaluation, Raymond indicated management changes would be coming soon. Additionally, Frazer instructed Hulsey to re-check Airways' pilot records, but did not inform Complainant of the alleged discrepancies as to allow him a chance to explain or correct the problems. Further, Wachendorfer sent an email to both Complainant and Frazer alerting them of various scheduling problems; but Complainant testified when he re-submitted the schedule he was never informed it was unacceptable. A few days later, in an email on January 13, 2003, Complainant indicated to pilots his schedule had been rejected by Wachendorfer. The protected activity in December 2002 was approximately one and one-half months prior to the adverse employment action.

However, following the protected activity Frazer and Wachendorfer revoked Complainant's duty to consult with the FAA on interpretation of regulations and rendered insignificant his research on duty-time issues. Similarly, the protected activity in January occurred within 2 weeks of Complainant's termination, but in the interim his supervisors consistently marginalized Complainant's duties and effectiveness as a leader by literally disregarding him as the Director of Operations, instead requesting other Ameristar employees to perform his duties.

I note with significance that only following the protected activities of December and January did his superiors begin treating him as an even more inferior manager at Ameristar then specifically having his duties, and thus authority, stripped away. The totality of the activity combines to create a negative mindset in Respondent which ultimately resulted in retaliatory adverse action. As such, I find Complainant has established, by a preponderance of the evidence, his protected activity contributed to his termination on January 20, 2003. He has thus proven all five elements set forth in *Peck* to establish a *prima facie* case of discriminatory employment retaliation.

2. Rebuttal of Complainant's *Prima Facie Case*

Respondent may overcome a complainant's *prima facie* case of retaliation by demonstrating through clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See* 29 C.F.R. § 1979.104(c). Thus, Respondent may avoid liability under AIR21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. *Taylor*, 2001-AIR-2; *Yule*, 1993-ERA-12. Clear and convincing evidence has been recognized by the Secretary and the courts as being an evidentiary standard with a higher burden than "preponderance of the evidence" but less than "beyond a reasonable doubt." *Taylor*, 2001-AIR-2, slip. op. at 34. However, Employer "need not persuade the court -- the burden is only of **production**." *Bausemer v. TU Electric*, 91-ERA-20 (Sec'y Oct. 31, 1995)(emphasis added), *citing Kahn v. United States Secretary of Labor*, 64 F.3d 271, 278 (7th Cir. 1995)(stating the employer need not substantiate the assertion, as mere articulation of a lawful reason for the firing satisfies the burden); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Respondent contends it had multiple legitimate and nondiscriminatory business reasons for discharging Complainant, sufficient to rebut the *prima facie* case. Respondent asserts it had reason to terminate Complainant for his poor management skills. Specifically, Respondent asserts Complainant was legitimately terminated for failing to draft pilot schedules per management's instruction, failing to maintain proper pilot records, failing to revise manuals, improper dissemination of charts, a problematic revenue flight and an inflammatory email Complainant sent to all the pilots on January 13, 2003.

Respondent met its burden of production with respect to each assertion, except the assertions that Complainant improperly disseminated navigational charts and failed to update the manuals. With respect to pilot schedules, Wachendorfer and Frazer testified there were many problems with the schedule in January; particularly that it did not have enough crews on duty to cover all three aircraft. This was corroborated by Complainant and Sprat's testimonies that there were continual problems with the pilot schedules, which were routinely unacceptable to upper

management. With respect to the pilot records, Hulsey testified Complainant failed to keep complete sets of records, and even after notifying him of the deficiencies, Complainant failed to update the records. Complainant and Barker both testified that they did not believe the changes recommended by Hulsey were necessary, but that they added the records anyway. They also testified that the upgrade testing records were not timely filed at headquarters. Both Complainant and Wachendorfer testified that at his only revenue flight, Complainant was unable to load all the pallets scheduled for delivery. Additionally, both Complainant and Frazer testified the January 13, 2003 email was vulgar, rude and improper for a manager to send. Rives testified she received the email some time during her investigation and Sprat indicated he received it when Complainant originally sent it. As for Complainant lackluster performance as a manager, Rives testified to an event where pilots did not show up to work. Also, Complainant, Sprat and Barker testified pay and scheduling continued to be problems and negatively impacted pilot morale, which was Complainant's responsibility to keep up. Based on the foregoing, I find Respondent submitted clear and convincing evidence of legitimate business reasons for terminating Complainant.

