U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 31 January 2005

CASE NO.: 2004-AIR-00012

In the Matter of

BRENT BARKER
Complainant

v.

AMERISTAR AIRLINES, INC.
Respondent

Appearances: Marie Chopra, Esq.
Steven K. Hoffman, Esq.
JAMES & HOFFMAN, P.C.
For Complainant

Chris Howe, Esq.
KELLY, HART & HALLMAN
For Respondent

Before: Administrative Law Judge Janice K. Bullard

DECISION AND ORDER

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("the AIR21 Act"), as implemented by 29 C.F.R. 1979 (2002). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor 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 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 relating to air carrier safety. 49 U.S.C. § 42121(a).

I. BACKGROUND

A. Procedural Background

Brent Barker ("Complainant" hereinafter) was employed by Ameristar Airways, Inc. ("Respondent" or "Ameristar" hereinafter), one of three airlines owned by Thomas

Wachendorfer. He also owns Ameristar Jet Charter Inc. and Ameristar Air Cargo, and all are operated from a joint corporate address. Complainant worked as chief pilot and check airman for Respondent from September 23, 2002 until his termination on April 14, 2003. Thereafter, Complainant filed a complaint with the United States Department of Labor's Office of Occupational Safety and Health Administration ("OSHA" hereinafter) alleging that he had been discriminated against by Respondent for engaging in whistleblowing activities. OSHA investigated Complainant's allegations, and on January 20, 2004, issued the Secretary's Findings and Preliminary Order, determining that Complainant's complaint had merit. OSHA concluded that Complainant's protected activity contributed to his termination, and that Respondent was unable to establish that his termination would have occurred absent such activity.

On February 19, 2004, Respondent filed an objection to OSHA's findings with the Office of Administrative Law Judges ("OALJ") and requested a hearing. The case was assigned to me, and a hearing was scheduled in the matter for May 11, 2004. Respondent requested a continuance to allow for the filing of a motion for summary decision, which I granted. On June 3, 2004, Ameristar filed a dispositive motion for summary decision in the instant matter. Complainant filed a response to the motion on June 18, 2004. By Order issued July 7, 2004, I denied Respondent's Summary Judgment motion.

A hearing was held in Dallas, Texas on August 2 through 4, 2004. At the hearing, Respondent renewed its motion for summary decision with respect to two elements of Complainant's alleged protected activity. I allowed time for a written response, which Complainant timely filed on September 7, 2004. I received the transcript of the hearing proceedings on September 14, 2004, and on October 7, 2004, issued an Order granting Respondent's motion for partial summary judgment. For reasons explained in that Order, I found that Complainant's reports of non-safety related violations of Federal Aviation Authority ("FAA") regulations did not constitute protected activity under the Act.

The parties filed written closing arguments. The findings of fact and conclusions of law set forth in this Decision and Order are based on my analysis of the entire record. Each exhibit and argument of the parties may not be specifically referenced throughout, but each has been carefully reviewed and thoughtfully considered.[1]

B. Complainant's Statement of the Case

During his tenure as a pilot for Respondent, Complainant had reported safety and maintenance problems to the FAA. Complainant had also discussed safety and maintenance issues with his supervisors. On March 28, 2003, Complainant wrote to company officials to report maintenance concerns about two of Respondent's aircrafts and sent a copy of the letter to the FAA. He was terminated on April 14, 2004. Complainant contends that his termination was in retaliation for his complaints about safety issues.

[1] In this Decision and Order, "ALJX" refers to exhibits admitted into the record and offered by the Administrative Law Judge, "CX" refers to the Complainant's exhibits, and "RX" refers to Respondent's exhibits. "Tr." refers to the hearing transcript.

C. Respondent's Statement of the Case

Respondent contends that Complainant was discharged as part of a reduction in force that included the discharge of three other pilots. Respondent maintains that Complainant's protected activity had nothing to do with his termination, and that his layoff would have occurred regardless of his protected activities.

II. ISSUE

Whether Respondent Ameristar took adverse action against Complainant Brent Barker in retaliation for his alleged protected activities in violation of the Act.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Testimonial Evidence

The following summary of the testimony of the witnesses who appeared at the hearing emphasizes those facts that I consider most probative and relevant to my findings. However, in reaching my findings of fact and conclusions of law, I have carefully considered all of the testimony of all of the witness, taking into account all relevant and probative evidence. I have evaluated the testimonial evidence by assessing its inherent consistency and consistency with other evidence of record. I have also made assessments of the credibility of the witnesses, considering the source of information, its reasonableness, its consistency with other evidence, and the demeanor and behavior of the witnesses.

Brent Barker

Mr. Barker is an experienced pilot who served as captain and check airman on several types of aircraft. Tr. at 21. He is familiar with FAA regulations ("FAR") pertaining to different types of air carriage, and is knowledgeable about the regulatory requirements governing air carriers. Tr. at 22. He holds an airline transport pilot license and a first-class medical issued by FAA. Tr. at 27. Mr. Barker had been working for Southeast Airlines out of St. Petersburg, Florida when he heard from a friend that Respondent intended to start up an airline under FAR Part 125. Tr. at 29-31. Complainant described the new airline as a contract cargo airline within the description of FAR Part 125. Tr. at 30. Mr. Barker explained that airlines operating under Part 125 are limited to flying cargo for customers under specific contracts. Id. Respondent already was operating a FAR Part 135 airline and a Part 121 airline before starting up the Part 125 operation. Tr. at 32-33.

Since Mr. Barker had experience working for a start-up air carrier, and wanted to work for a company closer to his home, he contacted Andrew Williams, the chief pilot for Ameristar Jet Charter, which is the FAR Part 135 operation.. Tr. at 29. Complainant met with Mr. Williams in August, 2002, and also met with Lolly Rives, Respondent's Human Resources Manager. Tr. at 33. He completed an application for employment as pilot, and discussed the

possibility of filling the position of Director of Operations, and reviewed the projected pilot salary plan. Tr. at 33-39. When he called back several days later to determine the status of his application for employment, he was offered a position as captain. Tr. at 40. He reported to work for Respondent on September 23, 2002.

Complainant explained that it is routine for pilots to receive training upon starting work at a new airline. Tr. At 49. Following ground training, pilots were expected to complete simulator training. Tr. at 50. When Complainant assumed his position at Ameristar, the airline had not yet received its certification, but it was expected to be issued by the time the pilots had completed ground school training. Tr. at 49.

When he first arrived at Ameristar, Mr. Barker's supervisor was the Director of Operations, Tom Clemmons, a pilot with whom he had worked in the past. Tr. at 40-41. During the second week of ground training, Mr. Clemmons told Complainant that he would be chief pilot for Ameristar Airways. Tr. at 42. Mr. Lindon Frazer and Respondent's President Tom Wachendorfer approved his appointment as chief pilot. Tr. at 42, 43. Complainant understood that he would receive a guaranteed salary of $63,998.00 per year, regardless of how much he flew, in contrast to other captains, who were to earn a far lower base salary and had to exceed a certain number of flight hours to receive extra money. Tr. at 44-46; CX 71. He also was assigned the duties of check airman. Id.; RX 5; CX 40.

Complainant recalled that FAA issued Respondent's certificate in the middle of October, 2002. Tr. at 54. Shortly thereafter, the airline started to fly. Id. He did not recall flying at first, but was more involved with duties related to his positions as chief pilot and check airman. Tr. at 56-57. As check airman, Complainant was responsible for conducting checks and training of pilots. Tr. at 58. Although his responsibilities would have included performing proficiency checks for captains and first officers, he was terminated before those checks were due. Tr. at 60. He did undertake upgrade training of two first officers so that they could fly as captains. Tr. at 61. His duties as chief pilot included assuring that procedures were standardized, conducting test flights, keeping the Chief of Operations apprised about the content of cargo. Tr. at 78. He also was responsible for making decisions about coordinating pilot availability and advancing pilots. Tr. at 77. His duties included maintaining necessary records and documentation regarding pilot training and proficiency. Id.

Mr. Barker decided to upgrade two first officers to captain because he was concerned that some pilots might quit, as many were disgruntled about pay and schedules. Tr. at 62 -63. Mr. Clemmons approved the selection of Pete Foster and Gene Mercer for upgrade training. Tr. at 77. Of the two trainees, Mercer passed, but Foster failed. Tr. at 64. He conducted no other pilot training, because no other pilots were hired during his tenure with Respondent. Tr. at 73. Mr. Barker flew in schedule with the other pilots from January, 2004 until his discharge in April. Tr. at 70.

From the time the pilots began to fly, issues arose about pilots' pay and their duty and rest time. Tr. at 82. In November, 2002, Mr. Barker wrote a letter to management outlining these concerns, as well as concerns about pilot pay. Tr. at 83, CX 9. Mr. Clemmons signed off on the letter as well, and it was sent to Lindon Frazer and Tom Wachendorfer. Tr. at 83-84. Mr.

Barker was not disciplined in anyway for his suggestions, but the pilots found extra money in the pay that directly followed the letter. Tr. at 91. On November 15, 2002, Mr. Barker and Mr. Clemmons received a letter from two pilots, Billy Joe Spratt and Marty Krutolow, who expressed concerns about time and duty hours. Tr. at 92-93; CX 51. The FAA sets limits on the time that pilots may fly and imposes mandatory rest periods between periods of flight. Tr. at 93-94. The pilots alleged that they were being asked to work more than the maximum allowed 16 hour duty days, and were interrupted during their rest periods with pages, in violation of the FAR. Id., 95. Complainant recalled being asked during a flight to extend the 16 hour duty limit to arrive at a destination sooner. Tr. at 96. In November, another pilot, Shawn Humenick, reported being asked to expedite the completion of a flight segment in a manner inconsistent with the FAR. Tr. at 103-105; CX 76. Gene Mercer also had been asked twice to extend duty hours. CX 60.

Pilots also advised Mr. Barker that they believed that Mr. Frazer was instructing them to keep maintenance logs in a manner inconsistent with the FAR. Tr. at 101. Pilots are required to record in a log any maintenance problems they observed while flying an aircraft. Tr. at 100. Mr. Frazer issued a memo instructing pilots to contact maintenance control about a maintenance problem before recording it in the log. Tr. at 101; CX 52. Complainant understood that to mean that pilots needed permission to log a maintenance discrepancy. Tr. at 102. He observed that there were many maintenance discrepancies on aircraft he flew for Respondent. Tr. at 103.

