



In the Matter of:

HARRY SMITH,

ARB CASE NO. 11-086

COMPLAINANT,

ALJ CASE NO. 2006-STA-031

v.

DATE: June 6, 2013

CRST INTERNATIONAL, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq.; Washington, District of Columbia

For the Respondent:

Mark J. Herzberger, Esq., Simmons Perrine Moyer Bergman, P.L.C.; Cedar Rapids, Iowa

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Lisa Edwards Wilson, Administrative Appeals Judge

DECISION AND ORDER OF REMAND

Complainant Harry Smith filed a complaint against Respondent CRST International, Incorporated (CRST) under the whistleblower protection provision of the

Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997),¹ and its implementing regulations at 29 C.F.R. Part 1978 (2009).² Complainant alleged that CRST refused to hire him as a driver in violation of the STAA. The Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed the complaint, and Smith requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).

Prior to the scheduled hearing, CRST filed a motion to dismiss the complaint alleging that Smith's failed to timely file his hearing request. The ALJ cancelled the hearing, granted CRST's motion, and dismissed the complaint.³ Smith appealed to the Administrative Review Board (ARB or Board), which affirmed the dismissal.⁴ Smith then appealed to the United States Circuit Court for the Sixth Circuit, which remanded the case for further proceedings on the grounds of equitable tolling.⁵

On remand, the ALJ set September 7, 2011, for a hearing, but CRST filed a motion for summary decision on May 9, 2011. On August 15, 2011, the ALJ entered summary decision in CRST's favor, and dismissed Smith's complaint. The ALJ determined that, based on "undisputed evidence," CRST demonstrated that it was not Smith's employer and that its refusal to hire him did not violate the STAA. The ALJ concluded that Smith failed to show that CRST was not entitled to summary decision and dismissed Smith's complaint.⁶ Smith petitioned the ARB for review. For the following reasons we affirm the ALJ's decision in part, and reverse and remand the case in part, for further consideration.

¹ Congress amended the STAA in 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007). *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(b)(1)(Thomson/West Supp. (2010)). Smith filed his complaint on November 15, 2005, prior to the effective date of the amendments, which in any event would not affect our disposition of this case.

² 49 U.S.C.A. § 31105(b)(2)(B); 29 U.S.C.A. § 1978.105.

³ *Smith v. CRST Int'l, Inc.*, ALJ No. 2006-STA-031 (Sept. 5, 2006).

⁴ *Smith v. CRST Int'l, Inc.*, ARB No. 06-146, ALJ No. 2006-STA-031 (ARB June 30, 2008).

⁵ *Smith v. Solis*, 390 Fed. App. 450 (6th Cir. 2010).

⁶ *Smith v. CRST Int'l, Inc.*, ALJ No. 2006-STA-031 (Aug. 15, 2011)(D. & O.).

BACKGROUND

When this controversy arose, Smith was an over-the-road truck driver for Lake City Enterprises, Inc. (LCE), a small leasing fleet under contract with CRST. Shortly after LCE hired Smith, he complained that a trailer he was hauling was structurally unsafe, informing the LCE dispatcher “to get me another trailer or get yourself another driver.” LCE interpreted Smith’s ultimatum as a resignation, and terminated his employment.

When LCE hired Smith in September 2005 to drive a tractor/trailer that LCE owned but leased to CRST, LCE had two agreements with CRST. Its exclusive agent agreement provided that LCE was an independent contractor that solicited freight for CRST and had “complete and sole responsibility” for hiring; setting wages, hours, and working conditions; adjusting any grievances; and supervising, training, disciplining, and firing all employees it deemed necessary to fulfill its duties and obligations under the agreement. Such employees were “subject to the full control and direction of [LCE] at all times and at its own expense.”⁷

LCE’s independent contractor operating agreement provided that LCE would use its equipment and drivers to transport, load, and unload freight such as steel coils and bars on CRST’s behalf. LCE’s drivers would submit to required federal and state physical examinations and comply with CRST’s drug and alcohol policy, including random testing. Further, the agreement reiterated LCE’s “sole responsibility” for its employees and stated that “[n]o person [LCE] may engage shall be considered [CRST’s] employee.”⁸

Smith initially contacted CRST through its web site to find out about contracting with CRST as a truck driver through its lease-purchase program. Smith was not entirely comfortable with the details of the program, and a CRST recruiter suggested that he could possibly drive for LCE and perhaps obtain a better understanding of CRST’s operation. Later, the CRST recruiter arranged a conference call with Smith and LCE’s owner, Crystle Morgan, and explained that Smith wanted to learn more about CRST before signing up for the lease-purchase program.⁹ Morgan subsequently interviewed Smith and, after hiring him on Labor Day 2005, sent him to CRST in accordance with its policy and agreement with CRST.¹⁰

⁷ CRST Appendix in Support of Summary Judgment at 24-29; D. & O. at 2 n.2.