As regarding Complainant's updating the manuals, Hulsey testified he only saw minor changes which Complainant made; Complainant himself admitted he did not finish the re-write of Airways' General Operations Manual before he was discharged, although he was able to work on the minimum equipment list and aircraft check lists. Frazer and Rives also indicated Complainant did not properly maintain airline manuals in working order. However, Rives' notably testified that the manuals did not become an issue until Raymond brought them to Frazer's attention after he took over as D.O. at Airways. Indeed, the record does not include any conversations or discussions of the condition of Airways' manuals prior to Complainant's termination. As such, I find Respondent failed to produce clear and convincing evidence that Complainant was legitimately terminated for his failure to maintain manuals.

Respondent also asserted Complainant was fired for failing to properly disseminate charts. To support their contention they submitted the email from dispatcher Daniels to Muth indicating pilots were confused about whether they had current charts. Muth then questioned Complainant what his policies for chart dissemination. However, there was no indication in the email or in the testimony of Complainant, Rives, Frazer or Wachendorfer that the pilots had outdated charts or that there was a problem with the dissemination procedures. In fact, Complainant testified he followed Ameristar procedure for disseminating charts, a statement which was corroborated by Frazer who stated Jet Charter and Air Cargo had established procedures which he assumed Complainant followed at Airways. Moreover, the record indicates the pilots actually had current charts. I find that confusion over navigational charts does not equate to problems with the dissemination, as the current charts were actually delivered. As such, Respondent failed to produce clear and convincing evidence that Complainant did not properly disseminate navigational charts.

Nonetheless, based on Complainant's job performance related to manuals, scheduling, record keeping, pilot management, his revenue flight and the January 13, 2003 email, I find Respondent successfully rebutted Complainant's *prima facie* case of employment discrimination.

3. Pretext

> [O]nce the employer meets this burden of production, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256.

Carroll v. U.S. Department of Labor, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995). The complainant must prove pretext by a preponderance of the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). Although the presumption drops out of the equation, the trier of fact may still consider evidence establishing the *prima facie* case and any inferences drawn there from on the issue of whether Respondent's explanation was pretextual and is unworthy of credence. *Id.* (*quoting Burdine,* 450 U.S. at 255, n 10).

Respondent asserted Complainant was legitimately discharged for failure to draft efficient schedules, maintain pilot records, load the aircraft properly, the January 13 email and his overall poor management skills. For the following reasons I find these reasons constitute pretext and are not worthy of credence. Admittedly, three of Respondent's officers were aware of the reasons for Complainant's discharge: Wachendorfer, Rives and Frazer. (*See* CX-7). Wachendorfer, as noted above, only mentioned one reason initially: Complainant's inability to properly load an aircraft on January 16, 2003. In fact, Complainant was not responsible for the inability to load the aircraft with all 24 pallets, but rather the customer had provided inaccurate pallet dimensions. Regarding the scheduling problem, Complainant followed Wachendorfer's instructions of assigning pilots 14 days on and 7 days off. When it finally became apparent to Complainant, through Muth, that Wachendorfer wanted pilots assigned 15.5 days on and 5.5 days off, he revised the schedule. Although Frazer testified that he had to make up the January/February schedule, no such schedule was produced nor was the alleged inaccurate schedule created by Complainant. Indeed, if there was fault concerning the schedule it lay with Wachendorfer and Frazer who never communicated adequate instructions. Admittedly Frazer had to approve Complainant's schedules, yet Frazer was never warned or admonished about the inadequate schedules.

