

**Mr. Potty, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters, AFL-CIO.** Case 28-CA-11331

March 16, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The issue in this case is whether the Respondent violated Section 8(a)(5), (3), and (1) by discharging an employee and by making changes in the employees' working conditions without prior bargaining with the Union.

On October 23, 1992, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions, a brief in support of the judge's decision, and an answering brief to the Respondent's exceptions.

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,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

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

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>The judge, in the text of his decision, found that the Respondent's discharge of employee Mitch Sanders violated Sec. 8(a)(5), as well as Sec. 8(a)(3) of the Act. However, in the Conclusions of Law, the judge inadvertently failed to note that the discharge violated Sec. 8(a)(5). Accordingly, we shall modify Conclusion of Law 3 to read as follows: "By discharging Mitchell Sanders on February 11, Respondent engaged in an unfair labor practice within the meaning of Sec. 8(a)(1), (3), and (5) of the Act."

<sup>3</sup>We agree with the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by unilaterally discontinuing the bonus program. Therefore, we shall order the Respondent, in addition to reinstating the bonus program, to make whole those employees, including Mitchell Sanders, who may have lost earnings or benefits as a result of the Respondent's unlawful unilateral change as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), or *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), depending on the individual employee's employment situation with the Respondent, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We have modified the recommended Order and Notice to Employees accordingly.

modified below and orders that the Respondent, Mr. Potty, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Reinstute its bonus program discontinued on January 1, 1992, making whole those employees, including Mitchell Sanders, who may have lost earnings or benefits as a result of the discontinuance of the program; rescind its requirement that employees furnish periodic updates of their official Nevada driving records until the Union is given notice and an opportunity to bargain concerning any proposals about either matter."

2. Substitute the attached notice for that of the administrative law judge.

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 discharge or discriminate against employees in order to discourage membership in Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters, AFL-CIO or any other labor organization.

WE WILL NOT alter employee benefits or other terms of employment without providing the Union prior notice and an opportunity to bargain concerning such matters.

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

WE WILL reinstate our driver bonus program and maintain it in effect until any change thereto is negotiated with the Union; WE WILL make whole those employees, including Mitchell Sanders, who may have lost earnings as a result of our discontinuance of the program; and WE WILL recind our requirement that drivers furnish us with periodic updates of their official

Nevada driving record until the terms of any such requirement are negotiated with the Union.

WE WILL offer Mitchell Sanders immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, on February 11, 1992, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge on February 11, 1992, and that the discharge will not be used against him in any way.

MR. POTTY, INC.

*Paul R. Irving, Esq.*, for the General Counsel.  
*James V. Fisher*, President, American Labor Management Association, of Las Vegas, Nevada, for the Respondent.  
*David R. Deitrich*, Business Agent, of Las Vegas, Nevada, for the Union.

## DECISION

### STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters, AFL-CIO (Union) filed an unfair labor practice charge against Mr. Potty, Inc. (Respondent or Company) on February 2, 1992.<sup>1</sup>

On March 18, the Regional Director for Region 28 of the National Labor Relations Board (NLRB or Board) issued a complaint alleging Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act).

Respondent timely answered the complaint on March 25 denying that it engaged in the unfair labor practices alleged. The complaint was docketed for hearing before an administrative law judge.

I heard this matter on July 23 and 24 at Las Vegas, Nevada. On consideration of the record, the witnesses' demeanor, and the posthearing briefs filed by the General Counsel and Respondent, I find Respondent engaged in certain of the alleged unfair labor practices, but not others, based on the following

### FINDINGS OF FACT

#### I. ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Pleadings*

The complaint alleges that the Union is the certified representative of Respondent's Las Vegas drivers and that Respondent violated Section 8(a)(5) by unilaterally: (1) instituting rules on December 3, 1991, and January 19, which required management consent for employee-posted bulletin board notices, and which required employee-provided De-

partment of Motor Vehicles (DMV) record updates each 6 months; (2) discontinuing an employee bonus program on January 1; and (3) discontinuing benefits and merit wage increases on January 26.

The General Counsel also alleges that Respondent violated Section 8(a)(3) by: (1) warning Mitchell Sanders in writing on December 3, 1991, for misusing a company bulletin board; (2) denying Sanders' bonus on January 1; and (3) terminating Sanders on February 11.<sup>2</sup>

As noted, Respondent denies the substantive allegations of the complaint but admits the Union's representative status and the appropriateness of the certified drivers unit.

