RGC (USA) Mineral Sands, Inc. *and* Calvin T. Coon *and* Harold Knowles Jr. *and* International Association of Machinists and Aerospace Workers, District Lodge 112, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 12–CA–19258, 12–CA–19499, and 12–CA–20101

January 10, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On November 5, 1999, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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,[1] and conclusions and to adopt the recommended Order.

The judge found, inter alia, that the Respondent's employees engaged in an unfair labor practice strike in August 1998. We agree. The record shows that in October and December 1997, in response to a vote of its employees to reject its proposal to place all mechanics on a rotating 24-hour shift roster without regard to the mechanics' seniority, the Respondent assigned certain of its maintenance mechanics to a rotating 24-hour shift. In January 1998, the Union filed an unfair labor practice charge concerning the shift assignments.[2]

Thereafter, the shift-assignment issue continued to be a source of concern for the employees. In May 1998,[3] the Respondent proposed a shift-assignment roster schedule that included language requiring the Union to terminate "all pending grievances and arbitration actions regarding shift assignments." On May 5, Union Steward Harold Knowles informed the Respondent's managers that the Union was not willing to drop their grievances and unfair labor practice charges. Also, by letter dated June 4, the Union formally rejected the Respondent's proposal, citing concerns that dropping these causes of action would leave them "without resolution."

In July and August, the Respondent and the Union held about 18 sessions to negotiate a new collective-bargaining agreement. These discussions included proposals concerning the shift assignments. On August 24, the Union held a membership meeting to discuss the Respondent's final offer. At the meeting, the employees expressed concerns that the final offer did not include a provision for shift assignments to be determined by seniority. They also expressed their concern that the Union's pending unfair labor practice charges over the discriminatory assignments in October and December might not resolve the shift-assignment issue to the employees' satisfaction. At the following membership meeting on August 27, the employees continued to discuss the Respondent's final offer—including the shift-assignment proposal—and thereafter voted to strike.

It is well settled that if a strike is caused in part by an employer's unfair labor practice, the strike is an unfair labor practice strike. E.g. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 (1995). An unfair labor practice strike occurs even when the employer's unfair labor practice is not the sole or major cause or aggravating factor; it need only be a contributing factor. *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990).

Here, the record shows that the Respondent's shift assignments of October and December 1997, which we have found to be unfair labor practices, contributed to the employees' decision to strike. The chain of causation actually began in the fall of 1997 with the Respondent's proposals over shift assignments without regard to sen-

[1] 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.

The Respondent also asserts that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by threatening an employee with legal action because of his concerted activity, by telling employees it was improper to make safety complaints, by interrogating an employee about his filing an unfair labor practice charge, by creating an impression of surveillance of employees' union activities, by preventing a union steward from coming on to the Respondent's property to investigate potential grievances and working conditions, by conducting an interview with an employee and refusing the employee's request to consult with a union representative, and by refusing to accept employee grievances. In addition, no exceptions were filed to the judge's findings that the Respondent unlawfully issued disciplinary warnings to employees Harold Knowles Jr. and Jeffrey Tillis, and that the Respondent unlawfully suspended and terminated Knowles.

Member Hurtgen notes that although the Respondent excepted to the judge's decision not to defer to arbitration the issue of shift assignments, its brief indicates present opposition to deferral, stating that such deferral would only delay resolution of the issue.

[2] We agree, for the reasons stated by the judge, that the Respondent violated Sec. 8(a)(3) and (1) of the Act by making these shift assignments.

[3] All dates hereafter are in 1998 unless stated otherwise.

iority. The employees voted to reject these proposals. In direct response to that vote, the Respondent made the unlawful shift assignment in October and December. This unlawful conduct remained unresolved and in dispute when contract bargaining began in July. It was inextricably linked to, and indeed aggravated, the negotiations over the Respondent's shift-assignment proposal. This causality is highlighted by the fact that the Respondent's shift-assignment proposal in May included language requiring the withdrawal of any grievances or arbitration actions filed over the 1997 assignments. In rejecting this proposal, the Union made clear that it was not willing to drop any grievances or unfair labor practice charges. The failure to reach agreement on this shift-assignment issue contributed directly to a breakdown in contract negotiations and to the employees' decision to strike. Also highlighting the causality, the pending unfair labor practice charges were considered in conjunction with the Respondent's final offer at the August 24 membership meeting, and this discussion continued at the August 27 meeting when the strike vote was taken. Thus, it is clear that the Respondent's discriminatory shift assignments were integrally linked with the breakdown in negotiations and a contributing factor in the employees' decision to strike.

We find no merit to the Respondent's contention that the shift assignments in October and December 1997 were too remote in time to be considered a cause of the strike in August. The dispute over using seniority as a factor in making the shift assignments, although contractual in nature, was significantly aggravated by and cannot be separated from the Respondent's discriminatory assignments in 1997. The parties clearly understood that resolution of the contractual issue required resolution of the unfair labor practice charges as well. Thus, the Respondent's discriminatory assignments continued as a point of dispute during the contractual negotiations in July and August. In these circumstances, where the 1997 assignments were a continuing concern of the employees, and where the Respondent's unlawful conduct was considered together with the contractual proposals, it is clear that not only were the unfair labor practices a contributing factor in the decision to strike, but there was a causal connect between them. Thus the Respondent's conduct was not too remote in time to have been a cause of the strike in August.

Accordingly, we adopt the judge's findings that the strike in August was an unfair labor practice strike. We therefore also adopt the judge's finding that the Respondent's refusal to reinstate the strikers on their unconditional offer to return violated Section 8(a)(3) and (1) of the Act as alleged.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, RGC (USA) Mineral Sands, Inc., Green Cove Springs, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Evelyn Korschgen ,Esq., for the General Counsel..
Michael J. Bobroff, Esq. and *Gail G. Renshaw, Esq. (Bobroff, Hesse, Lindmark & Martone, Esq.),* for the Respondent.
Bob Sapp, *Grand Lodge Representative*, for the Charging Party.
Calvin T. Coon, appearing pro se.
Harold Knowles Jr., appearing pro se.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN**,** Administrative Law Judge**.** The original charge in Case 12–CA–19258 was filed by Calvin T. Coon, an individual (Coon) on January 23, 1998, and an amended charge on February 3, 1999. The original charge in Case12–CA–19499 was filed on May 26, 1998, by Harold Knowles Jr., an individual (Knowles), a first amended charge on June 15, 1998, a second amended charge on October 16, 1998, and a third amended charge on February 2, 1999. The original charge in Case 12–CA–20101 was filed on April 29, 1999 by International Association of Machinists and Aerospace Workers, District Lodge 112, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (the Union), and a first amended charge on May 17, 1999.

A consolidated complaint issued on May 7, 1999, and an amendment thereto on May 17, 1999. The complaint as amended alleges that RGC (USA) Mineral Sands, Inc. (Respondent or the Company) interfered with, restrained, and coerced employees in the exercise of their Section 7 rights by engaging in the following acts and conduct:

(1) Threatening an employee with legal action because he made a concerted safety complaint.

(2) Creating an impression of surveillance of its employees' union activities.

(3) Interfering with its employees' rights to make safety complaints by stating that it was improper to make such complaints.

(4) Interrogating employees about their making safety complaints.

(5) Interrogating employees about the filing of an unfair labor practice charge.

(6) Denying an employee's request to consult with a union representative prior to an interview with the employee which the latter had reasonable cause to believe would result in disciplinary action against him.

(7) Preventing Charging Party Knowles from coming onto Respondent's facility and from talking to anybody in order to perform his duties as the union steward.

The amended complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by engaging in the following acts and conduct:

(1) Threatening employees in October 1997, because of their union activities with assignments to more onerous shifts, assigning eight employees[1] in October 1997, to more onerous shift assignments because they assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in such activities.

(2) Assigning six employees[2] on December 17, 1997, to more onerous shift assignments because they assisted the Union and engaged in concerted activities, and to discourage employees from engaging in such activities.

(3) Refusing since April 26, 1999, to reinstate certain unfair labor practice strikers[3] who had made unconditional offers to return to their former positions of employment.

(4) Refusing since May 3, 1999, to reinstate unfair labor practice strikers Michael Padgett and Kyle Jackson who had made unconditional offers to return to their former positions of employment.

