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Union de Obreros de Cemento Mezclado (Betteroads Asphalt Corp.) *and* Manuel Almanzar. Cases 24-CB-1808 and 24-CB-1900

October 31, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On January 7, 2000, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent (also referred to as the Union) filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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, as modified below, and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Union breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act by the manner in which it presented laid-off employee Manuel Almanzar's grievance to an arbitrator. The Union excepts, claiming, inter alia, that the judge mischaracterized the position it took on Almanzar's grievance at the arbitration hearing. As explained below, we find that although the judge misstated the Union's position on the grievance before the arbitrator, this factual error does not require reversal of the judge's conclusion that the Union violated Section 8(b)(1)(A) of the Act.

As more fully set forth in the judge's decision, the record shows that when Almanzar returned to the bargaining unit after a brief stint in a supervisory position, the Employer notified him that he would occupy his former position with his prior seniority. The Union, however, insisted that, under the contract, Almanzar could not retain his old seniority because he had "resigned" when he accepted the supervisory position.[2] The Employer then changed its position and denied Almanzar his prior seniority. Although Almanzar complained to both the Employer and the Union, his seniority was not restored.

Subsequently, the Employer laid off Almanzar and eight other unit employees. It is undisputed that Almanzar would not have been laid off had he not been denied 10 years of seniority based on the Union's insistence that he had "resigned." Almanzar filed a grievance over his layoff, and the grievance was processed to arbitration.

In his findings of fact, the judge stated that, at the arbitration hearing, "the Union and the company both took the position that because Almanzar accepted a position as supervisor in June 1996, he 'resigned' as that term is used in the collective bargaining agreement and therefore lost all of his past seniority." Similarly, in his analysis, the judge stated that "the Union and the company took the same position [before the arbitrator] regarding the interpretation of the collective bargaining agreement." The English translation of the record of the arbitration hearing shows that the Employer argued against allowing Almanzar to retain his seniority on his return to the unit. The translation also shows that, rather than taking the same position as the Employer, the Union took no position on the merits of Almanzar's grievance. We therefore do not adopt the judge's characterization of the Union's position at the arbitration hearing. We find, however, that the judge's error does not affect his conclusion that the Union breached its duty of fair representation.

It is well established that a union breaches its duty of fair representation toward employees it represents when it engages in conduct affecting those employees' employment conditions which is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). In serving the unit it represents, a union, as the employees' bargaining representative, must be afforded a "wide range of reasonableness." See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). The "wide range of reasonableness" afforded a union in serving the unit employees it represents must be exercised "in good faith, with honesty of purpose, and free from reliance on impermissible considerations." *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB No. 59, slip op. at 2 (2000), quoting *P.P.G. Industries*, 229 NLRB 713, 715 (1977), enf. denied 579 F.2d 1057 (7th Cir. 1978). A union does not violate its duty of fair representation where it acts

> pursuant to a reasonable interpretation of the collective-bargaining agreement . . . . In evaluating whether the union's conduct in such cases breached the duty of fair representation, the Board's responsibility "is not to interpret the pertinent contract provisions and determine whether the Union's interpretation [of the contract] was correct. Rather, our responsibility is to determine

[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.

[2] The collective-bargaining agreement provides that "seniority rights will cease" for several reasons, including "resignation."

> whether the Union made a reasonable interpretation [of the contract] or whether it acted in an arbitrary manner."[3]

A union does violate its duty of fair representation if its disposition of a grievance was "motivated by ill will or other invidious considerations." *Bottle Blowers Local 106 (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979).

Applying these principles to the facts of this case, we find, in agreement with the judge, that the Respondent's handling of the Almanzar grievance violated the Act. For the reasons stated by the judge, we find that the Union's position that Almanzar "resigned" when he moved from a unit position to a supervisory position was an unreasonable interpretation of the contract.[4] The Union's position is in conflict with the ordinary meaning of the word "resignation," and the Union offers no bargaining history or other evidence of the parties' intent to adopt a different meaning. We agree with the judge that the only reasonable meaning of "resignation" is that it refers to an employee's separation from employment with the Employer, i.e., an employee's seniority rights cease when he quits.

