Macy's, Inc. *and* Bridgett Redd

United Food and Commercial Workers, Local 5 *and* Bridgett Redd. Cases 20–CA–270110 and 20–CB–269444

August 3, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On October 29, 2021, Administrative Law Judge Ariel L. Sotolongo issued the attached decision, and on November 22, 2021, he issued an errata. Respondent United Food and Commercial Workers, Local 5 ("UFCW" or "Union") filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Respondent UFCW filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

We adopt the judge's findings, for the reasons he states, that Respondent UFCW breached its duty of fair representation and violated Section 8(b)(1)(A) of the National Labor Relations Act by arbitrarily interpreting the seniority provision of the parties' collective-bargaining agreement to require that employee Bridgett Redd lose her accrued seniority when she returned to the bargaining unit after serving two years as a supervisor. We also adopt his finding, for the reasons he states, that Respondent UFCW violated Section 8(b)(2) of the Act by causing Respondent Macy's to lay off Redd as a result of its unreasonable interpretation of the collective-bargaining agreement.[4]

[1] Respondent UFCW has implicitly 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.

In the absence of exceptions, we adopt the judge's finding that Respondent Macy's violated Sec. 8(a)(3) and (1) of the Act by acquiescing in Respondent UFCW's interpretation of the collective-bargaining agreement and laying off Charging Party Bridgett Redd.

In addition, although we need not reach the issue of animus here, we would not adopt the judge's analogy between being pregnant and having animus.

[2] Although the judge correctly stated in his Conclusions of Law that Respondent Macy's was engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, he inadvertently found in the Jurisdiction section of his decision "that the Employer has been engaged in commerce withing the meaning of Sec[.] 2(5) of the Act." We correct this inadvertent error, which does not affect our decision.

[3] Although the judge included a narrow cease-and-desist provision in his recommended Order, he inconsistently included a broad cease-and-desist provision requiring the Respondents to cease and desist from violating the Act "in any other manner" in the Remedy section of his decision. We find that a broad order is not warranted under the circumstances of this case. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979) (finding broad cease-and-desist order warranted where "a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights"). Accordingly, we will order the Respondents to cease and desist from violating the Act "in any like or related manner."

We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

Members Kaplan and Ring acknowledge and apply *Paragon Systems* as Board precedent, although they expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

In light of the close factual connection between the unfair labor practices committed by Respondent Macy's and Respondent UFCW, we shall further modify the judge's recommended Order to require each Respondent to post a signed copy of the other Respondent's notice, to be provided by the Region, in the same places and under the same conditions as each posts its own notice. See *Everport Terminal Services, Inc.*, 370 NLRB No. 28 (2020).

We shall substitute new notices to conform to the Order as modified.

[4] In affirming this violation, Member Ring additionally relies on Respondent UFCW's admission in its brief that its interpretation of the collective-bargaining agreement was based at least in part on the fact that Redd accepted a permanent position outside the unit as supervisor and her interests therefore did not "remain aligned with the Union." Respondent UFCW stresses that Redd accepted an "apparently permanent and unconditional move to supervisory status [and] . . . took a withdrawal card from the Union," and explains why seniority is not also reset for employees who accept a temporary promotion to holiday supervisor as follows:

> [E]mployees know up front that a temporary holiday assignment will end after just a few months. (See Tr. 315.) Employees would not want to take these temporary positions if they knew that they would lead to a reduction of seniority. The temporary nature of the assignment also means that the interests of these individuals remain aligned with the Union. When an employee takes a permanent, indefinite position in management, the employee's interests become aligned with Macy's management.

In Member Ring's view, these admissions support a finding that Respondent UFCW violated Sec. 8(b)(2) by causing or attempting to cause Respondent Macy's to discriminate against Redd for the purpose of encouraging or discouraging union membership, i.e., because she "took a withdrawal card from the Union" and her interests were not "aligned with the Union." See, e.g., *Radio Officers (A.H. Bull Steamship Co.) v. NLRB*, 347 U.S. 17, 42—52 (1954).

Although Respondent UFCW timely raised its Section 10(b) defense in its answer to the consolidated complaint, the judge failed to address this argument in his decision. We reject Respondent UFCW's argument that these allegations are time barred by Section 10(b) of the Act. The 10(b) period does not begin to run until the alleged discriminatee receives "clear and unequivocal notice—either actual or constructive—of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knows or should know that his statutory rights have been violated." *John Morrell & Co.,* 304 NLRB 896, 899 (1991) (internal citations omitted), enfd. 998 F.2d 7 (D.C. Cir. 1993). As found by the judge, Respondent Macy's first notified Redd of her impending layoff on June 25, 2020. Respondent UFCW contends that it first interpreted the collective-bargaining agreement to require a reset of seniority when an employee accepted a position outside the unit in 2019. But the judge did not credit union representative Vargas's testimony that he asked Respondent Macy's to adjust Redd's seniority in 2019. Moreover, even if that testimony had been credited, there is no evidence that Redd was aware of any adjustment to her seniority until June 25, 2020. Accordingly, the charge was timely filed on November 20, 2020, within the six-month Section 10(b) period.

ORDER

A. The National Labor Relations Board orders that the Respondent, United Food and Commercial Workers, Local 5 ("UFCW" or "Union"), San Francisco, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to fairly represent employees by arbitrarily interpreting the seniority provision of the collective-bargaining agreement to require that they lose their accrued seniority after accepting a position outside the bargaining unit and then returning to a unit position.

(b) Causing Macy's to lay off employees as a result of its arbitrary interpretation of the collective-bargaining agreement.

(c) 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, correct its files to reflect Bridgett Redd's correct seniority date, September 26, 1988, and notify Macy's of her corrected seniority date.

(b) Jointly and severally with Macy's, make Bridgett Redd whole for any loss of earnings or other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Jointly and severally with Macy's, compensate Bridgett Redd for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

(d) Within 14 days from the date of this Order, remove from its files any reference to Bridgett Redd's unlawful layoff and, within 3 days thereafter, notify her in writing that this has been done and that the layoff will not be used against her in any way.