In addition, the complaint alleges that Respondent violated Section 8(a)(1), (3), and (4) of the Act by giving disciplinary warnings to employees Jeffrey A. Tillis and Harold Knowles Jr., on May 6, 1998, by suspending Knowles on June 6, 1998, and by terminating him on June 26, 1998, because Tillis and Knowles engaged in union activities, because Knowles complained about unsafe working conditions and Respondent believed that Tillis was involved in the same activity, because Knowles and Tillis were named in the unfair labor practice charge in Case 12–CA–19258, and because Knowles filed the charge in Case 12–CA–19499.

A hearing on these matters was conducted before me in Jacksonville, Florida, on May 24 through 27, 1999. Thereafter the General Counsel, Respondent, and the Charging Union filed briefs. Based on all the evidence of record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is incorporated and has its headquarters in Australia. It is also incorporated in the State of Florida,[4] where it is engaged in mining operations principally involving titanium, at Green Cove Springs, Florida. During the 12 months immediately preceding issuance of the consolidated complaint, Respondent shipped from its Green Cove Springs facility goods valued in excess of $50,000 directly to points outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6,) and (7) of the Act.

International Association of Machinists and Aerospace Workers, Local Lodge 1098, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO (the Union), and International Association of Machinists and Aerospace Workers, District Lodge 112, affiliated with International Association of Machinists and Aerospace Workers AFL–CIO (IAM District Lodge 112) are both labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE OVER SHIFT ASSIGNMENTS—SEPTEMBER 1997

A. Summary of the Evidence

There are three primary production and maintenance components at the Green Cove Springs facility—the wet mill, which is the mining component, the dry mill, which processes the material, and the maintenance shop, also called the "front shop." Maintenance mechanics and electricians worked in all three components. The Union has represented the production and maintenance employees for about 17 years, and was a party to a collective-bargaining agreement with Respondent ending August 30, 1998.[5]

Respondent had three shifts operating a total of 24 hours per day. Prior to October 1996, the maintenance mechanics worked only one shift out of three. Beginning October 10, 1996, Respondent instituted a 6-month trial program whereby all mechanics and electricians except leadermen would be assigned to a rotating 24-hour "shift roster." Shortly after the institution of this program, the electricians were eliminated from the roster.[6] Soon after execution of the collective-bargaining agreement, employee Richard Godfrey was assigned to the shift roster. He filed a grievance based on the fact that he was more senior than other mechanics were who were not assigned.

On September 30, 1997, Respondent issued a letter proposing that all maintenance mechanics would be placed on the shift roster.[7] Harold Knowles Jr. testified that there was a union meeting at which the membership rejected the Company's proposal, and the Company was so informed. In lieu thereof, the Union expressed preference for assigning the least senior mechanics to the shift roster. The collective-bargaining agreement

[1] Calvin T. Coon, Dale C. Condos, Steven O. Lester, Charles Jammes Sr., Jeffrey A. Tillis, Harold Knowles Jr., Allan T. Knowles, and Eldon J. Robinson.

[2] Calvin T. Coon, Dale C. Condos, Steven O. Lester, Charles Jammes Sr., Jeffrey A. Tillis, and Harold Knowles Jr.

[3]

Fred L. Allen	Theodore Allen	Tony Ashby
Michael C. Bennett	Markham D. Bowman	Upton Bowman
Chris Campbell	Antwan Coleman	Dale Condos
Calvin T. Coon	Jack Coon	Jerry T. Coon
David Davidson	Donald Davidson	D. Everington
Michael Gale	John Harthcock	E. Havorka
Douglas Hilton	C. Jammes Sr.	C. Jammes Jr.
James Jones	Allen Knowles	C. Knowles
Harold Knowles Jr.	Charles R. Lee	Michael Lee
Steve Lester	Gregory Looney	Josh Looney
John Mikell	Larry Murphy	J. Newman
Henry Povich	Fred Rhodes	John E. Riley
E. Robinson	John Robinson	Tom Rozier
Dan W. Still	Joe Sweat	K. Sweat
Jeffrey Tillis	Michael Weizant	

[4] Testimony of Graeme Sloan, U.S. general manager of operations for Respondent.

[5] GC Exh. 6.

[6] Testimony of General Manager Sloan.

[7] GC Exh. 5.

provided for "bidding" on "promotion or new shift assignments . . . . Years of service will be the determining factor to award positions if similarly qualified employees bid on the position . . . . If after the bidding process is completed and no one meets the position requirements, the Company then has the right to select anyone whom the Company deems is best qualified to fill the position opening."[8] Respondent contends that the latter provision gives it "the right to make shift assignments in any way it wishes, and that there is no seniority."[9]

Within days after the union vote, Respondent selected Calvin Coon, Dale Condos, Steven Lester, Charles Jammes Sr., Jeffrey Tillis, Harold Knowles Jr., Allan Knowles, and Eldon Robinson, all front shop mechanics, for placement on the shift roster.

Marvin Short, senior maintenance supervisor, met with front shop mechanics a day or two after the Union had rejected the Company's proposal, and announced the foregoing employees to be placed on the shift roster. Harold Knowles testified that an employee asked how the eight employees were selected, because there was "no structure" to the selections. According to Knowles, Short threw a folder on a table, put his leg on a bench, and said:

> I'll tell you how you were picked or why you're going on because the bullshit that you went down there to the Union hall and started the way you all voted. . . . Mr. Sloan was tired of it, and that's the reason we were on shift.

Calvin Coon testified about the same meeting. One employee asked whether the Company was doing this to "punish" the employees. Short "slammed" his folder on a table, put his foot on a bench, and said that "he was tired of the BS and because of that fucking vote that you all took at the Union hall."

Charles Jammes testified about the same meeting. Short said that the selected employees would be put on the shift roster because of the vote at the union hall. General Manager Sloan was also present, according to Jammes. He said that the employees had "browbeat" other employees to get the vote they wanted, that they were "bloody bullies," and that he knew how the vote went. Dale Condos testified that an employee asked why the persons selected were being punished. Short answered, "because the man in the front office is tired of your bullshit and because of the vote you took at the fucking Union hall."

Short testified that he had to evaluate the capabilities of his employees to make sure that all shifts had capable mechanics. He agreed that on September 30, 1997, General Manager Sloan had signed an order requiring all maintenance mechanics to be on the shift roster. After the union vote rejecting the Company's original proposal, Sloan told Short that the wet mill and dry mill mechanics were to be excluded from the shift roster, leaving only the front shop mechanics. Short stated that he did not consider seniority in making the assignments. He did not recall making the remarks attributed to him by the General Counsel's witnesses, but did not specifically deny making those remarks.

[8] GC Exh. 6, art. 7, sec. 2.

[9] R. Br. at 5.

On December 17, 1997, Short assigned six of the employees permanently to the shift roster.[10]

B. Factual and Legal Conclusions

I credit the generally consistent testimony of the General Counsel's witnesses that Short made the statements attributed to him. They establish that the Company originally decided to assign all mechanics to the shift roster, but then, after the Union vote rejecting it, decided to assign only selected employees from the front shop. I further conclude that, although a "graveyard" shift might be preferable to some employees, it is onerous to others. Short's announcement of the pending assignments constituted an unlawful threat violative of Section 8(a)(1). The General Counsel has established a prima face case that the assignments were disciminatorily motivated and violated Section 8(a)(1) and (3).[11]

Short's testimony that the assignments were based on the relative capabilities of the employees is too vague to offset the evidence of his discriminatory motivation. Respondent's argument that the shift assignments were allowed by the collective-bargaining agreement has no merit. The plain language of the contract shows that it was intended to govern "bidding" by employees for new jobs or new and presumably desirable shifts, not attempts to assign employees to more onerous shifts against their will—particularly, as here, where the employer has in effect admitted that the assignments were made because of the employees' union activities. The Board has found such assignments to be violative of Section 8(a)(1) and (3)[12] and I reach the same conclusion here.

The complaint allegation that Respondent on December 17, 1997, assigned six of the original employees to the shift roster permanently is simply an extension of its original actions. Business Manager Sloan testified that the Union recommended that the Company post such positions. Union Chief Steward Tony Ashby credibly denied that the Union made any such recommendation. Respondent did not submit any bids, and I conclude that there were none. Respondent's unlawful motivation in its September assignments to the shift roster carried over to its December permanent assignments. Accordingly, I conclude that these assignments also violated Section 8(a)(1) and (3) of the Act.

III. THE ALLEGED IMPRESSION OF SURVEILLANCE — SEPTEMBER 1997

The complaint also alleges that Respondent, by General Manager Graeme Sloan, created an impression of surveillance of its employees' Union activities. I credit the uncontradicted testimony of Charles Jammes that, at the shift roster meeting described above, General Manager Sloan told employees that

[10] Calvin T. Coon, Dale C. Condos, Steven O. Lester, Charles Jammes Sr., Jeffrey A. Tillis, Harold Knowles Jr.

