Post Tension of Nevada, Inc. *and* District Council of Iron Workers of the State of California and Vicinity. Case-28–CA–21579

August 29, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 18, 2008, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed cross-exceptions and supporting briefs. The General Counsel and the Respondent filed answering briefs and reply briefs.

The National Labor Relations 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 as modified and set forth in full below.[2]

AMENDED REMEDY

Having found that the Respondent unlawfully failed and refused to reinstate 15 unfair labor practice strikers on September 26, 2007, we shall order the Respondent to offer those employees immediate and full reinstatement to their former positions (to the extent it has not already done so), or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, discharging, if necessary, any replacements hired after the start of the strike. Any 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, with placement on the list determined by seniority or some other nondiscriminatory standard. *RGC (USA) Mineral Sands, Inc.,* 332 NLRB 1633, 1645 (2001), enfd. 281 F.3d 442 (4th Cir. 2002).[3] The Respondent shall also make employees

[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.

We agree with the judge that the Respondent violated Sec. 8(a)(1) by prohibiting its employees from going to a nearby Chevron station where they typically stopped at the start of their workday to purchase food, socialize, and discuss work issues. This prohibition was announced only after the Respondent learned that employees were meeting with union representative Brady Bratcher at the Chevron station. As the judge found, this prohibition was overly broad and discriminatory. The judge, however, failed to address the General Counsel's allegation that the rule also prohibited the employees from assembling. In additionally finding this violation, we rely on the fact that the Chevron station was a central location for employees of the different crews to gather and discuss working conditions and organizing. Thus, the prohibition against going to the Chevron station reasonably tended to impede and discourage employee concerted activity.

In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by discharging striking employees, we disavow any implication in the judge's decision that the violation turns on whether the Respondent intended to discharge the strikers. Rather, the test is whether "the words or action of the employer 'would logically lead a prudent person to believe his [her] tenure has been terminated.'" *North American Dismantling Corp.*, 331 NLRB 1557 (2000) (quoting *NLRB v. Trumbull Asphalt Co.,* 327 F.2d 841, 843 (8th Cir. 1964)), enfd. in relevant part and remanded 35 Fed. Appx. 132 (6th Cir. 2002). The relevant events must be viewed from the employees' perspective. Id., fn. 4. Applying this test, we agree with the judge that the General Counsel failed to prove that the Respondent discharged the striking employees.

In adopting this dismissal, Chairman Schaumber additionally relies on *Nations Rent, Inc.,* 342 NLRB 179 (2004).

In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by prohibiting employees from cashing their paychecks at the Chevron station, Member Liebman does not rely on the judge's discussion of *Success Village Apartments, Inc.*, 350 NLRB 908 (2007), in which she dissented. Member Liebman adopts the judge's dismissal of this allegation based on the judge's factual determination that the Respondent never implemented such a prohibition.

In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by failing to consider for employment applicant Brady Bratcher, we do not pass on the judge's finding that the General Counsel failed to meet his initial burden under *FES*, 331 NLRB 9, 10 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). Even assuming arguendo that the General Counsel met his initial burden, we agree with the judge that the Respondent met its rebuttal burden by showing that it would not have considered Bratcher for employment even in the absence of his union activity or affiliation.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

We shall modify the judge's recommended Order to conform more closely to the findings herein. We shall also substitute a new notice in accordance with the Order as modified and in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

We have also modified the judge's recommended Order to require that the notice to employees be posted in Spanish as well as English. In light of this determination, we deny as moot the Charging Party's Request that the Board take Administrative Notice of Spanish language notices in two prior cases.

In their cross-exceptions and supporting briefs, the General Counsel and Charging Party seek compound interest computed on a quarterly basis for any backpay awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Rogers Corp.*, 344 NLRB 504 (2005).

[3] We shall amend the judge's recommended remedy to conform to the standard remedy for the reinstatement of unfair labor practice strikers.

whole for any loss of earnings and other benefits sustained by them as a result of the Respondent's unlawful discrimination against them. Those amounts shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Post Tension of Nevada, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate unfair labor practice striking employees who made unconditional offers to return to their former or substantially equivalent positions of employment.

(b) Promulgating and maintaining overly broad and discriminatory work rules designed to prohibit employees from meeting with union representatives and from assembling for such purposes at local retail establishments.

(c) Threatening employees with discharge if they engage in a strike.

(d) Informing employees it will not issue paychecks on Friday mornings in order to interfere with employees' protected union activity of meeting with a union representative.

(e) Refusing to give any person an employment application because of the person's union affiliation.

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

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

(a) Within 14 days from the date of this Order, insofar as it has not already done so, offer the employees named below, immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges.

Agustin Cuevas Ayala	Crecensio Montoya Ramirez
Leobardo Delgado	Jesus Prudenciado-Orenday
Alfonso Arca Salazar	Aureliano Zazueta-Rivera
David Amaya Ruiz	Eduardo Velasco Hernandez
Gregorio Quiroz Sanchez	Leonidas Ruiz-Quiroz
Teodoro Flores Sanchez	Damion Garcia
Salvador Quiroz Merino	Felix Quiros
Jesús Martinez	

(b) Make the employees described in paragraph 2(a) above whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the amended remedy section of the Board's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to reinstate the employee 3 days thereafter notify them in writing that this has been done and that the refusal to reinstate them will not be used against them in any way.

(d) Rescind its prohibition against its employees meeting at a nearby Chevron station on their way to their worksite, and notify its employees in writing that it has done so.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its office in Phoenix, Nevada, copies in English and Spanish of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the operations involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 1, 2007.

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

In *Oil Capitol Sheet Metal,* 349 NLRB 1348 (2007), the Board addressed the burdens applicable to compliance proceedings involving union "salts." There is no contention or evidence that the unfair labor practice strikers in this case were salts. Accordingly, we disavow the judge's statement, at fn. 34 of her decision, that reinstatement of the unfair labor practice strikers is subject to defeasance if the General Counsel fails to meet his burden of proof under *Oil Capitol.*

[4] 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."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to reinstate employees who engage in an unfair labor practice strike and who make unconditional offers to return to their former or substantially equivalent positions of employment.

WE WILL NOT make and announce work rules in order to prohibit employees from meeting with the District Council of Iron Workers of the State of California and Vicinity (the Union) or with any other union representative, and from assembling.

WE WILL NOT threaten employees with discharge if they engage in a strike.

WE WILL NOT tell employees we will not issue paychecks on Friday mornings in order to interfere with employees meeting with representatives of the Union or with any other union representative.

