

Pope Concrete Products, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 3-987. Cases 26-CA-13404 and 26-CA-13472

December 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

One of the issues presented in this case¹ is whether the Respondent's 3-day suspension of employee Danny Owen violated Section 8(a)(3) of the Act. The judge found that the General Counsel failed to prove the alleged violation. The General Counsel has filed exceptions to this finding.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, except as discussed below, and to adopt the recommended Order as modified.

For the reasons set forth fully in the judge's decision, we agree with his findings that, after becoming aware of employees' union organizing activity in August 1989,³ the Respondent: instituted an unlawful written warning system;⁴ discriminatorily issued written warnings on August 29 to employees Danny Morgan and Daythiel Buie, who had engaged in union activities; impliedly threatened employee Owen in early September with a cut in employees' wages and hours if they unionized; and unlawfully discharged leading union activist Buie in late September. For the reasons which follow, we also find that the Respondent unlawfully suspended employee Owen on September 11.

Driver employee Owen assisted in organizational activities. In addition, he and Buie were the only employees who spoke often about employee wages, working conditions, and union representation in three em-

ployee meetings with part-owner and president, Albert Pope, held in the period between the filing of a representation election petition on August 23 and the withdrawal of the petition on October 12. Owen was also the immediate object of part-owner and precase manager, Jeff Pope (Albert's son), implied threat to cut wages and hours in early September.

On September 11, Owen was suspended for 3 days without pay, the first disciplinary action against him in his 18-month tenure with the Respondent. The suspension followed an accident that occurred on September 8. His trailer broke an air coupling and fell 12-16 inches to the ground because Owen failed to lower the supporting "dolly legs" before unhooking the trailer from the truck cab.

In May 1988, Owen had been involved in a similar accident, which resulted in greater damage. At that time, Albert Pope only told Owen to be more careful. In the fall of 1988, Owen put a small crease in the side of a tanker. He reported this incident to the Respondent, without any immediate consequence. These two earlier incidents were mentioned, however, in the September 11 letter explaining the reasons for Owen's suspension. In addition, Albert Pope testified that he had observed Owen respond too slowly to an overflow warning bell while filling his truck just prior to the September accident. Pope said that he felt Owen needed "something to kind of wake him up a little bit."

The judge found that Owen was a union supporter, but he was not as active as Buie. He further found that, under the circumstances presented, the General Counsel had failed to prove that the discipline imposed on Owen was so "particularly harsh or disparate" as would warrant an inference of discriminatory motivation. Accordingly, he found that the Respondent suspended Owen for a nonpretextual, legitimate business purpose.

We find that the General Counsel has presented prima facie proof of unlawful discrimination against Owen. (1) He was an open union supporter, second only to Buie among employee activists. (2) The Respondent's knowledge of Owen's prominence in that campaign is inferable from evidence that, in late August, Albert Pope told an employee that he knew who the "instigators" were and, in early September, Jeff Pope singled out Owen for an unlawful threat to retaliate against unionization. (3) The Respondent's pronounced animus to union activity is manifest in the threat of Owen and in the Respondent's earlier unlawful actions of instituting a written disciplinary system and discriminatorily issuing warnings to union activities. (4) The timing of Owen's suspension proximate to these other unfair labor practices and in the context of a representation election campaign suggests a nexus between the Respondent's action and Owen's union activity. This nexus is underscored by the parallel between the Respondent's pretextual reason for institut-

¹On April 10, 1991, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions, a supporting brief, and a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³All dates are in 1989, unless otherwise stated.

⁴We agree with the judge that the Respondent violated Sec. 8(a)(3) by implementing and enforcing a new formal written warning policy for unexcused absences. We emphasize that this unlawful conduct is distinguishable from the Respondent's prior irregular practice of placing notes above verbal warnings in employees' personnel files.

ing the unlawful written disciplinary system—i.e., to “get employees’ attention”—and one purported reason for shortly thereafter disciplining Owen—i.e., that he needed “something to kind of wake him up a little bit.”