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[12] *The Independent*, 319 NLRB 349, 373 (1995); *MPG Transport,* 315 NLRB 489, 492 (1994); *Wellstream Corp.*, 313 NLRB 698, 706 (1994); *Yale New Haven Hospital*, 309 NLRB 363, 371 (1992); and *Central Broadcast Co.*, 280 NLRB 501, 534 fn. 55 (1986).

they browbeat other employees to get the vote they wanted, that they were "bloody bullies," and that he knew how the vote went. Sloan did not say how he learned of this. Although Union officials may have informed him about the vote, nothing to this effect was said to the rank-and-file union members. I conclude that Sloan's statements created an impression of surveillance of the employees' union activities, and that Respondent thereby violated Section 8(a)(1).

IV. RESPONDENT'S ALLEGED INTERFERENCE WITH EMPLOYEE SAFETY COMPLAINTS

A. The Alleged Threat of Legal Action—January 1998

The complaint alleges that Respondent threatened an employee with legal action because he made a safety complaint and that Respondent told employees that it was improper to make such complaints.[13]

Union Steward Harold Knowles testified that there was a pontoon catwalk leading to the wet mill. It had a handrail which was broken in several places. It if failed, employees traversing it could fall into a pond, or be pushed onto a 13,800 volt cable. Knowles testified that he spoke about the matter for a year with the maintenance planning coordinator, and with several leadmen, but no action was taken. On January 14, 1998, Knowles filed a complaint with the Mine Safety and Health Administration (MSHA).[14] An inspector came out, and, a short time later, a leadman handed a work order to employees to reweld the handrail. The catwalk was temporarily shut down at that time.

Knowles was called into Supervisor Marvin Short's office. The latter asked whether Knowles had called MSHA, and Knowles agreed that he had done so. Short told him that this was wrong, and that General Manager Sloan was "looking into whatever legal action" he could take against Knowles.

Later the same day, Knowles was called into the office of Business Manager Sloan. He told Knowles that the latter's action had made the whole mine look bad. Knowles replied that he had tried to get supervisors to issue a work order to repair the handrail, without success. Sloan replied that the Company had internal procedures to handle matters like this, and that Knowles should never have gone outside the Company about the matter.

The next day, Supervisor Marvin Short held a safety meeting. He said that everybody knew that the catwalk had been closed, and stated that he felt as if his throat had been cut. "/I/t took a chicken shit MF to do something like that," Short told the employees.

Knowles was a truthful witness and his testimony is credited.

B. The Overloaded Crane—April 1998

1. Summary of the evidence

On Saturday of the Easter weekend in 1998[15] Knowles and Jeffrey Tillis observed a ladder sitting up against the dredge at the wet mill. A huge pin had to be placed into the ladder, which had to be raised. The Company brought in a 125-ton crane for this job. However, when the crane operator picked up the ladder, the front pads of the crane lifted to shoulder height, and the operator discontinued the attempt. Next, the Company placed the blade of a bulldozer as a counterweight on the side of the crane which was being raised, in an attempt to prevent this from happening. However, on the next attempt the bulldozer itself went up in the air. There were several employees present, and some warned others to get out of the way. One of them (Calvin Coon) said, "There goes 12 or 15 years of safety right out the window." That night, Knowles filed a complaint with MSHA.

A day or two after these events, an inspector from MSHA came out and talked with several employees, including Knowles. On the same day business manager Sloan interviewed five employees in his office, including Knowles and Jeffrey Tillis. He first asked the employees whether they had observed anything unsafe, according to Knowles and Tillis. The latter two replied affirmatively while the other three employees denied seeing anything unsafe. Knowles and Tillis testified that Sloan then asked whether anybody had called MSHA. The other three employees denied it; Knowles stated that he did not want to answer, and Tillis asked Sloan why he wanted to know. He added that "if you call putting a bulldozer on a crane unsafe," then he did see something. Sloan then dismissed the other three employees, and continued questioning Knowles and Tillis. According to the latter, Sloan repeatedly asked whether it was Knowles or Tillis that called MSHA. Tillis kept asking why he wanted to know, and Sloan "never gave a straight answer."

Sloan testified, and agreed that he questioned various individuals, but claimed that he did so individually. He denied asking employees whether they had filed an MSHA complaint, but, in the later meeting with Knowles and Tillis, acknowledged asking them whether either had "reported." Sloan was asked on cross-examination: "Reported what?" He gave evasive answers to this question, and essentially contended that he could not remember his exact words. Sloan denied that his questions had anything to do with the MSHA investigation—he was simply trying to find out why employees felt it necessary to call MSHA and what the problems were with the Company's "internal processes."

MSHA later issued a citation stating that the Company put a bulldozer blade on the crane and that the latter was being used beyond its designed capacity. Respondent was fined $120.[16]

2. Factual conclusions

Knowles and Tillis were more truthful in demeanor than Sloan, and were more consistent and probable. Sloan's assertion that he interviewed the employees individually is inconsistent with the arrangement whereby three were dismissed, while Knowles and Tillis were retained. I do not credit Sloan's denial that he asked the employees whether they had called MSHA, and conclude that he simply evaded this issue at trial. Accordingly, I credit Knowles' and Tillis' account of this meeting.

[13] GC Exh. 1(gg), par. 5(b).
[14] GC Exh. 10.
[15] I take administrative notice that this date was April 11, 1998.
[16] GC Exh. 11; testimony of Safety Administrator James Carter.

C. Legal Conclusions

It is well settled that the expressions of concern about the safety and the well-being of employees is conduct encompassed within the meaning of "mutual aid or protection" as provided by Section 7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Daniel Construction Co.*, 277 NLRB 795 (1985). Appeals to appropriate governmental agencies to protect employees' rights constitute protected activity. *Eastex v. NLRB*, 437 U.S. 556, 565-566 (1978) (Section 7 protects employee attempts to improve working conditions through resort to administrative and judicial forums); *Pete O'Dell & Sons Steel*, 277 NLRB 1358 (1985) (employee's meeting with U.S. Army Corps to discuss employer's compliance with Davis-Bacon Act is protected activity where union initiated the Corps' investigation); *Afro-Urban Transportation*, 220 NLRB 1371 (employee effort to seek the aid of governmental agencies in order to protect working conditions). I find that Knowles' complaints to MSHA constituted protected activity.

It is equally clear that threats to institute legal action because of an employee's protected activity violate Section 8(a)(1) of the Act. *Braun Electric Co.*, 324 NLRB 1 (1997); *Holy Cross Hospital*, 319 NLRB 1361, 1366 (1995). I find that Supervisor Short's statement to Knowles that General Manager Sloan was "looking into whatever legal action" he could take against Knowles because of the latter's complaint to MSHA about the defective handrail on the catwalk constituted a threat of legal action based on Knowles' protected activity, and was violative of Section 8(a)(1). Sloan's statement to Knowles that he should not go outside the Company with matters like this constituted an order that Knowles was not to engage in protected activity, and also violated Section 8(a)(1).

Sloan's repeated interrogation of employees as to which one filed a complaint with MSHA about the bulldozer/crane incident constituted a further violation of Section 8(a)(1). Sloan simply wanted to know the identity of the "reporting" employee—not what was wrong with his "internal processes." I conclude that these inquiries also violated Section 8(a)(1).

V. THE WARNINGS ISSUED TO HAROLD KNOWLES AND JEFFREY TILLIS—MAY 1998

A. Summary of the Evidence

The complaint alleges that Respondent gave unlawful disciplinary warnings to Harold Knowles and Jeffrey Tillis on May 6, 1998. The warnings related to a prior assignment on April 23. The employees were both on duty at about 1 a.m., when the gear box of the third floor elevator at the dry mill broke down. Knowles and Tillis were assigned to repair it. According to Tillis, the shaft fell out, the tongue buckle broke, and everything was coming apart." The elevator had "sanded up," and the sand had to be removed. The temperature on the third floor was 120 to 130 degrees. They needed "pullers" to get the bearing off, but the ones they obtained first were too short and had to be replaced. The bearing was so hot it had melded to the shaft and had to be burned off with a torch. The employees obtained fire extinguishers, and roped off the area. Supervisor Lewis Rogers helped the employees get the gear box off the shaft. When putting the gear box back in place, the belts of the same size that had been on the box were too tight, and had to be replaced. Tillis did most of the work on the box, while Knowles was down in the store room on the first floor getting parts. He testified that he had to use the computer to find the location of the proper parts. Supervisor Rogers saw him doing this, without objection.