The Union's interpretation of the contract provision becomes even less tenable in light of record evidence that the Employer's past practice has been to recognize an employee's seniority as commencing from the date of hire, even though the employee chose to leave a unit position to take a nonunit position. For example, in 1976, employee Zenon Quinones returned to a unit job after almost 4 years in a nonunit position. When he retired in 1994, the Employer calculated his retirement benefits from 1959 when he was hired, including his years as a nonunit employee. The Union did not object. The record contains other examples of the Employer recognizing an employee's seniority as commencing from the date of hire, even when the employee's service has been interrupted or when the employee has not always been a unit member.[5]

Furthermore, the judge found that Almanzar, together with other employees, engaged in the protected concerted activity of attempting to change the Union's leadership and that the Union manifested animus toward Almanzar because of his intraunion activities. Indeed, the judge concluded that the only reason the Union interpreted the contract as it did was to retaliate against Almanzar.

Finally, the record shows that the Union continued to insist on its unreasonable contractual interpretation during the processing of Almanzar's grievance. Although, by the time the grievance reached arbitration, the Union did not take a formal position on the merits of the grievance, the Union, by its silence, cannot escape responsibility for all of its preceding conduct. As discussed above, it was the Union that caused the Employer to adopt the position that Almanzar lost his seniority when he "resigned," and, as a result of the Union's silence, that position was the only one advanced before the arbitrator. In other words, by remaining silent before the arbitrator, the Union did not adopt a truly neutral stance on the merits of the grievance, but, rather, perpetuated the unreasonable contract interpretation it had advanced since the beginning of the dispute because of its ill will toward Almanzar.

In these circumstances, we conclude that the Union failed to represent Almanzar in a fair and impartial manner before the arbitrator, thereby breaching its duty of fair representation and violating Section 8(b)(1)(A) of the Act.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Union de Obreros de Cemento Mezclado, San Juan, Puerto Rico, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to fairly represent employees in an arbitration proceeding.

(b) In any like or related manner 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, notify the Employer, Betteroads Asphalt Corp., in writing, with a copy to Manuel Almanzar, that it has no objection to the employment of Manuel Almanzar and request that the Employer reinstate Manuel Almanzar to his former position of employment or, if that position is no longer

[3] *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB No. 59, slip op. at 2 (2000), quoting *General Motors Corp.*, 297 NLRB 31, 32 (1989).

[4] Chairman Hurtgen does not necessarily agree that the "resignation" argument was unreasonable. However, he agrees that the Union was motivated by Almanzar's Sec. 7 activities within the Union.

[5] Although the Union claims its interpretation of the term "resignation" was consistent with past practice, it offers no examples in support of its assertion.

[6] We shall modify the recommended Order to require the Union to remove from its files, and ask the Employer to remove from its files, any reference to Almanzar's layoff. Additionally, in light of the fact that the Respondent's employees are Spanish-speaking, we shall modify the recommended Order to provide that the Respondent post the attached notice to employees in both English and Spanish. Finally, we shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (2001).

available, to a substantially equivalent position, with the seniority he would have obtained had he not been laid off in December 1996.

(b) Make Manuel Almanzar whole for any loss of earnings and other benefits suffered as a result of his layoff on December 20, 1996, until either he is reinstated to his former or substantially equivalent position of employment or until such time as he obtains substantially equivalent employment with another employer. Backpay shall be computed in accordance with *F .W. Woolworth Co*., 90 NLRB 289 (1951), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files, and ask the Employer to remove from the Employer's files, any reference to the layoff of Manuel Almanzar, and within 3 days thereafter notify Manuel Almanzar in writing that it has done so and that it will not use the layoff against him in any way.

(d) 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 backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its business office and meeting hall copies of the attached notice marked "Appendix."[7] Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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.

(f) Within 14 days after service by the Region, deliver to the Regional Director for Region 24 signed copies of the notice in sufficient numbers to be posted by Betteroads Asphalt Corp. at its San Juan, Puerto Rico facility, in all places where notices to employees are customarily posted, if it is willing.