We further find that each of the Respondent’s alleged reasons for suspending Owen was pretextual. As previously indicated, our finding that the Respondent’s first “call to attention” masked a discriminatory disciplinary scheme contradicts the claim that a second, similar “call to attention” for Owen was entirely legitimate. The validity of the Respondent’s concern with Owen’s purported slow response to an overflow warning bell is also rebutted by the failure of the written suspension memo to mention this matter and by uncontroverted evidence that Owen had been reacting to the bell in the same manner for a prolonged period of time without any overflow spill or caution from the Respondent’s officials.

It is also clear that the Respondent’s reliance on Owen’s accident record was not genuine. The particular incident for which he was disciplined was very similar to the incident which occurred in May 1988. Owen received no discipline whatsoever for the earlier incident, which actually entailed more costly damage. The contemporaneous advice to be more careful cannot reasonably be construed as an indication that a recurrence of such negligence almost a year and a half later would warrant the imposition of a 3-day suspension. The juxtaposition of these two trailer incidents, with discipline imposed only following the onset of organizing activity, contradicts the judge’s finding that Owen was not subjected to disparate treatment. Indeed, the disparity in treatment was further demonstrated later in September when the Respondent excused employee mechanic David Brinley, who was not a union supporter, from a 3-day suspension for negligence which contributed to \$4000 in damage to a truck engine.

Based on the foregoing, we find that the Respondent’s suspension of Owen was motivated by a desire to retaliate against a known union activist. Consequently, we conclude that the Respondent violated Section 8(a)(3) and (1) when it suspended Owen. We shall modify the judge’s recommended Order and notice to include provisions for the appropriate “make-whole” remedy to Owen for the discrimination against him.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pope Concrete Products, Inc., Paris, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

“(b) Suspending or discharging any employee for engaging in union or other concerted activity protected by Section 7 of the Act.”

2. Substitute the following for paragraph 2(a) and (b).

“(a) Offer Daythel Buie immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make Buie and Danny Owen whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them.

“(b) Remove from its files any reference to the unlawful discipline imposed on Daythel Buie, Dan Morgan, and Danny Owen, and notify these employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT implement a written warning system, issue warnings to employees, implicitly threaten to cut hours and wages, or otherwise discriminate against our employees because of their activities in support of union affiliation for purpose of collective-bargaining representation or otherwise engaging in protected concerted activities.

WE WILL NOT discharge or suspend any employee for union or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Daythel Buie immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without

prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make Buie and Danny Owen whole for any loss of earnings and other benefits resulting from Buie's discharge and Owen's suspension, less any net interim earnings, plus interest.

WE WILL notify Daythel Buie, Dan Morgan, and Danny Owen that we have removed from our files any reference to their unlawful discipline and that the discipline will not be used against them in any way.

POPE CONCRETE PRODUCTS, INC.

Jane Vandeventer, Esq., for the General Counsel.
Richard H. Allen Jr., Esq. and *Bruce H. Henderson, Esq.*, of
 Memphis, Tennessee, for the Respondent.
Hugh Jacks, of Knoxville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Paris, Tennessee, on January 23 through 25, 1991. Subsequent to an extension in the filing date, briefs were filed by Respondent and the General Counsel. The proceeding is based on charges, as amended filed September 5 and October 5, 1989,¹ by Oil, Chemical and Atomic Workers International union, AFL-CIO, Local 3-987. The Regional Director's consolidated complaint dated March 30, 1990, alleges that Respondent Pope Concrete Products, Inc. of Paris, Tennessee, violated Section 8(a)(1) of the Act by threatening employees with changes in wages, hours, and working conditions if the employees selected a Union to represent them and that Respondent violated Section 8(a)(1) and (3) of the Act by instituting a new policy of giving written warnings to employees, by issuing written warnings to Danny Morgan and Daythel Buie, by suspending Danny Owen, by issuing a verbal warning to Daythel Buie, and by discharging Daythel Buie, all because of their activities and sympathies on behalf of the Union.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the distribution of concrete and other building materials.

It annually ships goods valued in excess of \$50,000 from its Paris location to points outside Tennessee and it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Tennessee. It admits that at all times material is, it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All following dates are in 1989, unless otherwise indicated.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Albert Pope has been Respondent's owner and president since he purchased the business in March 1987. His son Jeff Pope is a coowner and precast manager and Danny Hart is general manager of a business that generally has a total of about 12-13 employees.