Respondent's warnings centered on the time it took to repair the gear box. It took Knowles and Tillis 5.7 hours to complete this job. Respondent submitted work records of other gear box repairs. Supervisor Joey Carter testified that two employees, with the assistance of one other, took 3 hours to replace a smaller gear box where the only problem was a gear box and a bearing.[17] Another job also involved a smaller gear box, and four employees required 2 hours to repair it.[18] Carter testified that, with four employees on a job, one of them could take a break from the heat on the third floor, and that a repair job runs more smoothly with additional employees.

Business Manager Short questioned Knowles the next day, April 24, about the time that it took to complete the job. He did not issue warnings until about 2 weeks later. According to Short, he had to investigate the facts. He agreed that there were no storeroom employees on the third shift, and that mechanics had to find the parts themselves. He asked Supervisor Rogers whether he had helped Knowles and Tillis remove the gear shift. Rogers denied it according to Short—he had merely assisted them in a "fire watch". After much equivocation, Short agreed that he had concluded his investigation not later than April 29. In fact, he testified, "I basically had all I needed after talking with Hal (Knowles) and Jeff Tillis one-on-one."

There was an intervening event prior to the warnings. Knowles testified that he was in the process of discussing shift assignments with Campbell and Thornton. They proposed one such assignment, and Knowles said he would consult with the Union members. On May 5, he informed the managers that the members were not willing to drop their grievances or unfair labor practice charges.

On the next day, May 6, 1998, Short issued warnings to Knowles and Tillis for taking 5 hours to replace the gear box.[19] He agreed that no similar warnings had previously been issued.

B. Factual and Legal Conclusions

The General Counsel has established that Respondent unlawfully transferred Knowles and Tillis (and other employees) to more onerous assignments in October and December 1997, and that it singled them out for interrogation concerning the complaints to MSHA. These actions establish Respondent's animus against Knowles and Tillis as union activists. The General Counsel has thus established a prima facie case that the warnings issued to them were motivated by their union activities or sympathies, and thus violated Section 8(a)(3) and (1).

The complaint also alleges that the warnings violated Section 8(a)(4). After Knowles was assigned to the shift roster, he told Business Manager Sloan that he was a single parent with two

[17] R. Exh. 12, order 74–0359.
[18] R. Exh. 12, order 97–01457.
[19] GC Exhs. 29, 39.

children at home, and would never have taken the job if he had known that he would be transferred to the shift roster. On January 23, 1998, Knowles was named as one of the discriminatees in the original charge based on the shift assignments in Case 12–CA–19258.[20] On May 5, 1998, the day before the warning issued to him, Knowles told the company managers that the employees would not drop their unfair labor practice charges or their grievances. I conclude that Knowles supported the charge in Case 12–CA–19258.

Tillis testified that he was present at the meeting in 1997 when Short and Sloan discussed the shift roster. Tillis was also one of the employees transferred to the roster at that time, and was also named as a discriminatee in Case 12–CA–19258. Tillis testified: "At the time Mr. Sloan was speaking, he was staring straight at me like I was the one that coerced people to vote the way I wanted them to vote." I conclude that Respondent believed that Tillis supported the charge in Case 12–CA–19258.

The issue presented by the 8(a)(4) allegation is whether a violation may be found where there is no filing of a charge or testimony by the alleged discriminate but where the employee supported or assisted such a charge filed by another employee. On this issue, the Court of Appeals for the First Circuit has stated:

> Section 8(a)(4) should be read broadly in favor of the employee, *NLRB v. Scrivener*, 405 U.S. 117, 122, 92 S. Ct. 798, 801-802 (1972) . . . *Scrivener* held that Sec. 8(a)(4) protected employees who gave sworn statements to a Board field examiner investigating an unfair labor practice charge filed against their employer, although they had neither personally "filed charges" nor literally "given testimony" (citation). The Court found this liberal approach justified by the congressional purpose to allow "all persons with information about (unfair labor) practices to be completely free from coercion against reporting them to the Board" (citation) and to protect the integrity of all investigative stages of Board proceedings and an employee's participation in them, regardless of whether it falls somewhere between an actual filing and formal testifying. (citation).
>
> The *Scrivener* rationale has led to the interpretation of Section 8(a)(4) to protect an employee who merely threatens to file charges with the Board (authority cited); who refuses to testify on the employer's behalf in relation to charges filed with the Board (authority cited). *National Surface Cleaners v. NLRB*, 54 F.3d 35, 40 (1st Cir. 1995).

In applying these criteria, the court in *National Surface Cleaners* agreed with the Board that Section 8(a)(4) had been violated where the employer believed that the employees intended to support the charge in the form of corroborative statements and testimony.[21] In the case at bar, Respondent had reason to believe that Knowles and Tillis would provide such support and assistance to the charge.

Respondent's asserted reason for the warnings is not persuasive. The time that it took Knowles and Tillis to repair the gear box on April 23 was not excessive, considering the difficulties involved. Respondent's records show that other employees had easier jobs, or that more than two employees were involved. These examples are not analogous to the problems Knowles and Tillis faced.

The fact that Short delayed issuing warnings on the day after the repair job, and again delayed issuing them well after the date he had completed his so-called "investigation," constitutes evidence of discriminatory motivation. *Rainbow Garment Contracting*, 314 NLRB 929, 938 (1994). This inference is augmented by the fact that Knowles informed management the day before his warning that the Union was not going to withdraw its grievances or unfair labor practice charges. I conclude that the warnings were issued because of Knowles' and Tillis' union activity and support of the charge in Case 12–CA–19258, and were violative of Section 8(a)(1), (3),and (4) of the Act.

VI. RESPONDENT'S ALLEGED INTERVIEW WITH KNOWLES, WHICH THE LATTER HAD REASONABLE CAUSE TO BELIEVE WOULD RESULT IN DISCIPLINARY ACTION, DESPITE ITS DENIAL OF KNOWLES' REQUEST FOR A SHOP STEWARD—JUNE 1998

A. Summary of the Evidence

Knowles was the steward on shift on June 3, 1998, and was called to the office of Supervisor Marvin Short. Mining Manager Elliott Mallard was present, together with Short. Mallard told Knowles that employee Billy Carter, driving a truck, had run into the back of another truck, and had been sent for a drug test.

Knowles talked with Mallard the following morning, June 4, asked him the location of the truck that had been hit, and stated that he wanted to inspect it to determine whether it was on a blind curve, whether the brakes were bad, or some other extenuating circumstances. Knowles' shift started at 3 p.m. on June 4. He punched in at 2:40 p.m., and discovered that the truck had been brought to Respondent's facility. He and Jeffrey Tillis inspected it briefly, and then left the truck to begin their shift. Knowles testified that he walked into the office to get his work assignment about 30 seconds after 3 p.m.

Later that day, June 4, Knowles was called to the conference room for a meeting with Business Manager Sloan and other officials. Union Secretary Mike Bennett was present. Knowles asked what the meeting was about, and Sloan said that he just wanted to ask a few questions. He asked why Knowles disobeyed a direct order, and what right he had to investigate the truck. At that point, Knowles said that he wanted a shop steward. When Sloan replied that Mike Bennett was present, Knowles observed that Bennett was the union secretary, not a shop steward.

Another steward, Tony Ashby, was at the facility at this time. He was called, and Knowles and Bennett were asked to step out of the conference room into the lobby. Ashby passed them and went into the conference room. After about 10 minutes, Knowles and Bennett were brought back into the conference room, where Ashby was present. Sloan began again to ask questions, and Knowles stated that he would like to speak with Ashby first. Sloan replied that Knowles could talk with Ashby

[20] GC Exh. 1(a).
[21] 54 F.3d 35.

"in a little while," and again started asking questions. Knowles again stated that he wanted to talk with Ashby. Sloan responded that he could do so when Sloan was finished talking. "You mean I can't talk to my steward?" Knowles asked. Ashby corroborated Knowles on this testimony. Sloan asked additional questions, and Knowles answered him. Sloan asked why Knowles investigated the truck and why he did not report for work on time. Jeffrey Tillis corroborated Knowles, except that he put their time of beginning work at about 3:05 p.m., instead of 30 seconds after 3.