Complainant discussed the duty and rest time problems with Mr. Clemmons who discussed it with Mr. Frazer. Tr. at 98. When the problems were not abated, he contacted Ron Brown of the FAA, who held a meeting with him and Mr. Clemmons in early January, 2003. Id., 107. The meeting was held in Mr. Clemmons' office at Respondent's business site. At the meeting, Mr. Brown asked Complainant and Mr. Clemmons to put their concerns about duty time and rest periods in writing. Tr. at 108. Almost immediately after Mr. Brown left the meeting place, Mr. Wachendorfer came to Mr. Clemmons' door and commented on their meeting with an FAA official. Tr. at 116. Mr. Wachendorfer told them that he expected problems to be handled "in house", and did not want to involve the FAA. Id. Although nothing else was said to Complainant about his meeting with the FAA, two weeks later Mr. Clemmons was fired. Tr. at 117.

After Mr. Clemmons was fired on January 20 or 21, 2004, Matt Raymond became Director of Operations. Tr. at 72-73; 117. On January 23, 2003, Mr. Raymond sent Complainant an e-mail advising him to provide his required medical documentation, and to complete pilot training records. Tr. at 119, 120; CX 58. Mr. Barker was confused about the request involving records, because Pat Hulsey, who was with Respondent's Part 121 operation, had looked at the records, as did an inspector from the FAA. He believed he had made all necessary changes, and noted that Mr. Hulsey was satisfied and the FAA found the records complete. Tr. at 120, 121. He was aware that he had not completed all of the records pertaining to the upgrade training of Foster and Mercer. Tr. at 121. When Complainant reported to the office, he saw that ground training records were not all signed, and he spent 20 to 30 minutes signing them. Tr. at 122. He also completed the upgrade training records. Id. Although Complainant completed the ground school training records as requested by Mr. Raymond, he did not believe that those types of records are required for pilots working under FAR Part 125. Tr. at 125. Although Mr. Raymond expressed his concern that the records would not meet FAA's

approval, in Mr. Barker's experience with FAA records inspections, FAA allowed airlines to correct records deficiencies without other consequences. Tr. at 131. Mr. Barker was not disciplined because of shortcomings in his recordkeeping. Tr. at 134.

In an e-mail to Complainant, Mr. Raymond advised that he would issue a memo about duty time. Tr. at 132; CX 58. On January 24, 2003, Complainant sent an e-mail to Mr. Raymond that asked for clarification about duty hours, and that proposed getting a written statement on that issue from Respondent's FAA inspector, Ron Brown. Tr. at 135; CX 22. Subsequently, Mr. Raymond sent an e-mail to all of pilots addressing the issue of duty time. Tr. at 138, 139; CX 61. Complainant did not believe that Mr. Raymond adequately resolved the pilots concerns that they were expected to exceed FAR limits on flight time. Tr. at 139-140.

Complainant had also raised a question with Mr. Raymond about which type of fluid would properly de-ice an aircraft during snowing or icing condition. Tr. at 133, CX 75. Mr. Raymond discussed Complainant's concerns with a member of Respondent's maintenance department, who assured Mr. Raymond that the proper de-icing methods were being employed. Tr. at 146. Based on his conversation with maintenance, Mr. Raymond rejected Complainant's recommendation that pilots log the number of times their planes were de-iced and the type of fluid used. Tr. at 146. Complainant was dissatisfied with this response, but did not pursue it further. Id.

Complainant also advised Mr. Raymond of other maintenance problems, including maintenance not recording aircraft problems, or recording that problems were fixed. Tr. at 149. He further believed that some reported maintenance problems were not fixed, because some maintenance problems required repeated recording in a space of time that suggested the defect was not fixed, despite maintenance recording that it was. Tr. at 150. Complainant cited a pressurization problem and fuel leak problems that were repeatedly documented, and apparently not fixed. Tr. at 151. There were also problems with maintenance keeping a sufficient supply of appropriate light bulbs. Tr. at 152-153. On March 28, 2003, Complainant advised Mr. Raymond of these maintenance concerns and others in an e-mail that he also sent to Mr. Frazer, Mr. Wachendorfer, Ron Brown and David Powell. Tr. at 155-156; CX 18. In addition to describing his problems with a fuel leak, Complainant reported that he had observed a bent spoiler panel on his plane (an aircraft part that aids turning, take off and landing). Tr. at 157. When he pointed it out to a mechanic, he was informed that maintenance was aware of the problem, but believed that it met flight tolerances and was clear to fly. Id. Complainant was concerned that there was no record of this maintenance discrepancy in the log. Tr. at 159. Complainant declined to fly until a mechanic looked at it. Id. The panel was indeed defective and needed to be replaced. Id.

Because of the defects in maintenance recording, and the apparent disregard of obvious mechanical problems, Complainant was concerned about flight safety, and believed he had to bring his concerns to the attention of all of management, not just Mr. Raymond. Tr. at 160. On March 28, 2003, Mr. Frazer responded with a promise to investigate Complainant's allegations. Id.; CX 18. He heard nothing else from management until April 14, 2003, when Mr. Raymond and Mr. Frazer called him and told him he was terminated. Tr. at 163. Respondent's agents advised Mr. Barker that he was selected for termination because his salary was higher than any other pilot's. Tr. at 163. He wasn't told who was being retained to fly, but he subsequently

learned that four pilots were retained. Tr. at 164. He believed that Respondent violated its seniority policy by terminating him, because he believed he was first on a seniority list. Id.

Sometime after his termination, Complainant had a conversation with one of the captains who had been retained, Billy Joe Spratt, and learned that at the time of his termination, Mr. Spratt was earning more than Mr. Barker. Tr. at 165. Complainant believes that his termination was directly related to his complaints to the FAA and management and duty hours and maintenance problems. Tr. at 167. Complainant declined to accept an offered severance payment because acceptance was conditioned on his waiving his right to pursue any other claims against Respondent. Tr. at 164.

Complainant was out of work until June 30, 2003, when he began to work for FAA. His starting pay with the government was less than what he earned with Respondent until he completed one year of duty with FAA. Tr. at 172. Complainant claimed remedies in the amount of $16,000.00 for the pay differential after his termination. Tr. at 170-177.

Thomas Clemmons

Mr. Clemmons is an experienced pilot who began working as Director of Operations for Respondent's Part 125 start up operation on September 6, 2002. Tr. at 298-302. No one from management explained what his duties would be, but he had a good idea of the responsibilities and duties that his job entailed. Tr. at 305. He was primarily responsible for recruiting and training pilots and managing the flight operations of the airline. Tr. at 306-307. Mr. Clemmons consulted with his supervisor about pilot candidates and then he conducted interviews. Tr. at 308-310. He did not personally hire Complainant, but knew him from working with him in the past. Tr. at 307. Once Mr. Barker was hired, Mr. Clemmons consulted with him about potential pilots. Id.

Once all the pilots reported for duty, Mr. Clemmons and Mr. Barker conducted ground training, with some help from Mr. Pat Hulsey, who worked for Respondent's Part 121 operation. Tr. at 311; 306. Both he and Complainant were qualified to conduct training because FAA had approved them as check airmen. Tr. at 312. Although a chief pilot is not mandated by FAR Part 125, Respondent concluded that the operation would benefit from having a chief pilot, and Mr. Clemmons recommended Mr. Barker for the position. Tr. at 314. Mr. Clemmons described Complainant as his "right hand man", saying that he was responsible for training. Tr. at 316. Although completing training documentation was ultimately Mr. Clemmons' responsibility, Mr. Barker had conducted training and was responsible for completing training documents also. Tr. at 317. All training documents and pilot files were kept in Mr. Clemmons' office. Tr. at 318. Mr. Clemmons' supervisor, Mr. Frazer, asked Mr. Hulsey to audit the training records, which he did in early November, 2002. Tr. at 320. Mr. Hulsey made some recommendations, which Mr. Clemmons implemented. Tr. at 320 – 324. Mr. Clemmons also asked Mr. H.O. Abbott from the FAA to review the records, which he did on December 10, 2002. Tr. at 324. Mr. Abbott did not relate any problems with the recordkeeping, but Mr. Clemmons sought to ascertain the results of Mr. Abbott's inspection by filing a request for his report under the Freedom of Information Act. Tr. at 325-326. The report found no discrepancies. CX 77.

During his tenure as Director of Operations, Mr. Clemmons received complaints from pilots about their flight schedule and their pay, and he learned that some pilots had concerns about aircraft maintenance and duty and rest hours. Tr. at 331. The pilots' flight schedule had been determined before he came on board. Tr. at 310. FAA regulations require a pilot to be given 8 consecutive hours of rest in a duty period of 24 hours. Tr. at 334. Mr. Clemmons recalled that some pilots reported being encouraged to be creative with their duty time, and had their rest periods interrupted by pages and telephone calls from Respondent's agents. Tr. at 334-335. Mr. Clemmons discussed this issue with Mr. Frazer, who believed that a Part 125 carrier was exempt from the duty time standards, though he never provided Clemmons with documentation to support the exemption. Tr. at 336-337. Mr. Clemmons related an incident where pilots were directed by company officials to stay with a plane until the freight was unloaded, which took longer than the limits on duty time. Tr. at 339. According to Mr. Clemmons, the pilots stayed with the plane on after duty hours, while on their own time, which is not a violation of the FAR as he understood it. Tr. at 339.

Mr. Clemmons also exchanged e-mails with Mr. Wachendorfer on this issue. Tr. at 339; CX 15. Mr. Hulsey was also involved in the exchange, and indicated that he did not believe the company was required to strictly adhere to the duty hour rule. Tr. at 342; CX 15. Mr. Clemmons disagreed with the company's interpretation, and believed that the rule limiting flight time to 16 hours in a 24 hour period applied to Part 125 airlines. Tr. at 343. In reaching his conclusions, Mr. Clemmons had conducted research and consulted FAA officials. Tr. at 344-350. Mr. Clemmons was aware of several management meetings where the topic was discussed, but which he was not asked to attend. Tr. at 350. He had no further discussions with upper management about the issue, but recalled Respondent's management complaining that pilots Spratt and Krutolow were unwilling to extend their duty time over 16 hours, and ended a trip before it reached its scheduled destination. Tr. at 354-356; CX 14. In addition, Mr. Clemmons noticed a pattern of repeated recordings for maintenance problems, which suggested to him that problems were not fixed upon the first documentation. Tr. at 357. Mr. Clemmons brought these concerns to the attention of Mr. Frazer, who wanted the pilots to telephonically advise management of problems before logging them in the book. Tr. at 359-363. Mr. Clemmons perceived this to mean that pilots needed permission to log in a problem. Tr. at 364.

