UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK PARTY SHUTTLE, LLC	§	
Employer,	§	
	§	
and	§	**Case No. 02-CA-073340**
	§	
FRED PFLANTZER,	§	
An Individual.	§	

RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE FOR REGION 2

New York Party Shuttle, LLC ("NYPS"), Respondent in the proceedings before the Administrative Law Judge, raises the exceptions set out herein to the decision rendered on September 19, 2012.

I. INTRODUCTION

1. Fred Pflantzer ("Pflantzer"), a tour guide who performed services for NYPS from October through January 2011, filed a Charge with the National Labor Relations Board, alleging that he was not assigned to shifts as a retaliatory and discriminatory tactic for Pflantzer's unionizing and other concerted activity (Exh. GC-1 at page 19). NYPS denied the charge, explaining that Pflantzer was not an employee and, in any case, that he was never terminated (Exh. GC-5 at pages 1-3). NYPS also cited legitimate, non-discriminatory business reasons why NYPS chose to look to others than Pflantzer to lead its tours (*Id.*).

2. The Acting General Counsel filed a Complaint on the Charge of Fred Pflantzer (Exh. GC-1 at pages 7-12), which NYPS also answered and denied (Exh. GC-1 at pages 2-4). A hearing was held on August 7, 2012. Each party made opening statements, presented evidence, and filed post-hearing briefs (*See* Transcript of Hrg.). On

September 19, 2012, Judge Raymond P. Green issued his decision, finding that NYPS violated Section 8(a)(1) of the National Labor Relations Act by infringing on the rights guaranteed to workers under Sections 3 and 7. NYPS raises the points of exception set out herein, based on undisputed and no-evidence factual issues and matters of law.

II. POINTS OF EXCEPTION TO THE ALJ DECISION

3. NYPS excepts to the following aspects of the Administrative Law Judge's Decision:

a. The conclusion that Pflantzer was NYPS's employee for purposes of the National Labor Relations Act (ALJ Decision at 2:6-7), particularly with regard to the right-to-control test and Pflantzer's operation of another business in the same industry;

b. The inconsistency of the recommended Order in light of the finding that NYPS's failure to schedule Pflantzer for work from early January until February 11, 2012 was "not unlawful" (ALJ Decision at 3:50-4:2);

c. The statement that NYPS conceded that Pflantzer would not have been terminated but for the disparaging remarks in his email and Facebook post (ALJ Decision at 5:43-45);

d. The conclusion that Pflantzer's email and Facebook post constitute protected activity under Section 7 of the Act (ALJ Decision at 6:4-5);

e. The finding that Pflantzer's communications about NYPS were not libelous (ALJ Decision at 6:24-25);

f. The finding that Pflantzer's operation of a business in the same industry and same market area that infringed on NYPS's goodwill was not a motivating consideration in the company's decision not to continue assigning Pflantzer to shifts (ALJ Decision at 6:37-38);

g. The conclusion that Pflantzer was terminated for unionizing, when the record contains very little mention of unionizing efforts by Pflantzer (ALJ Decision at 6:43-44); and

h. The suggestion that by circulating the email and making the Facebook post Pflantzer was "publicizing a labor dispute," when the record contains no evidence of any ongoing dispute (ALJ Decision at 6 n4).

The factual and legal bases for these exceptions are set out in the following paragraphs.

III. SUMMARY OF THE ARGUMENT

4. A finding should be rendered that Respondent NYPS did not violate the National Labor Relations Act (the "Act") because:

a. Pflantzer operated a competing business with a website that directly competed against NYPS and would have been terminated for that reason regardless of any allegedly protected activity;

b. Employment action, if any, was taken against Pflantzer in early January, before the allegedly protected email was sent;

c. Pflantzer had engaged in unionizing activity in November and December of 2011, and continued to work at NYPS for a significant period thereafter, thus demonstrating that NYPS did not have an "antiunion animus";

d. The allegedly protected email communication was a false, defamatory, disparaging, and disloyal communication sent by a person operating a competing business, and is thus not entitled to protection under the Act;

e. The allegedly protected email did not seek or describe any collective action by workers, and is thus not a "concerted action;"

f. There is no evidence in the record to support the General Counsel's position that Pflantzer was terminated because of "union activity;"

g. The only evidence in the record is that Pflantzer did not request to be scheduled for tours after January 2012 and that he was working for his own tour company at that time; and

h. Pflantzer was an independent contractor not entitled to protection.

For these reasons, NYPS requests that the Administrative Law Judge's Decision be modified or vacated.