Mining Manager Elliott Mallard testified, and agreed that he had a conversation with Knowles on the morning of June 4. He contended that he told Knowles that the Company was investigating the accident, and that Knowles was not to inspect the truck until he had received permission from his supervisor. Mallard was asked whether this instruction prohibited Knowles from inspecting the truck in the morning, prior to his shift. Mallard first answered that this would not have been objectionable. However, he contradicted himself immediately, and said that there was nothing in the contract giving Knowles the right to inspect the truck. Mallard also agreed that there was nothing in the contract prohibiting such inspection.

Sloan asked Knowles his next scheduled day of work. Knowles replied that he was off on June 5, a Friday, but was scheduled to work Saturday and Sunday.

B. Factual and Legal Conclusions

The testimony of Knowles and Ashby concerning the details of the interview with Sloan is uncontradicted, and is credited. It establishes that Sloan insisted on demanding answers from Knowles despite the latter's protest that he first wanted to consult with steward Ashby. Knowles had reason to believe that the interview could result in disciplinary action, and, in fact, such action did ensue within a few days. Knowles' right to such consultation was established in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 25, (1075), and was reaffirmed by the Board in *Climax Molyodenum Co.,* 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978);[22] *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982); *System 99*, 289 NLRB 723, 727 (1988); *Postal Service*, 303 NLRB 463 fn. 4 (1991).

I conclude that, by denying Knowles the right to prior consultation with steward Ashby, Respondent thereby violated Section 8(a)(1) of the Act.

VII. COMMUNICATIONS BETWEEN SLOAN AND KNOWLES ON JUNE 5, AND THE MEETING OF JUNE 8

At the conclusion of the disciplinary interview on June 4, Sloan asked Knowles about his next scheduled day of work. Knowles replied that the next day, September 5, a Friday, was his day off, but that he was scheduled to work on Saturday and Sunday. Sloan asserted that he asked Knowles to come in on Friday, while Knowles contended that he merely promised to communicate with Sloan. He gave Sloan his beeper number. After unsuccessful efforts to reach Knowles by phone on Friday, Sloan called by pager at about 3 p.m., and said that he wanted Knowles back at the plant for a meeting. Knowles said the he could be back by 5 or 5:30 p.m., and Sloan replied that this was not soon enough. Knowles and Sloan had another dispute over this matter at the end of the day. Sloan told Knowles not to report for work on Saturday or Sunday, but to return on Monday, June 8.

A meeting took place at noon on June 8. Present for the Company were Management Representatives Ed Campbell, Marvin Short, Joanne Thornton, and Jimmy Scott. Sloan was elsewhere on business. Present for the Union were Union President Steven Hernandez, Knowles, and two other union members. Hernandez testified that they had the impression that some form of discipline of Knowles would take place. Three main topics were discussed—Knowles' alleged failure to show up for a meeting on Friday, insubordination by failing to report to a supervisor, and doing union business on company time. Regarding Knowles' alleged failure to report to his supervisor before inspecting the truck, Hernandez, reading from notes, said that nobody could figure out what Mallard had said. He asked the Company to put Knowles back to work, and they replied that they did not have that authority. Another meeting was scheduled for June 16.

VIII. RESPONDENT'S ALLEGED PREVENTION OF HAROLD KNOWLES FROM PERFORMING HIS DUTIES AS UNION STEWARD—JUNE 1998

A. Summary of the Evidence

The complaint alleges that Respondent on June 10, 1998, prohibited Harold Knowles from coming onto Respondent's property and thus prevented him from performing his duties as a steward.

On June 10, following the meeting on June 8, Knowles returned to the plant and, as the union steward, attempted to deliver some grievances concerning the truck incident to Human Resources Manager Joanne Thornton. She refused to accept the grievances. Knowles told her that he was also there to inspect the truck, and Thornton referred him to planning coordinator Joey Carter.

Knowles told Carter that he was there to inspect the truck, and the following exchange took place according to Knowles:

> He (Carter) said You can't inspect the truck. I said Why? He said you're not supposed to be here. I said, "Well, I'm not here to report to work. They told me not to report to work. I'm here to inspect the truck." He said "No, you can't inspect the truck. You're not even supposed to be on the property. You're suspended."
>
> And I told him, "Joey, nobody has said in the past that I was suspended. It was just not to report to work. I'm here in my official union capacity as a shop steward to look at the truck." And he said, "No, you can't even be around the property."

B. Factual and Legal Conclusions

Knowles' testimony is uncontradicted and is credited. Another employee had damaged a truck, and faced the possibility of discipline because of it. Although Respondent finally agreed that Knowles was suspended on June 6, its original position was that this did not take place until June 12 (See sec. IX, in-

[22] In *Climax Molybdenum*, the request for the presence of a steward was made by the union, not the employees, unlike the case at bar.

fra). In any event, whether an off-duty employee or a steward, Knowles had the right to enter the employer's premises in order to engage in union business. *Harvey's Resort Hotel*, 236 NLRB 1670 fn. 2 (1978). Citing *Harvey's* the Court of Appeals for the Ninth Circuit has agreed with the Board that an employer's ejection of union representatives engaged in union business violated Section 8(a)(1). *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995), enfg. 309 NLRB 761 (1992). The functions of a steward are activities protected by Section 7 of the Act. *Freeman Decorating Co.*, 288 NLRB 1235, 1239 (1988).

The language of the complaint, read literally, alleges that Respondent prevented Knowles from coming onto its property, and thus prevented him from performing his duties as a steward. Knowles in fact did come onto the property, but supervisor Carter said he had no right to be there, and prevented him from inspecting the truck. It was Respondent's refusal to permit this inspection which the parties were litigating. I conclude that by refusing to allow Knowles to do this Respondent violated Section 8(a)(1).

The same rationale applies to Human Resources Manager Thornton's refusal to accept the grievances from Knowles. The collective-bargaining agreement provided for participation of the union steward in the grievance procedure, and empowered him to submit grievances.[23] I conclude that Respondent's refusal to accept the grievances from Knowles was also a violation of Section 8(a)(1).

IX. KNOWLES' DISCHARGE

A. The Meeting on June 16

Sloan was back for the meeting on June 16. He asserted that Knowles had inspected the truck without permission, and Knowles denied it. He also wanted to know why Knowles had filed an unfair labor practice charge against the Company (Knowles had filed the original charge in Case 12–CA–19499 on May 26, and an amended charge on June 15). I conclude that Sloan's question was an unlawful interrogation. Sloan also told Knowles that he was suspended and was not to return to the property. By this act Respondent violated Section 8(a)(1) by preventing Knowles from acting as the union's steward.

The Meeting on June 19

The parties met again on June 19. General Manager Sloan was present. He presented Knowles with a document entitled "Discipline Review/Duty Status." It placed Knowles on suspension from June 12 to 19, 1998,[24] placed him "at the "Final Written Warning Step," required him to maintain a "clean record" for 12 months, and ordered him to return for his first scheduled work after June 19, 1998. One provision stated that all parties had reviewed and "accepted" the discipline.[25]

Knowles and Hernandez caucused, and returned to state that they could not accept the provision stating that Knowles accepted the discipline as this would preclude them from filing a grievance. They also protested that Knowles had been suspended since June 6, not June 12, and that his return to work should be "on" not "after" June 19.

Knowles asked what would happen if he refused to accept this discipline. Sloan replied that he would have to resign. Knowles responded that he would not resign because he had "done nothing wrong." According to Knowles, Sloan said that he would be terminated, that the Company would get the "paperwork" drawn up, and "get a hold" of Knowles. Sloan contended that it was agreed that further communication with Knowles would be through Union President Hernandez. The latter denied any agreement to serve as a conduit for such communications.

C. The Revised Discipline

By letter dated June 19, 1995, the Company sent Knowles a revision of its previous discipline. The beginning date of the suspension was changed to June 6, and Knowles was instructed to return to work on his "first scheduled shift" on June 22, 1998. The language about his "acceptance" of the discipline was eliminated.[26]

This letter was sent by certified mail. Knowles testified that he received it at 4:30 p.m. on June 23. The record contains copies of certified mail documents showing that Respondent mailed them to Knowles. The dates are June 23, 24, and 25, 1998.[27] Knowles testified that this letter was the first notice he received about the revised discipline.

On June 20, the day following the June 19 meeting with management, Union President Hernandez received an unsigned draft copy of the revised discipline, together with a letter from Management Accountant Ed Campbell.[28] Hernandez then left messages on Knowles' voice recorder on June 20, 21, 23, and 24, without receiving a reply. Hernandez testified without contradiction that Campbell called him on June 22 and asked whether he had received the draft copy. Hernandez acknowledged receipt, and asked whether anybody from Respondent had notified Knowles. Campbell replied that Knowles would be notified.

