

**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

November 18, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The issue in this case is whether the judge correctly rejected the Respondent's affirmative defenses to the General Counsel's compliance specification for discriminatee Daythel Buie.<sup>1</sup> The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions, as further explained below, and to adopt the recommended Order.

1. In finding that Buie diligently searched for alternative work, the judge relied in part on personal job search records maintained by Buie and his wife. Buie's personal records indicate that on January 14, 1991, Buie applied for jobs in Hollow Rock and Holladay, Tennessee. The employment and expense data sheets which Buie submitted to Region 26 make no reference to Tennessee jobsite applications on that date, but they indicate that Buie applied for a job in Murray, Kentucky. The Respondent argues that this discrepancy shows that the Buies fabricated evidence and undermines their credibility.<sup>3</sup> We disagree. The differences cited between Buie's personal records and the records submitted to the Region are an insufficient basis, in light of the record as a whole, on which to overturn the judge's credibility resolutions.

2. The Respondent claims that Buie was unavailable to work from September 21 to October 7, 1990, while his daughter was hospitalized in critical condition. In support of this argument, the Respondent relies on an application for unemployment compensation by Buie on October 2. Buie indicated there that he was unavailable to work afternoons because of child care responsibilities. We find that the application, which implicitly

<sup>1</sup>On July 8, 1993, Administrative Law Judge Lowell M. Goerlich issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

<sup>2</sup>The 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup>We note that the distances between Hollow Rock, Holladay, and Murray were not so great that it would have been impossible for Buie to visit all three cities in a single day. In fact, Buie frequently traveled long distances in a day to apply for jobs in several different cities.

indicated Buie's continuing availability for work at times other than in the afternoon, fails to meet the Respondent's burden of proving that Buie removed himself from the job market during the period in question.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge 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.

*Jack L. Berger, Esq.*, for the General Counsel.

*Rayford T. Blankenship* and *Martin Howe, Esqs.*, of Greenwood, Indiana, for the Respondent.

*Hugh A. Jacks*, International Representative, of Chattanooga, Tennessee, for the Charging Party.

SUPPLEMENTAL DECISION

LOWELL M. GOERLICH, Administrative Law Judge. This matter is here on the General Counsel's first amended specification, as amended, in which it is alleged that there is backpay due to Daythel Buie under the Board's Order.<sup>1</sup> In its answer to the amended specification, the Respondent admits the following allegations in the first amended specification:

An appropriate measure of the earnings Daythel Buie would have earned during each quarter of his backpay period is the average earnings of other individuals who were employed during the backpay period in Buie's job category.

The quarterly gross backpay computation for Daythel Buie is set forth on Appendix A.

Calendar quarter net interim earnings is the difference between quarter interim earnings and calendar quarter expenses.

Calendar quarter net backpay is the difference between quarter gross backpay and calendar net interim earnings.

The first amended specification is also admitted as to appendix A of the amended specification and as to Buie's employment and earnings at Houston Trucking Company (Houston).

Because the gross backpay<sup>2</sup> owing Buie has been admitted and the method of computing the backpay has not been challenged and the method of computing backpay is reasonable and fair, the burden shifted to the Respondent "to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *United States Air Conditioning Corp.*, 141 NLRB 1278, 1280 (1963), enfd. 336 F.2d 275 (6th Cir. 1964).

In this case of *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812 (5th Cir. 1966), the court commented:

<sup>1</sup>305 NLRB 989 (1991).

<sup>2</sup>"We have heretofore held, with court approval, that in a backpay proceeding the burden is on the General Counsel to show only the gross amounts of backpay due." *United States Air Conditioning Corp.*, supra at 1280.

While the General Counsel has the burden of proving unlawful discrimination on the part of the employer, and hence that backpay is due, the employer usually has the burden of establishing affirmative defenses which would mitigate his liability. *NLRB v. Miami Coca-Cola Bottling Co.*, supra [360 F.2d 569]; *NLRB v. Brown & Root, Inc.*, 8 Cir. 1963, 311 F.2d 447. Among these affirmative defenses are the unavailability of jobs because of nondiscriminatory factors . . . the employees' interim earnings to be deducted from the backpay award.

The cases are unanimous that the employer must establish these defenses by a preponderance of the evidence. *NLRB v. Miami Coca-Cola Bottling Co.*, supra; *NLRB v. Master Plastics Corp.*, 2 Cir. 1965, 354 F.2d 170; *NLRB v. Brown & Root, Inc.*, supra.