### B. *Facts*

#### 1. Background

Respondent, a Nevada corporation with an office and place of business in Las Vegas, Nevada, rents and services portable toilets, and provides other septic services to commercial and residential customers.<sup>3</sup>

Wayne Thompson acquired ownership of the Company in March 1990. At that time, Walter Kirk became the Company's comptroller, responsible for all accounting and personnel matters. Michael Thompson served as the Company's operations manager from March 1990 until July 1991; Jimmy Ellis succeeded him and has been operations manager since. Early in his tenure, Ellis assured drivers that they could look to him exclusively as their supervisor.

The Company's drivers deliver, service, and pick up portable toilets, and otherwise service commercial and residential septic tanks. Typically, four to six drivers are employed at Las Vegas. Driver turnover is high.

In May 1991, the Union began organizing the drivers. According to Sanders, the driver whose termination is at issue here, Richard Hillebrandt, a driver whose active employment ceased in September 1991 due to job injury 4 months earlier, initiated the union organizational effort. Early in the campaign, the Union wrote to the Company disclosing the names of an employee union organizing committee. Both Hillebrandt and Sanders (as well as nearly all other employees) were identified as union supporters in the Union's May letter to the Company.

That campaign culminated in an NLRB election and the Union's certification as the drivers' representative on August 26, 1991. Following the Union's certification, the drivers selected Hillebrandt as the employee representative on the union bargaining committee.

Bargaining between the Company and the Union commenced in October 1991. Wayne Thompson and Kirk represented the Company at the initial session which involved little other than the submission and review of union proposals. Kirk and Ellis appeared at a brief November session to present the Company's response rejecting the initial union proposals. In early December 1991, James Fisher became the

<sup>2</sup> The General Counsel alleges no independent 8(a)(1) conduct.

<sup>3</sup> In the 12-month period preceding the filing of the charge, Respondent's gross revenues and direct inflow each exceeded the Board's dollar volume standards established for exercising its statutory jurisdiction over retail and nonretail enterprises. Respondent admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7). Jurisdiction over this dispute lies with the NLRB.

<sup>1</sup> Unless shown otherwise, all dates which follow are in 1992.

Company's principal negotiating representative. Since then, Fisher and Kirk have represented the Company at all sessions. No agreement had been concluded by the time of the hearing.

Hillebrandt assisted the union representatives at the first three bargaining sessions. His service on the union negotiating committee ended on December 16 when his employee status ceased due to his disability. In mid-December 1991, the employees selected Sanders to succeed Hillebrandt on the union committee.

As this case involves claims that the Company unilaterally changed certain established policies without prior notice to the Union, a summary of the relevant policies and their origins follows.

## 2. Pertinent company policies and practices

### a. *DMV reports*

As noted, the turnover rate among the Company's drivers is unusually high. The Company recruits drivers primarily through newspaper classified section. Its standard ad reads: "DRIVER/SERVICE PORTABLE TOILETS—\$240 per week + bonus. Must bring a clean DMV to [the employment interview]." All drivers who testified furnished their personal DMV record when interviewed for employment.

According to Kirk, the Company established a policy in May 1990 requiring employees to furnish yearly updates of their DMV record. The DMV update policy, he said, grew out of an insurance carrier's suggestion that the Company maintain current DMV records for its drivers.

In response, Kirk drafted and caused a notice to be posted in late May 1990 requesting the drivers to obtain and submit current DMV records by the Friday following the posting. Shortly thereafter, a new notice was posted, perhaps in early June 1990, deleting the deadline reference because, according to Kirk, of the turmoil surrounding a concurrent office move.

Records available at the time of this hearing disclose that at least three employees responded to the May and June 1990 notices by providing updated DMV records. Driver Lewis, hired in October 1989, submitted a report dated July 3, 1990; driver Schumacher, hired in June 1989, submitted a report dated September 11, 1990; and driver Yoder, hired in February 1990, submitted a report dated June 28, 1990. Save for Lewis whose employment may have briefly overlapped with Sanders, none of these three drivers remained in the Respondent's employ during the tenure of the drivers employed at times relevant here.

The Company next requested DMV updates in January and February following the Union's certification. By that time, the Company employed a new crew of drivers unfamiliar with the earlier request.

### b. *Employee compensation*

In addition to a weekly salary and bonus referred to in the ad, drivers receive a commission on additional portable toilets or services they rent or sell to existing customers. The weekly wage, bonus payment, and commissions are reflected separately on employees' periodic paystubs.

The Company adjusts employee wages essentially on a merit basis. Sanders, for example, was hired at \$200 per week on September 24, 1990, and received three increases between that time and January 21, 1991, bringing his weekly

salary to \$320. Sanders' last increase—to \$345 per week—was effective June 24, 1991, at the same time most other active drivers received increases. June 24 aside, no regular pattern of wage increases is discernable.

