

**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.'S REPLY BRIEF IN SUPPORT OF
ITS CROSS-EXCEPTIONS**

April 17, 2013

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I. INTRODUCTION

The General Counsel's Answering Brief suffers from a split personality. Early in its brief, the General Counsel correctly cites that the determination of whether an employee has a reasonable basis to believe that a conversation constitutes an investigatory interview is considered from an objective perspective. In other words, do the facts and circumstances surrounding the conversation give rise to the belief, ignoring the employee's subjective opinion, that he may be disciplined as a result of the conversation.

Despite noting this in the first paragraph, the arguments contained within the Answering Brief advocate for precisely the opposite standard. Specifically, the General Counsel asks the Board to believe that the Charging Party's subjective belief regarding the potential for discipline is the key. This is false. When analyzed correctly, using the objective test, Charging Party Fred Rose had no fear of discipline, and therefore, no *Weingarten* rights to invoke.

II. ARGUMENT

A. The General Counsel Argues For A Subjective Test, Rather Than Objective.

The Board has previously held that *Weingarten* entitles an employee to union representation on request at an investigatory interview which the employee reasonably believes might result in his being disciplined. Thus, the standard requires that an employer evaluate an investigatory interview situation "from an objective standpoint—i.e., whether an employee would reasonably believe that discipline might result from the interview." *Consolidated Edison Co.*, 323 N.L.R.B. No. 163 (1997). Using this standard, there is no question that Rose had no "reasonable" belief that he would be disciplined for his actions on the morning of August 2, 2012.

Based on their testimony, when Dock Supervisor Vito Caponigro ("Caponigro") approached Rose that morning, the objective facts surrounding the conversation were the following:

1. Rose was scheduled for 6:00 a.m. shift. (Tr. 61).
2. Rose should have left the yard no later than 6:45 a.m. (Administrative Law Judge Amchan's Decision ("ALJD") at 2).
3. Rose was still in the yard at 7:47 a.m. with no apparent vehicle trouble. (ALJD at 2).

4. Rose had not notified Caponigro of his delays at any point that morning. (ALJD at 2, 4; Tr. 61).
5. Taking Rose's testimony as true, his delays were the result of taking his truck to maintenance. (Tr. 30-34).
6. Rose had never been disciplined for taking his truck to maintenance before. (Tr. 52).

Given these facts, Administrative Law Judge Arthur Amchan ("Judge Amchan") properly determined that there was no basis for concluding that Rose had any reasonable fear of discipline if he had simply told Caponigro that he was late because of maintenance issues.

Conversely, the General Counsel asks the Board to ignore the standard and focus only on what was going through Rose's mind when he was approached by Caponigro. In other words, the General Counsel asks the Board to only consider Rose's unsubstantiated fear that he was going to be disciplined when Caponigro approached him. This is not the standard.

There is no testimony or facts presented to show that Caponigro disciplined Rose each and every time he saw Rose. Further, the fact that Caponigro admitted that he had disciplined employees in the past for misuse of company time is *no* indication that he would necessarily do so under the circumstances. The General Counsel conflates the "possibility" of something occurring with the "guarantee" that it will occur.

Rose testified that he was at maintenance for the duration of the time between his pre-shift meeting and when Caponigro approached him. Rose cannot think of a time when he has been disciplined for taking his truck to maintenance. No record of Rose ever being disciplined for taking his truck to maintenance has been proffered by the General Counsel. Objectively, if Rose's story was true, he had nothing to fear, as no discipline would have resulted from his legitimate excuse.

B. The Fact That Rose "Demanded" To Know If Caponigro's Question Was An Investigation Does Not Create Rights He Never Had In The First Place.

The General Counsel contends that the mere fact that Rose requested union representation is protected conduct under the circumstances, as per the Board's ruling in *In re IBM Corp.*, 341 NLRB 1288 (2004). The Board's determination in *IBM* is inapplicable to the present facts. In *IBM*, the non-union employees were being interviewed following allegations of

sexual harassment. As a result, the employees knew, or certainly had the objectively reasonable fear, that discipline may result from the investigation.

Rose had no such objective fear. As illustrated above, assuming that Rose was telling the truth, he had no objective fear of discipline, as his maintenance excuse would have precluded discipline for the delays. Thus, the situation is *not* the same as that in *IBM*. In *IBM*, the employees could reasonably fear discipline, thus they were subjected to investigatory interviews. The only thing preventing them from invoking *Weingarten* rights was the fact that they were in a non-union environment.

Rose, on the other hand, was not subjected to an investigatory interview in the first place as he had no reasonable fear of discipline. Without an investigatory interview, no such rights exist, and the demand from Rose is not protected conduct. Thus, Caponigro could not have retaliated as a result of Rose's protected conduct, since no protected conduct took place.

C. There Is No Evidentiary Support For The General Counsel's Assertion That The Discipline Was Retaliatory.

The General Counsel continues to incorrectly insist that Caponigro's statement that he did not approach Rose with the intention to issue discipline is proof that the discipline was retaliatory. Judge Amchan properly dismissed this erroneous thinking when he concluded:

The fact that Caponigro did not decide to discipline Rose until he asked for union representation does not necessarily establish that Rose was disciplined for asserting his *Weingarten* rights. The fact that B occurred after A does not necessarily mean that B *was the result of* A, particularly where there is an alternative explanation for B.

(ALJD at 3) (emphasis added). There is an alternative explanation present: Rose could have been legitimately delayed (as he so claimed, in fact). Thus, discipline may not have been appropriate given the circumstances, and it was only *after* Rose failed to provide any explanation that Caponigro made his decision.

The fact that Caponigro asked the question and the fact that discipline resulted from the answer does not transform the question into an investigatory interview as Caponigro had no intention of disciplining Rose if Rose had simply provided an explanation for the tardiness. As explained more fully in Respondent's Answering Brief to the General Counsel's Exceptions, Judge Amchan specifically credited Caponigro's testimony regarding the fact that he did not discipline Rose in retaliation for invoking non-existent *Weingarten* rights. An administrative law

judge's credibility determinations are afforded an exceptional level of deference, and should not be overturned unless the clear preponderance of the relevant evidence shows the conclusion was incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd* 188 F.2d 362 (3d Cir. 1951). The General Counsel has failed to do so here.

III. CONCLUSION

For the reasons stated 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 17th day of April, 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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