

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 January 2005

CASE NO.: 2004-AIR-11

IN THE MATTER OF

THOMAS E. CLEMMONS,
Complainant

v

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,
Respondents

APPEARANCES:

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

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

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

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

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

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

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

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

I. ISSUES

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

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

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

II. SUMMARY OF THE CASE

A. Company Structure and Personnel

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

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

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

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

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

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

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

B. Summary of the Evidence

1. Thomas Clemmons

Background

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

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

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

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

Director of Operations Position

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

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

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

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

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

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

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

Pilot Hiring and Training

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

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

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

Pilot Scheduling

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

