

**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

**RESPONDENT YRC, INC. D/B/A YRC FREIGHT'S
BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

March 27, 2013

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent YRC, Inc. d/b/a YRC Freight (“YRC”) largely agrees with Administrative Law Judge Arthur Amchan’s (“Judge Amchan”) decision to dismiss Charging Party Fred J. Rose’s (“Rose”) allegations of a *Weingarten* violation. Indeed, the undisputed facts present no other conclusion but to dismiss the meritless charge.

YRC’s position, however, is that Judge Amchan erred in two narrow, but integral regards. First, Judge Amchan omitted (perhaps inadvertently) an express rejection of General Counsel’s *Weingarten* theory. Second, early in his decision, Judge Amchan states that “[w]ere I to conclude that Respondent’s warning letter was motivated by a desire to retaliate against Rose for asking for union representation, I would find a violation of the Act.” (Administrative Law Judge Amchan’s Decision (“ALJD”) at 3). This observation conflicts with Judge Amchan’s later finding that the elements of a *Weingarten* investigation were not established. As a result, no retaliation can exist, as Rose engaged in no protected activity. For these reasons, Judge Amchan’s proposed order should be amended to explicitly reject the existence of *Weingarten* rights.

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). YRC’s shipping facility in Bolingbrook delivers approximately 300 shipments per day, and picks up another 700 shipments for delivery elsewhere. (Tr. 61). 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 6:45 a.m. (ALJD at 2).

B. Rose’s Alleged Delays.

On August 2, 2012, following a few minutes of pre-shift meetings, Rose walked down the dock to receive his assignment. (Tr. 30). Rose claims that when he received his assignment, he was told that the load was incomplete and not ready for delivery. (Tr. 31). He then proceeded to perform a pre-trip inspection on his vehicle to check for defects. (*Id.*). Rose alleges that during his pre-trip inspection, he discovered that the mechanics had not signed off on his tractor from the previous day when they were supposed to have fixed the air conditioning. (Tr. 32). As

a result, Rose switched tractors and then proceeded to the back of the yard to get a refill of windshield washer fluid. (Tr. 33).

Following the washer fluid refill, Rose claims that his load was finally complete. (Tr. 33). Rose then proceeded to conduct a second pre-trip inspection. (Tr. 34). It was approximately 7:47 a.m. when Rose was completing his second pre-trip inspection, a full hour and forty-seven minutes after the 6:00 a.m. pre-shift meeting adjourned.

C. 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).

D. 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) 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. Caponigro did not question Rose with the intention of discipline. He simply needed to know what Rose's delays were. When Rose refused to respond, Caponigro had no choice but to issue discipline.

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).

E. 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 speculation based on 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 Zurales 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 spends nearly a page of his opinion accurately walking through the facets of a *Weingarten* rights analysis. (ALJD at 2-3). Specifically, he explains that the right to union representation during the course of an interview arises if the interview is investigatory, and a reasonable person would believe that the interview might result in discipline. *Storer Communications*, 292 N.L.R.B. 894 (1989). The test for determining whether an employee reasonably believes the interview might result in discipline is measured by objective standards under all the circumstances of the case, rather than the employee’s subjective motivations. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257, n. 5 (1975). Judge Amchan further explains that *Weingarten* rights only exist when an employer compels the employee *to appear unassisted at an*

interview which may put his job security in jeopardy. (ALJD at 3 (citing *Weingarten*, 420 U.S. at 257)). Based on this analysis, Rose had no *Weingarten* rights to invoke.

A. Respondent's Exception Number 1: The ALJ Should Have Explicitly Rejected The Existence Of *Weingarten* Rights.

With regard to the YRC's first exception, the issue is simply a lack of clarity in the Judge's decision. Although Judge Amchan does not explicitly use the words, he determined that Rose had no *Weingarten* rights to invoke in the first place. The facts and undisputed testimony confirm this. Thus, based on Judge Amchan's fully-supported factual findings, the General Counsel cannot establish any *Weingarten* rights in this case.

1. Rose Had No Objective Fear Of Being Disciplined.

As Judge Amchan properly ruled, Rose had no reasonable belief that the investigation could lead to discipline. Rose testified that he spent his time between the pre-shift meeting and 7:47 a.m. taking his truck to get serviced and swapping out trailers. He also testified that he could not remember having been disciplined for taking his vehicle to maintenance before. (Tr. 52). Caponigro verified that if someone had provided a legitimate explanation for their delays, no discipline would necessarily attach. (Tr. 57). Thus, he did not have an objectively reasonable belief that Caponigro's question would necessarily lead to discipline, and as a result, he had no *Weingarten* rights to invoke.