(e) Post at its San Francisco, California, union office copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 20, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Post at the same places and under the same conditions as in the preceding subparagraph signed copies of Respondent Macy's notice to employees marked "Appendix B."

(g) Within 14 days after service by the Region, deliver to the Regional Director for Region 20 signed copies of the Respondent's notice to employees and members marked "Appendix A" for posting by Respondent Ma-

[5] If the Respondent's office involved in these proceedings is open and accessible to a substantial complement of employees and members, the notices must be posted within 14 days after service by the Region. If the Respondent's office involved in these proceedings is closed or not accessible to a substantial complement of employees and members due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the office reopens and is accessible by a substantial complement of employees and members. If, while closed or not accessible by a substantial complement of employees and members due to the pandemic, the Respondent is communicating with employees and members by electronic means, the notices must also be posted by such electronic means within 14 days after service by the Region. If the notices to be physically posted were posted electronically more than 60 days before physical posting of the notices, each notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in each 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."

cy's at its facility where notices to employees are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 20 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.

B. The National Labor Relations Board orders that the Respondent, Macy's, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees as a result of having acquiesced in a request by United Food and Commercial Workers, Local 5 ("UFCW" or "Union") to reset their seniority date after they accept a position outside of the bargaining unit and then return to a unit position.

(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, if it has not already done so, offer Bridgett Redd full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with the Union, make Bridgett Redd whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Jointly and severally with the Union, compensate Bridgett Redd for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Bridgett Redd's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff, and within 3 days thereafter, notify Bridgett Redd in writing that this has been done and the layoff will not be used against her in any way.

(f) 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.

(g) Post at its San Francisco, California facility copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 its San Francisco facility at any time since June 25, 2020.

(h) Post at the same places and under the same conditions as in the preceding subparagraph signed copies of Respondent UFCW's notice to employees and members marked "Appendix A."

(i) Within 14 days after service by the Region, deliver to the Regional Director for Region 20 signed copies of the Respondent's notice to employees marked "Appendix B" for posting by Respondent UFCW at its offices and

[6] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notices must also be posted by such electronic means within 14 days after service by the Region. If the notices to be physically posted were posted electronically more than 60 days before physical posting of the notices, each notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in each 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."

meeting halls where notices to employees and members are customarily posted.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 20, 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. August 3, 2022

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT arbitrarily interpret the seniority provision of the collective-bargaining agreement to require that you lose your accrued seniority if you accept a position outside of the bargaining unit and then return to a unit position.

WE WILL NOT cause Macy's to lay off employees as a result of our arbitrary interpretation of the collective-bargaining agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, correct our files to reflect Bridgett Redd's correct seniority date, September 26, 1988, and notify Macy's of her corrected seniority date.

WE WILL, jointly and severally with Macy's, make Bridgett Redd whole for any loss of earnings or other benefits resulting from her layoff, less any net interim earnings, plus interest, and WE WILL also, jointly and severally with Macy's, make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, jointly and severally with Macy's, compensate Bridgett Redd for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Bridgett Redd, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the layoff will not be used against her in any way.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 5

The Board's decision can be found at https://www.nlrb.gov/case/20-CB-269444 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

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 lay off any of you as a result of having acquiesced in a request by United Food and Commercial Workers, Local 5 ("UFCW" or "Union") to reset your seniority date based on its arbitrary interpretation of the collective-bargaining agreement to require that you lose your accrued seniority if you accept a position outside of the bargaining unit and then return to a unit position.

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

WE WILL, within 14 days from the date of the Board's Order, offer Bridgett Redd full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly and severally with the Union, make Bridgett Redd whole for any loss of earnings and other benefits resulting from her layoff, less any net interim earnings, plus interest, and WE WILL also, jointly and severally with the Union, make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, jointly and severally with the Union, compensate Bridgett Redd for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Bridgett Redd's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Bridgett Redd, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the layoff will not be used against her in any way.

MACY'S INC.

The Board's decision can be found at www.nlrb.gov/case/20-CA-270110 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Matthew C. Peterson, Esq., for the General Counsel.
Kymiya St. Pierre, Esq. (Jackson Lewis P.C.), for Respondent Macy's.
Caren Sencer, Esq. and *Matthew J. Erle, Esq. (on brief), (Weinberg, Roger & Rosenfeld),* for Respondent UFCW Local 5.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether Respondent United Food and Commercial Workers, Local 5 ("Respondent Union" or "Local 5") violated Section(s) 8(b)(1)(A) and 8(b)(2) of the Act by causing Respondent Macy's, Inc. ("Respondent Macy's" or "Employer") to lay off Charging Party Bridgett Redd ("Redd') for reasons other than Redd's failure to tender uniformly required initiation fees and dues, and whether Respondent Macy's violated Section 8(a)(1) & (3) of the Act by laying off Redd at the request of Respondent Union. Subsumed withing such issue(s), is the question of whether the Respondent Union caused Redd's lay off by the Employer because of an unreasonable or arbitrary interpretation of the seniority provisions of their collective-bargaining agreement.

I. PROCEDURAL BACKGROUND

Redd filed a charge in Case 20–CB–269444 against Local 5 on November 20, 2020, and a charge in Case 20–CA–270110 against the Employer on December 7, 2020. Based on these charges, the Regional Director for Region 20 of the Board issued a consolidated complaint on March 8, 2021 alleging that the Respondent Union and Respondent Macy's had violated the Act as described above. The complaint was further amended during the course of the hearing in this matter, which took place June 8–10, 2021 via the Zoom video platform.[1]

II. JURISDICTION

The complaint alleges, and the Employer admits, that at all material times Respondent Macy's has been a corporation headquartered in New York, New York, with a place of business in Union Square, San Francisco, California, and is engaged in the business of operating retail department stores. The complaint further alleges, and the Employer admits, that during

[1] The amended complaint, which adds a Sec. 8(b)(1)(a) allegation against the Respondent Union, appears in the record as General Counsel's Exhibit 2 (GC Exh. 2).

the course of conducting its business operations during calendar year 2020, it derived gross revenues in excess of $500,000 and that it purchased and received at its San Francisco store products, goods and materials valued in excess of $5000 directly from outside the State of California. Accordingly, I conclude that the Employer has been engaged in commerce withing the meaning of Section 2(5) of the Act.