⁸ CRST Appendix at 24-29.

⁹ LCE hearing transcript (HT) at 50-52, 70-72, 98, 250.

¹⁰ D. & O. at 2.

CRST pre-qualified Smith for LCE by running a check on his motor vehicle and driving records, reviewing his employment history and application, and conducting a drug test. CRST issued him a log book and an identity number by which it could track his operations, and had his assigned truck and equipment inspected at one of its approved facilities. Smith attended CRST's day-long safety orientation and instructional seminar, and then began driving for LCE.¹¹

On November 5, 2005, Smith called LCE's terminal manager to complain about a near-rollover incident with his truck/trailer. He told the manager to tell Morgan, to "either replace him or the equipment," which Smith believed had caused the incident. Smith also called Morgan and complained about the faulty condition of his trailer. Morgan, in turn, called Milton Parks at CRST's recruiting department and told him that LCE "needed to reseat" the truck that Smith drove because he had given LCE "an ultimatum and told us to find another driver for the truck because we had faulty equipment." Parks informed Morgan that Smith had just called him and said that he was going to take LCE's truck/trailer to a Department of Transportation (DOT) facility and have it inspected. When Smith returned the truck to LCE's offices, Morgan fired him.¹²

A few days later, Smith contacted a friend, Sean Dostie, and agreed to drive the truck Dostie owned if he would become an independent contractor with CRST. Both then contacted a CRST recruiter about the arrangement. On November 11, 2005, Milton Parks informed Morgan that Smith had obtained a truck and wanted to drive it under lease to CRST. Parks asked Morgan if she would object to Smith driving for CRST, to which she indicated she had no objection.¹³

Subsequently, Morgan sent CRST a Notice of Personnel Action dated November 9, 2005, stating that Smith had quit LCE and had not reported an accident or damaged equipment. She also accused Smith of defacing the truck's tires by painting them white and taking one of the tarps from the trailer. On November 15, 2005, CRST's safety director, Carl Rochford, reviewed Smith's qualifications and, in keeping with CRST's practice, disqualified him from driving a CRST-leased truck based on Morgan's notice that he had failed to report an accident.¹⁴

¹¹ Craig Smith Deposition at 15-17.

¹² Management Overview at 2-3.

¹³ CRST Appendix at 7-8, Management Overview at 4.

¹⁴ CRST Appendix at 19.

On November 15, 2005, following his discharge, Smith filed a complaint with OSHA against both CRST and LCE.¹⁵ Smith alleged that his work for LCE “was through an assignment or other arrangement” with CRST, and that CRST discriminated against him in violation of STAA by collaborating with LCE in the termination of his employment on November 9, 2005, and by refusing to hire him after LCE fired him.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA.¹⁶ The ARB “shall issue a final decision and order based on the record and the decision and order of the administrative law judge.”¹⁷

The Board reviews an ALJ’s grant of summary decision de novo, applying the same standard that ALJs must employ.¹⁸ An ALJ may “enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”¹⁹ A “genuine issue” exists if a fair-minded fact-finder (the ALJ in whistleblower cases) could rule for the non-moving party after hearing

¹⁵ Complainant’s Exhibit (CX) 3. OSHA bifurcated the complaint and assigned each respondent to a different field office. The Toledo office denied Smith’s complaint against LCE on May 12, 2006 (ALJ Case No. 2005-STA-032), and the Atlanta office denied his complaint against CRST on March 21, 2006 (ALJ Case No. 2006-STA-031). Smith requested a hearing before an ALJ on both. On May 21, 2008, the assigned ALJ found that LCE had violated the STAA in firing Smith, and the ARB affirmed, but remanded the case for further consideration of damages. *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 28, 2010).

¹⁶ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

¹⁷ 29 C.F.R. § 1978.109(c).

¹⁸ 29 C.F.R. § 18.40. *See Henderson v. Wheeling & Lake Erie R.R.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 3 (ARB Oct. 26, 2012); *Peters v. Am. Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-014, slip op. at 3 (ARB Sept. 28, 2010).