Mr. Clemmons talked with FAA inspector Ron Brown about the duty hour issue at a meeting held in his office during the first week of January, 2003. Tr. at 356-357. Mr. Barker was also present at the meeting. Tr. at 376. Mr. Brown asked for Mr. Clemmons to submit a written request for clarification of the duty hour rules, but he did not have the opportunity to comply. Tr. at 379. Issues involving the airline call letters and their customers were also discussed with Mr. Brown. Id. He did not recall discussing his concerns that Respondent was suggesting that pilots defer making log entries of minor maintenance problems until the plane was at Respondent's base, to avoid hiring a mechanic at the plane's site. Tr. at 357; 386. After Mr. Brown had left Mr. Clemmons' office, Mr. Wachendorfer came to the office and asked if they had held a meeting with the FAA. Tr. at 381. He said nothing more. Tr. at 381. Later, Mr. Frazer asked Mr. Clemmons' who had tipped the FAA off about the call sign, and told Mr. Clemmons that "we handle that business in house. We don't go to the FAA." Tr. at 381. Mr. Frazer terminated Mr. Clemmons a short time after that conversation. Tr. at 382. No reduction

in force ("RIF", hereinafter) occurred during Mr. Clemmons' tenure with Respondent. Tr. at 310-311.

Mr. Clemmons acknowledged that in his position as Director of Operations, he had frequent communications with FAA personnel, many of which included Mr. Barker. Tr. at 385. FAA inspectors were frequently at Respondent's facility (Tr. at 387) and his job duties included requesting clarification from the FAA on FAR issues (Tr. at 388). Mr. Clemmons was not aware of any time that Mr. Barker shared his concerns about duty time with anyone in management above his level. Tr. at 391-392. Mr. Clemmons was not aware of any pilot being disciplined for any issue related to the duty time rule. Tr. at 392. Mr. Clemmons inferred that the instruction to give maintenance a call about aircraft problems was meant to restrict entering information in the log, though he admitted that the FAR does not preclude such phone calls, and requires that log books be updated upon landing. Tr. at 406-407. If pilots fail to record maintenance problems in the flight log, they are subject to FAR sanctions. Tr. at 408.

Aurora Ann Diaz Rives

Ms. Rives, commonly known as "Lolly", is human resources manager for all of Respondent's airlines. Tr. at 414; 420. Her duties include recruiting, interviewing, hiring, and orienting new employees, and maintaining records for employees' benefits. Tr. at 414. She is the point of contact for employees with any personnel, benefit or payroll issue. Id. She administers the company's drug testing programs and maintains the company's personnel files. Tr. at 415. Ms. Rives keeps records of disciplinary actions taken against employees in a confidential file. Tr. at 416. She also keeps records regarding pilot qualifications and licensing, including the results of background investigations of pilot candidates. Tr. at 417; 428.

Ms. Rives was part of the panel that interviewed Mr. Barker before Respondent hired him. Tr. at 441. She played no role in his termination on April 14, 2003. Tr. at 443. She discussed his termination with Mr. Raymond, who included Mr. Barker among those employees terminated as part of a RIF. Tr. at 443. She did not recall Mr. Raymond asking to review pilot files before he made the list of employees to terminate in the RIF. Tr. at 444. Employees of Ameristar Jet Charter were also laid off. Tr. at 445. She recalled Mr. Raymond stating that he made his selections based upon performance, and that four pilots were kept on board. Tr. at 446. She was aware that Mr. Barker's base salary was more than that of the other pilots, but did not know the amount of the difference. Tr. at 448-449. Two of the pilots who were retained when Mr. Barker was terminated in the RIF left the company a few months later. Tr. at 453. She believed that some training was subcontracted for some of the pilots after the RIF. Tr. at 452.

Ms. Rives became aware of Mr. Barker's whistleblowing complaint shortly after he filed it, and in her capacity as human resources manager, was assigned to file a response with OSHA on behalf of Respondent. Tr. at 456. She relied upon discussions with Mr. Barker's managers and other persons familiar with his employment with Respondent to assemble the response. Tr. at 456-480. The response was reviewed several times by counsel. Tr. at 475.

Thomas Wachendorfer

Mr. Wachendorfer is president and sole owner of Ameristar Airways, Inc., Ameristar Jet Charter, Inc., and Ameristar Air Cargo, all three airlines operated by Respondent. Tr. at 494-495. His Part 125 airline, Ameristar Airlines, is certified to carry private carriage. Tr. at 503. Different FAR rules regarding flight and duty time limitations apply to a Part 125 airline than to those under Parts 121 and 135. Tr. at 504. In addition, Part 125 airlines are subject to fewer pilot training requirements and fewer management positions than a Part 121 airline. Tr. at 504-505. The new Part 125 airline that Mr. Wachendorfer established shared operational and administrative functions with his other airlines, such as dispatch, maintenance, payroll, accounting, and billing. Tr. at 516-518. Mr. Wachendorfer approved the hiring of Mr. Clemmons and Mr. Barker. Tr. at 532. He approved the pay schedule for pilots and authorized Mr. Frazer to hire pilots along with the Director of Operations Mr. Clemmons. Tr. at 532-533.

Mr. Wachendorfer recalled an instance where a crew exceeded the limit on duty time, and recalled that another aircraft was dispatched to finish the trip. Tr. at 535. He recalled the pilots refusing to fly beyond what they considered their duty time, and he recalled there was some disagreement about their interpretation of the duty time rule. Tr. at 536. He had some communications with Mr. Clemmons regarding the issue, and he hoped to find support for his position that the duty time didn't apply or could be modified. Tr. at 538-539. He proposed a modification to allow an extension of the duty time in unavoidable circumstances to the FAA, which rejected his proposal. Tr. at 540-543; CX 21. Mr. Wachendorfer recalled that the FAA had advised his company of discrepancies that required corrective action, which the company took. Tr. at 569-570.

Mr. Wachendorfer was shown the list of the pilots targeted for termination in April 2003 by Mr. Frazer or Mr. Raymond. Tr. at 544. He did not recall discussing with anyone which pilots would be let go and which would be retained before the RIF was implemented. Tr. at 546. He did not discuss with Mr. Frazer or Mr. Raymond the reasons that certain pilots were selected for discharge and certain pilots retained. Tr. at 547. Mr. Wachendorfer relied upon his managers Frazer and Raymond to make decisions regarding staffing and he incorporated their reasons for Mr. Barker's selection for discharge through the RIF into his statements before OSHA. Tr. at 558. Among the reasons for retaining Spratt and Humenik was their willingness to be available for flights. Tr. at 564. He did not look at pay records before the discharge of the employees in April. Tr. at 567.

James Matthew Raymond

Mr. Raymond is an experienced pilot who has been employed in the aviation industry since at least the mid-seventies. Tr. at 704-705. He held the positions of chief pilot and director of operations at other airlines before he began working for Ameristar Air Cargo in late 1999. Tr. at 705-706. He was first employed as a line pilot and check airman, and became chief pilot for Ameristar Air Cargo in October, 2000. Tr. at 590. In 2003, he was Director of Operations at Ameristar Airways for a few months, beginning in January of that year. Tr. at 589; 706. He returned to his position as chief pilot with the Air Cargo operation in November, 2003. Id. He continued to fly for Air Cargo during his stint with Airways, and did some flying for Airways as

well. Tr. at 590-591. As Director of Operations, he was responsible for maintaining pilot records. Tr. at 593.

When he took over the job of Director of Operations at Airways, Mr. Raymond discovered incomplete ground school training records, missing certificates, undated and unsigned documents, and other discrepancies that did not comply with Respondent's FAA approved training manual, including records pertaining to Mr. Foster's failed upgrade check ride. Tr. at 595; 721-723. Mr. Raymond had reviewed the records briefly with Mr. Hulsey when he conducted a records review in November, 2002, and was aware that Mr. Hulsey had identified deficiencies in the training records . Tr. at 768-769. Mr. Raymond filled in the information he could on the records, but could not sign training documents because he had not conducted training. Tr. at 724. Mr. Raymond recalled exchanging e-mails with Complainant just days after coming on board in January, 2003, in which he addressed the concerns he had about the incomplete upgrade training records and other record keeping deficiencies that he had observed. Tr. at 602; 719-720; RX 16. He asked Mr. Barker to come to the office to complete the records, which he recalled took him about an hour to do. Tr. at 725. Mr. Raymond did not recall Mr. Barker asking for an explanation for why the forms had to be completed, or telling him that the FAA had looked at the records. Tr. at 726. Because he was responsible for maintaining the records, Mr. Raymond did not anticipate future record deficiencies, and consequently did not feel it necessary to discipline Mr. Barker. Tr. at 734. Mr. Barker was not required to complete any new records because none were generated. Tr. at 612.

Mr. Raymond had particular concerns about the incomplete records for the two pilots who had undergone upgrade training. Tr. at 728. There were no captain's pilot records or temporary certificate and license to show the FAA that Mr. Mercer was qualified as pilot because of his successful completion of upgrade training. Tr. at 728-730. The missing documents are required by the FAA and are described in the approved pilot training manual. Tr. at 730. Mr. Raymond filled in the information he could, but needed Mr. Barker to verify and sign the documents, and to complete the proficiency check form. Tr. at 732. In his e-mail of January 23, 2003, Mr. Raymond advised Mr. Barker that he needed the training documents to be completed, which Mr. Barker accomplished when he completed the other training documents. Tr. at 731-732. Mr. Raymond thought it was a serious failure for Mr. Barker to have allowed a month to lapse before completing the documents that authorized Mr. Mercer to fly as a captain. Tr. at 733. Although Mr. Raymond wanted the records completed by Mr. Barker, he did not consider it critical that Mr. Foster's records be updated because he was on medical leave. Tr. at 597.

Mr. Raymond could not recall how he first learned that Mr. Foster had failed a check ride, but remembered hearing about the incident before assuming his position as Director of Operations. Tr. at 601. Mr. Raymond did not think it was appropriate to send a captain candidate for his check ride with a newly minted pilot, which he believed to be the case when Mr. Foster failed his upgrade testing when flying with Mr. Mercer. Tr. at 736. Mr. Raymond also believed that because Foster failed his upgrade training, he should not have flown as first officer. Tr. at 738. His concern led him to instruct Mr. Foster not to record having flown as first officer after failing the check ride, an instruction which he acknowledged was improper. Tr. at 607-610. Mr. Raymond also acknowledged that his interpretation of the rule regarding the

propriety of Mr. Foster flying was in error, but defended his action as an error on the conservative side. Tr. at 611.

Mr. Raymond described pilot morale at the time he took over as DOP as very low because of pilot pay and work schedule. Tr. at 612; 714. In early February, 2003, Complainant sent to Mr. Raymond an e-mail that discussed the poor morale of the pilots, and proposed a method to increase their pay. Tr. at 715; RX 8. Mr. Raymond was aware that pilots who flew for Respondent's other operations earned more, but he did not think that Mr. Wachendorfer would be open to pay negotiations, considering the state of Respondent's business. Tr. at 716-718. He did not pass along Mr. Barker's proposal. Tr. at 717. Mr. Barker had also proposed an alternate work schedule for pilots that Mr. Raymond did not share with upper management because he was aware that upper management would not change the schedule. Tr. at 719.