The complaint also alleges, both Respondent Macy's and the Respondent Union admit, and I find, that at all material times, the Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FINDINGS OF FACT

A. Background Facts

Most of the facts in this case are not disputed, and indeed many of the facts were stipulated to by the parties, as further discussed below. As briefly mentioned above, the Employer operates a retail store at Union Square in San Francisco ("the store"), where it employs hundreds of employees as sales associates—although those numbers have been declining over that last few years. The employees at the store have been represented by Local 5 for many years, and the Employer and Local 5 have been parties to a series of collective-bargaining contracts covering the wages, hours, and working condition of said employees.[2] Redd began working at the store on September 26, 1988, and thereafter worked in various departments and floors, and has been a member in good standing of Local 5 during all relevant time periods. As described in the factual stipulations below, beginning on May 13, 2013, Redd left the bargaining unit to become a supervisor at the store, and returned to the bargaining unit on June 17, 2015, a little over 2 years later.[3] It was Redd's absence from the bargaining unit during this period, and how it impacted her seniority rights—including layoffs and recalls—which is at the heart of the instant dispute.

Tony Vargas ("Vargas") has been the union representative in charge of representing the employees at the store for the last 3–4 years, since 2017.

Traditionally, under the parties' collective-bargaining agreement(s), seniority has been used to determine employee rights regarding layoffs and recalls, scheduling (including weekends and holidays off), vacations, promotions, transfers, and the timing of sick pay. Regarding what constituted a break of seniority, the collective-bargaining agreement(s) (Sec. 18) provide as follows:

> E. Seniority shall be terminated by:
>
> 1. Written resignation.
>
> 2. Verbal resignation not withdrawn in writing by the close of the next business day.
>
> 3. Discharge for cause.
>
> 4. Failure to return from leave of absence granted in accordance with Section 13 (Leaves of Absence).
>
> 5. Failure to return to work from layoff within three (3) working days of mailing notification by certified mail by the Employer to the Employee's home address unless just cause for not returning to work is proven.
>
> 6. For employees:
>
> • with less than six (6) months of service, four (4) consecutive months of unemployment;
> • with six (6) months to one year of employment, six (6) consecutive months of unemployment;
> • with one (1) to two (2) years of service, nine (9) consecutive months of unemployment;
> • with two (2) or more years of service, twelve (12) consecutive months of unemployment.

The collective-bargaining agreement(s) also provide that the above six reasons are the only reasons to change or terminate an employees' seniority date, which is considered the employee's hiring date:

> It is understood that, in the application of this Agreement, an employee's employment date shall date from the beginning of his employment with the Employer and not from the signing of this agreement. Said employment date shall remain unchanged unless continuity of employment is broken pursuant to the provisions of Section 18.

Additionally, as further background information, I note that the parties joined in stipulating to the following facts:

> 1. During the period from at least 2014 through the present, there have been no written agreements or written procedures applicable to the bargaining unit about how seniority is earned, terminated, or applied to layoffs, other than as set forth in the parties' CBAs. The CBAs cover the terms and conditions of employment for the bargaining unit, including seniority and layoff provisions. See GC Exhibits 3-6 (includes 2009-2014 CBA provided by Union).
>
> 2. Charging Party Bridgett Redd's ("Redd") hire date at Respondent Macy's, Inc. ("Macy's") is September 26, 1988.
>
> 3. During the period from about May 13, 2013, to about June 17, 2015, Redd continued to work for Respondent Macy's at its Union Square, San Francisco location ("Union Square Location"), in supervisory positions that were not part of the Unit.
>
> 4. On about June 17, 2015, Redd returned to working in positions in the bargaining unit, where she has since worked continuously, except for periods of furlough or layoff.
>
> 5. At all material times since Redd returned to the bargaining unit on about June 17, 2015, the Parties' successive CBAs (primarily located in Section 3D) state that Macy's will provide the Union with a monthly list, in varying formats, of all employees in the bargaining unit. The list will include, *inter alia*, "Union seniority date (when administratively feasible by Employer)."

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[2] Copies of four collective-bargaining agreements were introduced in the record, covering the periods from 2009 to 2014, 2014 to 2017, 2017 to 2019, and 2019 to 2022 (GC Exhs. 3, 4, 5, and 6, respectively).

[3] During this period of time, Redd took a "withdrawal card" from Local 5, as required by its rules, which exempted her from having to pay dues during that time and allowed her to return to the bargaining unit without having to pay a new initiation fee.

6. Macy's HRIS system does not track employee's bargaining unit seniority date (this must be done manually). As such, the monthly lists indicate employees' seniority dates as their dates of hire, which is tracked in the HRIS system.

7. Macy's applies employees' seniority dates as listed in the monthly lists as employees' bargaining unit date, unless otherwise notified by the Union. When the Union notifies Macy's that it believes an employee's bargaining unit seniority differs from the seniority date listed in the monthly list, Macy's manually researches the employee's bargaining unit seniority.

8. Macy's has been unable to locate any seniority lists applicable to the bargaining unit that were sent to the Union aside from the 2020 monthly lists. Due to turnover Macy's has been unable to determine whether prior monthly lists have been sent to the Union. The 2020 monthly lists provided to the Union list Redd's seniority date as her hire date of September 26, 1988. See Exhibit 16.

9. Michael Abunda's ("Abunda") hire date is June 26, 1991. Abunda transferred to a supervisory position on October 12, 2014. On October 11, 2015, Abunda transferred to a bargaining unit position.