WE WILL NOT refuse to give any person an employment application because of the person's union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL offer the employees named below, immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed:

Agustin Cuevas Ayala	Crecensio Montoya Ramirez
Leobardo Delgado	Jesus Prudenciado-Orenday
Alfonso Arca Salazar	Aureliano Zazueta-Rivera
David Amaya Ruiz	Eduardo Velasco Hernandez
Gregorio Quiroz Sanchez	Leonidas Ruiz-Quiroz
Teodoro Flores Sanchez	Damion Garcia
Salvador Quiroz Merino	Felix Quiros
Jesús Martinez	

WE WILL make the employees named above whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful refusals to reinstate the employees named above and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusals to reinstate will not be used against them in any way.

WE WILL rescind our prohibition against our employees meeting at a nearby Chevron station on their way to their worksite, and we will notify our employees in writing that we have done so.

POST TENSION OF NEVADA, INC.

Chris J. Doyle,Esq., for the General Counsel.
James T. Winkler (Littler Mendelson, PC), of Las Vegas, Nevada, for the Respondent.
Brady Bratcher (District Council of Iron Workers of the State of California and Vicinity, AFL–CIO), of Pinole, California for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Phoenix, Arizona, on February 12 through 14 and 27, 2008,[1] upon complaint and notice of hearing (the complaint) issued November 30, 2007, by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by District Council of Iron Workers of the State of California and Vicinity (the Union). The complaint alleges Post Tension of Nevada, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[2] Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Did the Respondent engage in the following violations of Section 8(a)(1) of the Act: engage in surveillance of employees engaged in union and other concerted activities; orally promulgate and maintain overly broad and discriminatory rules that prohibit employees from talking to union representatives, that prohibit employees from assembling at a facility where they engage in concerted activities, and that prohibit employees from cashing checks at a facility close to the Respondent's facility; threaten employees with discharge if they engage in a strike.

2. Did the Respondent violate Section 8(a)(3) and (1) of the Act in the first week of September by imposing more onerous terms and conditions of employment by prohibiting its employ-

[1] All dates herein are 2007 unless otherwise specified.

[2] At the hearing, Counsel for the General Counsel amended the complaint to correct jurisdictional allegations in par. 2(b). Respondent admitted the amended allegation.

ees from cashing checks at a facility close to the Respondent's facility.

3. Did unfair labor practices committed by the Respondent cause or prolong the strike engaged in by certain employees of the Respondent on September 20?

4. Did the Respondent violate Section 8(a)(3) and (1) of the Act on September 20, by discharging employees David Amaya-Ruiz, Alfonzo Arce-Salazar, Agustin Cuevas-Ayala, Leobardo Delgado, Teodoro Flores-Sanchez, Damian Garcia, Jesus Martinez, Crecencio Montoya-Ramirez, Jesus Prudenciano-Orenday, Felix Quiros, Salvador Quiroz-Merino, Gregorio Quiroz-Sanchez, Leonides Ruiz-Quiroz, Eduardo Velasco-Hernandez, and Aureliano Zazueta-Rivera.

5. Has the Respondent, since September 26, violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate the employees named in paragraph 4 above to their former or substantially equivalent positions of employment following their unconditional offers to return to those positions.

6. Did the Respondent violate Section 8(a)(3) and (1) of the Act by refusing to consider applicant Brady Bratcher for employment.

III. JURISDICTION

At all relevant times, the Respondent, a Nevada corporation, has been engaged in the business of installing stress cables used in the construction industry with an office and place of business in Phoenix, Arizona (the Respondent's Phoenix facility). During the 12-month period ending September 20, the Respondent purchased and received at its facility goods valued in excess of $50,000, directly from points located outside the state of Arizona. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.

IV. FINDINGS OF FACT

A. The Respondent's Business

The Respondent operates its construction-industry business out of facilities located in Denver, Colorado, Henderson, Nevada and, Tucson and Phoenix, Arizona. This case concerns the Respondent's facility in Phoenix, Arizona (the Phoenix facility). John Hohman, based in Tucson, manages the Arizona facilities, visiting the Phoenix facility several times a week. During the period relevant to this matter, the following individuals held the following positions with the Respondent at the Phoenix facility and were supervisors and agents of the Respondent within the respective meanings of Section 2(11) and (13) of the Act:

John Hohman (Hohman)	Vice-President
Matt Pickens (Pickens)	Superintendent
Javier Loya Bando (Loya)	Assistant Superintendent
Ken Saffin (Saffin)	Manager

In 2007, the following seven employees, stipulated supervisors within the meaning of Section 2(11) of the Act, served as the Respondent's field foreman:

Roberto Arce-Salazar	(Foreman Salazar)
Jesus Guerrerro	(Foreman Guerrerro)
Ezequiel Ordonez	(Foreman Ordonez)
Juan Quintero	(Foreman Quintero)
Juan Delgado	(Foreman Delgado)
Rosalio Gastelum	(Foreman Gastelum)
Jaime Fernandez	(Foreman Fernandez)

At all relevant times, the Respondent's construction projects in Phoenix were carried out by field crews, each consisting of a foreman and a varying number of laborers. For several years prior to September 20, the Respondent's workday practice in Phoenix was for the field crews to report to the Phoenix facility, receive their work assignments, and depart for their specified work sites. Each crew was transported by its respective foreman in the foreman's personal vehicle. Enroute to the work site, most crews typically stopped at a nearby Chevron gas station/mini market (Chevron station) where the crew foremen fueled their vehicles while crew members purchased food and socialized, spending from 20 to 30 minutes there.

The Respondent paid its field employees an hourly rate plus a production bonus, normally issuing paychecks to the field employees each Friday morning.[3] Having established check-cashing privileges at the Chevron station, many crew members cashed paychecks there on payday mornings.

B. Union Organizational Activity among the Respondent's Field Employees

In 2005 Brady Bratcher (Bratcher), organizer for the Union, unsuccessfully sought an 8(f) agreement with the Respondent. That same year, he coordinated a brief economic strike against the Respondent by its field employees, resulting in a meeting among company representatives and workers to resolve certain work issues.

In early 2007 with the intention of organizing the Respondent's employees, Bratcher began visiting the Chevron station where he knew many employees gathered before dispersing in crews to individual worksites. A number of employees expressed to Bratcher dissatisfaction with the Respondent's failure to implement its 2005 poststrike promises, and Bratcher increased his meetings with them during mid-summer.[4] The Respondent knew Bratcher visited with employees at the Chevron station. On one occasion, as Bratcher met with employees there, he gave Loya, whom he knew from the 2005 strike, a business card, asking him to help the workers if he could.

In early August, Bratcher approached Mr. Saffin at the Respondent's Phoenix facility with the hope of securing an 8(f) agreement with the company. Mr. Saffin declined to talk to him, saying that in 2005 when Bratcher didn't get what he wanted he, "went behind [the company's] back."

[3] Employee paychecks, which were generated in Henderson, Nevada, sometimes did not arrive at the Phoenix facility until late afternoon Thursday or on Friday. When that happened, Pickens delivered them to employees on the jobsites. Deviation from Friday morning paycheck issuance appears to have been atypical and infrequent.