In October 1990, Mike Thompson instituted the monthly bonus program. Under that program, eligible drivers received a \$25 bonus paid within 2 months following the eligibility period. To qualify, drivers had to comply with substantially all of the 39 bonus criteria established by Thompson. Each element related directly to the manner in which employees performed their job. Bonus terms were rigidly enforced. When the program was discontinued 15 months later, only two drivers had qualified for bonus payments. Sanders received a bonus every month but one and another driver received four or five bonus payments.

Although he came to feel the nearly unattainable bonus standards made the program unfair, Ellis continued to grant bonuses albeit he relied more on his own judgment and somewhat less on Thompson's qualification list.

### c. *Bulletin board policy and practices*

Each employee receives a copy of the Company's Employee Policy Manual at the time of hire, at least for perusal. This four-page document, as last revised in August 1991, describes a variety of company policies and benefits. An entire page is devoted to 28 specific rules plus a catchall introduced with the admonition that "violations . . . will not be tolerated and are grounds for dismissal" and concluding with the assurance that "if possible we will give warnings prior to discipline and terminations." One rule prohibits "[p]osting, removing or altering any information posted on the bulletin boards or company property."

Respondent maintains a drivers' room with a bulletin board designed for posting information relevant to its drivers. In addition, each driver has a locker with a place to hang their clipboard.

Over time, the drivers have posted numerous messages on this bulletin board without prior management approval. Some driver postings related to work; others were strictly for entertainment.<sup>4</sup> Occasionally, drivers leave their trip sheets and messages on their locker clipboards which management officials check from time to time.

Sanders, in particular, frequently communicated with other drivers and management officials with handwritten notes posted on the drivers' room bulletin board or attached to a driver's clipboard hung on his locker. His penchant for written communication is not frivolous; he apparently is afflicted with a physiological speech impairment manifested by severe stammering.

## 3. The alleged unilateral changes

The General Counsel believes Respondent's policy of permitting employees to post bulletin board notes abruptly changed on December 3, 1991. On the day before, Sanders posted a bulletin board memo addressed to his fellow driver, Mark Taylor. It criticized Taylor for purportedly denigrating certain drivers, including Sanders, because of their cushy route assignments. Sanders obviously felt Taylor's comments

<sup>4</sup>For example, Sanders said that drivers frequently posted bulletin board notes about hard-to-locate units when routes changed. In addition, drivers often posted copies of latrine humor they encountered.

were inappropriate since, as Sanders put it, “[y]ou are not our [supervisor] nor will you ever be our [supervisor].” He further asserted that “all the drivers would like to see you mind your own business.”

The next day Ellis issued written reprimands to both Sanders and Taylor. The Taylor memo was attached to Sanders’ reprimand. Ellis threatened to terminate Sanders if he caused “such a problem” in the future. As Ellis saw it, the Taylor memo undermined his authority to determine who would or would not be a supervisor.

Following a heated discussion with Sanders over the reprimand and a subsequent conference with Kirk, Ellis re-drafted the reprimand. The newly drafted reprimand warned Sanders that he would be discharged “[i]f you ever post anything on the bulletin board without management prior permission” or “[i]f you write another note in this context, or threaten any employee.”

Later that month, driver Ness posted a Christmas cartoon which Ellis removed. When Ness saw Ellis with the cartoon, he asked why Ellis had removed it. Ellis told Ness that he had to have permission to post matters on the bulletin board. Ness then requested to post the cartoon, Ellis promptly consented and Ness reposted the cartoon.

Dietrich responded to Sanders’ December 3 reprimand in a January 24 letter which asserted that the reprimand lacked merit. Dietrich wrote that Sanders “understands the company has the right to name anyone they wish as management and withdraws any statements to the contrary.” In addition, Dietrich’s letter asserts that the Company had not theretofore warned employees, or threatened their termination, for posting notes on the bulletin board and asked Kirk to contact him if he wished to discuss the matter further. Apparently Kirk did not as no evidence shows that this matter was later pursued in bargaining.

Kirk and Ellis acknowledge that Respondent discontinued the driver bonus program at the end of December 1991 without prior notice to the Union. Sanders received his last bonus payment in February, apparently for the month of December; Ellis told him on February 5 that no further bonuses would be paid.

Fisher notified Dietrich in writing on January 26 that, as the parties had commenced negotiations, “[a]ll benefits and merit wage increases that were given to [Respondent’s] employees in the past will be discontinued and [Respondent will] maintain the status quo during negotiations.” Fisher explained that the Company was taking this action to avoid unfair labor practice charges and because it would be “disadvantageous to the Company during negotiations to give benefits.”