Mr. Raymond recalled being advised by e-mail from the Complainant that pilots wanted clarification about the duty hours and time issue. Tr. at 612; 746; RX 18. He was aware that pilots had questions about this issue (CX 59) and thought it reasonable to ask FAA for clarification. Tr. at 747. He sent his understanding of the rules to all pilots in an e-mail (RX 19) and to Respondent's FAA operating inspector, Ron Brown. Tr. at 748. Later, he spoke with Mr. Brown, who told him that Respondent was in compliance on the 16 hour duty time issue. Tr. at 749. Mr. Raymond did not recall discussing this issue further with Mr. Barker, but recalled telling two other pilots that Mr. Brown had clarified Respondent's position on the issue. Tr. at 751. He did not recall Complainant requesting an update on the issue. Tr. at 751-752.

Mr. Raymond was aware of Respondent's expectation that pilots would advise maintenance control of problems that they logged in the maintenance log book, so that maintenance could be arranged in advance. Tr. at 743. He did not understand this policy to constitute a pilot's need for permission to log a maintenance problem. Tr. at 744-745. Mr. Raymond did not recall Mr. Barker raising this issue, but did recall discussing it with other pilots. Id. Mr. Raymond received an e-mail from Mr. Barker in late January, 2003 that questioned which fluid would be appropriate for de-icing procedures. Tr. at 752-753; CX 75. In response, Mr. Raymond spoke with Respondent's director of maintenance, Mike Crawford, and sent an e-mail to the pilots that summarized his conversation with Mr. Crawford. Tr. at 753; CX 75. He recalled no further communications from Complainant on this issue. Tr. at 754. He spoke with Mr. Barker about maintenance issues, and recalled receiving a copy of a letter addressed to the FAA from Complainant in late March, 2003 that addressed two specific maintenance issues. Id.; RX 20. Mr. Raymond believes he spoke with Mr. Crawford about taking pilot concerns about maintenance seriously, and recalled that both maintenance issues were repaired. Tr. at 754 -756. He did not believe he advised Complainant that he had looked into these issues because Mr. Barker was flying, and he did not want to cut into his rest period. Tr. at 757. Mr. Raymond thought Mr. Barker was within his rights to contact the FAA if he had concerns about maintenance. Tr. at 758. Mr. Raymond estimated that he had daily communications with representatives of the FAA, and expected that Mr. Barker would have met with FAA officials frequently. Tr. at 741-742. He recalled seeing FAA officials with Mr. Barker in his office. Id.

Mr. Raymond made the decision to terminate Mr. Barker. Tr. at 616. On the day Complainant was terminated, Mr. Raymond discussed with Mr. Frazer who would be let go in Respondent's RIF. Id. Respondent decided to run its operation with only one airplane, and discussions were held with upper management for about a week about how many people it would take to do that, and how many people to let go. Tr. at 618-619. The company had considered reducing the workforce because of lack of business for months, and by April, had made the decision to implement a reduction in force. Tr. at 621. Mr. Raymond identified the personnel to be eliminated after consulting with Ms. Rives about procedural issues and the backgrounds of individuals. Tr. at 622. He compared pilot salaries, and noted that Mr. Barker earned almost twice as much as many of the line pilots. Tr. at 624. His comparison included consideration of extra salary that pilots had received and called "mystery money", and mileage bonuses. Tr. at 625.

Mr. Raymond discussed his reasons for selecting the pilots who remained with Respondent at a meeting with Respondent's management officials on the morning that the reduction in force was implemented. Tr. at 627. He made his selection on the basis of performance primarily, and the willingness of the pilots to stay with Respondent long-term. Tr. at 628. He needed to keep two crews available to fly one plane all the time, so he needed four pilots. Tr. at 641. The selection process did not consider the seniority of pilots. Id. Mr. Raymond considered the purpose of the seniority list was to resolve conflicts between pilots bidding for the same flights and schedule. Id.

When Mr. Raymond took over as Director of Operations in January, 2003, Mr. Barker was chief pilot, but he was primarily flying a regular schedule. Tr. at 707. During the period from January, 2003, until his termination in April, 2003, Mr. Barker did not engage in any activity related to chief pilot duties. Tr. at 708. Mr. Barker was not pleased about his flying schedule, and sometime in March, 2003 told Mr. Raymond "that he wasn't sure he wanted to keep doing this". Id. Mr. Raymond recalled having discussions with Complainant wherein he expressed his unhappiness with his pay and his reluctance to stay with Respondent. Tr. at 708; 629. Mr. Raymond believed that Mr. Barker was paid a salary of $64,000.00 per year, with extra pay for check airman duties. Tr. at 709. He compared Complainant's salary as being almost double what other pilots earned. Tr. at 710. Although the pilot salary schedule anticipated bonuses tied to mileage, few pilots were able to meet the mileage threshold that would have earned them much incentive pay. Tr. at 711. Mr. Raymond observed that business had been dropping off, and he did not see that it would improve. Id. Although Mr. Raymond had no opinion regarding Complainant's competence as a pilot, he had concerns over the timeliness and condition of flight paperwork that Complainant submitted, such as flight releases, flight plans, weight and balance reports, freight manifests, and fee sheets, which he considered significant to pilot performance. Tr. at 739-740. Mr. Raymond considered Complainant's handling of required paperwork as below average. Tr. at 740.

When Respondent decided to limit its operation to one plane, Mr. Raymond was given the responsibility to determine which pilots to keep on board to crew the plane. Tr. at 760. He received background information from Ms. Rives about the RIF process, but she had no other input in the decision making process. Id. Mr. Raymond did not recall consulting with other

management officials about his reasons to include Mr. Barker among the terminated pilots. Tr. at 762.

Mr. Raymond and Mr. Frazer together advised Complainant that he was being terminated, although Mr. Frazer conducted most of the conversation. Tr. at 631. He recalled that Mr. Barker was advised that money concerns were involved in the decision to terminate him. Id. Mr. Raymond was happy to let Mr. Frazer perform a distasteful duty, and did not think it was necessary to add that Mr. Barker's performance played a role in the decision. Tr. at 762. The same procedure was used when informing all of the six pilots who were let go. Tr. at 763. Four pilots remained, but the captains resigned after a short time, and then the remaining two first officers were laid off. Id.

Mr. Raymond denied considering any other factor other than money and performance in selecting which pilots to retain and which to let go. Tr. at 642. He recalled that two of the pilots who were retained, Spratt and Humenick, left within months. Tr. at 629. Spratt advised him he had another job, and Humenick had concerns over maintenance issues. Id.

Respondent did not continue the chief pilot position after its RIF in April, 2003. Tr. at 709. Although the position of chief pilot was not required, Mr. Raymond performed the duties associated with that position after the RIF. Tr. at 706. Because the operation was so small, little was required of that job. Tr. at 707. During Mr. Raymond's tenure as Director of Operations, two pilots needed a proficiency check that was conducted in Minnesota with a contractor at a cost of about $2,200.00. Tr. at 712-713. Mr. Raymond concluded that Respondent would have had to pay more for Mr. Barker to perform these duties, considering his base salary, extra pay for check airman duties, and the transportation and lodging costs to the off-site simulator that Respondent used. Tr. at 713-714.

At the end of March, 2003, at Mr. Frazer's request, Mr. Raymond forwarded to him a list of problems he had observed regarding training of pilots, including paperwork shortcomings. Tr. at 634-635; 759. He itemized those actions that he believed needed to be completed in order to comply with FAA requirements for a Part 125 operation. Tr. at 651. Mr. Raymond believed that Mr. Frazer's request was related to a claim filed by Mr. Clemmons with the State of Texas. Tr. at 759. Mr. Raymond acknowledged that some of the information in his March 31, 2003 response to Mr. Frazer could have related to Mr. Barker, but that the issues addressed Mr. Clemmons' responsibilities. Tr. at 759; CX 47.

Daniel Patrick Hulsey

Mr. Hulsey is an experienced pilot who has worked for Respondent since 1999. Tr. at 658. He is Director of Operations for the Part 121 airline of Respondent's operation, Air Cargo. Tr. at 658. Mr. Hulsey has experience as check airman, chief pilot, director of training, and assistant director of operations at other airlines, and serves on the Part 125/135 FAA Rule making Committee. Tr. at 658-659. His duties as Director of Operations require Mr. Hulsey to discuss many aspects of the airline's operations with FAA, including company policies, pilot training and qualifications, pilot records, exemptions. Tr. at 661. He estimates meeting with FAA officials in person once every two weeks and having almost daily phone conversations with

FAA inspectors. Tr. at 661. Typically, three FAA inspectors work with each airline, getting involved with maintenance and avionics issues, and it is common to have dialogue with them regarding the propriety of an airline's actions. Tr. at 661-662.

Mr. Hulsey has not held an official position with Ameristar Airways, and did not participate in the selection of pilots for that operation, but was involved with training pilots in handling hazardous materials. Tr. at 663. He recalled that Complainant conducted the majority of pilot ground training, but that he conducted the "Haz-Mat" training. Tr. at 665. He completed and maintained the pilot training records pertaining to that training. Id. Mr. Hulsey is familiar with training requirements for upgrading pilot positions. Tr. at 666- 668. He considered it important to document the performance of pilots in upgrade training, and he believed such documentation was required by training manuals that the FAA approves and inspects. Tr. at 670. If a pilot failed a portion of the training, Mr. Hulsey would consider dismissing the pilot, or retraining him, depending upon the degree of the failure. Tr. at 671. He believed a pilot who failed a portion of upgrade training should be removed from the flying roster. Tr. at 672; 691.

In addition to the training he provided to the new pilots, in November, 2003, Mr. Hulsey conducted an audit of Respondent's records at the request of Mr. Fraser and Mr. Wachendorfer. Tr. at 672 -675. His audit disclosed missing records, which he discussed with Mr. Clemmons and Mr. Barker. Id. He didn't recall either disputing his findings. Tr. at 676. Mr. Hulsey looked at the records again in early January at the request of Mr. Frazer. Id. He observed that some of the records that had been incomplete at the time of his November audit were completed, but ground school records were still not adequately completed. Tr. at 677-679. Mr. Hulsey was concerned because in the time between his first audit and second, pilots were flying without proper certification of their completed trainings. Tr. at 680.

Deposition Testimony

Brent Barker testified at an oral deposition on May 28, 2004. His testimony was reiterated at the hearing before me.

Tom Wachendorfer testified at an oral deposition on May 25, 2004. His testimony was reiterated at the hearing before me.

Lolly Rives testified at an oral deposition on May 26, 2004. Her testimony was reiterated at the hearing before me.

(James) Matthew Raymond testified at an oral deposition on May 27, 2004. His testimony was reiterated at the hearing before me.