[4] In addition to meeting with employees during workday mornings at the Chevron station, Bratcher met with them at an office building of the Building Trades Organizing Project (BTOP).

C. The Respondent's August 24 Meeting with Field Foremen

On August 24, Pickens held a meeting with the Respondent's seven field foremen at which Loya and Juan Carlos-Acosta translated.[5] At the meeting, Pickens distributed and discussed written instructions entitled "Tips for Management" setting forth rules for management conduct during union organizing campaigns. The handout categorized prohibited conduct by the acronym TIPS: Threats, Intimidation, Promises, and Spying.

Foreman Salazar testified that Pickens told the foremen they were not to talk to Bratcher or to take employees to talk to him.[6] Foreman Salazar quoted Pickens, as saying:

> I don't want you guys to go to the Chevron at all there, and to bring the laborers. In fact, I just don't want you to go to that Chevron gas station at all. Instead of going and gassing up in the morning, I would want you to go and gas up in the afternoon, so that in the morning, you don't have to go to the gas station at all. Just go straight away and go to work.

Foreman Ordonez essentially corroborated Foreman Salazar's testimony and further recalled that Pickens said the Respondent would no longer distribute paychecks in the morning in order to discourage crews from going to the Chevron station because Bratcher was there.

Pickens denied telling the foremen that they were not to go to Chevron station or threatening to impede their check-cashing there, and he denied telling the foremen to tell their crews they could not talk to Bratcher or go to the Chevron station or cash their checks there. According to Pickens, he told the foremen not to have any contact with union representatives, as they were members of company management, and not to threaten, intimidate, promise, or spy on their laborers. By Pickens' account, when the foremen said it was difficult to avoid Bratcher, as he was regularly at the Chevron station, Pickens suggested they not go there.

Loya testified Pickens told the foremen at the August 24 meeting that while they were not to have any contact with union representatives, it did not matter if the laborers did.

Following the meeting, Foremen Salazar and Ordonez told their crews Pickens had forbade them to take the laborers to the Chevron station because he did not want them talking to Bratcher. The workers complained about Pickens' interdiction, as it interfered with their ability to buy food and drink for the work day and, according to laborer Damion Garcia, they did not like being prohibited from speaking to whomever they wished. The employees discussed the possibility of striking.

Having considered all testimony regarding the August 24 meeting, I credit Foremen Salazar and Ordonez's accounts of the meeting and the laborers' accounts of what their foremen told them of it.[7] The foremen and laborer witnesses essentially corroborated each other and were otherwise believable.[8] On the other hand, I cannot find Loya to have reliably corroborated Pickens' version of the meeting. Loya's testimony was incongruously abbreviated, and he was so uneasy and muted in testifying as to prevent dependence on his account.

Thereafter, Foreman Salazar continued to take his crew to the Chevron station as before,[9] but Foreman Ordonez only occasionally stopped there enroute to his crew's work sites. On one or two occasions after the August 24 meeting, the Respondent handed out paychecks on Friday afternoons rather than mornings. According to Foreman Ordonez, on those occasions, Pickens said he was delaying the checks because he did not want to see the crews at the Chevron.

D. Alleged Surveillance at the Chevron Station

Early in the morning of August 29, Bratcher spoke with Foreman Guerrerro and his crew at the Chevron station while Guerrerro fueled his vehicle. As they talked, Pickens appeared at the Chevron station and told Guerrero that he needed to get to work.[10]

On August 31, Bratcher again went to the Chevron station, finding Foremen Salazar, Ordonez, Guerrerro, and Gastelum and their crews there. While Bratcher visited with Foreman Guerrerro and his crew, Pickens appeared. Three witnesses testified they saw what they believed to be Pickens taking a photograph of Bratcher as he talked to Foreman Guerrerro and his crew: (1) Bratcher testified that as he talked to the Guer-

[5] There is some question as to whether Loya fully translated what Pickens said. Foreman Salazar testified that Loya rendered lengthy utterances by Pickens into brief translations; Foreman Ordonez testified that Loya does not speak or read English very well. However, Loya is an admitted supervisor, and while his statements may not have precisely reflected those of Pickens, the Respondent is answerable for what. Loya said. See *3E Co., Inc.*, 313 NLRB 12 fn. 1 (1993). I find it unnecessary, even if it were possible, to distinguish between Pickens and Loya's statements. Moreover, Foremen Salazar and Ordonez who are at least conversant in English have testified to what Pickens said.

[6] Initially, Salazar testified that Pickens said the foremen were not to "take people to talk to [Bratcher]." In response to questioning by Bratcher, Foreman Salazar clarified that Pickens had told the foremen not to "take any of our laborers to where they could meet up or talk with Brady [Bratcher] or any union representative."

[7] The foremen's statements to the laborers are the admissions of admitted supervisors against a party-opponent and thus not hearsay under Rule 801(d)(2) of the Federal Rules of Evidence. See *U.S. Ecology Corp.,* 331 NLRB 223, 225 (2000). I have considered the fact that the foremen were allied with the laborers in their dispute with management as a reflection on their credibility, but the immediacy of the foremen's recounting of the meeting along with lack of motivation to misinform the laborers provide adequate circumstantial guarantees of reliability.

[8] The foremen's statements to the laborers are the admissions of admitted supervisors against a party-opponent and thus not hearsay under Rule 801(d)(2) of the Federal Rules of Evidence. See *U.S. Ecology Corp.,* 331 NLRB 223, 225 (2000). I have considered the fact that the foremen were allied with the laborers in their dispute with management as a reflection on their credibility, but the immediacy of the foremen's recounting of the meeting along with lack of motivation to misinform the laborers provide adequate circumstantial guarantees of reliability.

[9] Although there were a couple of occasions when Foreman Salazar did not take his crew to the Chevron station after the August 24 meeting, those deviations coincided with assignments to sites that took him and his crew on routes inconvenient to the Chevron station.