Rives asserted various reasons for Complainant's discharge to the Texas Workforce Commission. On January 22, 2003, she asserted Complainant had been discharged due to poor judgment in executing training plans and work schedules. Allegedly, Complainant failed to prepare work schedules on two occasions which maximized use of equipment and personnel. Complainant was directed to rework the schedules on two occasions. Rives claimed that employee morale suffered because of the schedule change but offered no evidence to support such an assertion or of deficiencies in training plans. In addition, Rives advanced another reason for the discharge: Complainant's failure to maintain flight currency in the most economical manner by using a flight simulator rather than an aircraft. However, neither Rives nor Respondent provided any evidence to support this assertion. Indeed, it appears from Rives'

submission that the flight simulator in question was being used by other personnel when Complainant was allegedly supposed to use it. (*See* CX-44).

In her second submission to the Texas Workforce Commission on April 4, 2003, Rives stated the same reasons for the discharge but added Complainant had been warned by Frazer on prior occasions concerning the schedules and that, in fact, Frazer was involved in getting 18 pallets loaded on aircraft on January 16, 2003. Rives not only expanded the reasons for Complainant's discharge to include the January 16, 2003 incident but inaccurately claimed that Frazer was involved when the record is clear he had no direct involvement. Rives, moreover, warned Complainant about inadequate schedules. In her third submission to the Texas Work Force Commission on April 26, 2003, Rives for the first time claimed that Complainant failed to maintain and document training records. Thus, Respondent gave shifting reasons for its termination of Complainant starting with the first filing with the TWC just a few weeks after his termination. Throughout her filings with the TWC, and continuing with her filings with OSHA, Rives listed varying reasons for Complainant's termination which leads to a determination of pretext.

When Rives responded to the OSHA complaint she again expanded the reasons for Complainant's discharge to eight, including: (1) inadequate work schedules citing a Wachendorfer e-mail of November 26, 2002 which did not deal with work schedules but, rather, Barker permitting Wannamaker to take off early for Thanksgiving; (2) not managing the crew effectively when pilot Humenik failed to show as scheduled; (3) failure to disseminate flight aids to crew members where the facts established that flight aids and charts had been properly distributed; (4) pilot morale problems secondary to his providing pilots incorrect information on access to cabin, telling employees the January 13 flight schedule was not his creation, soliciting information about Preuninger's reasons for resignation and promising to support employee claims for unemployment; (5) failing to secure approval/authorization of required manuals; (6) failing to maintain pilot training records; (7) failing to document check ride failure of Pete Foster and (8) failing to maintain operating manuals in proper form for DC-9 aircraft. (*See* CX-46).

Frazer admittedly provided no reason to Complainant for his discharge except the fact that he had lost confidence in his ability to manage pilots; this was corroborated by Rives' testimony that Frazer gave no reason for Complainant's termination in an effort to avoid a confrontation. Frazer claimed he received a copy of Clemmons January 13, 2003 e-mail, wherein he referred to Wachendorfer as Wachmeoffendorfer, solicited employee resignations, accused Wachendorfer of flawed schedules, and offered to provide help to employees with unemployment claims, several days after it was sent and that it prompted him to fire Complainant. However, I note with significance that the only version of this email submitted into the record was the copy Wachendorfer forwarded to Frazer and other managers on March 28, 2003. From the text of the message, it appears Wachendorfer retrieved the message from Respondent's system, but did not receive it in January, 2003. As such, it is not reasonable to conclude this email resulted in Complainant's termination. Moreover, Rives, who was in direct contact with Frazer regarding the discharge, did not mention the January 13 e-mail until the May 9, 2003 submission to OSHA. Wachendorfer notably did not mention the email as a cause for Complainant's termination, even though the nickname Complainant used was allegedly so offensive it justified his discharge. This email was sent exactly one week prior to Complainant's

termination; if it had truly been such a primary cause for his termination I find it reasonable to conclude Frazer would have mentioned it in the termination meeting on January 20, 2003, Rives would have so indicated on February 5, 2003, and Wachendorfer most certainly would have mentioned it in his testimony at the hearing. As none of these things took place, I find Respondent's reliance on the January 13 email as a legitimate cause for Complainant discharge is purely pretextual.