The fact that the General Counsel included deductions of interim earnings in his backpay computation in no manner lessened the Respondent's burden.

The Respondent raises several affirmative defenses which shall be considered below.

First: The Respondent asserts that Buie did not use reasonable exertions to find interim employment. Apparently the Respondent attempts to sustain this assertion by discrediting Daythel D. Buie, the discriminatee, and his wife Patsy June Buie,<sup>3</sup> who testified as to Buie's job search; by claiming that Buie's job search in certain quarters did not meet mitigation requirements; and by producing newspaper ads for truck-driver jobs and the testimony of the Respondent's witness which disclosed that a substantial number of truckdriver jobs were available during the backpay period.

In the case of *Florence Printing Co.*, 158 NLRB 775, 777 (1966), enfd. 376 F.2d 216 (4th Cir. 1967), the Board held that the respondent failed to meet its burden to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability when the respondent failed to show that employees did not seek jobs advertised in the newspaper or available jobs. See also *Airports Service Lines*, 231 NLRB 1272 (1977). Likewise, in the instant case, the Respondent has failed to meet this burden. In fact, P. Buie testified that she looked at job placement ads in the Paris, Tennessee papers, some of which were answered. Moreover, there is no credible proof that the advertised jobs were substantially equivalent employment.

In regard to the claim that Buie was lax in certain quarters, on this subject the Board has opined:

A discriminatee who has otherwise made reasonable efforts to seek out new employment is not required in each specific quarter to repeat job applications which from her past efforts she knows are foredoomed to futility in order to protect her claim of backpay for that particular quarter. *Rather, the entire backpay period must be scrutinized to determine whether throughout*

<sup>3</sup>Buie's wife usually accompanied D. Buie in his job searches. Because D. Buie's reading and writing abilities were limited, P. Buie filled out the job applications for her husband. She also maintained written records of the job searches including the information on job searches sent to the National Labor Relations Board recorded on the National Labor Relations Board employment and expense data sheets.

*that period there was, in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss.* [*Cornwell Co.*, 171 NLRB 342, 343 (1968).] [Emphasis added.]

In regard to the credibility of D. Buie and P. Buie, based on their demeanor and an examination of the record as a whole, I find them to be credible witnesses in respect to the matters involving job search. The test is whether the discriminatee had made reasonable efforts to find new employment which is substantially equivalent to his prior position. *American Mfg. Co. of Texas*, 167 NLRB 520, 525 (1967). On the basis of the record as a whole, I find that Buie diligently searched for alternative work. In fact he not only searched for work, but also he found work and accepted employment at the Houston Trucking Company.

An employee has not willfully incurred a loss of earning where he has made a good-faith effort to obtain interim employment. A "wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the [employee] be successful in mitigating the damage." *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985).

It is well established that "any uncertainty must be resolved against the wrongdoer whose conduct made certainty impossible." *Fibreboard Paper Products Corp.*, 180 NLRB 142, 143 (1969).

The Respondent's foregoing defense is not well taken.

Second: The Respondent further asserts that Buie quit substantially equivalent employment without just cause.

Buie first contracted psoriasis when he was 14 years old. Doctors told him that "grease, oil, chemicals would irritate it." While he worked for the Respondent from March 27 to September 27, 1989, driving a sand and gravel dump truck his psoriasis condition was not adversely effected.

On February 26, 1990, Buie went to work for Houston Trucking Company where he remained employed until August 31, 1990, at which time he quit. Buie's job at Houston was to pull a bulk tanker. The tanker carried clay in a powdered or dust form. The clay dust is composed of approximately 39.5 percent aluminum oxide. (G.C. Exh. 6, p. 552.) The clay is called ball clay, Al<sub>2</sub>O<sub>3</sub>2SiO<sub>2</sub>2H<sub>2</sub>O, hydrous aluminum silicate, kaolinite. (R. Exh. 7.)

While loading and unloading the tanker, the driver is exposed to the clay dust which escapes. For example when a tanker is overloaded "they blow off" the excess clay dust some times "back into a silo, but there's times they'll just blow it off on the ground."<sup>4</sup> Sometimes the dust was 6 to 8 inches deep. While working at the job, Buie was exposed to the clay dust which settled on his person.

When Buie went to work for Houston, his psoriasis was "under control." "It continuously got worse. I started breaking out again about three, three and a half months after I went to work there, and it just continually got worse til it got unbearable." During the period, Buie was using medication and seeing Dr. Robert J. Kaplan, who specializes in dermatology. Buie testified, "I went to the doctor, he told me to avoid the chemicals, stay out of the dust. . . . I told him,

<sup>4</sup>Ray Houston's testimony. Houston also testified, "[I]f you stop it up you could get covered with dust."

