

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

**In the Matter of:**

YRC, INC. D/B/A YRC FREIGHT

and

FRED ROSE

Case No. 13-CA-087525

**ANSWERING BRIEF OF RESPONDENT  
YRC, INC. D/B/A YRC FREIGHT**

March 27, 2013

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

The General Counsel's Exceptions To The Administrative Law Judge's Decision (the "General Counsel's Exceptions") are nothing more than a camouflaged attempt to attack proper credibility resolutions by Administrative Law Judge Arthur Amchan ("Judge Amchan"). It is undisputed that Charging Party Fred Rose ("Rose") (a driver employed by Respondent YRC, Inc.) was late leaving the yard on August 2, 2012. Rose, in fact, admitted that he was over an hour late in leaving to perform his route when dock supervisor Vito Caponigro asked him why he was delayed. It is furthermore undisputed that, when Rose requested union representation in response to this question, Caponigro offered Rose the opportunity to select any employee that was on site at that time. And, it is undisputed that Rose refused to identify a coworker in response to Caponigro's offer. It was only after Rose's refusal that Caponigro advised Rose that he would receive a warning letter for misuse of company time.

Given these undisputed facts, this case turns entirely on Caponigro's motivation in disciplining Rose. Specifically, the *only* question presented is whether Caponigro disciplined Rose because he was late leaving the yard, or whether he disciplined Rose because Rose asked for a union steward. Caponigro testified forthrightly and unequivocally that he disciplined Rose solely because Rose was more than an hour late in leaving to deliver his load. The General Counsel, lacking any direct evidence to the contrary, sought to impeach Caponigro's testimony based solely on circumstantial evidence.

Judge Amchan weighed this evidence and chose to credit Caponigro's testimony in its entirety based on his finding that Caponigro was a credible witness. The General Counsel's argument is a thinly disguised (and unsupported) assertion that Judge Amchan should have instead credited the circumstantial evidence. Thus, the General Counsel's Exceptions should be disregarded, and the ALJ's dismissal of the General Counsel's alleged *Weingarten* violation should be adopted in its entirety.

## **II. STATEMENT OF FACTS**

### **A. Background.**

YRC is a trucking company with a facility in Bolingbrook, Illinois. (Administrative Law Judge Amchan's Decision ("ALJD") at 1). Rose has been an employee of YRC for approximately 20 years, and is familiar with the practices and policies of the Bolingbrook facility. (Tr. 22). His position at the time of his alleged unfair labor practice was Combination

Driver (“combo driver”) on the 6:00 a.m. shift. (*Id.*). On August 2, 2012, Rose reported for work at 6:00 a.m. and should have left the yard to begin his delivery run by no later than 6:45a.m. (ALJD at 2).

**B. Rose’s Conversation With Caponigro.**

Caponigro observed Rose still in the yard with no apparent mechanical issues at 7:47 a.m. and approached him. (ALJD at 2). Caponigro testified that he knew Rose’s shift began at 6:00 a.m., and he had not seen Rose having any issues with his truck. (Tr. 65). Caponigro testified also that when he walked over to Rose’s truck, he was not considering discipline because delays are sometimes unavoidable. (Tr. 18).

Once they were within speaking distance, Caponigro asked Rose what had caused his delays. (Tr. 65). Rose asked if he was being investigated. (Tr. 35). Caponigro said that he was not conducting an investigation and again asked Rose why he was delayed. (*Id.*). Rose demanded a union steward. (*Id.*). Caponigro testified that he told Rose that there were no stewards available, and then offered Rose the selection of anyone else in the yard. (*Id.*). Despite his knowledge of the other employees on his shift, Rose refused to choose a coworker and instead demanded a list of every employee who was on site at that particular time. (*Id.*). While the Bolingbrook facility has a seniority bid sheet, there is no employee list that accounts for employees who are absent on any given day or who have left the facility to perform their routes. (Tr. 66).