(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 the Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
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 fail to fairly represent employees in an arbitration hearing.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, notify the Employer, Betteroads Asphalt Corp., in writing, with a copy to Manuel Almanzar, that we have no objection to the employment of Manuel Almanzar and WE WILL request that the Employer reinstate Manuel Almanzar to his former position of employment or, if that position is no longer available, to a substantially equivalent position, with the seniority he would have obtained had he not been laid off in December 1996.

WE WILL make Manuel Almanzar whole for any loss of earnings and other benefits suffered as a result of his layoff on December 20, 1996, until either he is reinstated to his former or substantially equivalent position of em-

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice "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.''

ployment or until such time as he obtains substantially equivalent employment with another employer, less net interim earnings.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, and ask the Employer to remove from its files, any reference to the layoff of Manuel Almanzar, and WE WILL, within 3 days thereafter, notify Manuel Almanzar in writing that we have done so and that we will not use the layoff against him in any way.

UNION DE OBREROS DE CEMENTO MEZCLADO

Virginia Milan, Esq. and *Marisol Ramos*, *Esq*., for the General Counsel.
Jose A. Aneses Pena, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me on October 6, 1999. The charges were filed on December 20, 1996, and October 22, 1997, and a consolidated complaint was issued by the Regional Director on March 31, 1998. It alleged that the Union violated Section 8(b)(1)(A) by breaching its duty of fair representation in relation to its handling of a grievance by Manuel Almanzar.

The complaint also requests as part of a remedial order that the Union make Almanzar whole for any loss of earnings and other benefits resulting from his loss of employment on December 20,1996, until he is reinstated by the Employer or obtains other substantially equivalent employment. That is, the General Counsel, consistent with *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998), asserts that I should find, in the context of the present case, that Almanzar should have prevailed in his grievance at arbitration. As there was, in fact an arbitration proceeding involving Almanzar's layoff, the General Counsel argues that I should conclude that the arbitrator incorrectly interpreted the collective-bargaining agreement, and that I should effectively overturn his findings. To reach this conclusion, the General Counsel contends that the arbitrator's decision was tainted by the way the Union presented Almanzar's case.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company involved in this case, Betteroads Asphalt Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Almanzar was employed by Betteroads since about 1987 and was at all times a member of the Union and covered by the applicable collective-bargaining agreements.

In 1995 and thereafter, Almanzar and other employees lobbied the Union to replace their existing shop steward, Victor Figueroa, whom they felt was not doing an adequate job. At one point during a meeting, the employees expressed their desire to have Almanzar be a part of the committee for the 1996 negotiations and he was placed on it. However, he was never made a shop steward and Figueroa retained his position.

Almanzar testified that on one occasion, Figueroa accused him of always sticking his nose into his business and threatened to slap him. I should note that Figueroa has a personal relationship to the Union's president who is the godfather to one of Figueroa's children.

In June 1996, Almanzar was offered a job as a supervisor and told the Company and the Union that he wanted to take this job conditionally; that he wanted to be able to go back to a unit job if he didn't like the supervisory position. According to Almanzar, before he accepted the promotion, he spoke with Union President Antonio Rodriguez and said that he was going to try out the job but if it didn't work out he would return to his current position as a screedman. Almanzar testified that Rodriguez said that this was not a problem and that Almanzar should accept the job. Consequently, he accepted the supervisor's job and resigned his membership in the Union.

Almanzar took the job, but decided to leave it when it became apparent that he wasn't making enough money. On July 29, 1996, Almanzar resumed his job as a screedman and in a company memo written by Manager Miguel Guerra, Almanzar was notified that he would occupy his former position, "with the seniority he had in the Union."

Notwithstanding the above, the evidence shows that on August 7, 1996, Union President Rodriguez met with Guerra and took the position that under the contract, Almanzar could not retain his old seniority because he "resigned" his position.