10. Seniority is the only factor that Macy's uses for layoffs and recalls; it does not use merit and ability for layoffs and recalls. Macy's uses seniority, merit and ability for promotions and transfers.[4]

Finally, the General Counsel and the Respondent Union further stipulated to the following facts:

11. There are no written agreements or procedures applicable to the Unit pertaining to how seniority is earned, terminated, or applied to layoffs, during the period from 2013 through the present, other than as set forth in the parties' collective-bargaining agreements.

12. General Counsel's Exhibit 11 is a report from the electronic database from June 3, 2021, that contains the Union's membership file for Bridgett Redd. It is the only file the Union maintains for Bridgett Redd.

13. Bridgett Redd's Union membership file reflected in GC 11 and the monthly seniority lists that the Employer provides the Union are the only written records on which the Union relied to determine, calculate, or adjust Bridgett Redd's seniority date during times when she was working in the bargaining unit during the period from January 1, 2013, to the present.

14. General Counsel's Exhibit 14 contains the only records of the Union's communications with Macy's regarding Bridgett Redd's requested, potential, or actual layoff in calendar year 2020, that the Union possesses. (GC Exh. 18).

[4] These factual stipulations originally were between the General Counsel and Respondent Macy's (GC Exh. 19), but the Respondent Union joined in the stipulations (Tr. 238–239; 242).

B. The Events Resulting in Redd's Layoff in July 2020

As described above, Redd returned to the bargaining unit as a sales associate in the luggage department on June 17, 2015, after a 2-year stint as a supervisor in the store, and promptly reactivated her membership with Local 5 and resumed paying her union dues.[5] According to Redd's testimony, which was not contradicted in this regard and which I credit, she used her 1988 hire-date seniority over the next 5 years to secure favorable shifts and transfers between departments and floors.[6] Then came the 2020 COVID-19 pandemic, which forced tectonic shifts in the store. In mid-March 2020 the store, along with many businesses throughout California and the nation, was forced to shut down, resulting in the furlough of all its bargaining unit employees. As would be expected, such unprecedented furlough raised questions about when employees would be recalled to work, and about how seniority would impact such recall. On or about April 6, 2020,[7] while still furloughed, Redd texted Local 5 representative Vargas to inquire about her seniority status. The texts were introduced into evidence as General Counsel's Exhibit 7 (GC Exh. 7), and while not easily followed in their sequence, given the nature and format of printed mobile phone texts, they show, in relevant part, the following:

- Redd requested Vargas to provide her with her store "seniority number" in comparison with other employees.
- Initially, Vargas replied that the Employer had not sent its current (seniority) report, but then indicated that "technically" her seniority would be "when you joined the Union after ending your management role." He also suggested that the contractual language allowed the employer to factor in "merit and ability" in any recall/seniority issues.[8]
- Redd replied pointing out that she had some 32 years seniority and did not understand what merit and abil-

[5] Redd testified, without contradiction, that when she took a withdrawal card from the Respondent Union in 2013 at the time she left the bargaining unit to become a supervisor, she was never told by anyone in the Union or management that her leaving the bargaining unit would affect her seniority when or if she returned to the bargaining unit. On the other hand, she admitted that no one from the Union or management had told her that such move would not affect her seniority. She further testified that until 2020 she believed that her seniority remained the same as before, her hire date of 9/26/88.

[6] Stipulation # 9, above, shows that another employee named Michael Abunda ("Abunda") left the bargaining unit on October 12, 2014 to become a supervisor, and returned to the bargaining unit a year later, on October 11, 2015. Abunda testified that his seniority remained as before, his original hire date of June 26, 1991, and that he used such seniority to obtain favorable vacation slots.

[7] All dates hereafter shall be in 2020 unless otherwise indicated. These texts were produced by the Union pursuant to subpoena based on a back-up file of Varga's phone, and while the exact dates of the exchanges may not be verifiable, it is clear that they took place prior to Redd's July layoff. Both Redd and Vargas vouched for their authenticity.

[8] Both Local 5 as well as Respondent Macy's admitted, however, that merit and ability was not, and has never been, applicable in determining seniority rights, particularly regarding layoffs and recalls. (see Stipulation # 10, above)

ity had anything to with her recall rights.

- Vargas replied "yes, but when you were a supervisor, didn't you withdraw from the union? I was told you were a manager for 2 years. When you leave the union for that long, seniority resets."
- Vargas then followed up, apparently not certain about his prior response, stating "let me research it in past contracts." When Redd replied that she still thought she had about 30 years seniority, Vargas replied "I think you would be at the top of the list, *because the contract does not say anything about a break in service*. I would assume the same applies to MJ in men's."[9] (GC Exh. 7; emphasis supplied)

Redd testified that the above-described text exchange with Vargas was the first time she had heard anything, from any source, about seniority being "re-set" because a bargaining unit member left the unit to become a supervisor.

Redd, as well as many other store employees, returned to work in mid-June, after the store re-opened in light of improved COVID-19 conditions. On or about June 25, the Employer notified Redd that she would be laid off as of July 3. In late June, Redd had another text message exchange with Vargas, in which she sought an explanation as to why her seniority date had been re-set, resulting in her upcoming layoff.[10] Vargas responded that "the CBA covers bargaining unit positions. If a member leaves the bargaining unit, their affiliation ends with the union. If they come back several years later, it's like being a new member. If they remained with the company, they continue to keep company related benefits, but seniority date would change." When Redd inquired about the source of Vargas' explanation, Vargas replied "the CBA does not cover non-bargaining unit (union member) positions. It would not be in the CBA." (GC Exh. 13.)