**C. Rose’s Discipline.**

Rose and Caponigro’s testimony regarding this brief conversation is virtually identical. (Tr. 16-18 (Rose’s testimony about the conversation); Tr. 35 (Caponigro’s testimony about the conversation); and ALJD at 2 (acknowledging that there is little, if any, dispute regarding the conversation)). There is no dispute regarding what was said or what Rose requested. More importantly, when the conversation concluded, Caponigro testified that he knew only the following:

- 1) that Rose was nearly two hours late;
- 2) that Rose’s load was ready to leave on time;
- 3) that Rose refused to give him an answer regarding why he was delayed; and
- 4) Rose refused to pick a union representative for purposes of further discussion regarding his delays and explanation.

Based on this information, which is undisputed, Caponigro made his decision to discipline Rose.<sup>1</sup> Shortly after this conversation, Caponigro emailed other management officials about his encounter with Rose. G.C. Exh. 2. On August 8, 2012, Caponigro issued Rose a letter stating that he was being warned for misuse of company time. Jt. Exh. 2. In the letter, Caponigro stated, “I asked you what were your delays. You could offer no valid reason as to why you were delayed.” (*Id.*). Under the National Master Freight Agreement, which governs the terms and conditions of Rose’s employment with YRC, Rose filed a grievance in response to his warning letter. (Tr. 58; R-2). In his grievance, Rose claimed only that he should have been provided representation. He did not provide any reason for his delay on August 2nd or claim that the delay was unavoidable. (R-2).

**D. Judge Amchan’s Findings of Fact.**

In his decision, Judge Amchan found that Caponigro testified credibly. (ALJD at 4). Judge Amchan found that the only evidence the General Counsel gave as to Caponigro’s motivation was circumstantial. (*Id.*). Specifically, on cross-examination the General Counsel questioned Caponigro whether he knew Rose’s load was ready. (Tr. 71-72). Caponigro confirmed on direct that he believed the load to be ready, and that it was his job to know that the load was ready. (Tr. 69).

Further, the General Counsel offered only circumstantial evidence that Caponigro somehow knew that Rose’s load was not ready. Specifically, the General Counsel offered only Rose’s testimony that he informed dispatcher Chris Zuales of the delays. (Tr. 68-69). Judge Amchan did not find the General Counsel’s evidence persuasive and credited Caponigro’s testimony regarding his motivation for the discipline. (ALJD at 4). Judge Amchan therefore recommended dismissal of the complaint. (*Id.* at 5).

**III. ARGUMENT**

Judge Amchan’s decision relies on a credibility determination, namely that Caponigro was credible when he testified that he did not discipline Rose for requesting union representation. Judge Amchan weighed both Rose and Caponigro’s testimony and ultimately, he credited Caponigro’s testimony. The Board should not overrule such a determination absent clear preponderance of evidence that shows the ALJ’s decision was otherwise unsupported.

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<sup>1</sup> Although the General Counsel is intent on showing that it is disputed that Rose’s load was ready to go, it is undisputed that Caponigro was unaware of any delays. Indeed, Caponigro

**A. The Board Should Not Overrule An Administrative Law Judge’s Credibility Determinations.**

The Supreme Court has firmly established the deference owed to an ALJ’s finding, particularly with respect to credibility. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), the Court held that:

The “substantial evidence” standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witness and lived with the case has drawn conclusions different from the Board’s than when he had reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report of course, depends largely on the importance of credibility in the particular case.

Likewise, in *Ewing v. NLRB*, 732 F.2d 1117 (2d Cir. 1984), in language applicable to the Board in reviewing an ALJ’s credibility resolutions, the court said:

It is the task of trial judges to separate factual wheat from evidentiary chaff, and appellate courts must accord great deference to these determinations. The temptation to displace the trial court’s judgments with our own is often strong, but the integrity of the decision-making process requires that we do so only in cases of clear error. Fed. R. Civ. P. 52(a). The same policies apply in the administrative context when decisions of the finder of fact are brought under review.