¹⁹ 29 C.F.R. § 18.40(d) (2012).

all the evidence. A “material fact” is the one that “could establish an element of a claim or defense and, therefore, affect the outcome of the action.”²⁰

The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact.²¹ The moving party may prevail by pointing to the absence of evidence for an essential element of the complainant’s claim or by presenting admissible evidence in support of its motion. In responding to a motion for summary decision, the non-moving party may not rely solely on his allegations, speculation, or denials, but must set forth specific facts that could support a finding in his favor.²² If the moving party submitted evidence supporting its motion, the non-moving party must also provide admissible evidence to raise a genuine issue of fact.²³

In reviewing an ALJ’s summary decision, the ARB does not weigh the evidence or determine the truth of the matters asserted. “Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve one or more factual questions; it is not an assessment on the merits of any specific claim or defense.”²⁴ To avoid summary decision, therefore, the non-moving party does not have to show that he will ultimately prevail on the merits of his complaint; rather, he need only demonstrate the existence of a factual dispute regarding a required element of his complaint that could affect the outcome of the case.²⁵

²⁰ *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 4 (ARB Apr. 30, 2010).

²¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

²² *See* 29 C.F.R. § 18.40(c).

²³ The burden of producing evidence “is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant’s] claim.” *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 7 (ARB Sept. 26, 2011)(citing *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008)).

²⁴ *Turin v. Amtrust Fin. Svcs.*, ARB No. 11-062, ALJ No. 2010-SOX-018, slip op. at 5-6 (ARB Mar. 29, 2013).

²⁵ *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op at 7 (ARB July 27, 2010).

DISCUSSION

A. Applicable Statutory Framework

The STAA provides that an employer may not “discharge,” “discipline,” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity.²⁶ A “refusal to hire” constitutes a separate actionable discriminatory employment practice.²⁷

To prevail on his STAA complaint filed prior to 2007, Smith must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer was aware of the protected activity, (3) his employer took an adverse action against him, and (4) and the “existence of a ‘causal link’ or ‘nexus,’ between the protected activity and the adverse action.”²⁸ The causal link required for a prima facie showing under the pre-2007 standard requires evidence that the “protected activity was a ‘motivating factor’ in the employer’s decision to take adverse action.”²⁹ “Evidence of each of these elements raises an inference that the employer violated the STAA.” Under the pre-2007 standard, “[o]nly if the complainant makes out this prima facie showing does the burden shift to the employer to articulate a nondiscriminatory reason for the adverse action.”³⁰

The evidentiary record that the ALJ took into consideration in ruling on the CRST’s motion for summary decision and that this Board likewise considers on appeal consists of the evidence submitted by both parties in support of and in opposition to the motion, *see* Decision and Order (D. & O) at n.3, as well as all of the hearing transcript and exhibits of record from *Smith v. Lake City Enterprises*, ALJ No. 2006-STA-032 (Aug. 24, 2011), which the ALJ admitted into evidence pursuant to stipulation of the parties. D. & O. at n.2, n.3. Smith also submitted additional evidence in opposition to CRST’s motion for summary decision, including the depositions of Craig Smith, Jeff Loggins, and Carl Rochford, as well as interrogatory excerpts.

²⁶ 49 U.S.C.A. § 31105(a)(1).

²⁷ *Sasse v. U.S. Dep’t of Labor*, 409 F.3d 773, 783 (6th Cir. 2005)(quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)), which has described adverse employment actions as failure to promote, denial of transfer, termination, and refusal to hire.

²⁸ *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-060, slip op. at 6 (ARB July 31, 2007),

²⁹ *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033; slip op. at 4.

³⁰ *Id.*

Based on this record, the ALJ found that CRST had conceded that Smith engaged in protected activity and that CRST took an adverse action in refusing to hire him. The parties do not dispute these elements of Smith's complaint, and thus we do not address them.³¹ The issues on which the ALJ granted summary decision, and which are now before the Board on appeal, are: (1) whether CRST is liable under STAA for LCE's discharge of Smith as either a joint employer or because LCE acted as CRST's agent, and (2) whether CRST's subsequent refusal to hire Smith was causally related to his protected activity.

B. Undisputed evidence shows that CRST is not Smith's employer for purposes of STAA

The ALJ determined that LCE's and CRST's exclusive agent agreement, by which LCE solicited freight for CRST and then used LCE employees to transport that freight, controlled their agency relationship. While CRST provided some services for its contractors, including pre-qualification, orientation, and random alcohol and drug testing, the ALJ found that CRST did not exert sufficient control over the personnel decisions of LCE. The ALJ concluded that, because of CRST's limited control over the terms, conditions, and privileges of Smith's employment with LCE, CRST and LCE were not joint employers.³²

On petition for review, Smith argues that LCE was CRST's agent when it fired him and CRST employees acted within the scope of their agency when they collaborated to accomplish the discharge. Smith contends that Parks' call to LCE's Morgan provoked his discharge and CRST ratified her decision by refusing to allow Smith to drive for CRST. Thus, Smith further contends that the actual facts of the relationship among LCE, CRST, and him outweigh the contractual agreements between the two parties and create a genuine issue of material fact.³³ We disagree. The undisputed evidence supports the ALJ's conclusions that CRST was not a joint employer and that LCE did not act as CRST's agent when it fired Smith.