Redd testified that on July 2 she spoke to Store Manager Charles Kim during the course of her shift that day. Kim told her he was sorry she was being laid off but that it wasn't Macy's doing, it was at the Union's request. He asked what had occurred in light of her 32 years' seniority and mentioned that her Union representative had said something about her being a supervisor. Redd informed Kim that she had been a supervisor for 2 years, and that the Union was adjusting her seniority accordingly and taking away 24 years of that seniority away, something she had never heard about. Kim reiterated that he was sorry, but that he couldn't do anything, since it was a union store and it was out of his hands.

On July 3 Redd was laid off by Respondent Macy's. It appears that she was recalled to work at some point thereafter, but I have not found evidence in the record indicating when that occurred.

C. Respondent Union's and Respondent Macy's Basis for their Position on Seniority Reset

Vargas testified that he was unaware of any contractual provisions, outside of the six listed ones (in Sec. 18E) in the collective-bargaining agreement, that would address or govern the issue of re-setting an individual's seniority date. Vargas added, however, that that re-setting an employee's seniority date after a stint in management "made sense" to him. He volunteered that the idea of re-setting seniority in such manner had been mentioned to him by some of his predecessor representatives. I note, however, that Vargas named no such representatives, gave no dates or other foundational facts for these purported conversations, and that no other representative or individual corroborated this testimony. I therefore do not credit this last testimony and conclude that Vargas simply decided that such re-set was proper on his own accord, and requested that the Employer reset Redd's—and other individuals—seniority accordingly.[11] I also note that Vargas gave inconsistent accounts of when he first learned about Redd's departure from the bargaining unit from 2013 to 2015 for her stint as a supervisor. He first testified that he became aware of it as the result of the 2020 layoffs, as described above, but also testified that he learned about it sometime in 2019 when someone complained about Redd's seniority as a result of a "forced move."[12] It is clear however, that the Respondent Union took no action to re-set Redd's seniority until June 2020, when the Employer announced upcoming layoffs, at which time Vargas reached out to the Employer (specifically, to Desimone) to request that Redd's seniority date

[9] According to Vargas' (as well as Redd's) testimony, "MJ" refers to another employee named Marijane Mock who, like Redd, had left the bargaining unit to become a supervisor and had later rejoined the bargaining unit. Following the reference to MJ Mock, Vargas again alluded to the "merit and ability" language of the contract. As discussed above, however, it is clear that this is not a factor in determining layoff and recall rights pursuant to the seniority provisions of the contract.

[10] Vargas admitted that he reached out to Desimone regarding Redd's seniority after he received complaints from employees being laid off asking whether Redd was on the layoff list (Tr. 375–376). In her text to Vargas, Redd copied members of the employee bargaining committee group, of which Redd was part (she was also a shop steward), on these text exchanges with Vargas, because they were also interested in seniority issues in light of the layoffs.

[11] There is no persuasive evidence that Vargas discussed this reset with his superiors, at least before such reset was a fait accompli. In this regard, I would note that Vargas testified that sometime around the time of the 2020 layoffs he and his boss Mike Frenna, spoke to the Employer's labor relations representative, Christopher Desimone, and informed him that members who were laid off were questioning why Redd's seniority had not been reset in light of her having "resigned" from her bargaining unit position, and asked him to look into her work history. According to Vargas, Desimone got back to him a couple of weeks later and said he agreed with Local 5's position that Redd's seniority date should be in 2015. Again, Vargas provided few foundational details about this purported communication with Desimone, and neither Desimone nor Frenna, who did not testify, corroborated Vargas' account. Moreover, I note that Vargas' account of the Employer's position on Redd's seniority is contradicted by Respondent Macy's answer to the complaint. See, e.g., GC Exh.1(h) p. 2 ¶ 6(a). Accordingly, I find this version of events is not reliable.

[12] Vargas introduced a "revised" seniority list that he stated sometime in 2019 containing the names of those employees whose seniority should be revised, including Redd (U Exh. 6). Vargas' testimony about how and when he created this list, and how often he revised it, was extremely vague and unreliable—and I give this testimony little weight. What is important, however, as I discuss below, is that it constitutes an admission that he knew as early as 2019 that Redd had left the bargaining unit in 2013–2015.

be re-set to 2015, when she returned to the bargaining unit following her 2-year hiatus as a supervisor.[13] The Employer acquiesced to Vargas' request, and Redd was laid off as a result of her 2015 seniority date.

No Employer management official was called to the witness stand by the General Counsel, Respondent Macy's, or Respondent Union. In its answer to the Complaint, as briefly discussed above, Respondent's Macy's took the position that it had maintained that Redd's seniority was her hiring date in 1988 (see, also, Stipulation # 8), but admits it applied the Respondent Union interpretation of seniority with Respect to Redd, which resulted in her being laid off.[14]

IV. ANALYSIS

The General Counsel argues that the Respondent Union violated Section 8(b(1)(A) and 8(b)(2) of the Act by requesting and causing the layoff of an employee, Redd, based on an arbitrary and unreasonable interpretation of its collective-bargaining agreement with Respondent Macy's.[15] It further argues that Respondent Macy's violated Section 8(a)(1) and (3) of the Act by acceding to that request and laying off Redd. The Respondent Union argues that it did not violate the Act for a variety of reasons, but primarily because it asserts that its interpretation of the contract was reasonable and valid, and its conduct thus lawful. Finally, Respondent Macy's argues, in essence, that it acted lawfully because its compliance with the Respondent Union's request was compelled by the parties' past practice regarding their collective-bargaining agreement. For the reasons discussed below, I conclude that the General Counsel has the better argument, and that the defenses proffered by the Respondents fail in these circumstances.