IV. STATEMENT OF FACTS

5. Fred Pflantzer was not an employee of New York Party Shuttle. It was stipulated that NYPS hires tour guides to lead particular tours (Tr. at 55:10), and that the tours are designed by the company in terms of the route and the stops along the way (Tr. at 55:16-24; 56:13-17). The undisputed testimony presented at the hearing was that the tour guides operate at their own discretion regarding their interaction with tour

passengers, including what material they present and how (Tr. at 112:3-7; 13-16), also that Pflantzer and other tour guides hold a license issued by the New York City Department of Consumer Affairs that allows them to lead tours in New York City for any tour company, including one of their own (Tr. at 89:4-7; 21-23; 90:4-5).

6. Most importantly, Pflantzer admitted that he and other tour guides operated under their own discretion within the itinerary as advertised to tour passengers (Tr. at 91:5-16), and that he also led private tours for NYPS, in which he would contact the guests to define the tour itinerary himself (Tr. at 90:24-90:4). Lastly, Pflantzer admitted that he ran his own tour business (Tr. at 80:23-25: 81:9-16), and that his own business hires tour guides as independent contractors, not as employees (Tr. at 84:7-16).

7. NYPS never terminated Pflantzer's employment. Pflantzer testified that he was first engaged by NYPS in early October 2011. (Tr. at 63:5-11), and that he did his last tour with NYPS no later than January 3, 2012 (Tr. at 71:4-13). However, he admitted that he was never terminated (Tr. at 80:4-6). Pflantzer presented no testimony to contradict the fact that NYPS tour guides all work on at *ad hoc* basis and are engaged for particular tours (See Tr. at 9:19-10:3). The undisputed testimony was that the sightseeing tour business in New York City is seasonal and that January through mid-March is historically a slow period (Tr. at 98:17-22). It was further undisputed that Pflantzer was not assigned to tours in January or February 2012 for this reason (*Id.*). Most Importantly, Pflantzer did not dispute NYPS testimony that as of March 2012 he no longer inquired about available shifts or communicated his availability to NYPS's director of operations (Tr. at 104:1-7).

8. NYPS had valid reasons for not assigning Pflantzer to its tours following January 3, 2012. The business is seasonal and has a natural and consistent lull in January, February, and early March of each year (Tr. at 98:17-22; 101:10-16; Exhs. Resp-2 & Resp-3). Year 2012 was no exception. NYPS testimony was that it went from 24 to 25 tour guides in December 2011 to 17 or 18 tours guides working fewer tours in January 2012 (Tr. at 98:6-13). NYPS's director of operations testified to four or so tour guides other than Pflantzer not receiving shift assignments in January and February 2012 (Tr. at 98:23-99:8). NYPS also testified to its objective hiring criteria that apply to any tour guide: 1) availability for assignments, 2) working relations with drivers and other staff, 3) ability to get along with customers, 4) knowledge of the sites visited on the tour, and 5) work ethic (Tr. at 129:1-19). Testimony was undisputed that NYPS had other tour guides that did a better job than Pflantzer (Tr. at 97:7-17), and that had a lot more availability (Tr. at 97:18-19). Although the underlying allegations were refuted, NYPS received complaints about Pflantzer's relations with co-workers (Tr. at 120:5-15) and professionalism (Tr. at 120:18-21).

9. Pflantzer admitted that he ran a competing tour business under the trade name NY See Tours (Tr. at 80:23-25; 81:8-16) ("NY See" mis-transcribed as "NYC"); (see also Tr. at 83:2-25; Exh. Resp-5).[1] Pflantzer also acknowledged that he ran tours for his own business in the months of December 2011 and January 2012 (Tr. at 84:19-23), and that he led guided tours on three NYPS routes, named "NY See the Holiday Lights Tour", "NYC Freedom Tour", and "NY See It All! Tour" (Tr. at 86-:11-87:21).

[1] Pflantzer's company name and his tours are imitations of the proprietary tours and names developed by Respondent. *Cf.* http://www.onboardnewyorktours.com *with* http://www.nyseetours.com.

10. NYPS's dealings with Pflantzer and other drivers and tour guides disproves discriminatory motive. First, the director of operations testified without contest that he reached out to Pflantzer to encourage him to make himself more available in order to be placed on the schedule (Tr. at 99:25-100:3). Additionally, NYPS testified to the cessation of dealings with Luke Miller, a superior tour guide, when it was revealed that he was running a competing business (Tr. at 118:9-23), also, that the company does not use tour guides who operate competing tour companies (Tr. at 120:2-4).

11. In regard to Pflantzer's complaints about working conditions, the record shows no pattern of discrimination. Testimony was that workers complain of the same general types of matters as Pflantzer "almost every day" at NYPS (Tr. at 121:9-13). NYPS's director of operations named two workers who complained of the lack of a PA system on the busses (Tr. at 122:3-21), one worker who complained about expired Department of Transportation stickers on the busses (Tr. at 122:25-123:11; 124:2-5), and one worker who complained about the air conditioning on the busses being weak (Tr. at 124:15-19). The undisputed testimony was that all of the identified complainants still receive work assignments from NYPS (Tr. at 124:13-16). NYPS also acknowledged complaints about paychecks bouncing (Tr. at 124:20-23), but testified, without contest from Pflantzer, that no one was terminated for these complaints (Tr. at 126:10-16). NYPS further denied that anyone was fired for complaining of working conditions on its fleet of buses (Tr. at 124:17-22). There was also testimony that NYPS management makes themselves available to hear and respond to workplace complaints (Tr. at 126:23-127:1).