Lindon Frazer testified at an oral deposition on May 27, 2004. The record contains just one page, number 153, which implies a lengthier deposition transcript. That one page was included in Complainant's response to Respondent's motion for summary decision. By itself, it has little probative value.

Affidavit & Declaration Testimony

Steven K. Hoffman is an attorney who represents Complainant, and who stated that discovery conducted in the litigation of this matter produced an excerpt from Respondent's General Operations Manual that set forth the duties and responsibilities of the position of Director of Operations. Mr. Hoffman also asserted that Respondent did not produce any documents relating to the ranking of pilots for purposes of accomplishing Respondent's RIF.

Thomas Clemmons gave a written declaration submitted in support of Complainant's response to Respondent's motion for summary decision. His assertions therein were reiterated in his oral testimony.

Brent Barker gave a written declaration submitted in support of his response to Respondent's motion for summary decision. His assertions therein were reiterated in his oral testimony.

Tom Wachendorfer, Jr. gave a written statement submitted in support of Respondent's motion for summary decision. His assertions therein were reiterated in his oral testimony.

(James) Matt Raymond gave a written statement submitted in support of Respondent's motion for summary decision. His assertions therein were reiterated in his oral testimony.

Lindon Frazer gave a written affidavit on September 23, 2003, in which he stated that he has held the position of Vice President of Operations with Ameristar Airways Inc. since July 10, 2002. Mr. Frazer's affidavit primarily discussed his reasons for discharging Thomas Clemmons from his position as Respondent's Director of Operations.

Documentary and Other Evidence

Filings and Pleadings of the parties shall be referred to by description herein. The parties included documentary evidence with its pleadings regarding Respondent's motion for summary decision. I issued a separate Order on that issue, and this Decision and Order does not enumerate and describe those documentary exhibits, many of which were admitted to the record at the hearing, and are duplicative.

Complainant submitted exhibits that were marked CX 1 through CX 80, with the exception of Exhibits 25, 26, and 37, which were not submitted, and Exhibits 34, 35, and 36, which were withdrawn. At the hearing, I sustained Respondent's objection to Exhibits 7, 67 and 68, and those are excluded.[2] Tr. at 11-14. Some of the documents had been submitted earlier with Complainant's response to Respondent's motion for summary decision. I received into the record and considered all evidence in ruling on that motion under separate Order issued October 7, 2004. I incorporate all duplicate exhibits into the exhibits offered at the hearing, described below:

[2] I note that Exhibits CX 42 through 46 pertain to an employee other than Complainant, and have little relevance to my determination. However, Respondent did not object to their admission, and they are admitted, but are entitled to little weight. See Tr. 11-14.

1. FAA Air Carrier Certificate for Ameristar Air Cargo, Inc., effective date September *5,* 2000, authorizing Ameristar Air Cargo, Inc. to conduct common carriage operations.

2. FAA Air Carrier Certificate for Ameristar Jet Charter, Inc., effective date August 23, 2000, authorizing Ameristar Jet Charter, Inc. to conduct common carriage operations.

3. T. Wachendorfer's letter and Preapplication Statement of Intent, dated July 11, 2002, and stamped received July 19, 2002, to D. Dalbey at the FAA re: Ameristar Airways, Inc.'s application for a certificate to conduct operations in accordance with FAR Part 125, naming Thomas K. Biondo as Director of Operations and Lindon Frazer as Director of Maintenance, and proposing to utilize personnel and resources from affiliated companies, Ameristar Air Cargo, Inc. (FAR 121) and Ameristar Jet Charter, Inc. (FAR 135).

4. T. Wachendorfer's letter, dated August 30, 2002, to D. Dalbey at the FAA re: FAR Part 125 Application by Ameristar Airways, Inc.

5. Ameristar Airways, Inc.'s Amended Preapplication Statement of Intent dated September 3, 2002, re: Ameristar Airways, Inc.'s application for a certificate to conduct operations in accordance with FAR Part 125.

6. FAA Air Carrier Certificate for Ameristar Airways, Inc., effective date October 19, 2002, authorizing Ameristar Airways Inc. to operate as an Air Operator and conduct 14 C.F.R. 125 Operations.

8. Ameristar Airways, Inc.'s Part 125 General Operations Manual, Page A-3, describing the role of Management Personnel and listing the management personnel duties, responsibilities, and authority of the President.

9. Director of Operations Clemmons' and Chief Pilot Barker's Memorandum to Management, dated November 25, 2002, re: DC-9 Pilot Program, making a proposal for pilot pay and compensation.

10. T. Wachendorfer email to L. Frazer, dated November 26, 2002, re: Part 125 schedule problems.

11. T. Wachendorfer email to L. Frazer, dated December 2, 2002, re: Humenik, concerning pilot failure to arrive on time for flight from Oklahoma City.

12. T. Wachendorfer email to P. Hulsey and L. Frazer, dated January 9, 2003, re: 125.119, discussing access to crew emergency exits.

13. T. Wachendorfer email exchanges with T. Clemmons, S. Muth, L. Frazer, dated January 9, 2003, re: 125.119, discussing accessibility requirements in cargo compartments.

14. T. Wachendorfer email to T. Clemmons, L. Frazer and S. Muth, dated December 7, 2002, re: Trip 46650, concerning crew problems, the refusal of pilots Spratt and Krutolow to take a trip because of duty time; noting the "vast majority" of DC-9 trips has had a problem; and requiring a meeting of Frazer, Clemmons, Barker and Muth.

15. T. Wachendorfer email dated December 11, 2002, to T. Clemmons, forwarding December 10, 2002, e-mail from P. Hulsey re: Beyond Our Control and attaching document named 12 1_So5ExceedDuty. doe.

16. T. Wachendorfer memo to L. Frazer and T. Clemmons, dated January 9, 2003, re: Ameristar Airways pilot schedule, describing January and February pilot schedule as "unacceptable," and ordering a revised schedule for a 2 week on, 1 week off rotation.

17. T. Wachendorfer email to L. Frazer, P. Hulsey and M. Raymond dated March 28, 2003, forwarding T. Clemmons January 13, 2003, e-mail to pilots, re: Revised Schedule.

18. L. Frazer email to B. Barker, M. Raymond, T. Wachendorfer, D. Powell and R. Brown, dated March 28, 2003, re: Barker/Safety Allegations stating Frazer would investigate the allegations and report back "to all of you"; and B. Barker March 28, 2003, memo re: Ameristar DC-9 Maintenance expressing concerns about lack of maintenance and discrepancies discovered during routine scheduled maintenance checks not entered in the aircraft logbooks, and providing two examples.

19. Email exchange between T. Clemmons and T. Wachendorfer, et al., dated December 17 and 18, 2003, re: FAR Part 125 Duty, discussing the 16 hour duty limit as applied to Part 125 operations.

20. AOPA legal office memo, dated November 3, 2002, re: "Court Upholds the Whitlow Letter 16-Hour Duty Limit", with attached opinion from AOPA Legal Office re: 125 Rest Requirement Interpretation.

21. Portion of January 17, 2003, letter from T. Wachendorfer to FAA re: Part 125.3 7(b) duty and rest times and R. Brown, FAA, January 30, 2003, response, denying Ameristar Airways, Inc.'s proposal to modify flight and duty time limitations.

22. B. Barker email to M. Raymond, dated January 30, 2003, re: FAR Part 125.37 Crew Rest & Duty, suggesting obtaining a written statement from FAA inspector Ron Brown.

23. M. Raymond letter to R. Brown, dated May 26, 2003, seeking interpretation of FAR 125.37(a) re: rest and duty limitations, and R. Brown's response to T. Wachendorfer re: same, dated May 28, 2003.

24. FAA attorney L. Word's letter to T. Wachendorfer, dated December 31, 2003, re: charged violations of FAR Section 125.11(b), finding that 112 Ameristar Airways, Inc. flights constituted flights in common carriage, and suggesting a settlement fine of $123,200.00.

27. T. Lambert, FAA, memo re: Phone Conversation, dated March 12, 2003, between T. Lambert, L. Frazer and T. Wachendorfer re: Letter of Investigation addressing Holding out to the Public (FAR 125.11(b)).

28. A. Chennault, FAA attorney, letter to S. Isreal, dated March 1, 2004, re: Notice of Informal Conference, setting March 30, 2004 for an informal conference to discuss Civil Penalty Letter dated December 31, 2003 (CX-24).

29. T. Wachendorfer letter to T. Lambert, FAA, dated March 13, 2003, re: Part 125 issues, listing the names of other Part 125 carriers allegedly engaging in common carriage.

30. T. Wachendorfer letter to T. Lambert, FAA, dated March 31, 2003, re: investigation of "holding out.. . to the public", justifying the practice of Ameristar Airways, Inc. on the basis that other Part 125 carriers operate in the same manner, and stating that FAA Headquarters Flight Standards is in the process of reviewing Part 125 operations.

31. Attorney A. Chennault's, FAA, fax to Attorney S. Isreal, dated April 13, 2004, re: 112 flights, case no. 2003SW070038, with attached list of Alleged Flights.

32. Affidavit of Tom Wachendorfer, Jr., dated September 23, 2003.

33. Ameristar Airways Dispatch Log re: events, 1/16/03—2/13/03, noting 1/17/03 communications re: loading problem and conversation between T. Wachendorfer and the co-pilot.

38. Brent Barker's Confidential Employment Application File, including background check information and State of Michigan new hire reporting form, reflecting Mr. Barker's employer was Ameristar Jet Charter, Inc.

39. Brent Barker's Medical and Personnel Files. The medical files show that Ameristar Jet Charter, Inc. carried health insurance for Mr. Barker. The personnel files include payroll status change forms, lists of property issued to and returned by Mr. Barker, paperwork checklist for new hires, Ameristar Jet Charter, Inc.'s Section 125 Tax Savings Plan for Mr. Barker, information on American Express corporate card issued to Mr. Barker, an Employment and No-Compete Agreement signed by Mr. Barker, a Confidentiality Agreement signed by Mr. Barker, Mr. Barker's W-4 form showing his employer to be

Ameristar Jet Charter, Inc., forms signed by Mr. Barker relating to Ameristar Jet Charter's Substance Abuse Program, Acknowledgment of Receipt of Ameristar Jet Charter, Inc. policies signed by Mr. Barker, and Mr. Barker's Application for Employment to Ameristar Jet Charter, Inc.

40. Ameristar Airways, Inc.'s General Operations Manual, Section 1.2.4. Chief Pilot and Check Airman, dated February *5,* 2003, and January 22, 2003, listing duties of the Chief Pilot and Check Airman.

41. Ameristar Airways, Inc.'s Flight Crew Policies, dated January 1, 2003, including the Seniority policy and appending Ameristar Airways, Inc.'s Seniority List.