On June 22, Campbell sent Hernandez a signed copy of the revised discipline, together with a cover letter inviting any grievance.[29] Hernandez responded with a grievance via facsimile denying any wrongdoing by Knowles.[30]

On June 24, Campbell sent Hernandez a communication via facsimile as follows:

> Per our previous discussion, RGC (the Company) will enforce all aspects of the discipline outlined in our correspondence of June 19, 1998. The conditions of this discipline action allowed Mr. Knowles to return to active duty on June 22, 1998, as of his next scheduled shift as reference in Item 4 of this Discipline Review/Duty Status Summary. Mr. Knowles has failed to complete assigned shifts on the 22nd and 23rd of June and his next scheduled shift is Friday June 26. RGC will maintain all aspects of Mr. Knowles' discipline as detailed in

[23] GC Exh. 6, art. 9.
[24] The Company later changed the beginning date to June 6, 1998.
[25] GC Exh. 13, par. 5.
[26] GC Exh. 12.
[27] GC Exh. 30.
[28] GC Exh. 34.
[29] GC Exh. 35.
[30] GC Exh. 36.

> the June 19 summary and the General Manager will respond to your grievance summary.[31]

Hernandez also had three telephone conversations with Campbell on June 24. In the first one, Campbell observed that Knowles had not appeared for his June 22 and 23 shifts. Hernandez asked whether anybody from the Company had notified Knowles, and Campbell replied that the Company had sent him a letter. In his second conversation with Campbell, Hernandez asked when Knowles could return to work. Campbell replied that he would have to get back in touch with Hernandez. He did so, and informed Hernandez that Knowles was to return to work on June 26. Hernandez' testimony is again uncontradicted and credited.

On June 25, Management Representative Jimmy Scott[32] called Hernandez and asked whether the latter knew anything about Knowles' return to work on June 26. According to Hernandez, he recited to Scott his conversations with Campbell, and that the latter had said Knowles would be notified. Scott replied that he would get back with Hernandez, and did so. He declared that Knowles was to report for work on June 26. Scott did not testify, and Hernandez' testimony is credited.

Knowles testified that he called the Company on June 25, and left a voice mail for Campbell. The latter returned the call, and told Knowles to report for work the next day, June 26, at his regularly scheduled shift. Knowles' uncontradicted testimony is credited.

D. Knowles' Discharge

Knowles clocked in on June 26 prior to his starting time of 7 a.m., and worked for about 2 hours. He was then called to the conference room, waited there for about 2 hours, and was then brought into a conference room with Sloan, Campbell, and Union Steward Tony Ashby. Sloan handed Knowles a letter stating that he was being terminated for violating his "probation," in that he was absent and had failed to call in on June 22 and 23.[33]

Sloan argued that, although Knowles did not receive the certified letter until 4:30 p.m. on June 23, he could still have reported prior to the beginning of his shift which on that date was midnight. Asked why the Company did not send Knowles notice by facsimile of the revised discipline, Sloan said that the Company could not rely on Knowles and needed the assurance of a certified letter. Knowles testified that he did not go to work on midnight of the June 24 because he had worked all day, and had made no provision for his children. In addition, the reporting date in the letter was June 22, which had already passed. Instead, Knowles called the Company on June 25 and, as indicated, was told by Campbell to report for work on June 26.

E. Factual and Legal Conclusions

The General Counsel has established proof of animus against Respondent—its unlawful transfer of Knowles (and others) to the shift roster, the unlawful interrogation of Knowles concerning the complaint filed with MSHA, the unlawful warning following the repair involving the job on the gear shift, the unlawful interview with Knowles involving probable disciplinary action, and Respondent's refusal to permit Knowles, as shop steward, to examine a truck damaged by another employee, or to submit grievances.

Respondent's asserted reasons for discharging Knowles are contradictory and improbable. Knowles was told at the June 19 meeting that the Company would "get a hold" of him. He heard nothing until the afternoon of June 23. The letter which he received on that date was ambiguous in that it simultaneously asserted that June 22 was still the reporting date, but that Knowles' next reporting date was June 26. The revised offer was tardy, and gave Knowles inadequate time to comply with it. In addition to the ambiguities of the revision, Knowles had children and other matters to take care of, and it was unreasonable for Respondent to anticipate that he would report by midnight on the June 24. Respondent has given no credible reason for failing to send Knowles notice via facsimile of the revised discipline, with its June 22 reporting date, followed by a certified letter if Respondent so desired.

Finally, Campbell's statements to Knowles and Hernandez, supported by Scott's statements to the union president, were unequivocal—Knowles could report for work on June 26 and would be notified. I conclude that the Company's reason for discharging Knowles was pretextual and that the real reason was his union activities, his support of the charge in Case 12–CA–19258, and his own charge in Case 12–CA–19499 filed on May 26, 1999. Accordingly his suspension and discharge violated Section 8(a)(1), (3), and (4) of the Act.

X. RESPONDENT'S ALLEGED FAILURE TO REINSTATE ALL UNFAIR LABOR PRACTICE STRIKERS TO THEIR FORMER POSITIONS OF EMPLOYMENT—APRIL 1999

A. The Strike, August 30, 1998

1. The evidence

The complaint alleges that on April 26, 1999, Respondent refused to reinstate all employees who engaged in a strike on August 30, 1998, caused by Respondent's unfair labor practices.

The parties held 18 bargaining sessions from July 6 to August 23, 1998. According to union negotiating committeeman Dale Condos, the Union continued throughout the negotiations to raise the issue that assignment to the shift roster should be based on seniority. The Union's proposal provided that shift assignments would first be filled by volunteers, with the most senior employee having the first option. If there were no volunteers, the assignment would go to the least senior employee.[34] Business Manager Sloan testified that the Company's position throughout the 1998 negotiations was that the Company did not have to use seniority in making shift assignments; the positions of the parties remained the same.

The Company delivered its final proposal to the Union on August 23, 1998. Union President Hernandez held a 10-hour

[31] GC Exh. 37.

[32] Scott was one of the company representatives at the June 8 meeting.

[33] GC Exh. 31.

[34] GC Exh. 33, proposal 25, art. 7.

session the following day at which the employees gave their opinions on the company proposal. Hernandez testified that, as a result of these discussions, he realized that what he had been told by the negotiating committee was correct—although there were other concerns, seniority, as it related to shift assignments and promotions, was the most important issue in the minds of the employees. Calvin Coon testified that the employees were concerned with whether the Board's handling of the unfair labor practice charges concerning the previous assignments to the shift roster would solve the problem. One employee said "If they'll do it to the senior mechanics the way they have, they will do it to anybody."

A second union session was held on August 27, and the employees voted with the same result—more than two-thirds voted to go on strike. They also asked Hernandez to ask for a 1-week extension of the contract. He did, the request was rejected, the contract expired at 7 a.m. on August 30, and the Union went on strike at 7:01 a.m.

2. Factual and legal conclusions

It is settled law that a strike is an unfair labor practice strike if one of the causes is the employer's unfair labor practice, even though economic factors are present.[35] It is not necessary to conclude that the strike would not have occurred but for commission of the unfair labor practices. *Northern Wire Corp. v. NLRB*, 887 F.2d 1313 (7th Cir. 1989). I have previously found that the assignments to the shift roster in 1997 were discriminatorily motivated and unlawful. In 1998, the employees went on strike against this continuing practice by the Company. I conclude that the strike was an unfair labor practice strike.

B. The Employees' Offer to Return to Work

1. Summary of the evidence

On April 21 and May 3, 1999, the Union notified the Company by letter that 46 employees were making an unconditional offer to return to work.[36]

By letter via facsimile dated April 26, 1999, Respondent informed the Union that it considered the strikers to be economic strikers, that it would place them on a preferential hiring list and recall them as positions became available. However, the communication stated, employee Jack Coon was to report to work at 7 a.m. on April 28, 1999.[37] On April 28, 1999, the Company asserted that Union President Hernandez had left by voice mail a statement that Coon would not be available until May 3, 1999. The Company thereupon directed that he report on that date.[38] By letter on April 28, 1999, via facsimile, the Union's Grand Lodge notified Respondent that Coon was engaged in an unfair labor practice strike, and that the Company was not to continue attempting to return the employees to their former positions in a "piecemeal" manner.[39]

The Company hired 44 striker replacements,[40] and after one transfer to a nonsalaried position, made them permanent striker replacements prior to December 31, 1998.[41] None of these employees was discharged.