12. Pflantzer's statements were not aimed at unionizing or other concerted activity. Nothing in the statements advances or suggests concerted activity (*See* Exh. GC-13 at page 2). Further, undisputed testimony at the hearing was that Pflantzer ran his own competing business. He advertised his business on TripAdvisor.com, the same as NYPS (Tr. at 81:8-16), and that operates under the name "NY See Tours" (Tr. at 83:13-14), the same as two of NYPS's tours that Pflantzer worked on (Tr. 86:11-17; 87:13-14). Pflantzer's statements were made to further Pflantzer's interests and to defame a direct competitor to his tour company.

13. The statements on Pflantzer's email and Facebook posting were not made to fellow "employees" of NYPS. Pflantzer admitted that one had to be invited to access the NYC tour guides page (Tr. at 65:22-66:9). He also admitted that none of the members worked at NYPS, to his knowledge (Tr. at 66:21-67:2). The statements were also false. The fact is that NYPS does offer its drivers and tour guides the opportunity to participate in a health insurance plan. (*Compare with* Tr. at 127:2-17). There was no testimony presented at the hearing to establish a good-faith basis for Pflantzer's comments on bus safety (*See generally* Tr.).

V. ARGUMENT & AUTHORITIES

14. The General Counsel's Office built their case around a statement from NYPS's Response to Charge of Fred Pflantzer, in which NYPS acknowledged libelous and disparaging comments Pflantzer made to third parties as a contributing reason to NYPS's decision to cease assigning Pflantzer to shifts after January 3, 2012. Taken in context, this statement does not support a finding of discriminatory motive, and the General Counsel's Office failed to demonstrate a violation of the Act.

A. No Employment Action Was Taken in Response to the February 11 Email

15. There is no evidence in the record to support the General Counsel's suggestion that employment action was taken against Pflantzer on or about February 11, 2012 (*See* Tr. at 7:24-8:17). Pflantzer had only begun with NYPS four months earlier (Tr. at 63:5-11). Pflantzer, like other tour guides, was not assigned to tours following the close of the busy holiday season at the first of January (Tr. at 98:23-99:8). Nothing changed in that decision when, more than a month later, Pflantzer circulated his remarks about NYPS; the company did not schedule Pflantzer for work, as had been the case for over 30 days at that point (Tr. at 98:17-22). Nothing changed with Pflantzer; he had not taken steps to increase his availability to NYPS, even upon specific suggestion of NYPS's direction of operations (Tr. at 99:25-100:3). In fact, the undisputed testimony was that Pflantzer simply quit submitting his availability and requesting assignment to NYPS tours (Tr. at 104:1-7).

16. There is no termination letter, no alleged oral conversation, and no other facts to suggest that any employment action was taken or refrained from being taken at that time (*See generally* Tr.). Most importantly, Pflantzer himself admitted that he was never terminated by NYPS (Tr. at 80:4-6). Without proof that either he requested work and was declined, or that he was terminated by the company, there was no employment action taken in February, and therefore there can be no violation of the Act.

B. Pflantzer Did Not Engage in Any Action That Was Concerted

17. Pflantzer stated in the February 11 email that he was no longer working for NYPS (*See* Exh. GC-13 at pages 2-3). Pflantzer could not identify any NYPS workers who were members of the New York City tour guide Facebook page where he

posted his remarks about NYPS (Tr. at 66:21-67:2); in fact, Pflantzer admitted that no NYPS tour guides were members, to his knowledge (*Id.*). Evidence at the hearing proved Pflantzer's allegations about the company to be blatantly false with regard to the lack of a health insurance plan for its workers (Tr. at 127:2-17). Also, Pflantzer presented no evidence at the hearing on unsafe conditions on NYPS buses (*See generally* Tr.).

18. Taken in context, Pflantzer's posting was not written for the purpose of protecting employees or helping his position; it was written for one purpose: to malign NYPS on his own behalf and for the benefit of Pflantzer's competing tour business. That is clear from the express words and the tone of the message. These comments could not have been understood as "publicizing a labor dispute", as there was no evidence presented of an ongoing labor dispute at NYPS (*See generally* Tr.).

