

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

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

JOINT EMPLOYMENT

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

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

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

CLEMMONS' JOB RESPONSIBILITIES AND PERFORMANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

CLEMMONS' WHISTLEBLOWING
DUTY TIME/REST TIME

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

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

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

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

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

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

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

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

MAINTENANCE WRITEUPS

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

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

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

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

174; Exhs. C69, C70.

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

COMMON CARRIAGE/CALL SIGN

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

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

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

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

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

THE RON BROWN MEETING

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

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

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

CLEMMONS' TERMINATION

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

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

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

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

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

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

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

CLEMMONS' JOB SEARCH

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

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

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

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

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

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

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