On five separate dates, Respondent offered reinstatement to various employees—three on May 3, 1999,[42] and nine on May 7.[43] On May 11, 1999, by letter via facsimile, Respondent notified the Union that none of the foregoing nine employees had reported for work, and that the Company therefore concluded that they had rejected offers of reinstatement.[44] In the same communication, the Company offered reinstatement to eight other employees.[45] On May 17, 1999, the Company informed the Union to have 17 strikers return to work 2 days later.[46] On May 20, 1999, Respondent repeated the instruction with respect to five additional strikers.[47]

2. Legal conclusions

It is settled law that unfair labor practice strikers are entitled to immediate and full reinstatement to their former jobs, or to substantially equivalent jobs if their original positions are no longer available, upon their unconditional offer to return to work. *Super Glass Corp.*, 314 NLRB 596, 598 (1994), citing *Harowe Servo Controls*, 250 NLRB 958, 1070 (1980); *Capitol Steel & Iron Co.*, 317 NLRB 809, 814 (1995). The Board, however, has found that a 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible, and the employer's need to effectuate the return in an orderly manner. *Beard Industries*, 311

[35] *Larand Leisurelies v. NLRB*, 523 F.2d 814 (6th Cir. 1975); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 905 (5th Cir. 1978); *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 704 (7th Cir. 1976); *Massachusettes Coastal Seafoods*, 293 NLRB 496 (1989); other cases put the test in a variety of phrases, all meaning the same as the reason set forth above: *I. W. Corp.*, 239 NLRB 478; *Newport News Shipbulding Co. v. NLRB*, 602 F.2d 73, 78 (4th Cir. 1979); *NLRB v. Wichita Television Corp.*, 277 F.2d 579, 584 (10th Cir. 1960), cert. denied 364 U.S. 871 (1960); *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 907 (9th Cir. 1953); *NLRB v. Milco, Inc.*, 388 F.2d 133, 139 (2d Cir. 1968); *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 409 U.S. 856 (1972); *NLRB v. Safeway Steel Scaffolds Co. of Georgia*, 383 F.2d 273, 280 (5th Cir. 1967), cert. denied 390 U.S. 955 (1968); *Carpenters Local 1780,* 244 NLRB 277, 281 (1979); *Bender Ship Repair Co.*, 188 NLRB 615, 631 (1971); and *Decker Coal Co.,* 301 NLRB 729 (1991).

[36] The April 21 letter inadvertently included the names of two employees who had already returned to work. GC Exh. 19. These were deleted from the complaint. The May 3 letter added two employees whose names had been omitted. Michael Padgett and Kyle Jackson. GC Exh. 36.

[37] GC Exh. 20.

[38] GC Exh. 28.

[39] GC Exh. 21.

[40] GC Exh. 17.

[41] GC Exh. 40.

[42] Dyall (sic) Bowman, Chris Campbell, Ray Lee (GC Exh. 22).

[43] Edward J. Hovorka, Dan W. Still, Michael T. Bennet, Calvin T. Coon, Stephen O. Lester, Frederick Rhodes Jr., Charles J. Knowles Jr., Charles R. Lee, and Douglas Hilton (G.C. Exh. 24).

[44] GC Exh. 25.

[45] Ibid. John M. Hartcock, Gregory T. Looney, Alan T. Knowles, Michael L. Weizant, Charles E. Jammes Sr., Larry J. Murphy, Tony L. Ashby, and Jeffrey A. Tillus.

[46] David H. Davidson, Dale C. Condos, Michael M. Padgett, Theodore J. Allen, Fred I. Allen, Michael A. Gale Jr., Kenneth L. Sweat, Markham D. Bowman, David E. Everington, John A. Robinson, Jerry Coon, Donald H. Davidson, John J. Mikell, Antwan K. Coleman, Kyle R. Jackson, James O. Newman, Josh G. Looney (GC Exh. 26).

[47] Charles E. Jammes Jr., Joseph M. Sweat, Thomas E. Rozier, James F. Jones, Henry H. Povlich (GC Exh. 27).

NLRB 768, 771 (1993), citing *Drug Packaging Co.*, 228 NLRB 108, 113 (1977), modified on other grounds 507 F.2d 1340 (8th Cir. 1978). The 5-day period will not apply where an employer ignores or rejects, or unduly delays its response to such an offer, or attaches unlawful conditions to its offer of reinstatement. *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

It is also settled law that piecemeal reinstatement is not compliance with the law after an unconditional application for same. *Orit Corp.*, 294 NLRB 695, 700 (1989); *Dorsey Trailers,* 327 NLRB 835 (1999).

The fact that an employer has hired permanent replacements does not eliminate the right of unfair labor practice strikers to reinstatement. "Unfair labor practice strikers are entitled to reinstatement even though the employer has hired permanent replacements. The replacements must be terminated if necessary to make room for the unfair labor practice strikers." *Detroit Newspapers*, 326 NLRB 700, 776 (1998).

In the case at bar, Respondent did not comply with the law as above stated. It delayed 5 days after the offer to return to work, and then offered reinstatement to only one employee. Thereafter, Respondent did that which the Board says it may not do—it offered piecemeal reinstatement to strikers. I conclude that by failing to offer full and immediate reinstatement to the strikers Respondent thereby violated Section 8(a)(1) and (3) of the Act.

XI. RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent argues that the charges in Case 12–CA–19258 (the shift assignments) and Case 12–CA–19499 (the warnings to Harold Knowles Jr. and Jeffrey Tillis) should have been deferred to arbitration under the collective-bargaining agreement.[48]

The Board has concluded that deferral to arbitration is inappropriate where the issues are intertwined with other issues which remain and where a hearing on all issues has already been held. *International Harvester Co.*, 271 NLRB 647 (1984). Deferral is inappropriate where the charges involve the issue of violation of Section 8(a)(4); the Board rejected delegating to an arbitrator issue involving access to the Board's processes.[49] The Board rejected deferral where a union agent was denied access to plant premises in order to conduct union business, and was threatened with bodily harm. *15th Avenue Iron Works*, 301 NLRB 878 fn. 3, 882 (1991).[50] I have found that steward Knowles was denied access for the purpose of examining the damaged truck, and was threatened with legal action for engaging in protected activity. The Board will not defer to arbitration cases where the employer took discriminatory actions against employees, and harbored animosity toward the exercise of their statutory rights. *Ironton Publications*, 313 NLRB 1208 (1994). These factors are present in this case. I conclude that there are compelling reasons under Board policy for refusing to defer these proceedings to arbitration.

Respondent further argues that the Region delayed investigating the charge in Case 12–CA–19258, and that if the Region had acted more promptly, Respondent could have changed its shift assignments in some manner, or could have avoided or delayed hiring permanent replacements.[51] Respondent's argument appears to be the disingenuous position that it was the Board's conduct which caused the Company to commit unfair labor practices. However, Respondent's counsel admitted at hearing that his client did not lose any evidence or witnesses because of the claimed delay. Laches is not available as a defense against the General Counsel for asserted negligent delay *Consolidated Casinos Corp.*, 266 NLRB 988, 992 (1983).

The Company also argues that the Regional Director's alleged failure to engage in prompt investigation of the charge violated the Board's Casehandling Manual. The Manual contains "guidance, not rules."[52]

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Respondent RGC (USA) Mineral Sands, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, Local Lodge 1098, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO and International Association of Machinists and Aerospace Workers, District Lodge 112, affiliated with International Association of Machinists and Aerospace Workers, AFL–CIO are both labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by engaging the following conduct:

(a) Threatening employees with more onerous work assignments because of their union activities.

(b) Threatening an employee with legal action because he made a concerted safety complaint.

(c) Telling employees that it was improper to make safety complaints.

(d) Interrogating employees about their safety complaints and concerted activity.

(e) Interrogating an employee about his filing an unfair labor practice charge.

(f) Creating an impression of surveillance of its employees' union activities.

(g) Preventing a union steward from coming onto the property to investigate potential grievances and working conditions.

(h) Conducting an interview with an employee at which the latter had reasonable cause to believe that disciplinary action would be taken against him, despite Respondent's refusal to grant the employee's request to consult with a union representative.

(i) Refusing to accept employee grievances.

4. On August 30, 1998, certain employees of Respondent ceased work concertedly and engaged in a strike caused by Respondent's unfair labor practices.

[48] R. Br. at 48; R. Answer, GC Exh 1(nn), par. 4.