At the conclusion of his opinion, Judge Amchan agrees with this determination when he states:

I also conclude that the General Counsel has not established that Rose reasonably believed that Caponigro's inquiry would result in disciplinary action. If the explanations Rose gave at trial and in his August 12 letter for the delay on August 2 are accurate, there is no basis for concluding that Rose reasonably feared discipline had he told Caponigro that he was late leaving the yard for the reasons he proffered belatedly.

(ALJD at 4). Judge Amchan is correct. Without an objectively reasonable fear of discipline, Rose had no *Weingarten* rights to invoke.

2. Caponigro's Single Question Did Not Constitute An Investigatory Interview.

Caponigro approached Rose that morning because Rose was not where he was supposed to be and Caponigro needed to know why. Caponigro did not approach Rose with the specific intention to issue discipline, because an employee may have a valid reason for a delay. (Tr. 18,

57). Because the time between 6:00 a.m. and 9:00 a.m. is the busiest time of day at the facility (Tr. 61). Rose was one of five drivers scheduled, and Caponigro is responsible for maintaining the schedule. (Tr. 62). It is imperative that drivers maintain their schedules, particularly when there are 300 shipments going out of and 700 shipments coming into the Bolingbrook facility on any given day. (Tr. 61). As a result, Caponigro has a need to know what one of his combo drivers is doing in the yard when he is supposed to be out on a run.

Caponigro asked Rose a straightforward question: what are your delays? (Tr. 65). Rose provided no answer. Any determination that Caponigro's question rises to the level of an investigatory interview strains logic, as it would render any inquiry by management, no matter how simple or necessary, to require union representation. As a result, it does not constitute an investigatory interview, and Rose therefore had no *Weingarten* rights to invoke.

3. There Are No *Weingarten* Rights Available When Discipline Is Simply Being Issued.

Finally, the fact that Rose was disciplined for misuse of company time does not suggest a contrary result. The Board has already determined that *Weingarten* does not require union representation at an interview called merely to inform an employee of discipline already decided upon. *Baton Rouge Water Works, Co.*, 246 NLRB 995 (1979). Thus, Caponigro's issuance of discipline to Rose at the conclusion of their brief conversation was nothing more than the Dock Supervisor informing an employee of the discipline that he had determined based on the situation before him.

When Caponigro concluded his conversation with Rose on August 2nd, Caponigro knew only the following:

1. that Rose was nearly an hour late for his run;
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. that Rose refused to pick a union representative for purposes of further discussion regarding his delays and explanation.

Thus, while it was not Caponigro's intent to issue discipline when he approached Rose, the situation changed based on Rose's conduct. On that basis, Caponigro made a decision during his discussion that he would, in fact be required to issue discipline. The issuance of the determined discipline does not trigger *Weingarten* rights. Rose was therefore not entitled to representation.

B. Respondent's Exception Number 2: Because Rose Did Not Engage In Protected Conduct, The General Counsel's Retaliation Theory Fails As A Matter Of Law.

As shown above, it appears that Judge Amchan agrees that there are no *Weingarten* rights in this case. As a result, there is no basis for the General Counsel's retaliation theory. In *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the Board set forth the causation test for retaliation cases. First, the General Counsel must show by a preponderance of the evidence that the employee engaged in protected, concerted activity, and that anti-union sentiment was a substantial or motivating factor in the challenged employer conduct. Once this is established, the burden shifts to the employer to prove that it would have taken the same action even if the employee had not engaged in protected concerted activity. (*Id.*).

Protected, concerted conduct is the *preeminent* element of a retaliation claim. Rose did not engage in protected conduct because he had no *Weingarten* rights to invoke. Therefore, the retaliation claim must fail as a matter of law. Thus, Judge Amchan's observation that he would have found a violation of the Act had he determined that Caponigro's warning letter was motivated by retaliation rings hollow, as Rose had no protected activity to retaliate against.

IV. CONCLUSION

For the reasons above, the Respondent YRC requests that Judge Amchan's decision be amended to reflect that no Section 8(a)(1) violation occurred because Fred Rose had no *Weingarten* rights to invoke.

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 of the National Labor Relations Board. Copies were also sent to:

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