[10] It was the first time Bratcher had seen Pickens at the Chevron station. Several employees also testified they had never seen Pickens there before Bratcher began meeting with them. The Chevron station was locally noted for its spicy burritos and was convenient to the Respondent's facility. Both Hohman and Pickens credibly testified that they regularly purchased food items at the Chevron station.

rerro crew, he saw Pickens in front of or on the passenger side of his truck point a little camera toward them, and he saw a photographic flash; (2) Agustin Cuevas Ayala (employee Cuevas Ayala), a laborer on Foreman Salazar's crew, testified he saw Pickens, in a photograph-taking posture, point his cell phone at Foreman Guerrerro who was talking with Bratcher but saw no flash; (3) Damion Garcia testified he saw Pickens seated behind his steering wheel pointing a cell phone toward Bratcher, as Bratcher talked with Foreman Guerrero and surrounding laborers. Pickens denied ever taking a picture of any employees at the Chevron station and posited that he may have been seen text messaging while there. I credit Pickens' denial. Testimony regarding Pickens' alleged photographing of employees was inconsistent, and there is no clear evidence Pickens' action on which the testimony was based was not cell phone use unrelated to employees' union activity.[11]

E. The September 20 Strike and September 26 Unconditional Offer to Return to Work

Upon reporting to work the morning of Thursday, September 20, Foreman Salazar told some of the laborers that Loya had announced they would not receive their paychecks until Friday afternoon because the Respondent did not want them to go to the Chevron to cash them and see Bratcher. The employees asked for a meeting with Pickens. Pickens refused to meet with the laborers, but with Loya translating, Pickens met in his office with five of the field foremen, Salazar, Ordonez, Delgado, Guerrero, and Fernandez, for about an hour and a half. During the meeting, the foremen requested a written explanation of the company's pay system for field employees, which Pickens said he could not immediately supply. They also asked the company to provide water and ice machines and reimburse them for their hand tools. Pickens said he would discuss their requests with the company owners. Agreeing to meet with them again after work, Pickens prevailed upon them to leave for their job sites in order to meet deadlines for scheduled construction inspections.

The five foremen left Pickens' office, but only Foreman Guerrero went to work with his crew. The remaining foremen met with their crews, and Foreman Salazar told the laborers that Pickens had said he would not turn over the checks until Friday afternoon so that the workers would not "hook up" with Bratcher at the Chevron station.[12] While the laborers were still talking with their foremen, Pickens came outside. Foremen Salazar, Ordonez, Delgado, and Fernandez informed Pickens that they were not going to work. With Loya translating, Pickens spoke to the foremen and their crews outside his office.[13] The employees told Pickens they were unhappy about the lack of equipment, and the failure of the Respondent to furnish an ice machine and water.[14] Pickens said he was not so stupid as to buy an ice machine. Employees asked if they "were allowed to go to the Chevron in order to cash [their] checks." Pickens told them he would not give out their paychecks until Friday afternoon because he did not want them going to the Chevron station.[15] The employees said they wanted to receive their paychecks in the morning, and if they did not, they would unload their tools. The laborers began unloading their tools from their foremen's pickups, and Pickens told them that if they did, he would assume they were quitting or giving up their jobs, which the employees denied.[16] The workers completed their unloading and left the Respondent's facility, going directly to the Chevron station.

The foremen and laborers who had refused to work regrouped at the Chevron station and telephoned Bratcher, who arrived an hour or so later. Foremen Salazar and Ordonez told Bratcher the company had refused their demands for equipment, water, and ice, had declined to explain how their pay was calculated, had forbidden them to go to the Chevron to cash their checks, had changed Friday morning paycheck distribution to the afternoon, and had told them they would be quitting if they refused to work. The employees told Bratcher they wanted to strike. Bratcher told them that as the Respondent had violated federal law by telling them they couldn't speak to him or go to the Chevron station and other possible unfair labor practices, they could convert the strike to an unfair labor practice strike.[17] He helped the employees draw up a strike notice, which all signed, as follows:

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[11] I recognize that I have earlier declined to credit Pickens' testimony as to another issue. The Board has long held that failure to credit part of a witness' testimony does not preclude crediting other parts of his testimony. *Service Employees Local 1877 (American Building Maintenance),* 345 NLRB 161 fn 3 (2005).

[12] The substance of Foreman Salazar's report to the laborers is based on the testimony of employee Cuevas-Ayala whom I found to be a candid and reliable witness. Ayala's testimony was, in part, corroborated by Damion Garcia whom I also found credible; Garcia testified that Pickens was "bent on the fact that we should not go to the gasoline station."

[13] There is some disagreement as to whether the laborers were involved in this second discussion with Pickens or only the foremen. Pickens testified he had a second meeting only with the foremen. It is clear, however, that whether Pickens included them in the second discussion, the laborers were in a position to hear what he said, as translated by Loya and by Foreman Salazar, and offered comments through Foremen Salazar and Ordonez who translated for them.

[14] Although employee testimony regarding the second discussion with Pickens varied in some details, the employee witness accounts were essentially consistent, and I credit their testimony. The account set forth is an amalgam of their credible testimony.

[15] While Pickens denied ever having delayed paycheck distribution to prevent employees from meeting Bratcher at the Chevron station, he did not deny telling employees so. I credit employee witness accounts.

[16] Pickens admitted telling Foremen Salazar and Ordonez he assumed they were quitting, further testifying they replied, "Yes we quit." I do not credit Pickens' implied testimony that his statement was directed solely to the two foremen and that they were the only ones who responded. I credit employee Cuevas-Ayala's testimony of what occurred at that time, and I find Pickens told the group generally that if they unloaded the tools, they had given up their jobs, to which employees insisted they were striking. I find the employees' conduct was at all times consistent with strike activity rather than voluntary termination

[17] This account of the employee discussion regarding their decision to strike is an amalgam of employee and Bratcher's credible testimony. Employee Cuevas Ayala testified his motive for joining the strike was, in part, the Respondent's prohibition on going to the Chevron station and seeing or talking to Bratcher, all of which complaints he discussed with fellow laborers prior to the strike. Aureliano Zazueta-Rivera

WE HEREBY NOTIFY POST TENSION OF NEVADA THAT WE ARE ON UNFAIR LABOR PRACTICE STRIKE UNTIL FURTHER NOTICE

Agustin Cuevas Ayala	Crecensio Montoya Ramirez
Leobardo Delgado	Jesús Prudenciado
Alfonso Arca Salazar	Aureliano Zazueta
David Amaya Ruiz	Eduardo Velasco Hernandez
Gregorio Quinoz Sanchez	Juan Quiroz
Teodoro Flores S	Roberto Arce Salazar
Salvador Quiroz Medina	Jaime Fernández
Jesús Martine	Juan Delgado
Damion Garcia	Brady Bratcher
Gerónimo Quiroz	Ezequiel Ordonez

The group returned to the Respondent's facility, and the workers presented the strike notice to Saffin.

After presenting the strike notice to the Respondent, the striking employees gathered at the BTOP offices and made picket signs reading "POST TENSION OF NEVADA UNFAIR." The following day, on the morning of September 21, the striking employees appeared at the Respondent's facility at about 5 a.m. and picketed the company with the above-described picket signs for approximately 3 hours and each workday thereafter through the morning of September 26.

During the period September 21 to 26, the Respondent hired eight field employees, each of whom signed a form acknowledging employment as a permanent replacement for a striking employee. The Respondent hired one of the eight as a foreman with two of the new hires assigned to his crew. The other five new hires were dispersed between two existing crews.[18]

During the morning of September 26, the strikers, having agreed to end the strike, suspended picketing at Respondent's facility and presented to Mr. Saffin and Hohman an unconditional offer to return to work with the following signatures:

> We the striking workers of Post Tension of Nevada listed below hereby agree to end our Unfair Labor Practice strike unconditionally this 26th day of September, 2007 and to return to work immediately.