Dietrich sought clarification of Fisher’s letter at least at the February 6 bargaining session. On February 7, Fisher wrote Dietrich to explain that the Company would continue to grant merit wage increases where warranted and that all benefits then under negotiation would not be unilaterally changed. By the time of the hearing, Dietrich interpreted Fisher’s January 26 letter to mean only that the Company intended to discontinue the bonus program.

Only one driver received a merit wage increase following the Union’s certification. In January, Sanders made two requests for a wage increase. Kirk turned down those requests

on the ground that Sanders’ wage rate already exceeded the driver pay ceiling.<sup>5</sup>

In the meantime, Ellis posted a notice on the drivers’ room bulletin board on January 17 pertaining to the DMV record matter. This notice stated that the Company’s insurance carrier required that current DMV reports be kept for all active drivers and that updated reports were required each six months. As it had been more than 6 months since the drivers had furnished a DMV record, the notice asked each driver to furnish an updated report by Friday, January 31.

Some drivers promptly complied with the request in Ellis’ notice; others, including Sanders, did not. In fact, Sanders began contacting drivers after work apparently to suggest that the requirement should properly be negotiated with the Union. On February 5, Kirk telefaxed another DMV notice to Dietrich and posted his notice on the drivers’ bulletin board the following day at an unspecified time. Kirk’s notice stated that “[y]early” DMV updates were required and warned that “[i]hose of you who have not responded to the above request by 6AM Tuesday February 11, 1992 *will not be allowed to work until the report is furnished to the company.*” [Emphasis added.]

#### 4. Sanders’ termination

Sanders, employed since September 1990, was the Company’s most senior and, judging from his pay and bonuses, its most proficient driver. At the relevant times, Sanders worked a Tuesday through Saturday schedule each week. As noted above, Sanders was also an early supporter of unionization.

Although not yet on the bargaining committee, Sanders attended the brief November bargaining session. He stood in the doorway of the meeting room waiting to speak with Hillebrandt at the conclusion of the meeting. Both Hillebrandt and Sanders claim that Kirk, on noticing Sanders, remarked to Ellis, “What’s Mitch doing here. Don’t tell me we have to worry about him, too.” Kirk and Ellis deny that such an exchange occurred.

Union Representative Dietrich claims that he verbally notified the Company of Sanders’ selection as the employee-member of the Union’s negotiating team at the January bargaining session. Dietrich said that he attempted to schedule afternoon bargaining sessions with the company representatives to accommodate Sanders’ work schedule but never met with success because of the inconvenience to Kirk’s commuting schedule.

After Ellis posted his January 17 DMV notice, Sanders discussed the notice with other drivers. When he arrived at work on February 6, Sanders presented a note to Ellis signed by himself and two other drivers which states: “Please be advised that ‘all new company policies’ (such as having DMV reports @ 6 mths.) need to be presented to our business agent—Mr. Dave Dietrich, for ‘bargaining.’” Sanders said that Ellis read the note in his presence, and then told

<sup>5</sup> Kirk’s January 20 memo denying Sanders’ pay increase requests explains that Sanders’ \$25-per-week premium over the hourly pay ceiling was for preventative maintenance work arranged by Mike Thompson. Even that work, Kirk wrote, was being reviewed and if “the agreed upon procedure is not being performed to our satisfaction we reserve the right to eliminate the additional \$25.00 per week incentive.” Kirk also advised Sanders to “bring these matters to the Union’s attention [in the future], so that we are not in conflict with our going negotiations.”

him sternly that the matter was none of Sanders' business as he would run the Company "anyway I want to."<sup>6</sup>

Everyone agrees that Sanders attended the February 6 bargaining session at the union hall which began between 9 and 9:30 a.m.<sup>7</sup> Kirk promptly objected to Sanders' presence because he had not been excused from work. Sanders asserted that he was using his lunchbreak to attend the meeting. Kirk, however, insisted that Sanders return his assigned truck to the company terminal and return in his own vehicle if he wanted to attend the meeting. Dietrich ended this dispute by instructing Sanders to go back to work.

Following Sanders' departure, the negotiators addressed certain pending issues, including the meaning of Fisher's January 26 letter and the DMV record requirement. According to Dietrich, the company representatives asserted that the driver DMV records were required to comply with the requirements of the Company's insurer but when Dietrich requested to see the insurer's instruction, the Company declined to provide it to him. No resolution was reached on the DMV matter.

