

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

YRC, INC., D/B/A YRC FREIGHT

AND

13-CA-087525

FRED ROSE, AN INDIVIDUAL

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
REPLY TO RESPONDENT'S ANSWERING BRIEF

Respectfully submitted,



Electronically Filed

Christina B. Hill

Counsel for the Acting General Counsel

National Labor Relations Board

209 S. LaSalle Street, Suite 900

(312). 886.4886

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In accordance with Section 102.46 (h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel submits this reply brief to Respondent's Answering brief. Contrary to Respondent's contentions, Counsel for the Acting General Counsel does not except to the Administrative Law Judge's decision based on credibility. The exceptions are instead based on the fact that the relevant evidence, which is not in dispute, warrants a conclusion contrary to the Judge's. *See Southern Mail*, 345 NLRB 644, 651, n. 23 (2005) (Board distinguishing between exceptions based on credibility and those that challenge an administrative law judge's findings based on the record.)

By Respondent supervisor Vito Caponigro's own admissions, Counsel for the Acting General Counsel satisfied the initial burden under *Wright Line*. Caponigro admitted employee Fred Rose asked for union representation, that he absolutely had no intentions of disciplining Rose after witnessing Rose's late start from the yard, and that he decided to issue discipline only after Rose exercised his Section 7 rights by failing to explain his conduct, absent union representation.¹ (ALJD pg. 2, lines 2-4, 27-28; Tr. pg. 18, lines 21-23) Therefore, all the

¹ Rose's request for representation was protected conduct. Even if the Employer was not conducting an investigatory interview, which General Counsel does not concede, Rose's request was nonetheless protected. Rose was not required to explain his delay. He was entitled to union representation upon request and conditioning his willingness to provide an explanation on being represented by a union representative was too protected conduct.

relevant and undisputed evidence - the spontaneity of the disciplinary decision, the Respondent's initial lack of intent to discipline, and the absence of an investigation before issuing the disciplinary letter six days after the alleged misconduct - supports the proposition that Rose's request for union representation motivated the Respondent's decision to discipline him. *See e.g. Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing alone may establish discriminatory motive); *W.W. Grainger, Inc.*, 582 F.2d 118, 1121 (7th Cir. 1978) (failing to investigate alleged misconduct may be used in establishing discriminatory motive.)

This is not a case where Respondent would have disciplined Rose regardless of his excuse for his belated start. Caponigro's state of mind before he began to question Rose shows that he would not have disciplined Rose simply for being in the yard past his scheduled departure time. These facts are not in dispute.

Furthermore, the Judge did not expressly reject Dispatcher Chris Zurales's status as a 2(13) agent of the Respondent. The Judge simply refused, in error, to give any weight to Rose's limited and uncontradicted testimony between him and Zurales. Zurales was not alleged as a wrongdoer in this case or to have played any role in Rose's discipline. Rose's conversation with Zurales was offered for the limited purpose of showing that someone other than Caponigro played a role in deciding when loads were ready for dispatch and that Caponigro did not have all the requisite facts when he decided to discipline Rose.

The overwhelming evidence supports one conclusion: Caponigro would not have disciplined Rose before his conversation with Rose, and he would not have disciplined Rose if Rose had not exercised his Section 7 rights. These are not credibility arguments. They are

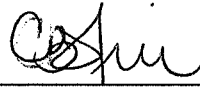
arguments based on the undisputed evidence as a whole that warrants a conclusion different from the Judge's.

CONCLUSION

Based upon the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board finds merit to the General Counsel's Exceptions to the Decision of the Administrative Law Judge.

Dated at Chicago, Illinois, this 3rd day of April 2013.

Respectfully submitted,



Christina B. Hill
Counsel for the Acting General Counsel
National Labor Relations Board
209 S. LaSalle Street, Suite 900
(312). 886.4886

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Counsel for the Acting General Counsel's Reply to Respondent's Answering Brief** was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board on March 13, 2013, and that true and correct copies of the document were served on the parties in the matter indicated below:

E-Mail

JOHN ROLSTON, Terminal Manager
YRC INC., D/B/A YRC FREIGHT
260 E OLD CHICAGO DR
BOLINGBROOK, IL 60440-3088
e-mail: John.rolston@yrcfreight.com

JEFFREY R. VLASEK
BAKER & HOSTETLER, LLP
PNC CENTER
1900 EAST 9TH STREET, SUITE 3200
CLEVELAND, OH 44114-3482
e-mail: jvlasek@bakerlaw.com

FRED ROSE
109 WILLIS AVE
ROCHELLE, IL 61068-8820
e-mail: iroclroc@comcast.net

/s/ Christina B. Hill

Christina B. Hill
Counsel for the Acting General Counsel
National Labor Relations Board, Region 13
209 S. LaSalle Street, Suite 900
Chicago, Illinois 60604