Arce-Salazar Roberto	Prucenciano-Orenday Jesus
Arce-Salazar Alfonzo	Quiros Felix
Cuevas-Ayala Agustin	Quiroz-Merino Salvador
Delgado Juan	Quiroz-Sanchez Gregorio
Delgado Leobardo	Ruiz-Quiroz Leonides
Fernandez Jaime	Velasco-Hernandez Eduardo
Flores-Sanchez Teodoro	Zazueta-Rivera Aureliano
Garcia Damian	Montoya-Ramirez Crecencio
Martinez Jesus	Amaya-Ruiz David
Ordonez Ezequiel	

Upon receiving the unconditional offer to return to work, Hohman told the workers they had been permanently replaced. On that or the next day, each employee signed a document entitled "Preferred Hire List" as follows:

Delgado Leobardo	Crecencio Montoya Ramirez
Ezequiel Ordonez G	Gregorio Quiroz Sanchez
Damian Garcia	Salvador Quiroz Merino
Roberto Arce Salazar	Leonides Ruiz Quiroz
Jaime Fernandez	Eduardo Velasco Hernandez
Agustin Cuevas Ayala	Juan Delgado
Teodoro Flores Sanchez	Felix Quiroz
Alfonso Arce Salazar	Jesus Prucenciano Orenday
David Amaya Ruis	Jose O Sequera
Aureliano Zazueta Rivera	Jerónimo Quiroz

Following the Regional Office's decision to issue complaint in this matter, the Respondent on December 11, mailed or hand delivered offers of reinstatement to certain of the employees named in complaint paragraph 5(f), stating in part: "Pursuant to your offer to return to work, Post Tension of Nevada is prepared to put you back to work in your position immediately." Pursuant to the letters, the Respondent laid off all but one of the permanent replacements[19] and returned the following strikers to work on the dates indicated:

Salvador (Geronimo) Quiroz-Merino	Date unknown
Eduardo Velasco-Hernández	December 12
Jesus Martinez	December 12
Teodoro Flores-Sanchez	December 13
Crecencio Montoya-Ramirez	December 17

As of the date of the hearing, the Respondent had not returned the following strikers to work:

David Amaya-Ruiz	Jesus Prudenciano-Orenday
Alfonzo Arce-Salazar	Felix Quiros
Agustin Cuevas-Ayala	Gregorio Quiroz-Sanchez
Leobardo Delgado	Aureliano Zazueta-Rivera
Damian Garcia	

F. Brady Bratcher's Application for Employment with the Respondent

Although the Respondent hands out employment applications to individuals who request them at the Phoenix facility (office applicants) and accepts completed forms, the Respondent does not hire field employees from such applications.[20] The Respondent's hiring procedure is to select a foreman, often from its existing field workers, who then forms a crew, typically drawing from among his acquaintances and relatives. Upon selection for a field crew, each laborer completes an employment application and other employment forms. In 2007, no

testified the employees asked Brady for his help because Pickens had told them they had quit.

[18] The Respondent offered unrebutted evidence that the Company had experienced a decrease in work in the latter half of 2007 and, at the time of the strike, was considering a layoff of field employees. The Respondent's declining work load precluded replacement of all striking employees. Attrition further reduced the numbers of field employees; within the first 6 weeks, three replacements terminated employment.

[19] During the hearing, the Respondent represented that it had retained replacement Contantino Quiroz who, as a rehire, had inadvertently not been flagged as a replacement.

[20] The Respondent accepts applications essentially as an accommodation to job seekers receiving unemployment benefits who need to document work searches.

field employee was hired from the 19 applications submitted by office applicants. During that period, Maria Perez (M. Perez) worked in the Phoenix facility's office as a clerical employee with authority to dispense employment applications.[21]

On September 7, Bratcher went to the Respondent's Phoenix office wearing an orange cap on which "Iron Workers Local 75" was enscribed. Bratcher asked M. Perez for an employment application, telling her he wanted to work and to organize. M. Perez made a telephone call to Pickens from an adjacent office, telling him that Bratcher wanted to talk to him or Saffin and/or to get an employment application. Pickens told M. Perez to tell Bratcher to leave or the police would be called, which she did. M. Perez steadily refused to give Bratcher an application.[22] Had Bratcher been given an application, he would have completed it, and if offered employment, he would have accepted it.

DISCUSSION

A. Positions of the Parties

The General Counsel contends that when the Respondent's field employees refused to work on September 20, they were engaged in an unfair labor practice strike protesting, in part, the Respondent's unfair labor practices and that the Respondent terminated them for striking. When, on September 26, the striking employees made an unconditional offer to return to work, the Respondent unlawfully treated them as economic strikers. The General Counsel further contends that the Respondent unlawfully engaged in surveillance, refused to consider union organizer, Bratcher, for employment, and imposed more onerous terms and conditions of employment by prohibiting its employees from cashing checks at a facility close to the Respondent's facility.

The Respondent argues that any management directions regarding union activity were lawfully directed solely at its field foremen who are statutory supervisors. The September 20 work stoppage was, in the Respondent's view, a purely economic strike. Although the Respondent's superintendent informed the strikers that by refusing to work, he assumed they were quitting, that statement, too, was directed only at field foremen, and he was justified in the assumption. When the Respondent realized the employees were striking, the company lawfully responded to the strike by hiring permanent replacements and placing the strikers' names on a preferential hiring list. Although a downturn in business limited job availability, the Respondent intended to reinstate strikers as openings occurred in keeping with Board rules regarding economic strikers. Upon issuance of the complaint on November 30, the Respondent, without admitting guilt and for the purpose of limiting potential backpay, terminated the permanent replacements still employed and offered reinstatement to six strikers, four of whom accepted. As for refusing to consider Bratcher for employment, the Respondent contends that, given its hiring procedures, it would not have hired or considered Bratcher for hire even in the absence of his union affiliation.

B. Alleged Independent Violations of 8(a)(1)

1. Surveillance

The complaint alleges that on August 29 and 31, Pickens engaged in surveillance of employees' union activities at the Chevron station. In the early morning of August 29, a number of the Respondent's field employees along with Foreman Guererro were engaged in the protected activity of speaking with union representative, Bratcher, about employment concerns. As they talked, Pickens appeared and told Foreman Guerrero that he needed to get to work. I have credited Pickens' testimony that he regularly purchased food items at the Chevron station, and there is no evidence that his appearance in that public place at that time was for the purpose of observing the field employees' interaction with Bratcher. Mere supervisory observation of "open, public union activity on or near [an employer's] property does not constitute unlawful surveillance." *Town & Country Supermarkets*, 340 NLRB 1410 (2004); *Fred Wallace & Son*, 331 NLRB 914 (2000); see also *Consolidated Biscuit Co.,* 346 NLRB 1175, 1176 (2006). In these circumstances, Pickens' presence at the Chevron station cannot be deemed surveillance even if he observed union activity while there.