I said this is all that this man has for me to do. And he made the suggestion that I get out of it, and I asked him to give me a letter to where I could present to Mr. Houston.” Dr. Kaplan furnished such a letter dated September 6, 1990, in which appears, “This is to certify that I am treating Mr. Daythel Buie for severe generalized psoriasis. Exposure to irritating or toxic chemicals can exacerbate his psoriasis and I advised Mr. Buie to avoid such exposures as much as possible. P. Buie testified, “It [the psoriasis] was not clearing up, he was itching, he was scratching, he would scratch himself raw, he would scratch in his sleep and bleed on the bed, on his clothes.”

After being advised by Dr. Kaplan to avoid being exposed to chemicals, Buie returned to Houston and told them he was quitting “because that the clay was irritating my skin problem and that the doctor had advised me to.”<sup>5</sup>

Buie testified that he quit his employment with Houston, “[b]ecause I was going on the advice of my doctor, and it was itching so bad that I would claw the blood out of my arms and legs. And it was just unbearable. I could not put up with it.”

After Buie ceased working at Houston the psoriasis “cleared up.” P. Buie testified that after Buie no longer worked at Houston, “I observed the parts going away, the scabs, and it beginning to—instead of building up so high,

it began to thin down and to go away. I quit having blood on the sheet every morning and his clothes were not bloody.”

The record conclusively establishes that exposure to ball clay dust exacerbated Buie’s psoriasis condition to the point that the psoriasis became “unbearable.” Interim employment which exposed Buie (who had successfully filled a job for the Respondent) to working conditions which caused him severe hardship to the point where he could not tolerate the working environment without unbearable physical discomfort may not be held to be substantial equivalent employment. Nor did the duty to mitigate require Buie to work under such dire circumstances when, had he remained in the employment of the Respondent, he would have been able to have performed his job without the exposure which caused the severe exacerbation of his psoriasis. The Respondent’s defense is not well taken. Cf. *Airports Service Lines*, 231 NLRB 1272, 1273 (1977).

Third: The Respondent asserts that Buie was fully reinstated pursuant to the Board’s Order.

The General Counsel has compared the average hourly earnings and average daily earnings of Buie and Dalton Hall as derived from General Counsel’s Exhibits 7 and 8 and Respondent’s Exhibits 31(a)–(b) as follows:

#### DAYTHEL BUIE

<i>Week Ending</i>	<i>Gross Pay</i>	<i>Days Worked</i>	<i>Total Hours</i>	<i>Average \$ Per Hour</i>	<i>Average \$ Per Day</i>
3/12/92	\$184	3	27.00	\$6.81	\$61.33
3/19/92	295	4	38.25	7.71	73.75
3/26/92	253	5	*41.40	6.10	50.60
4/2/92	309	5	*47.50	6.51	61.80
4/9/92	307	5	57.00	5.39	61.40
4/16/92	278	4	46.25	6.01	69.50
6-wk. avg.				\$6.42	\$63.06

\* Weekly hours estimated inasmuch as copies of timecards [R. Exhs. 31(c) and (d)] do not indicate minutes.

#### DALTON HALL

<i>Week Ending</i>	<i>Gross Pay</i>	<i>Days Worked</i>	<i>Total Hours</i>	<i>Average \$ Per Hour</i>	<i>Average \$ Per Day</i>
3/12/92	\$367	5	47.00	\$7.81	\$73.40
3/19/92	448	5	48.00	9.33	89.60
3/26/92	276	3	26.00	10.62	92.00
4/9/92**	302	4	40.00	7.55	75.50
4/16/92	463	5	52.50	8.82	92.60
5-wk. avg.				\$8.83	\$84.62

\*\* There is no evidence to indicate that Hall worked the week ending 4/2/92.

Dalton Hall drove the truck which replaced the truck Buie had driven when Buie had worked for the Respondent prior to his discharge. Buie was assigned a truck which was driven home by Jeff Pope each day. Because Jeff Pope returned the truck to the Respondent’s premises later than the hour Buie had gone to work before he was discharged, Buie was deprived of worktime. Before his discharge he had been given

a key to enter the Respondent’s facility earlier in the morning to get his truck. By the new arrangement, whereby he had to wait for Jeff Pope’s arrival, one load was eliminated (Buie’s wages were based on the tonnage hauled).