*See also Standard Dry Wall Prods., Inc.*, 91 NLRB 544, *enf’d* 188 F.2d 362 (3d Cir. 1951) (“[A]s the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is [the Board’s] policy to attach great weight to a Trial Examiner’s credibility findings insofar as they are based on demeanor); *see also NLRB v. So-White Freight Lines*, 969 F.2d 401, 407 (7th Cir. 1992) (holding that an ALJ’s decision is entitled to deference because credibility is a function not only of *what* a witness says but of *how* a witness says it). Thus, Judge Amchan’s credibility determinations cannot be overturned unless the clear preponderance of all of the relevant evidence shows that the ALJ’s conclusions were incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf’d* 188 F.2d 362 (3d Cir. 1951). The Board routinely acknowledges the highly deferential nature of this standard in its decisions and that ALJ credibility resolutions are virtually never disturbed. No such evidence exists here.

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testified that he *did* know that Rose’s load was ready at the beginning of his shift. (Tr. 69-71).

**B. Judge Amchan's Decision To Dismiss Was Grounded On Credibility Determinations And On Direct Evidence.**

Judge Amchan's credibility resolutions are entirely consistent with the evidence presented at the hearing. The direct evidence is uncontroverted. Capongiro knew that Rose's shift began at 6:00 a.m. (Tr. 65). Caponigro was unaware of any mechanical issues with Rose's truck. (*Id.*). Caponigro first saw Rose in the yard at 7:47 a.m. (Tr. 18). Caponigro believed that Rose's load was ready, and there is no evidence that he had reason to believe otherwise. (Tr. 59). Rose refused to provide an explanation for why he was still in the yard at 7:47 a.m. (ALJD at 2). Because Rose was still in the yard at 7:47 a.m. and because he had no explanation for his delay, Caponigro issued Rose discipline for misuse of company time. Caponigro testified that his observations and Rose's lack of explanation were the only reason for the discipline. (Tr. 67). Based on this testimony, Judge Amchan credited Caponigro's testimony and motivation for the discipline.

Conversely, Judge Amchan did not credit Rose's circumstantial speculation offered to impeach Caponigro's explanation of events. Rose offered no evidence as to Caponigro's state of mind or personal knowledge of Rose's delays that morning. Even if Rose did, in fact, speak with dispatcher Chris Zurales ("Zurales") about his delays as he claims, Rose presented *no* evidence that Caponigro then spoke to Zurales regarding Rose's delays. This is insufficient for precisely the reasons Judge Amchan cited: Caponigro testified that as the dock supervisor, he believed that Rose's load was ready to go, and that he was unaware of any delays from Zurales or otherwise. This is consistent with the evidence provided, and the General Counsel cannot point to any error, much less a clear preponderance of the evidence, that could justify overruling Judge Amchan's decision.<sup>2</sup>

**C. The General Counsel's Arguments Are Insufficient To Overturn Judge Amchan's Proper Credibility Determinations.**

The General Counsel alleges that if Judge Amchan had credited Rose's testimony that dispatcher Zurales was "well aware" of the problems with his load, it would have lessened

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<sup>2</sup> The General Counsel argues that Caponigro contradicted himself on cross-examination by first testifying that he knew Rose's load was ready, but later testified that he did not investigate whether or not the load was ready. (General Counsel's Exceptions at 6). This is not contradictory. At the time he approached Rose, Caponigro had not been informed of any delay. Thus, Caponigro had no reason to investigate whether or not the load was ready and Rose certainly gave him no reason to believe otherwise when he refused to answer his question.

Caponigro's credibility. This is patently incorrect. Even if Judge Amchan had decided to believe Rose's testimony about what he may or may not have told Zurales, it does not change the fact that Caponigro testified that *he believed Rose's load was ready to go*. (Tr. 69-71). Judge Amchan's decision relies on Caponigro's testimony regarding what he knew at the time of his conversation with Rose. Caponigro testified that when he disciplined Rose, he knew only that Rose was late, that his load was supposed to be ready, and that Rose refused to provide any reason for the delay. What Zurales may have known about Rose's delays does not alter Caponigro's knowledge one iota.