After auditing pilot training records in November, 2002, and January, 2003, Hulsey reported alleged deficiencies in the records to Frazer, who claimed he discussed them with Complainant and Barker. I note with significance that Rives testified Complainant did a good job until at least mid November, 2002, and that Hulsey was not concerned about his initial review of the training records. Moreover, Complainant and Barker credibly testified the proposals Hulsey made were not necessary under Part 125, a certificate Hulsey did not work under at Air Cargo. The FAA approved Airways' pilot training records on December 10, 2002. When Hulsey rechecked the training records in January 2003, he informed Frazer that some corrections had been made but deficiencies persisted. Frazer testified he did not inform Complainant of the re-check and did not tell him of the continued deficiencies, even though it would have been Complainant's job as D.O. to correct the records for any deficiencies. Frazer's withholding this information from Complainant without giving him an opportunity to explain himself or correct the records indicates his intent to disguise the records incident as a legitimate cause for the discharge. However, in light of the FAA's approval in December 2002 and the fact that insufficient records were not listed a reason for Complainant's discharge until April 26, 2003, I find this reason to be incredible and pretextual.

Although Respondent did not meet its burden of production with respect to the condition of the manuals, I nonetheless emphasize that its continued assertion Complainant was responsible for ensuring manuals were accurate and complete before the time operations commenced was incredible in view of the fact that Complainant had nothing to do with the creation of the initial manuals, such task being assigned to Biondo and Hulsey who received no criticism for their work. Additionally the FAA had approved Airways' manuals, which was necessary for Airways to commence operations. Further, Complainant was responsible for the continued updates of the manuals; he credibly testified that he worked on fine-tuning the minimum equipment list with vendors and check list for DC-9 aircraft and he was in the process of updating the general operations manual when he was terminated. Respondent's failure to admonish or warn Complainant about the alleged manual deficiencies combined with the FAA's approval of manuals prior to the start of operations belies Frazer's assertion that the deficiencies were a cause for Complainant's discharge.

The only credible reason Frazer gave for the discharge was his loss of confidence in Complainant's ability to manage pilots to his satisfaction, in particular Complainant's refusal to pressure pilots into violations of the 16 hour rule, ignore maintenance problems and the fact that Airways was performing common carriage without the requisite certification and flight training. Complainant told Frazer he did not mind being a token D.O., but he would not violate FAA regulations despite pressure from Frazer and others to break such regulations and thus maximize profit. Frazer knew Complainant's position and thereby refused to take him into meetings with Brown to discuss the 16-hour rule. When it became apparent that Complainant alerted Brown

about the improper use of Jet Charter's call sign which was used to cover its common carriage operations, it became apparent that Frazer had to replace Complainant's with a more cooperative D.O. who shared his view that maximized profits took precedent over FAA safety regulations. Raymond fit that profile and was subsequently appointed to replace Complainant. Raymond's lack of regard for FAA regulations was demonstrated by his instructions to Foster to falsify a flight log. Frazer was obviously not concerned about this for he took no action to even admonish Raymond for his actions.

In conclusion, Complainant established a *prima facie* case of unlawful retaliation which Respondent successfully overcame by producing clear and convincing evidence of legitimate reasons for the discharge. However, based on the foregoing discussion, an examination of the record as a whole leads me to conclude these reasons were, in fact, illegitimate and pretextual in nature. As such, I find Respondent engaged in unlawful discriminatory retaliation for Complainant's protected activities by discharging him on January 20, 2003, absent legitimate reasons.

F. Damages

1. Back Pay

As to the appropriate remedy, the Act provides:

> If . . . the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--
>
> > (i) take affirmative action to abate the violation;
> > (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
> > (iii) provide compensatory damages to the complainant.
>
> If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

49 U.S.C. § 42121(b)(3)(B). In the present case, Complainant specifically requested he not be reinstated in his former position, as he has found employment elsewhere. Complainant has limited his requested damages to a total of $56,746.23 representing his back pay and lost wages from the date of his termination, January 20, 2003, through the month of July 2004, when the first hearings in this matter were conducted. I find this amount to be reasonable in light of

Respondent's actions, and I award said amount to Complainant as a remedy for the employment discrimination he endured.