The same analysis applies to Pickens' August 31 visit to the Chevron station. I have found the evidence does not establish that Pickens went to the Chevron station on that date for the purpose of observing employees engaged in protected activity or that he photographed any of his employees while there. In the absence of such evidence, his mere observation of employees' open, public union activity does not constitute unlawful surveillance.

2. Promulgation and maintenance of overly broad and discriminatory rules

The complaint alleges that during early September the Respondent orally promulgated and maintained overly broad and discriminatory rules by prohibiting employees from talking to any union representative and/or assembling or cashing their paychecks at a facility (the Chevron station) where they also engaged in protected, concerted activities.

I have credited testimony that Pickens told the field foremen not to take the laborers to the Chevron station where they were likely to meet Bratcher and that he told them the Respondent would no longer distribute paychecks on Friday mornings to further discourage employees' interaction with the Union. I have also accepted unrebutted testimony that the foremen communicated. Pickens' prohibitions to the field employees.

The evidence establishes that the Respondent's foremen had a longstanding, company-accepted practice of transporting the company's field employees to the local Chevron station where they purchased food and beverages before proceeding to the

[21] The complaint alleges that M. Perez is a supervisor and agent of the Respondent within the meaning of the Act. No evidence was adduced that M. Perez possessed any of the indicia of Sec. 2(11) of the Act.

[22] Possessing actual authority from Pickens, M. Perez served as the Respondent's agent in her direction to Bratcher. *Wal-Mart Stores, Inc.,* 350 NLRB 879 (2007).

worksites.[23] Company acceptance of the practice changed only after Bratcher began meeting employees there to garner support for the Union. The Respondent's consequent prohibition against the foremen taking field employees to the Chevron station was an overt attempt to prevent its employees from speaking with the union organizer.

In pertinent application of Section 7 of the Act, the Respondent's field employees had the statutory right to meet with a union organizer in the course of their regular stops at the Chevron station.[24] Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7."

The Respondent argues that even assuming Pickens issued a directive not to go to the Chevron station that included or impacted laborers as well as supervisors, his intention was only to lawfully curtail supervisory involvement with the Union, and, in any event, supervisors and laborers alike refused to comply.[25] The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Curwood, Inc*., 339 NLRB 1137, 1140 (2003); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001); *American Freightways Co.,* 124 NLRB 146, 147 (1959). An employer violates Section 8(a)(1) when its supervisors and agents engage in conduct tending to impede or discourage union involvement. *F. W. Woolworth Co*., 310 NLRB 1197 (1993); *Williamhouse of California, Inc*., 317 NLRB 699 (1995).

The Respondent further argues that even assuming Pickens told the field foremen not to take the laborers to a location where they could meet up with union representatives, such an instruction was lawful. The Respondent asserts that to do otherwise would violate Section 8(a)(2) of the Act by contributing support to a labor organization. It is true the situation presented a dilemma for the Respondent. An unquestionable conflict existed between the Respondent's right and even obligation to curtail its supervisors' involvement with or encouragement of the Union and its employees' right to engage in protected union activities. The Respondent could not, however, lawfully resolve the conflict by trampling on employees' Section 7 rights.

The Respondent's longstanding practice was for its field foremen to take their crews of laborers to the Chevron station nearly every working morning. In the summer of 2007, both foremen and laborers began meeting a union representative there. Although the foremen's interaction with the union representative was unprotected, the laborers' interaction was protected. When the Respondent ordered the foremen to discontinue the morning Chevron-station stops, their compliance with the order would necessarily have interfered with and restrained the laborers in their protected activity of meeting with a union representative. While the Respondent's prohibition of foremen union activity was lawful, its chosen effectuation of the prohibition—banning the customary morning Chevron-station stops—was oversweeping and inescapably interfered with employee protected activity, regardless of the Respondent's motive.[26] The Respondent's conduct meets the Board's objective 8(a)(1) test of tending to interfere with its employees' free exercise of Section 7 rights.

The Respondent makes a tacit de minimis argument, contending that Pickens' alleged prohibition against employees congregating at the Chevron station "was not much of a directive" since it was generally disregarded. However, the ineffectiveness of Pickens' prohibition is irrelevant to the objective standard the Board applies to 8(a)(1) allegations. See *Fieldcrest Cannon, Inc*., 318 NLRB 470, 490 (1995). The foremen's communication of the prohibition had an objectively reasonable tendency to intimidate and thus interfered with, restrained, or coerced the field employees in the exercise of rights guaranteed in Section 7. It thereby violated Section 8(a)(1) of the Act.

3. Pickens' September 20 threat of discharge

There is no evidence the field employees' cessation of work on September 20, was other than a work stoppage for "mutual aid or protection" protected by Section 7 of the Act. An employer violates Section 8(a)(1) of the Act by discharging employees who engage in a protected work stoppage or strike or threaten to do so. *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 14–17 (1962). By informing the field employees he would assume they were quitting if they unloaded their tools and did not go to work the morning of September 20, Pickens threatened them with termination for participating in a strike. Such threats violate Section 8(a)(1) of the Act. *Accurate Wire Harness*, 335 NLRB 1096 (2001).[27]

C. Alleged Violations of Section 8(a)(3) and (1) of the Act

1. Alleged imposition of more onerous terms and conditions of employment

The complaint alleges the Respondent violated Section 8(a)(3) and (1) of the Act in the first week of September by "impos[ing] more onerous terms and conditions of employment

[23] An employer may prohibit employees' union activity during "work time," that is, periods when employees are performing actual job duties excluding the employees' own time. See *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983). The Respondent does not contend its employees were on worktime during morning stops at the Chevron.

[24] Section 7 of the Act (in pertinent part) provides:

> Employees shall have the right to self-organization, to form, join, or assist any labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

[25] The Respondent argues that employees "must have seen that the directive not to go to the Chevron was not much of a directive if everyone continued to go there."

[26] As there is no evidence the Respondent explored any less drastic method of controlling its foremen's union activity, it is unnecessary to consider whether the circumstances obviated a less coercive approach.

[27] The threat of discharge was made to the field foremen and the field laborers alike; the General Counsel does not contend that threats made to the field foremen, who are stipulated 2(11) supervisors, violated the Act

by prohibiting its employees from cashing checks" at the Chevron station.