Sanders claims that he first noticed Kirk's revised DMV notice on Saturday, February 8. As Ellis does not work on Saturdays and Sanders was not scheduled to work on Monday, February 10, Sanders left a note on his driver clipboard along with his route sheets which begins: "What in the world is going on?" The note continues by pointing out the variance between the Ellis and Kirk notices followed by these two terse questions: "Who is Who and What is What? What Are *The Employees* To Think?" [Emphasis in the original.] His note concluded with an inquiry about Kirk's presence along his route on February 6.

When he reported for work on Tuesday, February 11, Ellis immediately asked Sanders for his DMV record and Sanders responded that he had not yet obtained the report. Ellis left and Sanders proceeded to his truck to warm the engine. While there, Ellis and Taylor—by then the operations supervisor—approached. Ellis handed Sanders his check and termination notice, and told him to clean out his truck because he was terminated. The termination notice states that Sanders was guilty of insubordination by refusing to provide a DMV report "since the 17th of January."

Ellis said Sanders was terminated solely for his failure to provide the Company with a DMV report. He asserted that only Sanders failed to submit the report and that he had decided on the evening of February 10 that Sanders would be terminated if he failed to report to work the following morning with an updated DMV record. To this end, Ellis requested that Kirk prepare a final check for Sanders on February 10. Kirk prepared the check (which only he could sign) and the termination notice given to Sanders.

Sanders testified that he was shocked about his termination for failing to submit a DMV report because Kirk's notice had

merely warned that drivers who failed to submit the report would not be allowed to work.

### C. Further Findings and Conclusions

#### 1. The alleged unilateral changes

Section 8(a)(5) of the Act mandates that an employer must "bargain collectively with the representatives of his employees." Section 8(d) defines the duty to bargain collectively as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

Matters within the broad ambit of "wages, hours, and other terms and conditions of employment" are deemed mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Subject to certain exceptions not relevant here, the Act requires an employer to provide its employee representative with notice and an opportunity to bargain prior to instituting changes in any matter which constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962).

Here, I find that the General Counsel has proven that Respondent violated Section 8(a)(5) as alleged with respect to its admitted discontinuance of its bonus program at the end of December 1991 and by failing to bargain concerning the duties and penalties related to furnishing updated DMV records. The General Counsel failed to prove his allegations concerning the use of the bulletin board, and the January 26 wage and benefit changes alleged.

#### a. The bulletin board issue

Respondent has always maintained a rule against bulletin board postings without prior management approval. However, it has not enforced the rule against employees who posted work related notes and harmless humor on the drivers' room bulletin board without prior management consent.

General Counsel, in effect, assumes that Respondent's "no harm-no foul" enforcement policy effectively repealed the existing posting rule and that Sanders' December disciplinary notice established a new prior consent rule which required union notification and bargaining. I do not agree.

I am not satisfied that the character of the December 3 disciplinary notice to Sanders, when considered in its entire context, represents any departure from Respondent's commonsense bulletin board practices. Rather than some broad rule change applicable in all circumstances, Sanders' December 3 reprimand is nothing other than discipline for his disruptive memo.

No showing was made that Respondent permitted unrestricted driver access to its bulletin board. No controversial matter, other than the Taylor memo, was called to my attention in an effort to show that Sanders' conduct fell within the scope of any past practice related to bulletin board use. Obviously, Ellis felt that the Taylor memo, as well as Taylor's purported conduct addressed therein, fell outside the bounds of useful exchange appropriate for the bulletin board or anywhere else in a productive workplace so he took appropriate disciplinary action. The fact that his revised reprimand addressed the future use of the bulletin board by Sanders is not inconsistent with the past bulletin board utilization.

<sup>6</sup>Ellis claimed that he found the note on a table in the drivers' room and did not speak with Sanders about it. I found Sanders overall to be the more convincing witness while testifying and credit his testimony where it conflicts with other witnesses save for the variance between his testimony and Dietrich's noted below.

<sup>7</sup>Contrary to Dietrich's testimony, Sanders asserted that he also attended the January bargaining session. As Sanders attended several bargaining sessions following his termination, I conclude that Sanders is confused on this incidental point.

Certain employer rules are obviously designed to assure the use of a business facility consistent with the general business interest of an enterprise. Perceived in this sense, a harmony is evident between the failure to enforce a rule in situations congenial to an employer's direct business interest, or at least not detrimental to it, and the enforcement of a rule in situations potentially harmful to that interest. Viewed otherwise, the essence of a rule, such as Respondent's no-posting rule, becomes the rule itself with the resultant squandering of productive time in permission-getting and permission-giving exercises unbecoming to adults. But unabated, matters similar to the Taylor note could easily grow into employee strife extremely damaging to productivity and harmful to an employer's overall business purpose.