Fraud Claim and Workers' Compensation Off-set

Respondent contends Complainant should not receive any back pay secondary to his fraudulent act of collecting workers' compensation and unemployment benefits while earning wages. Fraud is defined as the "intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." BLACK'S LAW DICTIONARY 594 (5th ed. 1987). Respondent failed to submit any evidence that Complainant expressly intended to commit fraud upon Respondent by collecting worker's compensation, unemployment benefits and wages from a short term job with D.F. Crew Leasing. I note Complainant did not recall if he received compensation benefits while he was employed at D.F. Crew, and no record of his employment or pay was submitted into evidence. Further, I find Respondent had constructive if not actual knowledge of Complainant's simultaneous worker's compensation and unemployment benefits, as Rives testified she is the only Human Resources employee who handles both of those types of claims at Ameristar. Thus, Respondent paid Complainant's worker's compensation while fully defending his unemployment claim, and did not raise the issue of fraud until this claim. Because Respondent had knowledge of the simultaneous claims, they cannot now argue Complainant was defrauding them. Moreover, when it was discovered Complainant received both benefits, he amicably agreed to return the unemployment benefits he received, and testified he is currently on a payment plan. As such, I find the record is devoid of any evidence indicating Complainant engaged in fraudulent activity.

Respondent argues, in the alternative, that Complainant's receipt of worker's compensation benefits precludes his ability to receive back pay; as he was evidently too injured to work for Employer and thus received worker's compensation, awarding him back pay would result in a windfall. Respondent relied on *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993), *cert. denied,* 510 U.S 1164 (1994); *Southern Stevedoring Co. v. NLRB*, 236 NLRB 860, 864 (1978), *enf'd. mem.* 591 F.2d 101 (5th Cir. 1979), to support its assertion that a complainant cannot receive back pay as a remedy for employment discrimination if he also received worker's compensation during the same time period. However, absent proof that the workers' compensation benefits are for lost wages due to injury the benefits are not deductible from the award of back pay. *American Manufacturing Co. v. NLRB*, 167 N.L.R.B. 520, 523 (1967). It has been explained that:

> "temporary disability payments are a substitute for lost wages during the temporary disability period, while permanent disability is for permanent bodily impairment and is designed to indemnify for the injury employee's impairment of future earning capacity or diminished ability to compete in the open labor market." *Canova v. NLRB*, 708 F.2d 1498 (9th Cir. 1983), 1504, *quoting Russell v. Bankers Life Co.*, 120 Cal. Rptr. 627, 634 (1975).

Williams v. TIW Fabrication & Machining, Inc., 88-SWD-3 (Sec'y June 24, 1992).

In the present case, Respondent stated in its Reply Brief that "one who receives workers' compensation income benefits is plainly not able to continue working for his employer during that period." However, there is no evidence that Complainant received workers' compensation benefits as compensation for lost wages. Complainant testified his doctor restricted him from lifting more than 25 pounds and from flying; he was still able to work and nothing indicates that he would not have continued working at Respondent with this disability. Even though he was restricted from flying, this was not listed as part of the duties of the Director of Operations. Thus, there is no evidence that Complainant would have lost wages due to his disability. Indeed, there is no identification of the workers' compensation benefits Complainant received as "income" benefits. The notice of payment of workers' compensation benefits indicated the benefits were for "temporary income benefits." (RX-34). However, I do not consider this evidence dispositive of the fact that the benefits were for lost wages, as "temporary income benefits" is not explained in the record, the notice was filled out on September 10, 2003, almost nine months after benefits began, and it is contradictory to Complainant's credible testimony that his doctor returned him to work, albeit under certain restrictions. I thus find that there is insufficient evidence to establish that the benefits were to compensate Complainant for lost wages, and the benefits shall not be deducted from Complainant's award of back pay.