[49] *Filmation Associates*, 227 NLRB 1721 (1977); *McKinley Transport*, 219 NLRB 1148 (1975); and *Kansas Meat Packers,* 198 NLRB 543 (1972).

[50] See also *Clarkson Industries*, 312 NLRB 349 (1993).

[51] R. Br. at 47.

[52] *Superior Industries*, 289 NLRB 834 fn. 13 (1988).

5. Respondent has violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) On October 8, 1997, assigning the eight employees listed in paragraph 9(a) of the consolidated complaint dated May 7, 1999,[53] and, on December 17, 1997, assigning the six employees listed in paragraph 9(b) of the complaint, to more onerous shifts because they assisted the Union and engaged in concerted activities.

(b) Since April 26, 1999, failing and refusing to reinstate immediately the 44 unfair labor practice strikers listed in paragraph 14 of the consolidated complaint dated May 7, 1999.[54]

(c) Since May 3, 1999, failing and refusing to reinstate immediately the two unfair labor practice strikers listed in paragraph 14(c) of the amendment to consolidated complaint.[55]

Respondent has violated Section 8(a)(1), (3), and (4) by engaging in the following conduct:

(a) Issuing disciplinary warnings to Jeffrey A. Tillis and Harold Knowles Jr. on May 6, 1998, because they assisted the Union, because they were named in the unfair labor practice charge in Case 12–CA–19258, because Knowles claimed that working conditions were unsafe and Respondent believed that Tillis had made similar complaints, and to discourage employees from engaging in protected concerted activity.

(b) Suspending Harold Knowles Jr. on June 6, 1998, and terminating him on June 26, 1998, because he engaged in the activities described above, was named in the unfair labor practice charge in Case 12–CA–19258, and filed the charge in Case 12–CA–19499.

THE REMEDY

It having been found that the Respondent has committed certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully refused to grant immediate reinstatement on April 26, 1999, to 44 unfair labor practice strikers, and similarly refused to grant such reinstatement to two unfair labor practices strikers on May 3, 1999, I shall recommend that Respondent be required to offer them full and immediate reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired after the start of the strike, and make such employees whole, with interest for any loss of earnings or benefits he may have suffered.[56] Any such employee for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available, and before other persons are hired for such work. Priority for placement on such a list shall be determined by seniority or some other nondiscriminatory test. Since Respondent has unduly delayed the employees' unconditional offers to return to work, no useful purpose will be served by granting a 5-day period before commencement of Respondent's backpay obligations; such obligation began upon the dates of the unconditional offers to return to work. *Frontier Hotel & Casino*, 323 NLRB 815, 822 fn. 21 (1997).

As I have found that Respondent unlawfully suspended Harold Knowles Jr., on June 6, 1998, and discharged him on June 26, 1998, I shall recommend that Respondent be required to offer him reinstatement to his former job, or, if that job no longer exists, a substantially equivalent job, and that he be made whole for any loss of earnings he may have suffered since his unlawful suspension on June 6, 1998, by paying him a sum of money which he would have earned absent the discrimination against him, less net interim earnings, with interest as described above. I shall also recommend expungement of all references to his discipline, including his unlawful warning, in Respondent's records. I shall further recommend that Respondent be required to expunge from its records all references to its unlawful warning issued to Jeffrey Tillis.

I shall further recommend that Respondent be required to return to their former shifts those employees who were unlawfully transferred to more onerous shifts in 1997.

On these findings of fact and conclusions of law and on the entire record I issue the following, recommended[57]

ORDER

The Respondent, RGC (USA) Mineral Sands, Inc., Green Cove Springs, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with more onerous work assignments because of their union activities.

(b) Threatening any employee with legal action because he made a concerted safety complaint.

(c) Telling employees that it is improper to make safety complaints.

(d) Interrogating employees about their safety complaints and concerted activity.

(e) Interrogating employees about their filing unfair labor practice charges.

(f) Creating an impression of surveillance of its employees' union activities.

(g) Preventing union stewards from coming onto its property in order to investigate potential grievances and working conditions.

(h) Conducting interviews with employees which the latter reasonably believe will result in Respondent's engaging in disciplinary action against him, despite Respondent's failure to grant the employees' request to consult a union representative.

(i) Assigning employees to more onerous work because they assist the Union or engage in protected activities.

(j) Refusing to reinstate unfair labor practice strikers immediately upon their unconditional application to return to work.

[53] GC Exh. 1(gg).

[54] Ibid.

[55] GC Exh. 1(11).

[56] Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *and New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[57] 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.

(k) Warning, suspending, or discharging employees because of their Union or other protected activities, or because they had filed charges or given testimony under the Act, or because Respondent believes that other employees will support such charges or testimony.

(l) Refusing to accept employee grievances.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from service of this Order, offer the following employees immediate reinstatement to their former jobs or to substantially equivalent jobs, discharging, if necessary, any replacements hired after the start of the strike:

Fred L. Allen	Theodore Allen	Tony Ashby
Michael C. Bennett	Markham D. Bowman	UptonD.Bowman
Chris Campbell	Antwan Coleman	Dale Condos
Calvin T. Coon	Jack Coon	Jerry T. Coon
David Davidson	Donald Davidson	D.Ever ington
Michael Gale	John Harthcock	E. Havorka
Douglas Hilton	C. Jammes, Sr.	C. Jammes ,Jr.
James Jones	Allen Knowles	C. Knowles
Harold Knowles Jr.	Charles R. Lee	Michael Lee
Steve Leste	Gregory Looney	Josh Looney
John Mikell	Larry Murphy	J. Newman
Henry Povich	Fred Rhodes	John E. Riley
E. Robinson	John Robinson	Tom Rozier
Dan W. Still	Joe Sweat	K. Sweat
Jeffrey Tillis	Michael Weizant	M. Padgett
Kyle Jackson		

In the event any such job is not immediately available, Respondent shall take the action set forth in the remedy section of this decision.

(b) Make the foregoing employees whole for any loss of earnings they may have suffered in the manner set forth in the remedy section of this decision. The beginning backpay periods for Michael Padgett and Kyle Jackson begin on May 3, 1999, and the backpay periods for the remaining employees begin on April 26, 1999.

(c) Within 14 days from service of this Order, offer Harold Knowles Jr., reinstatement to his former position or, if such position does not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill the position.

(d) Make Harold Knowles Jr. whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(e) Within 14 days from service of this Order, remove from its files all references to its unlawful warnings to Harold Knowles Jr. and Jeffrey Tillis and its suspension and discharge of Knowles, and within 3 days thereafter notify each of them in writing that this has been done, and that these actions will not be used against them in any way.

(f) Within 14 days from service of this Order, assign all employees which it transferred to its shift roster and to different shifts in 1997 back to their original shifts, unless any such employee elects to remain on the shift to which he is assigned.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Green Cove Springs, Florida, facility, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Within 21 days after service of this Order, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 threaten employees with more onerous work assignments because of their union activities.

WE WILL NOT threaten any employee with legal action because he made a concerted safety complaint.

WE WILL NOT tell employees that it is improper to make safety complaints.

WE WILL NOT interrogate employees about their safety complaints and concerted activity.

WE WILL NOT interrogate employees about their filing unfair labor practice charges.

[58] If 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 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."

WE WILL NOT create an impression of surveillance of our employees' union activities.

WE WILL NOT prevent union stewards from coming onto our property in order to investigate potential grievances and working conditions.

WE WILL NOT conduct interviews with employees which the latter have reasonable cause to believe will result in disciplinary action where we have failed to grant his request to consult with a union representative.

WE WILL NOT assign employees to more onerous work because they assist the Union or engage in protected activities.

WE WILL NOT refuse immediate reinstatement to unfair labor practice strikers on their application for same.

WE WILL NOT Warn, suspend, or discharge employees for engaging in protected activities, or because they filed charges or gave testimony under the Act, or because we believed that they did so.

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

WE WILL offer immediate reinstatement to the unfair labor practice strikers who applied for same, and make them whole for any loss of earnings, with interest, which they may have suffered.

WE WILL offer Harold Knowles Jr. reinstatement to his former or an equivalent position, and make him whole for any loss of earnings he may have suffered, with interest, because of the discrimination against him.

WE WILL remove from our files all references to the warnings issued to Harold Knowles Jr. and Jeffrey Tillis and to the suspension and discharge of Knowles, and tell them in writing that this has been done and that these actions will not be used against them in any way.

WE WILL assign all employees which we transferred to the shift roster and to different shifts in 1997 back to their original shifts.

RGC (USA) MINERAL SANDS, INC.