The whole comparison between the wages of Buie and Hall, above set out, discloses that Buie was not given the runs enabling him to make the wages he had earned before his discharge. Had Buie been fully reinstated, he would not

<sup>5</sup>Houston testified that about 2 weeks before Buie quit, Buie had mentioned to him that he had a skin problem with clay.

have been assigned to the truck driven home by Jeff Pope but would have been assigned to the truck assigned to Dalton Hall which was the truck he would have driven had he not been discharged. Thus, the Respondent's defense is not well taken.

Fourth: The Respondent asserts that the Respondent's backpay obligation should be reduced by \$1,277.33 because Buie's truck was inoperative, and Buie would have been laid off for 28 days while the truck was being repaired. The Respondent plants its claim on the fact that the truck Buie was driving was out of service for 28 days beginning September 26, 1989, by reason of a "blow up" of the engine until October 25, 1989.

The Respondent's claim is highly speculative. Buie had worked for the Respondent for over 6 months. Moreover, Buie was qualified to drive the Respondent's concrete mixer trucks, which on occasion Buie did drive. Had Buie not been wrongfully discharged, it is as likely that he would have been given a concrete truck to drive as to have been laid off. Bill Metcalf, who took Buie's place, was transferred from a concrete truckdriving job. Because the probability of Buie's being laid off must be construed less favorably as to the Respondent wrongdoer, I reject the Respondent's defense as too speculative on which to base a finding.

Fifth: The Respondent asserts that the Respondent's backpay obligation should be reduced by \$1,479.70 because Buie's truck was destroyed in an accident, and Buie would have been laid off for 59 days until a replacement truck was put in operation.

On November 3, 1989, 9 days after the truck Buie had been driving was repaired, the truck was totally destroyed in an accident. At the time of the accident, Bill Metcalf was taken off of a concrete truck and was driving the repaired truck. After the accident Metcalf went back to the concrete truck. In fact, Albert Pope testified:

Q. Have you ever had an occasion to lay off a sand and gravel driver because a truck was down?

A. I don't believe so.

The Respondent's claim is highly speculative. It is quite possible that if Buie had been driving the truck there would have been no accident. In any event, Metcalf was not laid off. It would seem reasonable that Buie would have been treated likewise. The Respondent's defense, being highly speculative, is not well taken.

Sixth: The Respondent asserts that Buie was not available for the entire backpay period.

The Respondent claims that from September 21 to October 7, 1990, Buie was unable to look for interim employment. This claim is based on the following entry in one of the records of job search kept by P. Buie:

9-21 thru 10-7 daughter in auto accident in critical condition in hospital.

Because I have already found that Buie had satisfied his duty in respect to job search throughout the backpay period, this defense is not well taken. Even had he refrained from searching for work for this short period, his overall efforts satisfied his duty to mitigate.

Seventh: The Respondent asserts that interest which accrued on backpay after April 22, 1992, should cease due to the Board's willful refusal to proceed in a timely manner to resolve the issues without good cause.

The Respondent plants this assertion in a letter which it addressed to "Compliance National Labor Relations Board, Region 26," as follows:

This to advise your office that the employer in the above entitled action stands ready to comply with the Board's Order.

Please contact my office and give me directions as to what you require.

The record does not disclose that the Respondent, although it sent the above letter, has ever fully complied with the Board's Order. In fact in this compliance hearing, it is resisting compliance with the Board's Order. The Respondent's claim for the tolling of interest as of April 22, 1992, is denied.

One further issue raised by the Respondent remains, i.e., whether to strike the testimony of Buie and Johnny Moody because during the testimony of Charging Party witness Danny Owen, witnesses Moody and Buie were present in court in violation of the order for separation of witnesses. The Respondent requests that "Mr. Moody's testimony should be stricken from the record in its entirety and Buie's testimony should be stricken as to the working conditions at Houston and Respondent." (R. posthearing Br. 13.)

I deem it unnecessary to pass on the Respondent's motion, because my decision would have been the same whether I had considered the testimony of Moody or Buie on the subject of working conditions at Houston.

Accordingly, there being no material and credible evidence presented in this case which supports a finding that the General Counsel's computations are not drawn according to law or technically correct, I adopt them and approve them.

On the foregoing, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Pope Concrete Products, Inc., Paris, Tennessee, its officers, agents, successors, and assigns, shall pay to Daythel D. Buie the amount of \$32,421.93 plus interest accrued to the date of payment, minus taxes.<sup>7</sup>

<sup>6</sup>If 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.

<sup>7</sup>There being no opposition thereto, the General Counsel's motion to correct the record is granted, and the record is corrected.