In late July 1989, Daythel Buie, a truckdriver employed by Respondent, contacted the Union and began to organize Respondent's employees. He talked to other employees about the Union and generated between six to eight signed authorization cards. He had a meeting of employees and union representatives at his home. Employees Danny Owen and Danny Morgan also talked to other employees and attended meetings, however Buie was the prime mover in the union organizing effort. After three meetings with the employees, the Union filed a representation petition on August 24. Respondent received the petition on August 28, however, Albert Pope admitted that he was told about union activities by an employee during the middle of the previous week. Previously, Pope admitted being told about union activities on about August 23 (midweek before he received the petition). Moreover, on August 8, Pope stood about 10 feet away from employees Buie and Darrell Hutchison while they discussed their opinions of and support for the Union. Hutchison saw Pope standing nearby for all but the first few words of the conversation, and both employees testified that Pope's face became red (which they said it always did when Pope became angry), however, Pope testified that he did not recall being present.

On August 16, Buie spoke with two former employees in Respondent's office and mentioned his involvement with the Union's campaign at Humphreys Concrete, a local competitor concrete company. He again noticed that Pope was standing nearby. Shortly thereafter, Buie was washing his truck and talking to employee Danny Morgan about who among Respondent's employees supported the Union. When both noticed that Pope was about 10 feet away and appeared red-faced and angry looking. Pope again said he did not recall such an incident.

A few days later, Pope approached Morgan in Respondent's mechanic shop and began to talk about the Union, and Morgan replied that he would be glad when it was over. Pope stated that he knew that Morgan was a "follower," but that he knew who the "instigators" were. Pope denied that this conversation ever took place.

Anthony Powell is a truckdriver for a company not involved who previously worked for Humphreys Concrete. While at work on August 28 he overheard a conversation between Pope and two managers for Humphreys in which they discussed the union activities that were going on at both companies. During the conversation Pope said someone had told him about a union meeting a couple of weeks previously.

On two occasions after August 28, Pope approached Buie and asked him what he thought about the Union. On the second occasion (in the mechanic's shop), Buie replied that he and the other employees thought that they would be better represented in their job relations with the Union. Buie recalls that Pope got red in the face, however, Pope denied that the incident occurred.

After the filing of the petition, Pope held three meetings with employees to discuss the Union. At the first of these,

he told the employees that he was “disappointed” and “frankly pissed off” at the petition (Pope admitted that he had said he was disappointed, but “doubted” and then denied that he had said he was “pissed off”). At the meetings, Buie and Danny Owen were the only employees who spoke up frequently, asking questions about their wages and working conditions, and discussed union representation.

As noted, the initial charges were filed on September 5 and October 5, and representation election was scheduled to be held on October 13, but on the October 12, the Union withdrew the petition and the election was canceled.

During this period of time several incidents occurred involving employees Owen, Morgan, and Buie relating to alleged improper threats, warnings, and a 3-day suspension. These incidents, as well as Respondent’s decision to terminate Buie, are the subject of the consolidated complaint, and are described more fully in the discussion section below.

Buie had 29 years of experience in driving tractor-trailer trucks when he was hired by Respondent in March 1989. He was assigned to haul sand and gravel to Respondent’s plant in a specific Kenworth truck, truck 35. Buie often worked 11 or more hours a day, the time necessary to haul six or seven loads each day. He worked on a commission basis and was paid a percentage of every load hauled. When his truck was down for repairs, no income was earned.

Buie testified that Pope told him when he was first hired that truck 35 lost oil, and that he should keep an eye on the oil level. Pope also told Buie that he intended to buy a new truck or to rebuild the engine on truck 35 “if we could make it through the busy season” (until November), and Pope admitted that both he and Respondent’s mechanic were well aware that truck 35 had an oil consumption problem. Buie was instructed to run truck 35 about a gallon low in oil, in other words, with 10 gallons of oil instead of its 11-gallon capacity, and, as part of his daily routine, he monitored the oil level in truck 35 throughout his employment.

In late July, Buie told Pope that truck 35’s oil consumption problem was getting worse, and he attempted to get a key to Respondent’s oil supply so that he could put oil in when he arrived at work at 4 or 4:30 a.m., when he was the first, and only, worker. His request was denied and he could not add oil until 7 a.m., after he had made his first run, and others had arrived to open the shop. Buie continued to tell Pope, about the problem with oil consumption but did not put this down on his driver’s daily reports because Pope had instructed both him and Owen to not write a whole bunch of stuff on the reports because it would reflect against them in case the D.O.T. inspected their records.