First, LCE's independent contractor operating agreement provided that LCE would use its equipment and drivers to transport, load, and unload freight such as steel coils and bars on CRST's behalf. While LCE's drivers had to submit to required federal and state physical examinations and comply with CRST's drug and alcohol policy, which

³¹ *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 9 (ARB June 24, 2011).

³² D. & O. at 10-12.

³³ Complainant's Brief at 20-22.

included random testing, the agreement reiterated LCE's "sole responsibility" for its employees and stated that "[n]o person [LCE] may engage shall be considered [CRST's] employee."³⁴ We agree with the ALJ that, based on the agreements' provisions, CRST did not delegate to LCE the authority to make employment decisions on its behalf.

Second, the exclusive agent agreement provided that if LCE hired other employees to fulfill its duties and obligations under the agreement, such employees "shall be subject to the full control and direction of Agent at all times and at its own expense." The agreement also stated that LCE retained complete and sole responsibility, "subject to any regulatory and/or legal requirement which may be placed on CRST by various government agencies," for maintaining an operation necessary to carry out the terms of the agreement, including hiring; setting wages, hours, and working conditions; adjusting any grievances; and supervising, training, disciplining, and firing all employees.³⁵

Finally, the factual circumstances show that only Morgan was motivated to fire Smith. Early on November 9, 2005, Smith called Morrison, LCE's terminal manager, to report the November 8 incident and told him, "either you replace this trailer or you will have to replace a driver." Morrison then repeated to Morgan what Smith had said. Morgan then called Smith and asked him if he could continue to Cleveland. Smith told her that she needed to replace her "junk trailer" because it was unsafe, but that he would deliver the load.

Subsequently, Morgan called CRST recruiter Parks to request another driver to replace Smith because, as she testified, she considered Smith's comment to be a "verbal threat" and "disloyal" to her company and intended to fire him. During that call, Parks told Morgan that Smith had told him that he planned to take the faulty trailer for a DOT inspection. Morgan then told Morrison to have Smith return to the LCE terminal where she fired him. Based on this undisputed timeline, the ALJ properly concluded that CRST was entitled to summary decision because it played no role in LCE's discharge of Smith and thus could not be held liable.³⁶

C. Disputed evidence in the record precludes summary decision on Smith's refusal to hire claim

The ALJ found that Smith offered no direct evidence that his complaint about the unsafe condition of his truck/trailer to Morgan and Parks contributed to CRST's refusal to hire him in November 2005. Rather, Smith relied on circumstantial evidence including

³⁴ CRST Appendix at 34-37.

³⁵ *Id.* at 25.

³⁶ D. & O. at 12-13.

(1) the temporal proximity between his complaint and CRST's refusal to hire; (2) Parks' knowledge that Morgan fired Smith after he complained about the unsafe trailer and that Smith was going to have DOT inspect the truck/trailer; (3) CRST's rehiring of one driver who failed to report an accident; and (4) Smith's report of the accident to both LCE and CRST.³⁷

The ALJ discounted this circumstantial evidence. First, the ALJ found that the inference arising from temporal proximity – a mere six days between LCE's November 9 discharge and CRST's November 15 refusal to hire – was weakened by the fact that Carl Rochford, who made the decision not to hire Smith, was unaware of Smith's safety complaints to LCE or to Parks.³⁸ Second, the ALJ rejected Smith's attempt to show that CRST's policy of not rehiring drivers who failed to report an accident was a pretext. Finally, the ALJ rejected Smith's argument that CRST should have allowed him to explain that he did not have an unreported accident before deciding not to hire him. The ALJ determined that Smith failed to offer any evidence that CRST's stated reason for not hiring Smith – that he had an unreported accident – was pretext for a discriminatory motive and concluded that Smith had not demonstrated a causal connection between his protected activity and CRST's adverse action of refusal to hire.³⁹

On appeal, Smith argues that the ALJ failed to view the facts in the light most favorable to him as the non-moving party. Smith contends that he is entitled to all the inferences arising from Morgan's conduct and Parks' knowledge of his protected activity and that these inferences demonstrate a causal connection between his protected activity and CRST's decision not to hire him as a driver.⁴⁰ He also argues that the ALJ erred in finding that Rochford had no knowledge of Smith's protected activity, citing *Staub v. Proctor*.⁴¹

³⁷ *Id.* at 14.