In support of its arguments, the General Counsel primarily cites *Union de Obreros de Cemento Mezclado (Betterroads Asphalt Corp)*, 336 NLRB 972 (2001), which facts closely resemble those in the present case, and which I find to be on point. In *Union de Obreros*, a bargaining unit employee with 10 years' seniority (Almanzar) was offered a supervisory position. He informed both his employer and union that he was accepting the supervisory position on the condition that he be allowed to return to the bargaining unit if things did not work out. Neither the employer nor the union objected to said condition, and indeed the union president assured Almanzar that he could return to his old job without a problem and advised that he should accept the promotion. He accepted the position and resigned from the union. A couple of months after taking the supervisory position, Almanzar decided to return to the bargaining unit, and the employer notified him that he could resume his old job in the bargaining unit with the same seniority as before. The union, however, took the position that Almanzar could not retain his old seniority under the provisions of the collective-bargaining agreement because he had "resigned" his position. The collective-bargaining agreement between the parties, similarly to the one in the present case, specifically spelled out the six (6) scenarios under which seniority would cease:

- Resignation
- Discharge for cause
- Layoff for a period of 6 months or more
- Absence due to disability or injury that occurred in the workplace . . .lasting more than 12 months
- Failing to return to work within 4 days after being duly notified
- Absence due to illness or physical disability lasting longer than 7 months

The union informed the employer that Almanzar should be treated as a new employee for seniority purposes, but the employer refused. A few months later, economic conditions caused the employer to lay off employees, and now the employer took the position, in agreement with the union, that Almanzar's seniority had reset, and he was accordingly laid off—something that would not have occurred had he been allowed to keep his original seniority. Almanzar filed Board charges alleging that the union had failed to represent him, after which the union agreed to represent him in arbitration, and the charge was deferred pending arbitration. At the arbitration, the union did not dispute the employer's position that Almanzar had "resigned" his position when he accepted the supervisory job. The arbitrator ruled against Almanzar, agreeing that he had "resigned" his position within the meaning of the contact.

In evaluating the union's conduct to determine whether it had violated its duty of fair representation, the Board pointed out that it was not its job to interpret the contract to determine whether the union's interpretation of such contract was correct. Rather, the Board's duty was to determine whether the union made a reasonable interpretation of the contract or whether such interpretation was arbitrary. *Union de Obreros*, at 972–973. In finding that the union had violated its duty of fair representation, the Board ruled that the union's position that Almanzar had "resigned" when he accepted the promotion to a supervisory position was unreasonable and arbitrary. In doing so, the Board pointed out that the union's position was in conflict with the ordinary meaning of the word "resignation," which typically conveys an employee's separation from employment with an employer, that is, when an employee quits. In reaching this conclusion, the Board pointed out that there

[13] Vargas, on July 8, also requested the Employer to re-set the seniority date for Marijane ("MJ") Mock, who like Redd had left the bargaining unit to become a supervisor, and then returned to the bargaining unit (U Exh. 2). However, Mock was then offered a supervisory position by the Employer, which apparently saved her from being laid off.

[14] In its brief, Respondent Macy's admits that it did not include Redd in its initial layoff list presented to the Respondent Union, but reset her seniority to 2015 after the Respondent Union complained her seniority date was wrong. After confirming that Redd had left the bargaining unit in 2013 (to become a supervisor) and returned to the bargaining unit in 2015, it agreed to reset her seniority—following what it claims was the parties' "past practice." There is no evidence in the record, however, that such resets were in fact "past practice."

[15] The General Counsel amended the complaint at the beginning of the trial, adding a Sec. 8(b)(1)(A) allegation (see GC Exh 2), which had been part of the original charge by Redd, to the pre-existing Sec. 8(b)(2) allegation. I allowed this amendment, both because it was timely offered at the beginning of the trial, and because it was closely related to the original 8(b)(2) allegation, flowing from the same set of facts. Indeed, I conclude that it is not only closely related to this allegation, but essentially "tied at the hip" with it.

was no evidence of past practice or bargaining history showing that the parties had agreed or intended to adopt a different meaning to the term "resignation." The Board further pointed out that the union's contractual interpretation regarding seniority was even more untenable in light of the fact that the employer had historically kept the employee's hire date as the "seniority date," even after employees had left the bargaining unit to accept promotions to positions outside the bargaining unit.

The above facts appear to squarely fit the situation in the instant case. As in *Union de Obreros*, the collective-bargaining agreement here specifically spells out several scenarios, almost identical to those in the contract in that case, under which a bargaining unit employee would lose his/her seniority, including resignation, discharge for cause, and failure to return from leave or layoff within a specified timeframe. As in *Union de Obreros*, leaving the bargaining unit to accept a promotion to a supervisory position with the employer is not one of the listed reasons for losing seniority. As in *Union de Obreros*, there is no evidence in the instant case that the Respondent Union and Employer ever came to an understanding, during negotiations or otherwise, that employees would lose their seniority if they left the bargaining unit to accept promotions, nor is there a history of that practice. Nor is there evidence that the parties came to an agreement or understanding that accepting such promotions would amount to a "resignation" within the meaning of the contract. To the contrary, the parties in the instant case have a history of allowing employees to accept supervisory position outside of the unit, albeit for only 2-3 months during the holidays, without losing or re-setting their seniority. Finally, as in *Union de Obreros*, the Respondent Employer in the instant case had a history of using—and keeping—the hire date as the seniority date, as it admitted in its answer to the complaint.