On August 12, 1996, Guerra wrote to Almanzar telling him that he had made a mistake about his seniority and that pursuant to article VI,B,(1) of the contract, "seniority ceases when an employee resigns and that absent consent of the contracting parties, the contractual language could not be changed." The applicable provision of the collective-bargaining agreement reads as follows:

> A. The Company will recognize the seniority rights of the employees covered by this Collective-bargaining agreement for the totality of continued services in the classification and in the bargaining unit only for purposes of lay-off and reinstatement.
>
> B. The seniority rights will cease for any of the following reasons:
>
> 1. Resignation.
> 2. Discharge for cause,
> 3. Layoff for a period of 6 months or more.
> 4. Absence due to disability for injury that occurred in the workplace that lasts more than 12 months as long as there is no conflict with the applicable laws.

> 5. If the person does not return to work within the term of 4 working days after being notified by certified mail, telegram, or in person, that the person must report to same unless he proves to the company's satisfaction the existence of a valid reason for not having reported during said period. In case that an employees is not able to report to his job after receiving notice from the company, he shall notify the company during the term of 2 days.
>
> 6. Absence due to illness or physical disability that lasts for a period longer than 7 months.

On receiving the August 12, 1996 letter, Almanzar told Guerra that this was not what he had been promised. He also testified that he spoke to Rodriguez about the seniority situation and that Rodriguez said he would speak to Guerra about it. (Almanzar did not know that Rodriguez had already spoken to Guerra about his seniority and that the Union's position was exactly the opposite of Almanzar's.)

On August 30, 1996, Union President Rodriguez wrote to the Company stating that it should treat Almanzar as a new employee and accordingly that he should be put on probation.

On September 16, 1996, Guerra responded and stated that the Company would not treat Almanzar as a probationary employee. Guerra stated in the letter that although Almanzar had resigned from the Union to take a supervisory position he had never ceased being an employee.

In any event, Almanzar continued to work at the Company in his old job. At the same time, there was a degree of intraunion turmoil, led in part by Almanzar and another employee named Gregorio Velez. For example, on August 28, 1996, Almanzar authored a petition asking that new elections be conducted for shop steward. Almanzar testified that Rodriguez came to the plant and angrily asked him who authorized him to collect signatures.

At some point, probably in the Autumn of 1996, a complaint was filed with the U.S. Department of Labor and on October 14, 1996, Almanzar sent a memorandum to the Union's members stating, in substance, that the Department of Labor was going to force Union President Rodriguez to hold an election because no elections had been conducted for 6 years.

In the ensuing months, an election campaign was conducted by vying slates, one of which included Almanzar as a candidate for president. The General Counsel offered into evidence, campaign literature issued by the incumbent slate wherein Almanzar was attacked for a variety of reasons including his decision to take a supervisory position and his consequent resignation from the Union; his country of origin (Dominican Republic); and for his pejorative attacks on the Union's leadership.

On December 19, 1996, the Company sent a letter to Almanzar which stated inter alia:

> After analyzing the work projections for the new year, we have noticed that the volume of contracts will begin to decline. For said reason, we have been forced to implement a reorganization plan that includes the control and reduction of costs.
>
> Upon applying Article VI: "Seniority", of the Collective-bargaining agreement in force, the position that you hold is included in those that will be affected by the reductions, for which reasons your services for the enterprise will terminate, effective on December 20, 1996.

On December 20, 1996, Almanzar and eight other unit employees were laid off. These layoffs were made in order of seniority and there is no dispute that if Almanzar had been accorded his ten years of seniority, he would not have been laid off. On the same day, Almanzar wrote to the Union, asserting that he should not have been laid off because of his ten years of seniority. He repeated his complaint to the Union on January 15, 1997.

On December 20, 1996, Almanzar filed the charge in Case 24–CB–1808 and this alleged that the Union caused the Company to refuse to honor his contractual seniority rights.

According to Almanzar, as a consequence of his layoff, he no longer could enter the Company's premises to do campaigning. Moreover, he testified that on one occasion, (probably in January), he was at the quarry when Rodriguez came over and told him that he could not be inside plant facilities. Almanzar adds that Rodriguez offered to fight him outside; an offer that he declined.