It is also irrelevant whether or not Zurales was present to testify. The General Counsel fails to recognize that Judge Amchan made his ruling based on Caponigro's *motivation* to discipline Rose based on Caponigro's knowledge at the time. The most that the General Counsel can offer in regard to Caponigro's motivation is circumstantial evidence that does not contradict Caponigro's direct testimony about his motivation.

As a last resort, the General Counsel twists Caponigro's testimony in a vain attempt to manufacture direct evidence that he maintained unlawful motivation for Rose's warning letter. Specifically, the General Counsel mischaracterizes Caponigro's testimony when it claims that, "Rose's request for representation was an unequivocal exercise of his Section 7 rights, and Respondent unambiguously cited Rose's protected conduct as the basis for the discipline." (General Counsel's Exceptions at 4, citing Tr. 67, lines 2-6). Lines 2-6 of page 67 of the Hearing Transcript actually read:

Mr. Vlasek: Why did you discipline Mr. Rose?

A: Because he couldn't tell me or he didn't tell me what he was doing when he was an hour and 47 minutes into his shift.

(Tr. 67). Joint Exhibit 2 confirms this. Thus, there is no "unambiguous" reference to Caponigro disciplining Rose for engaging in protected conduct. Just the opposite is true.

Finally, the General Counsel relies on the vacuous argument that Caponigro must have disciplined Rose for invoking his *Weingarten* rights because Caponigro did not issue discipline the first moment he saw Rose in the yard. (General Counsel's Exceptions at 4). This argument is illogical. By the General Counsel's reasoning, if a supervisor sees *any* behavior that seems remotely discipline-worthy, he must issue discipline first, and ask questions later.

**D. Judge Amchan Did Not Abuse His Discretion By Denying The General Counsel's Last-Minute Attempt To Amend The Complaint.**

Judge Amchan was well within his discretion in denying the General Counsel's last-minute amendment to plead that Chris Zurales as an agent of YRC. An ALJ has "wide discretion to grant or deny motions to amend a complaint." *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), *enf'd* 998 F.2d 1004 (3d Cir. 1993). An ALJ's decision regarding whether to permit amendment is reviewed under an abuse of discretion standard. *El Paso Healthcare Sys.*, 358 NLRB 54 (2012) (upholding an ALJ's denial of the General Counsel's attempt to amend the complaint at the hearing). Here, the General Counsel has not presented any evidence that Judge Amchan abused his discretion.

The General Counsel mischaracterizes Judge Amchan's reasoning as not wanting to rely on "surprise" testimony. (General Counsel's Exceptions at 5). As explained by Respondent's counsel at the hearing, the General Counsel never provided any explanation regarding why it wished to plead Zurales as an agent for the Respondent. (Tr. 7-8). Judge Amchan took this under advisement, and refrained from ruling on the question of the amendment at that time. (Tr. 8). Rose then testified extensively that he reported his delays that morning to Zurales. (Tr. 30-33). The General Counsel's theory, therefore, is that the knowledge of the reported delays is imputed to Caponigro.

In short, the General Counsel sought to plead Zurales as an agent of YRC in an attempt to impute knowledge of Rose's delays to other managerial employees, in effect bolstering its own theory of the case without providing Respondent an opportunity to rebut the allegations. After hearing the testimony and Zurales' alleged involvement in the dispute, Judge Amchan properly recognized that the amendment was simply "trial by ambush" and properly denied it.

In any event, amendment would have been futile. As explained above, even assuming that Zurales was told by Rose that he had been delayed, the General Counsel presented no evidence that Zurales told Caponigro of the delay. Despite any procedural maneuver, Judge Amchan nonetheless would have and did credit Caponigro's testimony that he was unaware of any delay and that he did not discipline Rose *because* he requested a union steward.

**IV. CONCLUSION**

For the reasons above, the General Counsel's Exceptions should be dismissed, and Administrative Law Judge Amchan's decision should be upheld in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 27th day of March, 2013, a true copy was filed electronically with the Executive Secretary for the National Labor Relations Board. Copies were also served to:

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