During the summer several repairs to truck 35 were made (a new fuel pump and air compressor), and the revolutions per minute of the engine were set at an increased level, higher than is recommended for the Cummings 350 engine in order to give the engine more power. Also, at Jeff Pope’s instruction, and without Buie’s knowledge, the spring on the oil pressure relief valve was lengthened, which had the effect of causing the oil pressure to build up higher. Subsequently, the mechanic mistakenly using a Caterpillar filter instead of a Cummings filter when he installed a new oil filter. The Caterpillar filter has fewer threads at the seal to secure it in place and on September 27, this ultimately caused a major leak at the weak seal when Buie started his first run.

On September 7, Buie, monitoring the oil at lunchtime, noticed it was low and on his return to Respondent’s facility told driver Danny Paschall (who had recently been hired to drive truck 35 at night) that he needed to add 2 gallons of oil to the truck. He then went to the office and notified Pope that he had received a subpoena to be a witness for the Union at the representation hearing scheduled for September 8.

Although Pope rarely checked himself, shortly after Buie showed Pope his subpoena, Pope himself checked the oil in Buie’s truck, found it to be 3 gallons low and decided to give Buie a verbal warning. On September 9, Pope called Buie into his office, told him the oil in the truck had been low, gave him the warning, and threatened him with “serious” trouble if it was low again. Buie protested that he had been telling Pope for months that the truck consumes up to 3 gallons of oil a day. Pope denied having been told and he placed a written copy of the warning in Buie’s file.

Buie who had difficulty reading and writing enlisted the help of Danny Owen, who wrote out the spelling for Buie, and on September 9, 11, 12, and 13. Buie started reporting in writing that truck 35 used “1–3 gallons of oil every day, and that this was “excessive.” He also noted on the reports that Respondent had been told about this “3–4 times.” Respondent received the reports, Pope was aware of them, and on September 12 he ordered mechanic David Brinley to keep a record of the oil he or the drivers put into truck 35, so that he could see “whether Buie was telling the truth or not.” Brinley’s notes of truck 35’s oil usage show about 1–2 gallons of oil used a day, but Brinley admitted that the record could have been inaccurate, as he was only recording the oil he himself put in the truck or that drivers reported to him they had put in. Some days were not recorded at all, with no explanation, and Brinley had no idea what had occurred on those days, nor of how much oil drivers put into truck 35 without informing him. Truck 35 was known to suffer from “blow-by,” which meant that the oil system built up excessive pressure that was not released in the normal way and could result in a blowing out of the dipstick. On August 24, Buie was out sick, Jeff Pope drove truck 35, and that day the oil pressure built up sufficiently to eject the dipstick (which is secured in the tube by a compression fitting), entirely out of the tube, and splattered oil over the right side of the truck.

Buie saw this oil spatter when he returned on August 25, and when he again urged Pope to do something about the truck’s oil system problems, Pope authorized him to take the truck to a shop which did repairs on Respondent’s trucks. Buie immediately reported back to Albert Pope the mechanic’s opinion that truck 35’s engine was “on the way down,” that it needed to be rebuilt, and that it could blow up or “lay down” any time. Pope was told that he could call to discuss the truck’s condition, but did not do so and instead Pope consulted his brother-in-law, a truckdriver who had done some mechanical work over the years. His brother-in-law looked at the engine for 15–20 minutes, agreed it had some blow-by, but told Pope that he did not really have to worry about the engine blowing up or “laying down” until water began to appear in the oil. Pope then instructed Buie to “run the shit out of it.”

On September 27, Daythel Buie arrived at Respondent’s yard at 4:30 a.m., and performed his routine checks on his

truck, including checking the oil. He allowed the motor to warm up for 15 minutes while he filled out his paperwork. After air pressure had built up, Buie pulled the truck forward, stopped, washing off his windshield, got back in the truck, checked the gauges, drove out through the gate, stopped the truck, locked the gate, drove to the railroad crossing, stopped, proceeded down Russell Street, entered Highway 641, and drove less than a half mile when he heard the engine make a squeak and saw the oil gauge begin to fall rapidly (there was no red light to show low oil pressure). He then pulled to the side of the highway, stopped, and called Pope at 5 a.m. Pope got a tow truck, towed Buie back to the facility, and told him to go home until he decided what was going to be done.