After-acquired Evidence Doctrine

In the alternative, Respondent contends any back pay awarded to Complainant should be cut off on March 28, 2003, the undisputed date on which Respondent received a copy of the January 13, 2003 email Complainant sent to the pilots. Respondent contends that the email is a legitimate cause for Complainant's termination, and thus he would have been terminated as of March 28, 2003, at the latest. Indeed, where an employer who was found to have violated the Act learns of an earlier event which would have constituted a legitimate reason for the discharge, back pay should be calculated "from the date of the unlawful discharge to the date the new information was discovered." *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 362 (1995); *see also Wallace v. Dunn Construction Co.*, 62 F.3d 374, 378 (11th Cir. 1995). However, the Supreme Court went on to say the courts should take into consideration "extraordinary equitable circumstances that affect the legitimate interests of either party." *McKennon*, 513 U.S. at 362.

As previously discussed, Complainant's January 13, 2003 email to the pilots was admittedly inflammatory, angry and improper behavior for a member of management. The Texas Workforce Commission determined it constituted insubordination which led to Complainant's termination. As such, Respondent contends it would have fired Complainant at the latest on March 28, 2003. The cases Respondent relies upon in support of the after-acquired evidence doctrine, *Wallace, supra,* and *McCafferty v. Centerior Energy*, ARB No. 96-144, ALJ No. 96-ERA-6 (ARB Sept. 24, 1997), involved complainants who had lied on their employment application and made false statements in a self-disclosure questionnaire, respectively. Those actions clearly constituted violation of the employers' policies and were legitimate reasons for termination. However, in the present case I find "extraordinary equitable circumstances" exist in that Respondent's own behaviors induced Complainant's improper email. Absent

Wachendorfer's and Frazer's disparate treatment of Complainant as Director of Operations, he would not have had cause to send out this angry message. As Respondent's asserted "legitimate" reasons for terminating Complainant were deemed pretextual based, in part, on its' treatment of Complainant, it would be inequitable to now ignore the behavior of Wachendorfer and Frazer. I find they contributed to Complainant's frustration thus prompting him to write the January 13 email; as such I find the after-acquired evidence doctrine should not apply to limit Complainant's award of back pay.

2. Interest

A back pay award is designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination. The assessment of prejudgment interest is necessary to achieve this end. Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated in accordance with 29 C.F.R. 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *Lawson v. United Airlines*, 2002-AIR-6 (ALJ Dec. 20, 2002); *see also Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced); *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991).

3. Attorney's Fees and Costs

Attorney's fees and costs are available to the prevailing Complainant as authorized by statute. *See* 49 U.S.C. § 42121(b)(3)(B). No award of attorney's fees for services rendered on behalf of the Complainant is made herein since no application for fees has been made by the Complainant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Complainant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.

G. Conclusions

In light of the foregoing, I find Complainant's claim for unemployment benefits and the rejection of said claim by the Texas Workforce Commission does not meet the requirements of collateral estoppel and thus does not preclude him from bringing the present claim against Respondents. Further, both Jet Charter and Airways are properly named in this case, as all elements of the joint employer doctrine were satisfied.

I also conclude Complainant successfully established a *prima facie* case of discrimination by proving his actions constituted protected activity under the Act that Respondent had actual or constructive knowledge of the protected activity which contributed to Complainant's termination. Although Respondent did meet its burden of production by articulating legitimate reasons for Complainant's termination, a weighing of the entire record by a preponderance of the evidence

established that Respondent's reasons were pre-textual and not worthy of credence. Thus, I find and conclude Complainant's January 20, 2003 termination was unlawful discriminatory retaliation. Complainant is thus entitled to his requested damages of $56,746.23 in back pay, which is not offset by his workers' compensation benefits or subject to the after-acquired evidence doctrine. I find Complainant is also entitled to receive costs and fees related to this litigation.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, **IT IS HEREBY ORDERED** that Respondent, Ameristar Jet Charter, Inc., and Ameristar Airways, Inc.:

1. Pay to Complainant back pay and other relief in accordance with the discussion above;

2. Pay to Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;

3. Pay to Complainant all costs and expenses, including attorney fees, reasonably incurred by them in connection with this proceeding. Complainant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Complainant and opposing counsel who shall have twenty (20) days to file any objection thereto.

Clement J. Kennington

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979,119, unless a petition for review is timely filed with the Administrative Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must

be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.11(a) and (b), as found OSHA, Procedures for Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099(Mar. 21, 2003).