Some employee discord in the workplace almost always occurs. But that does not mean that an employer must provide a forum for it. Neither the scope nor the context of the Taylor memo posting can be stretched into the realm of conduct protected by law requiring a judgment about competing lawful uses of the bulletin board. Sanders' reprimand did not result from his use of the bulletin board to advance a union cause or some other matter of moment to the interests of employees as employees; this is a situation where one employee used the bulletin board to sound off against another employee.

For these reasons, I have concluded Respondent did not unilaterally alter its posting rule or practices by reprimanding Sanders for posting the Taylor memo and, hence, it had no duty to bargain before issuing that reprimand.

#### b. *The DMV records issue*

Although I find Respondent has always required employees to furnish DMV reports whenever required, other more pertinent aspects of its policy, such as any disciplinary sanctions for failing to timely comply and the intervals at which a demand for updated information would be made, were uncertain or nonexistent. To the extent that these matters affect the terms and tenure of employment, they are bargainable subjects.<sup>8</sup>

Since the Respondent requires its employees to obtain the reports rather than ordering them itself, the import to employees of the frequency Respondent requires updated reports and potential sanctions attached to any failure to comply are evident. Were it not for the fact that this Company requires its employees to provide the DMV reports, no bargainable element would be present. Put another way, if Respondent exercised its available option to purchase its drivers' records directly from the Nevada DMV, it would have no duty to bargain with the Union over how often it chose to do so and no question of employee compliance would exist.

All agree that drivers were required to furnish a DMV report when they were hired and a preponderance of the evidence shows that on the only other occasion when Respondent asked for DMV records, at least some incumbent employees were required to furnish them. Thus, Respondent has consistently burdened its drivers or applicants with the task

<sup>8</sup>I find it of no significance to determine whether or not the updated records are mandated by Federal law, an explicit demand of Respondent's insurance carrier, or merely Respondent's own sense of caution. A significant business justification resides even in the latter.

of procuring their own DMV record whenever the Respondent required it.

However, the clarity of Respondent's prior DMV record policy stops there. When Respondent previously required reports from incumbent drivers, the period permitted for compliance was lengthy and the intervals at which such reports would be required were uncertain even to its own officials as evidenced by the difference in the Kirk and Ellis notices this year. Equally evident is the fact that the sanction imposed for current noncompliance turned on little other than the caprice of Respondent's officials.

Kirk seemingly recognized the significance of his February 6 notice fixing a deadline and establishing a sanction for employee noncompliance as he telefaxed an advance copy to the Union on February 5. Although the subject was discussed at the February 6 bargaining session, no evidence of a resolution or impasse exists.

Accordingly, by establishing and enforcing a deadline, Respondent effectively imposed a unilaterally determined policy while purportedly bargaining about the DMV issue. For this reason, I find Respondent violated Section 8(a)(5) as alleged with respect to its DMV record requirement. See *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978).

#### c. *The bonus and Fisher's January 26 letter*

Respondent concedes that it discontinued the employee bonus. Citing the Ninth Circuit's treatment of the *Nello Pistoresi*<sup>9</sup> case, Respondent argues it bore no obligation to bargain about discontinuing its bonus program as, legally speaking, that program was a gift. I cannot agree.

In *Nello Pistoresi*, the company unilaterally discontinued its Christmas bonus claiming, in effect, that it was a gift rather than a form of compensation which required prior bargaining. The facts there reflect that the bonus had only been paid twice, at Christmas time in 2 calendar years. Moreover, the amount of individual bonuses varied from \$25 to \$150, the size being determined by a company manager who considered each employee's customer relations performance, diligence and, to some extent, seniority but not the employee's salary.

Observing that the *Pistoresi* Christmas bonus had only a "short history and indefinite nature," the Ninth Circuit agreed with the company's claim. In so doing, the court cited the Eighth Circuit's decision in *Wonder State*,<sup>10</sup> another Christmas bonus case, with approval and distinguished contrary holdings in other cases.

Pointing to the Board's subsequent decision in *Benchmark Industries*,<sup>11</sup> which purports to follow the court decisions in *Nello Pistoresi* and *Wonder State*, the General Counsel argues that Respondent's bonus is a bargainable subject and not a gift. More particularly, the General Counsel contends in his brief that these "bonuses were consistently paid (monthly); the bonus was uniform in amount (\$25.00); the bonuses were linked to remuneration received by employees; the bonus was not linked to the financial condition of the Respondent; and, critically, the bonus was inextricably linked to, and based upon, job performance."

<sup>9</sup>*NLRB v. Nello Pistoresi & Son*, 500 F.2d 399 (9th Cir. 1974).