There is a company memorandum dated January 14, 1997, relating to the layoffs and explaining why Almanzar was laid off. It assumes that Almanzar had lost his seniority when he took the position as a supervisor but it also indicates that if he had a license for heavy duty equipment, he would have been entitled to bump another employee and move into the position of distributor driver. At the time of this memorandum, Almanzar had obtained such a license but this was not known to the company which, in its personnel files, had him as not having this license. It appears that no one from the company asked Almanzar about his license before he was laid off.

After Almanzar filed the charge referred to above, the Union decided to take his case to arbitration and the Regional Office deferred any further actions, pending its outcome.

An arbitration hearing was held on August 12, 1997, and Almanzar was "represented" by the Union's counsel, Aneses. He was not allowed to have his own attorney present. Almanzar testified that prior to the hearing, he was not spoken to by Aneses and therefore was not prepared for the hearing. This probably didn't make any difference inasmuch as it appears from the transcript of the proceedings and the arbitrator's award that the Union and the company both took the position that because Almanzar accepted a position as supervisor in June 1996, he "resigned" as that term is used in the collective-bargaining agreement and therefore lost all of his past seniority. As no-one argued a contrary position, the arbitrator accepted this definition of the word "resignation" in the contract's seniority provision and concluded, in agreement with the Company and the Union, that Almanzar had been properly laid off in December 1996, and in the correct order of seniority. No one pointed out to the arbitrator the other point that Almanzar had obtained the heavy equipment license and therefore would have been eligible to bump someone else for a driver's job.

The arbitration award issued on September 25, 1997, and a second charge was filed by Almanzar on October 22, 1997.

III. ANALYSIS

The leading case in this area of the law is *Vaca v. Sipes*, 386 U.S. 171 (1967), where the Supreme Court stated, inter alia:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. . . . Some have suggested that every individual employee should have the right to have his grievance taken to arbitration. Others have urged that the Union be given substantial discretion (if the collective-bargaining agreement so provides), to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility.
>
> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective-bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through the settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved.

By definition, a union will breach its duty of fair representation, and Section 8(b)(1)(A) of the Act, if it refuses to process a grievance *because* the employee in question is not a union member or because he engages in intra-union activities, such as running for office against incumbent officers. *Machinists District 186 (Federal Mogul*), 291 NLRB 535 (1988). If the General Counsel establishes that the Union was motivated by discriminatory reasons which violate an employee's rights under Section 7 of the Act, then this would be sufficient, in my opinion, to establish the violation without considering whether the union acted negligently, inefficiently, or without good judgment. Under such circumstances, it is my opinion that once a discriminatory motive is proven, the question as to the relative validity of the grievance becomes not a matter of determining whether a violation of the Act has occurred, but rather a question of what the proper remedy should be for the violation.

In the present case, the General Counsel has presented substantial evidence that Almanzar has engaged in the protected concerted activity of engaging with other employees in an effort to change both the shop steward and union's leadership. She also presented substantial unrebutted evidence showing animus toward Almanzar by both the incumbent shop steward, Figueroa, and Union President Rodriguez.

The principle reason that Almanzar was laid off was because it was the Union which insisted back in August 1996 that he lost all of his prior seniority because he had accepted a job as a supervisor and then changed his mind and returned to his former bargaining unit job as a screedman. This was not initially the position of the Company which assumed that he had not lost any seniority. The Company's position changed only when the Union insisted on a contrary interpretation.

The Union contends that the seniority provision makes it clear that Almanzar properly lost his seniority upon returning to his unit job from the supervisor's job. I don't agree. And in fact, it is my opinion that the contract should be read in exactly the opposite way. The provision providing that seniority should be used for layoff and recalls, states that there are a variety of situations wherein an employee with continuous service in a bargaining unit job may lose his or her accumulated seniority, one of which is "resignation." The Union takes the position that the word "resignation" should mean resignation from a bargaining unit job. But this is not what the contract says and this construction is contrary to the entire provision which lists a group of six reasons for losing one's seniority, all of which deal with circumstances where an employee is completely separated from his employment, either permanently or for a defined period of time (in the latter case, by virtue of layoff for 6 months or more or extended absences for disability or illness). In this context, it is clear to me that the intent of the contracting parties, was to provide a set of rules whereby an employee loses accumulated seniority only in those situations where he or she has either permanently severed his or her employment status or has had his or her employment status interrupted by a substantial absence from employment for involuntary reasons.[1]

Almanzar never resigned his employment with the Company; he simply took a promotion to a supervisory position which he relinquished after a few months. Clearly he did not resign his employment as that term is normally used. And in fact, that was the position that the Company took until the Union contended that the word "resignation" meant something other than its typical meaning.