42. L. Rives' fax cover sheet and response to Texas Workforce Commission, dated February 5, 2003, re: T. Clemmons' Notice of Application for Unemployment Benefits, stating alleged reasons for Mr. Clemmons' termination.

43. L. Rives' fax cover sheet and response to Texas Workforce Commission, dated March 31, 2003, re: T. Clemmons' Notice of Application for Unemployment Benefits, stating alleged reasons for Mr. Clemmons' termination.

44. L. Rives' fax cover sheet and response to telephone contact (4/4/03) by Gloria Sharp, TWC, dated April 4, 2003, re: T. Clemmons' unemployment claim, giving additional alleged reasons for Mr. Clemmons' termination.

45. L. Rives' letter to Commission Appeals, TWC, dated June 26, 2003, re: appeal from June 25, 2003, determination in T. Clemmons' unemployment claim.

46. L. Rives' letter (w/ attachments) to U.S. Dept. of Labor, Occupational Safety and Health Administration, dated May 9, 2003, re: T. Clemmons' AIR21 discrimination claim, stating alleged reasons for Mr. Clemmons' termination.

47. L. Rives' letter (w/ attachments) to U.S. Dept. of Labor, Occupational Safety and Health Administration, dated May 7, 2003, re: B. Barker's AIR21 discrimination claim, stating alleged reasons for Mr. Barker's termination.

48. L. Rives' letter (w/ attachments) to U.S. Dept. of Labor, Occupational Safety and Health Administration, dated June 9, 2003, re: B. Barker's AIR21 discrimination claim, responding to some of Mr. Barker's allegations and stating alleged reasons for the terminations of Mr. Barker and Mr. Clemmons.

49. Respondent's Objections and Answers to Complainant's First Set of Interrogatories, dated April 1, 2004.

50. Affidavit of Lindon Frazer, dated September 23, 2003 (w/ attachments), stating alleged reasons for the termination of Mr. Clemmons.

51. Capt. B.J. Spratt and F.O. M. Krutolow's memo to Capt. T. Clemmons and Capt. B. Barker, dated November 15, 2002, re: safety and efficiency, asking for interpretation and explanation of time and duty requirements and the procedure for writing up maintenance discrepancies.

52. Email exchange between L. Frazer and T. Clemmons, copied to T. Wachendorfer, dated December 2, 2002, re: general, with draft list of required procedures to be circulated to pilots.

53. Email exchange between S. Muth and T. Clemmons (cc: L. Frazer), dated December 31, 2002, and January 6, 2003, re: flight plans. This document reflects communications concerning the use of Ameristar Jet Charter, Inc.'s call sign by Ameristar Airways, Inc.

54. Affidavit of Matt Raymond, dated September 25, 2003, concerning alleged deficiencies in pilot training records.

55. M. Raymond email to L. Frazer, dated March 31, 2003.

56. February 6, 2003, letter from M. Raymond to R. Brown, FAA, re: manuals, and R. Brown March 4, 2003, response to T. Wachendorfer re: same.

57. February 23, 2003, letter from M. Raymond to R. Brown, FAA, re: grace period for training, and R. Brown February 24, 2003, response to T. Wachendorfer re: same.

58. Email exchange between M. Raymond and B. Barker, dated January 23-25, 2003, re: medical, discussing training records.

59. J.C. Schneider letter to M. Raymond, dated January 24, 2003, re: FAR 125.37 duty period limitations, expressing concern over eight consecutive hours relief from duty in each 24-hour period, and requesting a written statement concerning Ameristar's policy on crew rest and duty time.

60. G. Mercer email to T. Clemmons, dated January 25, 2003, re: [no subject], discussing a trip where Mr. Mercer was twice asked to exceed 16 hours duty.

61. M. Raymond memo, dated January 30, 2003, re: duty time, discussing and interpreting FAR 125.37, the federal regulation on duty period limitations for Part 125 carriers.

62. T. Lambert, FAA, letter to T. Wachendorfer, dated March 7, 2003, re: February 14, 18 and March 4, 2003 inspections and discrepancies; D. Powell, FAA, letter to T. Wachendorfer, dated March 31, 2003, re: same.

63. D. Powell, FAA, letter to T. Wachendorfer dated April 3, 2003, re: April 1, 2003, inspection; D. Powell, FAA, letter to T. Wachendorfer, dated May *5,* 2003, re: same.

64. A. Granados, FAA, letter to T. Wachendorfer, dated May 30, 2003, re: May 22, 2003, inspection; M. Raymond response to A. Granados, dated June 9, 2003; A. Granados reply to T. Wachendorfer, dated June 13, 2003.

65. D. Powell, FAA, letter to T. Wachendorfer, dated July 2, 2003, re: June 30, 2003, inspection (inboard spoiler); M. Raymond response to D. Powell, dated July 16, 2003.

66. T. Lambert, FAA, letter to T. Wachendorfer, dated July 11, 2003, re: June 30, 2003, inspection (paflets); M. Raymond response, dated July 29, 2003, with attachments; T. Lambert, FAA, reply to T. Wachendorfer, dated August 7, 2003.

69. B. Barker letter to R. Nardizzi, OSHA, U.S. Dept. of Labor, dated April 24, 2003, re: AIR2 1 Complaint against Ameristar Airways, Inc., explaining his allegations against Ameristar Airways, Inc. and his claims under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.

70. G. Foster, U.S. Dept. of Labor, cover letter to B. Barker, dated January 20, 2004, attaching J. Miles, Regional Administrator, OSHA/DOL, Findings and Preliminary Order in Ameristar/ Barker Case No. 6-1730-03-803 on AIR21 Complaint against Ameristar Airways, Inc./ Ameristar Jet Charter, Inc., finding the complaint was investigated and determined to have merit.

71. Ameristar Airways Captains' Pay Scale.

72. Ameristar Airways, Inc.'s Part 125 General Operations Manual Section A-4.2, Director of Operations, dated July 1, 2002, listing the duties, responsibilities and authority of the Director of Operations of Ameristar Airways, Inc.

73. K. Daniels email to S. Muth, dated December 18, 2002, re: DC-9 and S. Muth email to T. Clemmons and L. Frazer, dated December 18, 2002, re: same, in which Ms. Muth asked Mr. Clemmons what were the procedures for aircraft charts.

74. T. Clemmons letter to R. Brown, FAA, dated January 7, 2003, requesting permission for Ameristar Airways, Inc. to use the Ameristar Jet Charter, Inc.'s call sign and 3-letter

ICAO designator code.

75. D. Kotker, Boeing Commercial Airplanes Group, memorandum re: de-icing and attached notes from B. Barker and M. Raymond, dated January 30, 2002, concerning dangers from the repeated use of Type IV fluids for de-icing, Mr. Barker's concerns about Type IV fluids, and Mr. Raymond's response.

76. S. Humenik memo to T. Clemmons and B. Barker, dated January 17, 2003.

77. J. Tintera, FAA, response to T. Clemmons' FOIA request, dated April 26, 2004, re: H.O. Abbott's inspection of Ameristar's record keeping, and attached records of inspection.

78. G. Kirkendall, FAA, letter to T. Clemmons, dated April 21, 2003, re: preliminary results of FAA investigation into Ameristar Jet Charter, Inc., reporting that the FAA had investigated Mr. Clemmons' safety complaint.

79. Invoice # MN3O5124, dated May 15, 2003, from Pan Am International Flight Academy to Ameristar Airways, Inc., showing that Pan Am International Flight Academy charged $2,200 on May 15, 2003, for simulator training for Captains Humenik and Spratt.

80. Final Investigative Report, U.S. Department of Labor, Office of Investigative Assistance, Region VI, Dallas, Texas, in Barker v. Ameristar, 6-1730-03-803, undated draft.

Respondent submitted exhibits identified as RX-1 through RX-29. Some of the documents had been submitted earlier with Respondent's motion for summary decision. I received into the record and considered all evidence in ruling on that motion under separate Order issued October 7, 2004. I incorporate all duplicated exhibits into the exhibits offered at the hearing, as described below:

1, 2. Complainant's Application for Employment with Ameristar and resume.

3. Pilot's Employment and Non-Competition Agreement signed by Complainant upon his employment with Ameristar.

4. Employee's Confidentiality Agreement Complainant signed upon his employment with Ameristar.

5. Description of duties for the position of chief pilot, excerpted from Ameristar's General Operations Manual. This exhibit describes the duties and responsibilities of Complainant's position prior to his discharge.

6. Describes the duties of a check airman, a position Complainant held prior to his discharge.

7. Memo which Complainant and Tom Clemmons addressed to "Dear Sirs".

8. E-mail from Complainant to Matt Raymond asking him to consider an attached memo that proposed pay and scheduling changes for the pilots.

9. Handwritten and typewritten memo in which Barker states he "botched everything up" on his first day alone.

10. E-mail from Tom Wachendorfer to Lindon Frazer in which Wachendorfer discusses scheduling problems and declares that "the schedule is not working," then directs Frazer to return to Wachendorfer's previous schedules.

11. Letter from Scott Preuninger to Thomas Clemmons, resigning his pilot's position and complaining about various aspects of his employment.

12. E-mail from Tom Clemmons to the pilots he supervised, forwarding a letter of resignation he received from Scott Preuninger.

13. E-mail from Ted Wachendorfer to Lindon Frazer, Pat Hulsey, and Matt Raymond, forwarding an e-mail which Tom Clemmons sent to all pilots.

14. Timeline of complaints from pilots, prepared by Thomas Clemmons, along with Clemmons' and Barker's responses and a timeline of FAA involvement.

15. E-mail from Matt Raymond to Complainant, informing him of deficiencies in the training records for the pilots.

16. Exchange of e-mails between Matt Raymond and Complainant discussing problems in pilot records.

17. E-mail from Matt Raymond to Lindon Frazer discussing problems with Ameristar's various manuals and corrections that Raymond has made to the manuals.

18. Exchange of e-mails between Matt Raymond and Complainant regarding duty time and rest time for pilots.

19. E-mail from Matt Raymond to pilots discussing duty time and FAR 125.37. The e-mail provides detailed explanation of the regulations and its application to the pilots.

20. Memorandum addressed "To Whom It May Concern" from Complainant, discussing maintenance issues on the Company's airplanes.

21. E-mail from Lindon Frazer to Complainant and the pilots, responding to a previous e-mail from Complainant.

22. Letter from Ronald Brown of the FAA to Mr. Wachendorfer, explaining the FAA's interpretation of FAR Part 125.37(a).

23. Letter written from Complainant to Clemmons discussing some of their complaints while employed with the Company.

24. Letter from Complainant to Ms. Rossana Nardizzi of OSHA, responding to Ameristar's initial response which the Company had provided OSHA in answering Complainant's original complaint.