During the relevant period, it was routine for some field employees to cash their paychecks at the Chevron station during the crews' regular Friday-morning stops there. After Bratcher began meeting field employees during the morning stops, the Respondent threatened to delay distribution of Friday paychecks with the stated purpose of discouraging the meetings. In his posthearing brief, counsel for the General Counsel argues that the Respondent's rule prohibiting employees from cashing their paychecks at the Chevron station adversely affected its employees' working conditions by interfering with a "fast and easy way for employees to convert paychecks to dollars" in violation of Section 8(a)(3) of the Act. There is no question that delayed distribution of paychecks from Friday mornings to Friday afternoons inconvenienced some employees, and it is clear the Respondent advertised the delay as a maneuver calculated to stymie employees' union activities. However, the evidence does not establish an 8(a)(3) violation for several reasons.

First, the evidence does not show that the Respondent did, in fact, change its paycheck distribution practice. Credible evidence was adduced that Pickens and Loya told employees they would change the distribution practice to prevent employee interaction with Bratcher. There is also some evidence, albeit neither consistent nor unambiguous, that during the relevant period the Respondent occasionally failed to distribute paychecks on Friday mornings. But there is no definite evidence of an actual change. During the relevant period, the Respondent continued, at least some of the time, to distribute paychecks on Friday mornings, and there is no evidence that on those Friday mornings when the Respondent delayed the paychecks, the delay was not due to the same nondiscriminatory factors that had delayed distribution in the past. There is insufficient evidence, therefore, to support the allegation that the Respondent violated Section 8(a)(3) of the Act in changing its paycheck distribution policy.

Second, even assuming the Respondent did change its paycheck distribution policy so as to curtail Friday morning distribution, there is no evidence the Respondent in any way prohibited employees from cashing their paychecks at the Chevron station. Employees were free to cash paychecks there at any time they chose after receipt of the paycheck. The complaint allegation as stated is unproven.

Third, the General Counsel has not shown that Friday morning paycheck cashing at the Chevron station was a term and condition of employment, discriminatory preclusion of which would violate 8(a)(3). The convenience of Friday-morning check cashing was not specific or even relevant to the field employees' employment relationship with the Respondent, and it did not impact their working conditions. The Respondent changed none of the employees' basic terms or working conditions, and the Board does not consider mere employee convenience to be an aspect of an employment relationship. See *Success Village Apartments, Inc*, 350 NLRB 908, 909 (2007).

Even though the Respondent may not have violated Section 8(a)(3) by altering its paycheck distribution timing, when Pickens and Loya ascribed an unlawful motive to delayed paychecks they violated Section 8(a)(1) of the Act. Informing employees that an employer's conduct is discriminatorily motivated coerces employees and independently violates the Act even if the conduct has not actually occurred or is not unlawful. *Success Village Apartments, Inc*, supra; *K-Mart Corp.*, 336 NLRB 455 (2001); *Owens Corning Fiberglass Co.*, 236 NLRB 479, 480 (1978). Accordingly, I find that by informing field employees their paychecks were delayed in order to interfere with their engaging in protected union activities, the Respondent violated Section 8(a)(1) of the Act.

2. Alleged discharge of striking employees

As detailed above, on September 20, Pickens unlawfully threatened field employees with termination if they participated in a strike. Paragraph 5(f) of the complaint alleges that the Respondent thereafter discharged the striking employees. There is, however, no evidence the Respondent took any action reflecting an intention to discharge the strikers. Rather, the evidence establishes that the Respondent consistently treated the employees as economic strikers until issuance of the Complaint, at which time the Respondent applied reinstatement rights due to unfair labor practice strikers.[28] I shall, therefore, dismiss this allegation of the complaint.

3. The unfair labor practice strike

The General Counsel asserts that when the field employees ceased work on September 20 and went on strike, they were engaged in an unfair labor practice strike, while the Respondent contends it was an economic strike. It is true, as the Respondent argues, that a number of economic considerations (e.g. dissatisfaction with the Respondent's pay calculations, failure of the Respondent to furnish tools and water and ice) were motivating factors in the strike. It is also true that prior to commencement of the strike, the Respondent committed serious unfair labor practices by prohibiting and discouraging employees from congregating at a location where they met with a union representative and by threatening them with discharge if they went on strike. The question is whether the unfair labor practices contributed to causation of the strike.

In *Golden Stevedoring Co.*, 335 NLRB 410, 411 (2001) (citations omitted), the Board explained:

> It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events.

In determining whether a causal connection between the strike and preceding unfair labor practices exists, the Board looks to

[28] In his brief counsel for the General Counsel inconsistently asserts that the Respondent has not offered to return any striker to work and that at least 10 (out of 15) striking employees have not been offered reinstatement, suggesting that some strikers have been offered reinstatement. Insofar as there is a dispute about whether the Respondent has effected reinstatement of any strikers, the remedial provisions of this decision provide for resolution of that question.

the strikers' state of mind. See *C-Line Express*, 292 NLRB 638, 639 (1989) (lack of evidence strikers motivated to prolong strike by coercive employer statements on the picket line). When it is reasonable to infer from the record that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is an unfair labor practice strike. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 fn. 5 (1995), citing *NLRB v. Cast Optics Corp.,* 458 F.2d 398, 407 (3d Cir. 1972*)*, cert. denied 419 U.S. 850 (1972) (as long as an unfair labor practice has "anything to do with" causing the strike, it will be considered an unfair labor practice strike). The burden is on the employer to show that the strike would have occurred even if [it] had not committed unfair labor practices. *Larand Leisurelies, Inc. v. NLRB,* 523 F.2d 814, 820 (6th Cir. 1975).

Viewing the record as a whole, the evidence supports a finding that the Respondent's unfair labor practices contributed to the September 20 strike and/or thereafter prolonged it. Although the field foremen focused on economic issues in their meetings with Pickens on September 20, several field employees testified credibly of their concurrent displeasure at being restricted from the Chevron station, at being told to whom they could talk, and at being told their paychecks would be delayed to prevent them from meeting with Bratcher, all of which constitute unfair labor practices. The field employees were also unhappy about Pickens' unlawful threat that their work stoppage was tantamount to quitting, which information they related to Bratcher when he met with them a short time after they ceased work.