<sup>10</sup>*NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965).

<sup>11</sup>*Benchmark Industries*, 270 NLRB 22 (1984).

The General Counsel's analysis is sound and I adopt it. *Nello Pistoresi* and other similar Christmas bonus cases are inapposite. In those cases, the Christmas gift-giving element unquestionably colors the character of the bonus involved. By contrast, Respondent's bonus program lacked any connection to a seasonal or other celebratory event involving a tradition of gift giving; it related solely to the degree of perfection in job performance.

The fact that Thompson's notes concerning the establishment of Respondent's program reflects management's right to summarily discontinue the bonus lends no support to Respondent's gift argument. That aspect of the program formulation merely recounts the Company's common law right to unilaterally set wages, hours, and terms of employment where employees are unrepresented.

Complaint paragraph 6(d) alleges that Respondent also unlawfully discontinued benefits and merit wage increases on or about January 26. In support, General Counsel argues that Fisher's January 26 letter to the Union unlawfully announces unilateral changes in wages and benefits. Although that letter could be read as Respondent's announcement discontinuing benefits and merit wage increases, its further reference to maintaining the "status quo" confuses the intent or, at least, creates an ambiguity.

General Counsel points to no additional evidence showing Respondent discontinued merit wage increases or any other benefits apart from the bonus program. For this reason, and as Fisher's February 7 letter clarifies his January 26 letter by assuring the Union that the Respondent would continue granting merit increases where warranted and would not unilaterally change benefits, I find General Counsel's claim about Fisher's January 26 letter without merit.

For the foregoing reasons, I conclude Respondent violated Section 8(a)(5) as alleged by unilaterally discontinuing its bonus program but did not violate the Act as alleged in complaint paragraph 6(d).

## 2. Sanders' discharge and the other 8(a)(3) allegations

Employer "discrimination in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization" is an unfair labor practice under Section 8(a)(3) of the Act. Discrimination cases under the Act are governed by the following principles, summarized by the Board in *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985):

The Board held in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1981), cert. denied. 455 U.S. 989, that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer's action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place absent the protected conduct "by a preponderance of the evidence." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If an employer fails to satisfy its

burden of persuasion, a violation of the Act may be found. *Bronco Wine Co.*, 256 NLRB 53 (1981).

General Counsel met his burden of making prima facie showing that Sanders' discharge was motivated by his protected conduct. Thus, General Counsel established that Sanders supported unionization almost from the start and later succeeded Hillebrandt on the union negotiation committee. In effect, Sanders became the employees' liaison and on-the-job spokesperson for the Union.

Sanders' February notes to Ellis concerning the DMV record requirement represented his first effort to assert himself as an employee spokesperson. When he asserted in his February 6 note—signed by two other drivers—that the DMV update requirement should be discussed with the Union, Ellis obviously reacted in a hostile manner.

By Ellis' own account, the decision to terminate Sanders if he failed to comply with the deadline in Kirk's DMV notice occurred on the same day that Sanders' second note about the DMV updates came to his attention. Gauging by Ellis' reaction to Sanders' first DMV note, the tenor of his December reprimand of Sanders, and the point made early on about the exclusive nature of his supervisory authority over the drivers, Sanders' second note undoubtedly irritated Ellis even further.

In these circumstances, Respondent's purported motive for discharging its most diligent employee becomes extremely questionable especially where, as here, Kirk's notice gives no hint that such an extreme penalty would result from failing to meet the February 11 deadline. Instead, General Counsel's claim that this discharge resulted from Sanders' persistence about resolving this issue at the bargaining table becomes extremely plausible. Thus, I am satisfied that the General Counsel's prima facie case was sufficient to shift the burden of persuasion to Respondent under the analytical framework of *Wright Line*.

Respondent failed to persuasively show that Sanders' discharge would have taken place absent his protected conduct, i.e., his assertion that management negotiate about the DMV update matter and his criticism of management's conflicting notices on this subject. Indeed, Respondent provided no explanation at all for the sudden and surprising decision to terminate Sanders as opposed to not permitting him to work until he complied with the requirement as announced in Kirk's notice. Hence, Respondent's reason for taking this more drastic step in light of Kirk's contrary indication is still unknown.

Respondent also argues that it lacked knowledge of Sanders' union activity. This argument deserves no serious consideration; the Union's May 1991 notice to Respondent demonstrated Sanders' early support for the Union and the substance of his February 6 note demonstrated Sanders' continued support for the collective-bargaining process and management's duty to consult with the duly selected employee representative. This palpably incredible claim actually detracts further from Respondent's position that Sanders was discharged for cause and lends credence to the General Counsel's assertion that he was fired for his union activity. *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981).