25. Summary of "Responses" compiled by Complainant.

26. Letter to Ms. Nardizzi from Complainant, responding to Ameristar's position statement provided to OSHA from the Company's outside counsel.

27. Statement of unemployment benefits Complainant received from the Texas Workforce Commission.

28. Letter "To Whom It May Concern" from Robert J. Allen of AVIA Crew Leasing, LLC, indicating that Complainant was paid $1427.44 in June of 2003.

29. "Payroll Status Change" form from Ameristar, dated April 14, 2003, indicating Complainant was discharged due to "reduction in force."

B. Jurisdiction

Respondent did not object to the application of the AIR21 Act on jurisdictional grounds, and I find that Respondent is an air carrier within the meaning of 49 U.S.C. § 42121 that engaged in interstate commerce. I further find that Respondent is a covered employer and Complainant was an employee of the Respondent within the meaning of the AIR21 Act.

An additional issue arises regarding whether jurisdiction of this case lies solely with Ameristar Airways, Respondent herein. Ameristar Airways is one of three airlines owned by Thomas Wachendorfer. Airways shares office headquarters with Ameristar Jet Charter, Inc. and Ameristar Air Cargo. The airlines share common personnel, including President Thomas Wachendorfer, General Counsel Ted Wachendorfer, Human Resource Manager Lolly Rives, and Chief of Dispatch Stacy Muth. Maintenance is shared, and employees have worked or acted in an official capacity for, more than one of the airlines, sometimes simultaneously, including Lindon Frazer, Pat Hulsey, and Matt Raymond. The three airlines operate under separate FAA certificates. Air Cargo is a Part 121 carrier, Jet Charter is a Part 135 airline and Airways was certified under Part 125. In addition to sharing maintenance and dispatch, the airlines also have a common scheduler.

The Supreme Court has concluded that "several nominally separate business entities [constitute] a single employer where they comprise an integrated enterprise." *Radio and Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). The Court relied upon such factors as whether operations were interrelated, and whether there was common management, common ownership and centralized labor relations. Id. I find that such commonality exists between the three airlines owned and operated by Thomas Wachendorfer. Although the evidence demonstrates that certain individuals held discrete knowledge pertaining to the separate FAA certificates under which the airlines operate, there is integration of ownership, maintenance, scheduling, dispatch, personnel operations, and management among all three. I find that the airlines are integrated sufficiently to comprise a single employer.

C. Statement of the Law

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121. Subsection (a) prohibits 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 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.

49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(b)(1)-(4). An employee's complaint may be oral or in writing, but must be specific in relation to a given practice, condition, directive, or event. *Peck v. Safe Air International Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB January 30, 2004). The complainant must have a reasonable belief that his complaint is valid. Id.

The AIR21 Act requires a complainant to establish a *prima facie* showing that the protected activity described at 49 U.S.C. § 42121(a) was a contributing factor in the unfavorable personnel action taken against him. *Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ February 15, 2002). Once the Complainant presents a prima facie case, then respondent has the opportunity to present by clear and convincing evidence that there was a nondiscriminatory justification for the adverse employment action. 29 C.F.R. § 1979.104(c); See, *Yule v. Burns Int'l Security Service,* Case No. 1993-ERA-12 (Sec'y May 24, 1995)[3]. The respondent need only articulate a legitimate reason for its action. *St. Mary's Honor Center v. Hicks*, 509 I.S. 502 (1993). If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id. See also, *Blow v. City of San Antonio, Texas*, 236 F. 3d 293, 297 (5th Cir. 2001). The focus of the inquiry "is whether the complainant has shown that the reason for the adverse action was his protected safety complaints." *Pike v. Public Storage Companies Inc*., ARB No. 99-072, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.,* ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

D. Analysis

I. Protected Activities.

Under the AIR21 Act, a complaint must involve a purported violation of an FAA regulation, and must raise a safety issue. *Jan Svendsen v. Air Methods, Inc*., 03-074 (ARB August 26, 2004, ALJ 02-AIR-16); *Minard v. Nerco Delamar Co*., 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. Id. Additionally, complainant's belief about the violation must be objectively reasonable. *Peck v. Safe Air Int'l, Inc.,* ARB 02-028 (January 30, 2004); *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

In November, 2002, Mr. Barker wrote to Lindon Frazer and Tom Wachendorfer with specific concerns that pilots were expected to work more hours than allowed by FAA regulations, and that pilot rest hours were being interrupted by pages and phone calls from management. Complainant and Director of Operations Thomas Clemmons had received complaints from pilots who alleged that they were being asked to work more than the maximum allowed16 hour duty days, and were interrupted during their rest periods with pages, in violation of the FAR. Complainant had been asked during a flight to extend the 16 hour duty limit to arrive at a destination sooner, and other pilots were asked to expedite the completion of a flight segment in a manner inconsistent with the FAR.

[3] The whistleblower provision set forth in the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, contains the same burden of proof standards as those included in the AIR 21 Act.

Thomas Clemmons corroborated Complainant's testimony, and recalled discussing the issue with Mr. Frazer, who disagreed with the pilots' position regarding the work and rest hour rules. Mr. Clemmons brought the issue to the attention of Mr. Wachendorfer and Mr. Hulsey, who also disagreed with his position. Because Complainant and Mr. Clemmons were dissatisfied with management's response, they discussed the matter with Respondent's assigned FAA inspector, Ron Brown, who asked for a written memorandum of their concerns about the issue. This discussion took place shortly before Mr. Clemmons' discharge, and the issue remained unresolved when Mr. Raymond assumed the position of Director of Operations. Complainant asked Mr. Raymond to issue clarification on the issue, and suggested getting FAA's written interpretation. Mr. Raymond did issue an interpretation of the duty hours and rest period rules that Complainant found inadequate to resolve the dispute.

Mr. Barker also disputed Respondent's practices and procedures for de-icing planes, and discussed the issue with Mr. Raymond. Mr. Raymond made inquiries into Complainant's concerns, but rejected his recommendations. Mr. Barker was also concerned that management sought to curtail official reports of airplane maintenance problems. It is undisputed that Mr. Frazer instructed pilots to report maintenance problems to the maintenance department before recording them in the flight log. Complainant understood that to mean that pilots needed permission to log a maintenance discrepancy. In addition, Complainant had communications with Mr. Raymond about other maintenance related problems, including the apparent failure of maintenance to perform necessary repairs and maintenance that had been recorded in pilot flight logs. Some of the maintenance issues were serious enough to warrant grounding the plane, such as fuel line problems, pressurization problems, and equipment defects. In some instances, these problems had not been noted in the log, although they were apparent to Complainant upon his visual inspection before flying. On March 28, 2003, Complainant advised Mr. Raymond of these maintenance concerns and others in an e-mail that he also sent to Mr. Frazer, Mr. Wachendorfer, Ron Brown and David Powell. Although Mr. Frazer promised to investigate Complainant's maintenance concerns, his next contact with management was on April 14, 2003, when Mr. Raymond and Mr. Frazer called him and told him he was terminated.

I find that Complainant's concern about pilot duty and rest hours was directly related to safety. His concerns about Respondent's compliance with FAA's limits on pilot duty hours and guarantees of rest hours were objectively reasonable. The evidence reflects an ongoing dispute about Respondent's compliance with FAA rules regarding pilot duty and rest hours. Management sought an exception from the rules from the FAA, which suggests that Respondent was aware that the pilots' interpretation was meritorious.

Complainant's questions regarding de-icing policies were patently related to safety, as there can be no question that ice on aircraft creates a safety risk. Respondent took Complainant's concerns seriously, as demonstrated by Mr. Raymond's consultation with maintenance about the proper de-icing method to employ. Accordingly, Mr. Barker's complaints about this issue are reasonable. Complainant's complaints about equipment and maintenance defects, such as fuel leaks, pressurization problems, and faulty equipment are also clearly related to aircraft safety. Since the evidence reflects that Respondent made repairs to aircraft in response to Complainant's concerns, I find them reasonable. I also find it reasonable for

Complainant to suspect that Respondent was attempting to circumvent rules requiring pilots to report maintenance issues in flight logs is also reasonable. Respondent contended that pilots were to advise maintenance personnel of problems that should be reported in the flight log so that maintenance could be prepared to make repairs. Although this is reasonable on its face, it is inconsistent with the evidence of record that reflects that logged problems were not consistently repaired or addressed by Respondent. In addition, e-mail exchanges with Lindon Frazer, made more contemporaneously to the period when the issues arose, are not entirely consistent with the explanation proffered at the hearing by Respondent. The documentary evidence suggests that Mr. Frazer hoped to minimize reported problems by having maintenance confirm that a problem was indeed manifest.

I find that Complainant's communications regarding the issues discussed above constitute protected activity under the AIR21 Act.

II. Respondent's Awareness of Protected Activities

The evidence is clear that Mr. Raymond, and other individuals up the management chain, were aware of Complainant's complaints, and in some instances, took measures to address them. Mr. Wachendorfer admitted to seeking an exception from FAA's duty and rest hour rules for pilots to accommodate certain circumstances. E-mails document Complainant's communication with Mr. Raymond about maintenance problems and the choice of de-icing fluid, and Mr. Raymond testified that he investigated these matters. In addition, Complainant sent a letter on March 28, 2003 to the FAA that related his concerns about maintenance and other issues, a copy of which was sent to Respondent's management officials. I find that Respondent was aware of Complainant's protected activities.

III. Unfavorable Personnel Action

Respondent has not contested that discharging Complainant from his employment is other than an adverse action. Complainant was out of work for a time after his discharge, until he found employment with the FAA. The record also reflects that Complainant worked for AVIA Crew Leasing for a period before his job with FAA. RX 28.

IV. Protected Activities as Contributing Factors in Adverse Action

The temporal proximity of Complainant's March 28, 2003 letter to the FAA, which was also forwarded to Respondent's management officials, and his discharge on April 14, 2003, is sufficient to establish the inference of a causal nexus and thereby establish a *prima facie* case. Respondent contends that none of Complainant's activities, including his letter to the FAA, contributed in any way to his discharge. The protected activity must only "tend to affect in any way the outcome of the [adverse personnel] decision." *Marano v. Department of Justice*, 2 F.3d 1137 at 1140 (Fed. Cir. 1993).