In is true that in *Union de Obreros* there was additional evidence of animus by the union toward Almaraz based on internal union political activities by him, something lacking in the instant case. It is clear, however, that in *Union de Obreros* such evidence was simply *additional* evidence in support of the conclusion that the union had acted in an arbitrary manner, and one that was ultimately not necessary to such conclusion. In other words, the evidence of animus was simply an additional, and unnecessary, final nail in a coffin that was already sealed by the conclusion that the union's interpretation of the contract was inherently unreasonable and thus arbitrary.[16] Nonetheless, in the present case, in addition to the factors discussed above, there is additional evidence that suggests the Respondent Union's actions were arbitrary and done on an ad hoc and spur-of-the-moment basis, rather than a carefully considered one by the Respondent Union's leadership, let alone one that was negotiated about with the Employer. Thus, there is no credible evidence that Local 5 Union Representative Vargas discussed the seniority question with his predecessors or his superiors prior to deciding—on the basis that it made sense to *him*—that those who left the bargaining unit to accept promotions to supervisory positions should have their seniority reset. As Vargas admitted, and as is plain from the contractual language, this scenario is simply not covered by the language of the contract. Moreover, as admitted by Vargas, he knew as early as 2019 that Redd had left the bargaining unit to become a supervisor and had returned to the bargaining unit after 2 years—in 2015. Yet, no effort was made at the time to change her seniority, which remained as her hire date in 1988, and which she continued to use to her advantage.[17] Indeed, Redd's seniority first surfaced as an issue in April 2020, 5 years after she had returned to the unit, in the wake of the massive furlough caused by the closing of the store as the result of the COVID-19 pandemic. It was at that time, during an exchange of texts initiated by Redd, who was concerned about her seniority and recall rights, that Vargas first suggested to her that her seniority should be reset to 2015, when she returned to the unit. Still, Vargas did not do anything at the time to change Redd's seniority. It wasn't until 2 months later, in June 2020, after employees were recalled to work and the Employer announced a large layoff planned for July, that Vargas made his move—but only after other bargaining unit employees complained because Redd's name was not in the list of employees to be laid off. Vargas, in an obvious response to political pressure from disgruntled employees about to be laid off, then informed the Employer that Redd's seniority date should be in 2015, when she returned to the bargaining unit from her supervisory stint. The Employer, who did not initially agree with the Unions position, eventually relented—perhaps to avoid a grievance—and laid off Redd.

This ad hoc and spur-of-the moment conduct by Vargas, in apparent response to political pressure from other employee members of the bargaining unit, adds a sheen of additional arbitrariness to what already was an unreasonable interpretation of the contract. Further evidence of the ad hoc arbitrariness of Vargas' decision regarding Redd's seniority is the sheer lack of standards in determining how long employees can take leave from the bargaining unit to accept a supervisory position before seniority is reset. Thus, Vargas admitted that the practice has been to allow employees to leave the bargaining unit for up to 2–3 months during the holidays to become supervisors without affecting their seniority, and the record also shows that an employee named Michael Abunda left the bargaining unit for 1 year, from October 12, 2014 to October 11, 2015, to become a

[16] I would note that the General Counsel devoted a fair amount of time, and testimony by Redd, to the issue of *potential* animus by Respondent toward Redd, on account of the fact that Redd, who was a shop steward and member of Local 5's bargaining committee, along with others, expressed opposition to a planned strike by Local 5 against the Employer. The problem with this effort, however, is that while it may have shown a *basis* for potential animus by the Respondent Union, there was simply no evidence of animus. Having animus, in the final analysis, is like being pregnant—you are either pregnant or you are not. Accordingly, I opted not to spend any time describing testimony that was ultimately immaterial.

[17] Vargas testified that he approached the Employer about it in 2019—something I did not find credible. Even if true, however, the bottom line is that nothing came of it—Redd's seniority remained unchanged. Nonetheless, although I do not credit Vargas account that he approached the Employer about this issue, I find that it constitutes an admission by Vargas that he knew as early as 2019 that Redd had left the bargaining unit in 2013–2015 to become a supervisor.

supervisor, without affecting his seniority.[18] This begs the question: How long can an employee take leave from the bargaining unit, while remaining employed by the Employer (at the store, not another location), before that employee has his/her seniority reset? Apparently, it is at least 3 months, and perhaps as much as a year (Abunda), but apparently not 2 years. There appears to be no clear answer, because the answer seemingly depended on Vargas' (or the Respondent Union's) spur-of-the-moment decisions, with no guidance from the contractual language or past practice. When decisions are made without clear standards or demarcation lines, such conduct defines the term "arbitrary." It would stand to reason that the duty of fair representation, at minimum, would require that employee members of the Union be provided with fair notice or warning that they stand to lose their seniority rights if they do certain things—such as leaving the bargaining unit to become supervisors for longer than a certain defined period of time. No such fair notice or warning existed here—it was not provided by the contract, which was silent on this practice, nor by past practice, nor by the Respondent Union or Employer. It was apparently left up to Vargas to decide on a case-by-case basis, depending on "what made sense" to him, as he testified. Quite simply, this is arbitrary by definition.

In these circumstances, I conclude that *Union de Obreros* is right on point and controlling precedent, and find that the Respondent Union violated its duty of fair representation toward Redd, therefore violating Section 8(b)(1)(A) of the Act. Additionally, because the Respondent Union caused the Employer to discriminate against Redd by resetting her seniority to 2015, resulting on her lay off in July 2020, I conclude that it violated Section 8(b)(2) of the Act.[19] Moreover, because the Employer changed Redd's seniority and laid her off in July 2020 at the request of the Union, for reasons other than her failure to tender uniformly required initiation fees and dues, I find that the Employer violated Section 8(a)(1) and (3) of the Act.

CONCLUSION OF LAW

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

2. United Food and Commercial Workers, Local 5 (Respondent Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Macy's violated Section 8(a)(1) and (3) of the Act by acceding to the Respondent Union's demand to reset Bridgett Redd's (Redd) seniority date and consequently laying her off in July 2020.

4. Respondent Union failed in its duty of fair representation toward Redd, therefore violating Section 8(b)(1)(A) of the Act by unreasonably and arbitrarily interpreting the collective-bargaining agreement, and further violated Section 8(b)(2) of the Act by causing Respondent Macy's to reset Redd's seniority date and causing Respondent Macy's to lay her off in July 2020.

5. The unfair labor practices committed by Respondent Macy's and the Respondent Union, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the Section 8(b)(1)(A) and 8(b)(2) violations that I have found is an Order requiring the Respondent Union to cease and desist from such conduct and take certain affirmative actions consistent with the policies and purposes of the Act. Likewise, the appropriate remedy for the Section 8(a)(1)&(3) violations that I have found is an Order requiring Respondent Macy's to cease and desist from such conduct and take certain affirmative actions consistent with the policies and purposes of the Act.