Pope testified that he would have fired Buie immediately but because of the union circumstances he called Respondent's counsel for advice and then took pictures and made an investigation in accordance with counsel's instructions.

The pictures, taken at about 7:45 a.m., showed a large oil spot where Buie had washed the windshield, a track of oil made by the tires that had run through the oil, and a smaller oil spot where Buie had stopped at the front gate.

Pope and Danny Hart then interviewed mechanic Brinley. Pope remembered little of the conversation but Hart recalled that Brinley told Hart that the engine had locked up because all the oil had leaked out of it and that this occurred because "the oil regulator valve had stuck and when this happens the oil pressure will increase greatly causing the oil to find the weakest route, which at that time happened to be associated with the oil filter." The malfunctioning valve, Brinley told them, would cause the oil pressure to "go extremely high." Brinley testified that he was asked if the driver should have been able to catch the problem during the few minutes when it was happening, and Brinley said that it should be reflected on the oil gauge if it was functioning properly. Brinley also responded to Pope's and Hart's questions as to when the oil leaked out by saying that he thought it would have leaked out fairly quickly once the seal went, but at the trial he testified that could not say for certain.

Later that day, Pope and Hart interviewed Buie (Pope thought it was the following day) who explained that the oil pressure appeared normal until he had down shifted at an interchange a short distance from the plant, and had heard a "racket" from the motor and saw the oil pressure drop rapidly.

Later on the September 27, Brinley was examining truck 35 more closely, and discovered that in addition to the stuck valve, he had installed the wrong oil filter on the truck, and that the seal between it and the oil pump had been the weak point at which the oil had leaked out. He told Pope of this on September 27 or 28 and Pope admitted being told about it at least by September 28.

Pope terminated Buie on September 28, asserting that the reason was for "improper operation of a vehicle." Pope added at the hearing that he had terminated Buie "because he ruined a \$4000.00 engine carelessly," and otherwise stated that he was terminated because there was no oil in the truck, and that this was abuse of equipment. (Respondent's exhibits and Pope's testimony establish that the repair of the engine, including labor cost only \$2213.82.)

The day after Buie was terminated Brinley was given the following written warning:

I have investigated the incident concerning the engine blowing up in the Kenworth, truck. I have reached the following decision.

According to your own admission, the problem originated when you put the wrong oil filter on the truck, causing the truck to lose its oil. Normally, I would give you a three-day suspension. However, I feel that it would not be in the best interest of the company to do without a mechanic for three days. Therefore, I am giving you notice that in the future, if such negligence occurs again, you will be terminated.

III. DISCUSSION

The issues in this case arose from events which occurred contemporaneously with a union organizational drive at Respondent's facility and resulted in alleged threats, and the disciplinary warnings to several employees a suspension of one employee and finally the discharge of one employee who was the principal union activist.

A. Discharge and Warning of Daythel Buie

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activity was a motivating factor in the employer's decision to terminate or discipline the employee. Here, the record shows that disciplinary action against Daythel Buie began with a written warning on August 29 about an absence (discussed below) and verbal warning on September 9 because of a low oil level in his truck. This latter discipline occurred 2 days after Buie told Owner Pope that he had received a subpoena to be a witness for the Union at the scheduled representation hearing on September 8, a hearing that was canceled shortly thereafter, and it occurred after Pope himself had uncharacteristically checked the oil. As otherwise found, I find these warnings to be an unfair labor practice. Otherwise, it is clear that Pope knew about the union organizational attempt, knew Buie was an "instigator," and had expressed his displeasure with the employee's actions in attempting to organize.

Under these circumstances, I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to show antiunion animus and to support an inference that Buie's union activities were known to Respondent and were a motivating factor in Respondent's decision to terminate him. It also is shown that Long and Morgan were suspected of acting in concert with Buie and it also is inferred that the decision to discipline them also was motivated by the same reason. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1983); see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's principal defense is based on its contention that the discharge and warning to Buie were an appropriate response merited by the employee's negligence.