Based on the unrebutted evidence presented by the General Counsel, I conclude that the Union breached its duty of fair representation in the manner by which it presented the grievance to the arbitrator in August 1997. In this regard, as the Union and the Company took the same position regarding the interpretation of the collective-bargaining agreement, it is no wonder that the arbitrator reached the conclusion that he did. After all, he didn't have any choice, as both parties to the contract agreed to its meaning. But, as I conclude that the contract can't be read that way, and that the only reason that the Union took the position it did was to retaliate against Almanzar for his intra-union activities, I cannot give deference to the arbitrator's award. On the contrary, I conclude that absent the retaliatory motive behind the position taken at the arbitration hearing, Almanzar would have prevailed in his grievance had the Union honestly represented him.

[1] There is nothing in the contract which requires seniority to terminate when an employee temporarily moves from a unit job to a nonunit job or when the employee takes a supervisory position.

CONCLUSION OF LAW

It is my conclusion that the Union acted in the manner it did because its leadership wished to retaliate against Almanzar because he was making waves within the Union. Accordingly, I conclude that the Union violated Section 8(b)(1)(A) of the Act. Further I find that the unfair labor practice affects commerce as defined in the Act.

REMEDY

Having found that the Respondent has engaged in 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.

Pursuant to *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998), the General Counsel has alleged in the complaint and the Respondent has agreed to litigate the merits of Almanzar's grievance in the present unfair labor practice and not wait until a compliance proceeding.

Although the Union has taken Almanzar's case to arbitration and lost, I have concluded above, that but for the Union's position at the arbitration case, which was not consistent with the written language of the contract and tainted by discriminatory motivation, that Almanzar should have won his case. Therefore, I shall recommend that he be made whole by the Union for any loss of earnings and benefits that he suffered by reason of his lay off on December 20, 1996, until such time as he is reinstated to his former position of employment or he obtains comparable employment elsewhere. Interest shall be computed on a quarterly basis from the date of his layoff to the date of his reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 890 NLRB 289 (195), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Union de Obrero de Cemento Mezclado, San Juan, Puerto Rico, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Arbitrarily, discriminatorily, or in bad faith refuse, on request, to process grievances sought to be processed by employees toward whom it owes a duty of fair representation.

(b) In any like or related manner 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, request the Employer, Betteroads Asphalt Corp., to reinstate Manuel Almanzar to his former position of employment.

(b) Make Manuel Almanzar whole, with interest, for any loss of earnings he suffered as a result of his layoff on December 20, 1996, until either he is reinstated to his former position of employment or until such time as he obtained or obtains substantially equivalent employment.

(c) Within 14 days after service by the Region, post at its facility, copies of the attached notice marked "Appendix"[3] Copies of the notice, on forms provided by the Regional Director for Region 24 after being signed by 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. Responsible steps shall be taken by the 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, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 1996.

(d) 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 the Respondent has taken to comply

Dated, Washington, D.C. January 7, 2000

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 arbitrarily, discriminatorily, or in bad faith refuse, on request, to process grievances sought to be processed by employees toward whom we owe a duty of fair representation.

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

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[2] 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.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice "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, within 14 days from the date of this Order, request the Employer, Betteroads Asphalt Corp., to reinstate Manuel Almanzar to his former position of employment.

WE WILL make Manuel Almanzar whole with interest for any loss of earnings he suffered as a result of his layoff on December 20, 1996, until either he is reinstated to his former position of employment or until such time as he obtained or obtains substantially equivalent employment.

UNION DE OBREROS DE CEMENTO MEZCLADO