Specifically, to the extent that the Respondent Union has not already done so, it shall cease and desist from failing to fairly represent Redd by unreasonably and arbitrarily interpreting the collective-bargaining agreement and shall inform the Employer that it is no longer its official position that Redd's seniority date should be on June 17, 2015, and inform the Employer that Redd's seniority should be reset to her hiring date of September 26, 1988. Respondent Macy's, to the extent that it has not already done so, shall cease and desist from laying off Redd based on a seniority date of June 17, 2015 and shall instead reinstate her seniority date of September 26, 1988.

Respondents shall also cease and desist, in any other manner, from interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Having found that Respondents unlawfully caused Redd to be laid off on or about July 3, 2020, Respondents must jointly make Redd whole for loss of earnings and/or benefits she may have suffered as the result of the above-described conduct. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in New Horizons, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), the Respondents shall jointly compensate her for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra,

[18] This was established by Abunda's testimony as well as through a stipulation (see Stipulation # 9, supra). It should be noted that the Respondent Union (and Vargas) claims that it had no idea Abunda had left the bargaining unit to become s supervisor, blaming the Employer's apparently antiquated and inefficient record-tracking system, meant to keep track of employees' seniority. While it appears that the Employer's record-keeping system was of little help, this provides no cover for the Respondent Union. In that regard I would note that the Union had its own way to keep track of employees who left the bargaining unit, because like Redd did, many of them took "withdrawal cards" from Local 5—something it could keep track of, as admitted by Vargas (see, e.g., GC Exh. 11).

[19] In its post hearing brief, the Respondent Union argues that since the original charge by Redd alleges that it caused the Employer to discharge her, whereas she was only laid off, the General Counsel failed to prove its case. This argument simply lacks merit. The complaint clearly alleges that the Respondent Union caused Redd to be laid off by the Employer, and the complaint, along with the answer(s), controls this proceeding.

compounded daily as prescribed in *Kentucky River Medical Center*, supra. *In* accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondents shall compensate Redd for the adverse tax consequences, if any, of receiving lump sum awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 20 a report allocating the make-whole amount to the appropriate calendar year for Redd. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondents shall also be required to remove from their files any references to the unlawful layoff of Redd and also remove references to a June 17, 2015 seniority date and shall reinstate her September 26, 1988 seniority date and notify her in writing that this has been done.

Respondents shall each post an appropriate informational notice, as described in the attached appendixes "A" (for the Respondent Union) and "B" (for Respondent Macy's). This notice shall be posted, in the case of Respondent Union, at its business offices or wherever the notices to members are regularly posted, for 60 days without anything covering it up or defacing its contents, and in the case of Respondent Macy's, at its Union Square store in San Francisco where notices to employees are normally posted, for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its members or employees by such means. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed the facility involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent Employer at any time since June 1, 2020. In the event that, during the pendency of these proceedings, the Respondent Union has gone out of business or closed the facility involved in these proceedings, the Respondent Union shall duplicate and mail, at its own expense, a copy of the notice to all current members and former members at any time since June 1, 2020. When the notice is issued to the Respondents, each Respondent shall sign it or otherwise notify Region 20 of the Board what action it will take with respect to this decision.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[20]

ORDER

United Food and Commercial Workers, Local 5, and Macy's, San Francisco, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in any of the conduct described immediately above in the remedy section of this decision.

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

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

(a) Make Redd whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(b) 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 referral hall 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 the make-whole remedy due under the terms of this Order.

(c) Within 14 days after service by the Region, in the case of the Respondent Union, post at all its office in San Francisco, California where notices to members are customarily posted, copies of the attached notice marked "Appendix A," and in the case of Respondent Macy's, at its Union Square, San Francisco store, where notices to employees are customarily posted, copies of the attached notice marked "Appendix B."[21] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by each of the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to members or employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its members or employees by such means. Reasonable steps shall be taken by the Respondents 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 Employer has gone out of business or closed the facility involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent Employer at any time since June 1, 2020. In the event that, during the pendency of these proceedings, the Respondent Union has gone out of business or closed the facility involved in these proceedings, the Respondent Union shall duplicate and mail, at its own expense, a copy of the notice to all current members and former members at any time since June 1, 2020.

(d) Within 21 days after service by the Region, each of the

[20] 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.

[21] If this Order is enforced by a Judgment of the 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."

Respondents shall file with the Regional Director for Region 20, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington D.C. October 29, 2021

APPENDIX A

NOTICE TO 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 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.

In recognition of these rights, we hereby notify you that:

WE WILL NOT fail to fairly represent Bridgett Redd (Redd) by requesting that the Employer change her seniority date to June 17, 2015, resulting in her lay off in July 2020.

WE WILL NOT interpret or enforce our collective-bargaining agreement with Macy's in an unreasonable or arbitrary manner.

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

WE WILL inform Macy's that it is no longer our position that Redd's seniority date should be on June 17, 2015, and instead inform the Employer that her seniority date should reset to September 26, 1988, her hiring date.

WE WILL make Redd whole for any loss of earnings or benefits suffered as the result of her lay off caused by our unlawful request that her seniority date be changed to 2015.

WE WILL remove from our files and records any reference to Redd's June 17, 2015 seniority date and notify her in writing that this has been done and that this unlawful reset of her seniority date will not be used against her in any way.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 5

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-270110 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

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.

In recognition of these rights, we hereby notify you that:

WE WILL NOT accede to any unlawful requests by United Food and Commercial Workers, Local 5 ("Union") to reset the seniority date of Bridgett Redd to June 17, 2015, which resulted in her being laid off in July 2020.

WE WILL NOT lay off Bridgett Redd as a result of an unlawful reset of her seniority date from September 26, 1988 to June 17, 2015.

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

WE WILL expunge from our records all reference to Redd's 2015 seniority date and July 2020 layoff and notify her in writing that this has been done and that this unlawful reset of her seniority date will not be used against her in any way.

MACY'S INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-270110 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.