I find no persuasive evidence to support the Respondent's position and I conclude that its alleged reasons are pretextual

and merely designed to mask the fact that both the warning and termination were motivated by Owner Pope's aggravation over Buie's instigation of a union organizational effort at his facility. Here, I also find that Pope's extreme reaction to the reasonably predictable happening of some engine misfortune was as a result of his own choice to attempt to operate a truck with hard to diagnose oil problems through his "busy season" and that his characterization of Buie's behavior as abuse of equipment and careless ruin of a \$4000 engine (almost double the actual cost of repairs) are both illustrative of the pretextual nature of Respondent's asserted defense.

Pope was well aware of an unusual oil problem in truck 35 but when something finally happen he immediately decided to fire Buie. As Pope testified he made an investigation only because of counsel's advice and the "union circumstances." This so-called investigation on September 27, the same day as the incident itself, was a pretext and no attempt was made to access the possibility that such factors as pressure or a blockage could have allowed the oil gauge to show continued pressure for a short while after the initial catastrophic release of oil in Respondent's yard. When Pope received exculpatory information from mechanic Brinley shortly thereafter, he gave it no consideration and on September 28 followed through with his initial decision to fire Buie. Most significantly, when it was learned that the problem originated when Brinley put the wrong oil filter on the truck, Respondent disciplined Brinley with a notice that he normally would have been suspended for 3 days but was only being given a warning because the Company did not want to do without a mechanic for 3 days. Brinley did not support the Union and I conclude that Buie would not have been subjected to such disparate treatment were it not for his protected union activities.

Under these circumstances, I find the Respondent's stated reasons to be pretextual and, accordingly, I conclude that the Respondent has failed to show that Buie would have been discharged absent his union activities and protected concerted activity. The General Counsel otherwise has met his overall burden of proof and I further conclude that Respondent's discharge of Buie is shown to have been in violation of Section 8(a) (1) and (3) of the Act, as alleged.

As noted above, a few weeks prior to his discharge Buie was given a disciplinary warning for having a low oil level in his truck. This occurred after repeated reports by Buie and after Pope, uncharacteristically checked the oil himself on the same day that a representation hearing was canceled at which Pope knew Buie had been expected to be a witness called by the Union. The timing and pretextual nature of this warning show that it is unjustified and illegally motivated and I find that it is shown to be a violation of Section 8(a)(1) and (3) of the Act, as alleged.

B. Threats and Other Warnings

In early September, Danny Owen entered the mechanic shop when Jeff Pope remarked that if the employees got a union organized, it could hurt them more than it would help them. Owen responded that a union was only as good as its members. Pope replied that unions used to be good, but that they were not anymore, and that if the Union came in at Respondent that the employees would have to "run legal." This statement implied that drivers would have to limit their

driving time to 10 hours and 500 miles a day, a practice that would mean less income for Owen. Pope testified that he had no memory of the conversation and I therefore credit Owen's testimony. Pope's statement constitutes an implied threat to cut hours and wages if employees support union representation and I find that it therefore is shown to infringe on the employee's Section 7 rights and to violate Section 8(a)(1) of the Act, as alleged.

There is no evidence that Respondent used written warning (other than handwritten notes to the file) until after the representation petition was filed on August 23. Thereafter, warnings were typewritten on Respondent's letterhead and were given to employees after the receipt by Respondent of the petition on August 28. Warnings given to employees Morgan and Buie were dated August 24 and 25, but it was admitted that they were not handed to the employees until August 29. Dan Morgan received a warning dated August 25 for failing to personally advise the office of his sickness. Morgan was absent on August 25 but explained that his son whom he had instructed to call in to report his absence had forgotten to do so. At the time, Morgan was an employee of more than 4 years' tenure and had only failed to report an absence once, in March 1988 and had not been warned at that time.

Buie was sick on August 24 and did not work. He had asked his son-in-law Billy Christian also an employee of Respondent, to inform Respondent that he was out sick. Pope recalled Christian telling him that Buie was sick, but stated that Christian had informed Pope that Buie "probably" or "possibly" was home sick, however, it appears that Christian did not take the initiative in clearly informing them that Buie was sick. Pope gave Buie a no-call/no-show written warning on April 29 and told Buie that Christian had not reported his absence to Pope.