Complainant relies upon Mr. Frazer's e-mail to Mr. Raymond on March 28, 2003 as evidence that Respondent sought to retaliate against him for his March 28, 2003 letter to the FAA. In that communication, Mr. Frazer directed Mr. Raymond to provide him with a list of

record-keeping deficiencies that he had noted shortly after becoming Airways' Director of Operations in January, 2003. I am persuaded by Mr. Raymond's credible testimony that Mr. Frazer's instructions related to Respondent's preparation of its defense to Mr. Clemmons' unemployment compensation claim in state court. Although Complainant was responsible for some of the record keeping deficiencies that Mr. Raymond observed, particularly pilot training records, the Director of Operations, Mr. Clemmons, had ultimate responsibility for the maintenance of the records. Moreover, it makes little sense for Respondent to cite Complainant's record keeping shortfalls as grounds for discharge months after he had made the errors. Mr. Raymond thought it inappropriate to discipline Complainant when the record defects were discovered because he did not anticipate Complainant repeating the mistakes. In fact, the record demonstrates that Complainant had no further opportunity to document pilot records because no further pilot training was given during the remainder of his tenure with Respondent. I accept Mr. Raymond's explanation of Mr. Frazer's instructions as consistent with the record, and find no evidence that Complainant's letter to the FAA contributed to Mr. Frazer's request for information about pilot records.

I similarly decline to infer that Respondent considered Complainant's complaints about maintenance problems as a factor in its decision to discharge him with the 5 other pilots terminated in the April, 2003 RIF. Among the pilots who were retained when Complainant was discharged are two that had openly complained about Respondent's practices. In addition, the record reflects that Mr. Raymond made efforts to address Complainant's safety concerns, and despite grounding planes for repairs, Complainant continued to be assigned flights. I also note that Mr. Barker had been vocal about his concerns that Respondent was in violation of duty hours and rest periods for pilots, but no action was taken against him contemporaneous to those complaints.

This is not to say that Respondent welcomed and encouraged reporting of maintenance problems. Mr. Frazer's instruction to pilots to contact maintenance on the ground about maintenance problems observed on aircraft suggests that Respondent sought to limit reports of maintenance and equipment problems.[4] Moreover, the record is replete with complaints from other pilots in addition to Complainant about maintenance issues. Indeed, Respondent acknowledged it had a problem with its maintenance division. However, Complainant has offered little evidence to establish that his reports of maintenance issues contributed to his dismissal.

Nor do I find the fact that Complainant made his complaints public to the FAA a factor that Respondent relied upon in its decision to terminate him. I reach this conclusion despite according all credibility to Complainant's account that Mr. Wachendorfer counseled Complainant and Mr. Clemmons to keep some complaints in house. I place greater weight on the record evidence that reflects that Respondent's management and the FAA maintained regular and frequent communication. Although it is evident that Respondent sought a commercially favorable interpretation of FAA's pilot duty and rest hour rules, pilots who refused to fly in excess of their understanding of the maximum rules, or who refused to accept calls during rest

[4] In the absence of testimony from Lindon Frazer, I am unable to do more than infer from the circumstances the intent of his memo. I note that his testimony in deposition form was available to Complainant, who chose to submit one page from that testimony to the record.

periods, were not disciplined or otherwise "punished". Complainant's immediate supervisor, Mr. Raymond, addressed Complainant's report of the ongoing problem about duty and rest hours and sought clarification of the issue from the FAA. In addition, two pilots who were vocal about concerns of safety issues were selected to remain on board after Respondent's RIF.

I find no evidence that Complainant's protected activities were a contributing factor to his discharge beyond the temporal proximity of his March 28, 2003 letter and his termination on April 14, 2003. However, assuming arguendo that Complainant's protected activities were a contributing factor, the burden shifts to Respondent to present clear and convincing evidence of a legitimate, non-discriminatory business reason for its decision, and to show that it would have taken the same unfavorable action in the absence of his protected activity.

V. Respondent's Clear and Convincing Evidence of Legitimate Motive for Adverse Action

Although the standard of "clear and convincing" evidence has not been defined with precision, courts have held that it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." *Id*. If Respondent is able to meet this burden, the inference of discrimination is rebutted. To prevail, Complainant must then show that the rationale offered by the respondent was pretextual, i.e. not the actual motivation. *Overall v. Tennessee Valley Auth.,* Case No. 1997-ERA-53 at 13. The U.S. Court of Appeals for the Eighth Circuit in *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) observed:

> But once 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.

At that point, the fact that a Complainant has established a *prima facie* case becomes irrelevant. Rather, the relevant inquiry becomes whether Complainant has proven by a preponderance of the evidence that Respondent retaliated against him for engaging in a protected activity. *Carroll* at 356. As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. *See also Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001).

Respondent maintains that Complainant's discharge was totally unrelated to any protected activity and was purely the result of a RIF that involved five other pilots. Mr. Wachendorfer credibly testified that his start-up airline was steadily losing money, and he decided by late March, 2003 that the airline would fly only plane. At the time of the RIF, ten pilots were employed by Respondent, and Respondent's management team decided that only two

crew, or four pilots, would be needed. Mr. Wachendorfer tasked the job of identifying which four pilots to retain and which six to discharge to Mr. Frazer and Mr. Raymond. Mr. Raymond, who at the time was Respondent's Director of Operations and Complainant's immediate supervisor, made the decision to include Complainant among the pilots to be laid off. Mr. Raymond credibly testified that he considered such factors as Complainant's pay, his overall performance, and his apparent dissatisfaction with working for Respondent. In addition, two of the pilots that Mr. Raymond designated for retention had made complaints about Respondent's policies that touched on safety concerns. Within months after the lay-off, Respondent's operation was further curtailed and eventually no pilots were employed by Airways. No evidence to the contrary was submitted.

I find that Respondent has established by clear and convincing evidence that it had legitimate business reasons for discharging Complainant.

VI. Complainant's Burden to Show that Respondent's Legitimate Reasons are Pretextual

Complainant argues that the evidence demonstrates that Respondent's stated reason for his discharge is pretextual. Complainant does not suggest that Respondent implemented a RIF to mask discriminatory motive so much as he suggests that he was included in the discharged group of pilots because of his protected activities. His evidence of pretext falls within different categories, which I shall address individually insomuch as possible.

1. Seniority

Respondent incorporated a seniority list into its Flight Crew Policies. CX 41. Complainant believes that as the individual first on the seniority list, he should have been last on the list of pilots discharged in a RIF. I credit Mr. Raymond's testimony that he did not consider seniority when deciding who should be terminated and who should be retained in April, 2003. Mr. Raymond's understanding of the purpose of the seniority list, to resolve disputes between pilot claims on flight assignments, is consistent with the written policy. Complainant admitted that the seniority list was used to settle such disputes, and offered no company policy that specifically called for its application in a RIF. I do not find evidence of pretext in Respondent's failure to rely upon the seniority list when implementing its RIF.

2. Salary

It is undisputed that Complainant's base salary was almost twice as much as the other pilots, because of his position as chief pilot. In addition, he was scheduled to earn additional sums for any duties he performed in connection with his position as check airman. I find Mr. Raymond's testimony that he considered Complainant's salary as a factor in his decision to include him among the other discharged pilots credible. It is reasonable that Respondent would seek to eliminate the costs associated with Complainant's salary, as it is clear that he had little opportunity to perform duties as chief pilot and check airman, and had been "flying the line" along with lesser paid individuals since January, 2003. Although Complainant testified that he later learned that one of the retained pilots earned as much as he, there is no independent

corroborative evidence of that assertion. In addition, even if true, this fact does little to discredit Mr. Raymond's testimony regarding his consideration of Complainant's salary. Mr. Raymond rather relied upon the fact that Complainant's base was so much greater than that of other pilots. Because of the state of Respondent's business, Mr. Raymond found it unlikely that other pilots were earning enough in incentive pay to exceed the level of Complainant's salary.

Complainant correctly pointed out that his termination deprived Respondent of its only qualified check airman, thus incurring the costs of paying outside contractors for work associated with that position. However, Mr. Raymond credibly explained that the contract costs were no more , and probably less, than what it would have cost Respondent to retain Mr. Barker on salary. Complainant has failed to establish by a preponderance of the evidence that Respondent's reliance upon his salary was a pretextual reason for his discharge.

3. Willingness to Stay with the Company

Another factor that Mr. Raymond considered when making his determination about who to let go in the RIF was the degree to which a pilot appeared willing to stay with the company. Raymond recalled occasions upon which Complainant expressed his reluctance to stay with the company. Complainant admitted that he was looking for other employment before he was discharged. Complainant has presented no evidence to rebut this contention, and therefore has not shown pretext on these grounds.

4. Pilot Performance

Mr. Raymond testified that he had no reason to doubt Complainant's competence in the air, but he found his handling of the paperwork associated with flying to be less than average. Mr. Raymond considered pilot's paperwork a performance issue. Complainant presented no evidence to establish that he handled his paperwork as well as or better than those pilots who were retained. I find no evidence of pretext in this rationale.

Although I find that Complainant has failed to prove by a preponderance of the evidence that Respondent's legitimate reasons for his discharge were pretextual, I do agree that the evidence does not consistently demonstrate that those reasons were well formed at the time of the RIF. When he was terminated, Mr. Frazer advised him that it was because of money, and Mr. Raymond did not cite the other factors that he has testified he considered. However, regardless of what he was told at the time of his discharge, Complainant failed to show that Respondent's reasons for including him among the discharged employees were not valid, legitimate reasons related to the conduct of its business.

In addition, I am mindful of inconsistencies that appear in Mr. Raymond's testimony. Mr. Raymond's contention that he was concerned that the incomplete training records could draw a citation from the FAA is compromised by his instruction to a pilot under his supervision to falsify flight records. Mr. Raymond acknowledged the impropriety of his action, which clearly violates FAA rules. Mr. Raymond explained that in doing so, he was hoping to avoid a different type of FAA citation, because he believed that the pilot did not have proper certification to fly. I find it difficult to reconcile Mr. Raymond's concern about some FAA rules with his

total disregard of others, but do not find this inconsistency significant enough to totally discredit his testimony. Moreover, Complainant has not asserted that he was adversely affected because of the flight training records deficiencies.

Although the evidence shows Complainant's admirable dedication to safety, and also suggests that safety was not Respondent's first priority, the record does not establish that Respondent discharged Complainant in retaliation for his protection activities. The record overall demonstrates that Respondent had legitimate, non-discriminatory reasons for discharging Complainant, and Complainant failed to show those reasons to be pretextual.

E. Damages

Since Complainant has not carried his burden of proof, the issue of damages is not relevant.

IV. CONCLUSION

The Complainant failed to establish that his protected activities contributed to his discharge during a RIF implemented by Respondent in April, 2004. Complainant did not establish that the adverse personnel action was a pretext for any of Complainant's reports of safety-related concerns to Respondent's management or the FAA. In addition, the record does not establish disparate treatment of Complainant.

V. ORDER

The relief sought by BRENT BARKER is DENIED, and the complaint filed herein is dismissed.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. 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 fifteen (15) business days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within thirty (30) days of the filing of the petition, issues an order notifying the parties that the case have been accepted for review. If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. 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 1979.110(a) and (b) (2003).