Citing *C-Line Express*, supra, the Respondent contends that Bratcher conceded the strike was economic when he told employees it could be converted to an unfair labor practice strike. The Respondent further argues that if the Respondent committed any unfair labor practices, it did so prior to the employees' economically motivated walkout and that past unfair labor practices cannot be utilized to alter the strike category. Even assuming the Respondent asserts a colorable defense, its argument gives undue weight to Bratcher's apparent perception that the strike needed to be "converted." When employees met with Bratcher very shortly after unloading their tools and leaving work, they detailed their grievances with the Respondent, including the Respondent's prohibition against going to the Chevron station, its announced change in the paycheck distribution schedule, and Pickens' parting admonition that they would be quitting if they refused to work, all of which are unfair labor practices. These unfair labor practices were contemporaneous with the strike. Since employees bore the unlawful conduct in mind as they contemplated striking, the conduct, at least in part, catalyzed the strike. Bratcher's reference to strike conversion neither vitiates nor alters the employees' motivation. Moreover, *C-Line Express* is distinguishable from the instant situation. In that case, the Board found no evidence that strikers were motivated to prolong their strike by coercive statements to several strikers or that strikers were even aware of an unlawful refusal to furnish information. In short, no evidence showed the *C-Line Express* strike was motivated by anything other than inability to reach a bargaining agreement. That is not the case here. While employee witness recollections differed in detailing strike discussions, their credible testimony as a whole establishes that the employees considered and were provoked by specific unfair labor practices in deciding to strike, and the Respondent has not met its burden to show the strike would have occurred even if it had not committed unfair labor practices. Accordingly, I conclude the September 20 strike was an unfair labor practice strike from its inception.

4. Failure to reinstate unfair labor practice strikers

On September 26, the strikers presented an unconditional offer to return to work signed by each striker to the Respondent. Upon its receipt, Hohman told the workers they had all been permanently replaced and directed each to sign a preferential hiring list. No striker was returned to work until December when the Respondent recalled five strikers.

Unlike the obligation of an employer to an economic striker, upon an unconditional offer to return to work, an employer must immediately reinstate an unfair labor practice striker. *Sproule Construction Co*., 350 NLRB 774 fn. 2 (2007); *Nortech Waste*, 336 NLRB 559, 565 (2001). By failing immediately to reinstate the unfair labor practice strikers who unconditionally offered to return to work on September 26, the Respondent violated Sections 8(a)(3) and (1) of the Act.

5. Alleged refusal to consider Brady Bratcher for employment

The General Counsel alleges the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider. Bratcher for hire on September 7. On September 7, Bratcher presented at the Respondent's facility as a legitimate office applicant.[29] Because Bratcher was a union organizer, the Respondent refused his request for an employment application and threatened to call the police if he persisted. While the Respondent's conduct violated Section 8(a)(1) of the Act,[30] the issue of whether the conduct also constituted a discriminatory refusal to consider Bratcher for employment in violation of Section 8(a)(3) of the Act depends on the analysis set forth in *FES*, 331 NLRB 9, 15 (2000), supp. 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

Regarding discriminatory refusals to consider for hire, the Board stated in *FES*:

> [T]he General Counsel bears the burden of showing the following . . . (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.[31]

[29] Bratcher's position as a full-time paid official of the Union did not prevent his being a bona fide applicant. *Sproule Construction Co.*, supra.

[30] Refusal to give a person an employment application that is customarily proffered to all other job seekers solely because of the person's union affiliation is coercive regardless of whether or not completing the application might lead to employment. See *Tradesmen International, Inc.,* 351 NLRB 399 fn. 4 (2007).

[31] Id at 15.

The uncontroverted evidence herein is that the Respondent never hires field employees through the office application channel. Rather the Respondent's field foremen hire field workers, typically drawing from among acquaintances and relatives, and the foremen do not review office applications for employment leads. There is no contention the Respondent's field employment practices are other than neutral and legitimate. See *Ken Maddox Heating & Air Conditioning,* 340 NLRB 43, 44 (2003) and cases cited at fn. 4 (preference in employing individuals referred by existing employees is a legitimate policy). Therefore, filing an employment application at the Respondent's facility is not part of the Respondent's employment process. Even though the Respondent discriminatorily precluded Bratcher from filing an employment application on September 7, the General Counsel has not met his burden of showing that the Respondent "excluded [Bratcher] from a hiring process"[32] and has not established a prima facie violation of the Act. Even assuming that the General Counsel has met his burden, the Respondent has met its shifted burden of "show[ing] that it would not have considered [Bratcher] even in the absence of [his] union activity or affiliation."[33] Accordingly, I shall dismiss the 8(a)(3) portion of this allegation of the complaint.

CONCLUSIONS OF LAW

1. Post Tension of Nevada, Inc., is and has been at all times material an employer engaged within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Council of Iron Workers of the State of California and Vicinity (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by

(a) In early September 2007, orally promulgating and maintaining overly broad and discriminatory work rules designed to prohibit employees from meeting with union representatives at a local gas station.

(b) Threatening employees with discharge if they engaged in a strike.

(c) Informing employees it would not issue paychecks on Friday mornings in order to interfere with employees' concerted, protected activity of meeting with a union representative.

(d) Refusing to give a person an employment application because of the person's union affiliation.

4. The strike engaged in by certain of the Respondent's field employees on September 20, was an unfair labor practice strike.

5. Respondent violated Section 8(a)(3) and (1) of the Act on September 26, 2007, by refusing to reinstate the following unfair labor practice striking employees upon their unconditional offers to return to their former or substantially equivalent positions of employment:

Agustin Cuevas Ayala	Crecensio Montoya Ramirez
Leobardo Delgado	Jesús Prudenciado-Orenday
Alfonso Arca Salazar	Aureliano Zazueta-Rivera
David Amaya Ruiz	Eduardo Velasco Hernandez
Gregorio Quiroz Sanchez	Leonidas Ruiz-Quiroz
Teodoro Flores Sanchez	Damion Garcia
Salvador Quiroz Merino	Felix QuirosJesús Martinez

6. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

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

Respondent having, on September 26, unlawfully failed and refused to reinstate to employment the employees named below, it must offer them immediate and full reinstatement to their former positions insofar as it has not already done so, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:[34]

Agustin Cuevas Ayala	Crecensio Montoya Ramirez
Leobardo Delgado	Jesús Prudenciado-Orenday
Alfonso Arca Salazar	Aureliano Zazueta-Rivera
David Amaya Ruiz	Eduardo Velasco Hernandez
Gregorio Quiroz Sanchez	Leonidas Ruiz-Quiroz
Teodoro Flores Sanchez	Damion Garcia
Salvador Quiroz Merino	Felix Quiros
Jesús Martinez	

Respondent must also make the named employees whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal to hire to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must rescind its unlawful and discriminatory work rules prohibiting employees from gathering at a local gas station.

[Recommended Order omitted from publication.]

[32] Id at 15.

[33] Id at 15. See *Tradesmen International, Inc.*, 351 NLRB 399, 401 (2007) (rejection of applicants who violated policy against unscheduled walk-ins lawful).

[34] The reinstatement ordered herein is subject to defeasance if, at the compliance stage, the General Counsel fails to carry his burden of going forward with evidence that a discriminatee would still be employed by the Respondent if the discriminatee had not been the victim of discrimination. *Tradesmen International, Inc.,* supra at fn. 16, citing *Oil Capitol Sheet Metal*, 349 NLRB 1348, 1351 (2007)