Respondent held a meeting on Saturday morning, August 26, in which Hart reminded employees that they must call in if they were going to be off work, and, said that they should call in themselves. Hart testified that he said he "preferred" them to call themselves, not that they were required to do so. Hart also corroborated that Pope stated at this meeting that he remembered Christian informing him that "Buie was feeling bad."

Buie had no previous problem of this nature and Respondent had no record of past written warnings for such infractions, before the Union's petition was filed (personnel records introduced show that two other employees had received only a verbal counseling and a file note for a no-call/no-show and one employee had been absent without informing Respondent seven times without receiving a written warning or any discipline other than a verbal counseling).

Under these circumstances, I find that the record supports a conclusion that a policy of giving written warnings for absence occurrences had not existed prior to the union campaign and that the institution of this policy and its strict enforcement against two known union supporters occurred shortly after Owner Pope overheard or otherwise learned of their union sympathies.² Respondent's actions were moti-

² In all instances where I find Pope's testimony conflicts with the testimony of the General Counsel's witnesses, I find that the General Counsel's witnesses should be credited because with respect to most of these conversation, there is corroboration for each conversation and Pope admitted or displayed a bad memory on numerous occa-

vated by this knowledge and had the effect of illegally discouraging union activity and infringing on the employees' Section 7 rights.

Accordingly, I find that the General Counsel has shown that both the implementation of the written warning policy and the execution of this policy through the issuance of such warning to Buie and Morgan occurred as a result of the union organizational attempt; see *Joe's Plastics*, 287 NLRB 210 (1987), and I conclude that these actions violated Section 8(a)(1) and (3) of the Act, as alleged.

Danny Owen (who previously was the plant manager for competitor Humphreys Concrete) had been driving for Respondent for about a year and a half. He was an active union supporter and, along with Buie, spoke up, and asked questions during Respondent's antiunion meetings. On September 11, Owen was issued a suspension for 3 days without pay for an accident which occurred on September 8, when Owen neglected to roll down the supporting "dolly legs" before unhooking his trailer, which resulted in the front end of the trailer falling 12-16 inches to the ground, breaking an air coupling.

Owen had a similar mishap, in May 1988, shortly after he had started work. At that time which had actually resulted in greater damage: Pope told him to be more careful, and issued no discipline of any kind. This incident was mentioned in the September 11 suspension letter as part of the reason for the suspension. Just prior to the September incident, Owen had been observed being slow to respond to the site overflow warning bell and Pope said he felt Owen had been careless, and needed "something to kind of wake him up a little bit."

Although Owen was a union supporter, there is no evidence that he was considered to be a primary "instigator" as was Buie and, under these circumstances, there is no persuasive showing that Owen was subjected to any particularly harsh or disparate treatment that would tend to indicate illegal motivation on part of the Respondent and, otherwise, I find that the discipline imposed appears to have been for a nonpretextual, legitimate business purpose. Accordingly, I find that the General Counsel has failed to show a violation of the Act in this respect, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to "run legal" and implicitly cut hours and wages, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By instituting a written warning system and issuing written warnings to Daythel Buie and Dan Morgan on August 29, 1990, and by warning and discharging Daythel Buie on September 9 and 28, 1990, respectively, Respondent en-

sions tended to guess, to assume, and to overstate things as shown by his liberal use of phrases such as "probably," "most likely," "feel like," and "guess," otherwise contradicted himself on several occasions.

gaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

5. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the he complaint.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate Daythel Buie to his former job or a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),³ and that Respondent expunge from its files any reference to the discharge, as well as the unlawfully warning to Buie and Dan Morgan and notify them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against them.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Pope Concrete Products, Inc., Paris, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing a written warning system, issuing warnings to employees, implicitly threatening to cut hours and wages or otherwise discriminating against them because of their activities in support of union affiliation for purposes of collective-bargaining representation or otherwise engaging in protected concerted activities.

(b) Discharging any employee for activity protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

³Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer Daythel Buie immediate and full reinstatement and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section of this decision.

(b) Expunge from its files any reference to the warnings and discharge of Daythel Buie and Dan Morgan and notify them in writing that this has been done and that evidence of the unlawful discharge and warning will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all on records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(d) Post at its Paris, Tennessee facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

forms provided by the Regional Director for Region 26, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."