Moreover, in the course of attempting to establish that the DMV update requirement preexisted unionization, Respond-

ent introduced evidence reflecting that on the previous occasion when it requested DMV records of incumbents, two of three employees failed to comply for lengthier periods than Sanders—one took nearly 3 months—without any known discipline.

For the foregoing reasons, I conclude that Sanders discharge resulted from his aggressive assertions that Respondent was obliged to bargain about the DMV record requirement. Having previously concluded that the requirement was unlawfully promulgated, I find that Sanders' discharge violated Section 8(a)(3) and (5) of the Act.

General Counsel also alleges that Respondent unlawfully discriminated against Sanders by the issuance of the December 3 reprimand and by denying Sanders a bonus after December 1991. I find both allegations lack merit.

In his brief, the General Counsel asserts that the disparity between Ellis' treatment of Sanders' December 2 posting and Ness' Christmas cartoon posting establishes the discriminatory character of Sanders' reprimand. I disagree. As discussed above, the two employee postings are clearly distinguishable from the perspective of maintaining workplace order. For this reason, the claim that an inference of unlawful motive is suggested because Sanders was disciplined for his posting and Ness was not lacks merit. Sanders' posting posed a serious threat to harmony; Ness' posting was essentially harmless.

No direct evidence supports the claim that Respondent discontinued its bonus program essentially to retaliate against Sanders. Although Sanders benefited by the program far more than other employees, Respondent's assertion, in effect, that the benefit eluded most employees is unassailable. As the program was obviously designed as a motivational tool and as it obviously failed to motivate most employees, an equally compelling inference could be made in the absence of more direct evidence to the contrary that Respondent discontinued the program for legitimate business reasons. That being the case, General Counsel failed to carry his burden on this allegation.

## II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and is the certified representative of Respondent's driver employees in Las Vegas, Nevada, within the meaning of Section 9(a) and (e) of the Act.

3. By discharging Mitchell Sanders on February 11, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

4. By unilaterally discontinuing its bonus program, and by unilaterally promulgating a requirement with sanctions for noncompliance that incumbent employees furnish updated DMV reports within a certain time period, and by thereafter

enforcing the DMV record requirement with more severe sanctions, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

Respondent must reinstitute its bonus program and maintain it in effect until any modification is negotiated with the Union or an impasse in bargaining is reached. Respondent must also recind its DMV record update requirement until the terms of any such requirement are negotiated with the Union or an impasse in bargaining is reached.

To remedy Sanders' unlawful discharge, Respondent must immediately offer in writing to reinstate Sanders to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other benefits. Respondent must also make Sanders whole for the loss of pay and benefits suffered by reason of the discrimination against him.

Backpay, if any, shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions due to any trust fund account on behalf of Sanders shall be determined in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Computation of backpay shall give due consideration the probability that Sanders would have received bonus payments during the backpay period under Respondent's unlawfully discontinued program.

Respondent must further expunge from any of its records any reference to Sanders' February 11 discharge and notify Sanders in writing that such action has been taken and that any evidence related to that discharge will not be considered in any future personnel action affecting him. *Sterling Sugars*, 261 NLRB 472 (1982).

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

## ORDER

The Respondent, Mr. Potty, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

I. Cease and desist from

(a) Discharging employees in order to discourage membership in a labor organization.

(b) Discontinuing benefits or imposing new conditions of employment without providing the Union prior notice of such changes and an opportunity to bargain about them.

<sup>12</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing, or discriminating against employees because they exercise rights guaranteed by the Act.

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

(a) Bargain in good faith with the Union concerning wages, hours, and other terms or conditions of its drivers.

(b) Reinstigate its bonus program discontinued on January 1, 1992, and rescind its requirement that employees furnish periodic updates of their official Nevada driving records until the Union is given notice and an opportunity to bargain concerning any proposals about either matter.

(c) Immediately offer to reinstate Mitchell Sanders and make him whole for all losses incurred as a result of his February 11, 1992 discharge in the manner specified in the remedy section of the decision in this matter.

(d) Expunge from its records any reference to Mitchell Sanders' discharge on February 11, 1992, and notify him in writing that such action has been taken and that this discharge will not be used in any future personnel action involving him.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

and reports, and all other records necessary to determine the propriety of any offers of reinstatement, backpay, and trust fund reimbursements due under the terms of this Order.

(f) Post at its Las Vegas, Nevada office and terminal copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all complaint allegations not sustained by the administrative law judge's decision in this case are dismissed.

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."