³⁸ *Id.* at 15-16. Rochford stated in his deposition that he had not spoken to Parks prior to learning from Morgan's notice that Smith had not reported an accident. Rochford Deposition at 18-19. Rochford also averred in his affidavit that he had no knowledge of Smith's safety complaints. CRST Appendix at 19-20.

³⁹ *Id.* at 16.

⁴⁰ Complainant's Brief at 5-6.

⁴¹ 131 S. Ct. 1186 (2011); Complainant's Brief at 22-23.

Summary decision is difficult in “employment discrimination cases, where intent and credibility are crucial issues.”⁴² Obviously, the issue of causation in retaliation cases involves examining an employer’s intent and motivation for the unfavorable personnel action. Under the circumstances presented in this case, the causation determination requires the weighing of evidence that is precluded by summary decision, given Smith’s argument that the employer’s asserted reason, even if true, was not the motivating or only reason for its action. Here, the ALJ focused too narrowly on Rochford’s asserted lack of knowledge of Smith’s protected activity. As the ARB explained in *Bobreski*, proof that an employee’s protected activity contributed to the adverse action does not necessarily rest on the decision-maker’s knowledge alone, but may also be established by evidence demonstrating “that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee’s protected activity.”⁴³ The “cat’s paw” legal concept of liability recognized in *Staub*⁴⁴ demonstrates how knowledge of protected activity and actions by others can influence the final decision-maker and result in a finding of liability.

In concluding that Smith had failed to prove a causal connection, the ALJ relied on Rochford’s statement that he knew nothing of Smith’s protected activity. But Rochford’s deposition and affidavit do not alone prove that Rochford knew nothing of Smith’s protected activity. Rochford stated in his deposition that he had spoken with recruiter Parks and other recruiters in the normal course of hiring and qualifying drivers and that he had the authority to approve applications, based on the potential driver’s records. Asked directly if he had talked with Parks about Smith’s complaint, Rochford replied, “No, I cannot say that I did or not. I don’t recall that.”⁴⁵ Such uncertainty requires an evidentiary hearing for the ALJ to determine the credibility of Rochford’s statements.

Further, Morgan and Parks were well aware of Smith’s many complaints about the faulty trailer and his statement to Parks that he would take the trailer for a DOT

⁴² *Franchini*, ARB No. 11-006, slip op. at 9, 11 (citing *Bagley v. Blagojevich*, 646 F.3d 378, 389 (7th Cir. 2011)).

⁴³ *Bobreski*, ARB No. 09-057, slip op. at 13. *Accord Klopfenstein*, ARB No. 04-149, slip op. at 18 (requiring ALJ upon remand to determine “whether knowledge held by other company employees should be imputed to the decision-maker”).

⁴⁴ 131 S. Ct. at 1192 (“When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a ‘factor’ or a ‘causal factor’ in the decision. . . .”).

⁴⁵ Rochford Deposition at 31-32.

inspection. They also both knew that Smith had wanted to become a driver for CRST prior to being hired by LCE. Morgan told Parks a few days after she fired Smith that she had no problem with him driving for CRST, but then sent to CRST the official personnel notice that she knew would disqualify him from being hired. While Morgan was not Smith's employer, Rochford used her notice, which was indisputably untrue,⁴⁶ as the basis for refusing to hire Smith.

Taken as a whole, the temporal proximity between Smith's November 9, 2005 complaints, Morgan's verbal and written communication with Parks then and shortly afterward, and Rochford's refusal to hire on November 15 raise a genuine issue of material fact – whether Smith's protected activity of complaining to CRST about LCE's unsafe equipment played a motivating role in CRST's refusal to hire him – and requires an evidentiary hearing to resolve.

CONCLUSION

For the foregoing reasons, the ALJ's grant of summary decision on the ground that CRST is not Smith's employer under STAA is **AFFIRMED**. The ALJ's grant of summary decision to CRST on Smith's refusal to hire claim is **REVERSED**. The case is **REMANDED** for further proceedings on Smith's refusal to hire claim, e.g., whether Smith's protected activity was a motivating factor for the company's refusal to hire him.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

⁴⁶ The notice stated that Smith voluntarily quit and that he had not reported an accident. The ALJ found in the LCE case that Morgan acknowledged in her testimony and other documents that Smith complained about the trailer to her and Parks and that she fired him on November 9, 2005. *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033, slip op. at 4-5.