19. "Concerted activity" is activity that is "engaged in with or on the authority of other employees." *Meyers Industries*, 281 NLRB 882, 885 (1996), *affd. sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). There is nothing in the February 11 email that suggests anyone else was joining Pflantzer, and no indication that his email was written with the authority of any other employees (*See* Exh. GC-13 at pages 2-3). There is nothing in the email that asks other employees to help, assist, join, or otherwise work with Pflantzer to accomplish any goal (*Id.*). There is no request that action follow the email (*Id.*), and Pflantzer did not testify as to any action he took after sending the email (*See generally* Tr.). The fact that the email states that Pflantzer was no longer working at NYPS at the time confirms that the communication *could not have been* the basis for him not working at the company. The General Counsel's office makes the conclusory statement that Pflantzer "sought to

initiate or induce group action," but even they do not state what that alleged group action was because there is no evidence in the record to support their contention.

20. The record contains no credible evidence of Pflantzer's unionizing efforts. Pflantzer stated that he had one conversation with a single employee in which a labor union was mentioned (Tr. at 71:9-13). Later, Pflantzer claimed that he made statements to as many as seven employees, claiming that he was confused as to the timeframe of the earlier question (Tr. at 76:10-22). Still Pflantzer admitted that no mention of labor union organization was raised with NYPS's office staff (Tr. at 78:6-17). On the basis of this testimony, there is no reason to believe that NYPS terminated Pflantzer over a concern that he would unionize NYPS workers.

C. Pflantzer's Action Was Not Protected

21. The General Counsel's office relies on a quote from NYPS's Response to Charge of Fred Pflantzer, taken out of context, to show that Pflantzer was terminated for engaging in protected activity. The General Counsel spent most of its effort in this case demonstrating that Pflantzer engaged in protected activity, but they never show that Pflantzer suffered adverse employment action because of the protected activity. It's not enough to show that Pflantzer sent an email mentioning working conditions or the lack of a union. Even if it were true that Pflantzer was fired because of the February 11 email (which it isn't), the General Counsel would have to demonstrate that it was the protected statements in that email, and not other statements, that caused the adverse action. Here, it was not Pflantzer's mentioning of unions that was relevant. In fact, he had been engaging in unionizing activity for two months while he received countless shifts at the company. There is zero evidence in the record of any "antiunion animus" at NYPS. To

the contrary, Ron White testified that he would consider unions to be a benefit to his position.

22. It was the false statements of no employee benefits and unsafe busses, defaming NYPS, that were referred to in NYPS's Response to the Charge. The General Counsel failed to reference the last sentences of that paragraph, to wit: "However, this decision was based on his prior record with the Company and on the unprofessional behavior he exhibited in sending negative communications to third-parties who do not work for the Company on February 11, 2012. It was in no way related to any protected activity." Given the context of the paragraph, and the evidence put on at the hearing that the reason Mr. Pflantzer was not welcome back at NYPS was because he operated a tour business that competed directly with NYPS in Internet sales, there is no basis for a finding that NYPS violated the Act. The fact that Mr. Pflantzer never submitted his availability nor requested shifts after February 11 demonstrates conclusively that no employment action was taken at that time.

23. Pflantzer's action goes beyond what is protected under Section 7 of the NLRA. Under *Jefferson Standard*, employees are not given any right to engage in unlawful or other improper conduct. *NLRB v. Local Union No. 1229, Int'l Broth. of Elec. Workers*, 346 U.S. 464, 473 (1953). Particularly, the Supreme Court recognized that when an employee acts in a manner reasonably calculated to harm the employer's reputation and reduce its income is not an "unfair labor practice" within Taft-Hartley Act. 346 US at 472 (continuing, "It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their

common enterprise.”). The NLRA does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. *Id.*

24. Here, Pflantzer acted to damage NYPS’s business for the betterment of his own company, not to address working conditions for its tour guides. This is evidenced by the fact that the statements were not addressed to NYPS’s management or employees. During the entirety of his employment, Mr. Pflantzer never once complained to a manager about any of these issues. That fact alone speaks volumes about the validity of his complaints and what his real motivations were. The communications conveyed though the email and social media post were not designed to improve working conditions, but to malign NYPS. The fact that insubordination, disobedience, or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge. *Id.* at 475. As in *Jefferson Federal*, Pflantzer’s statements to third parties do not relate to any employment dispute. The only evidence that the General Counsel points to demonstrating such a dispute is the passing mention of an NYPS conference call at which paychecks having bounced was discussed. There was no evidence that the call involved any dispute, but rather that the company was discussing how to deal with that unfortunate situation if it arose. This does not satisfy the standard, and does not protect Pflantzer’s other statements about NYPS. The comments were false with regard to health insurance and other benefits. Further, they were false and defamatory with regard to statements that NYPS’s buses were unsafe. Ron White established that NYPS offers health insurance

and other benefits and that the company's buses were not unsafe. Mr. Pflantzer offered no contradictory testimony or evidence. While a bus might have lacked an inspection sticker, the General Counsel goes too far in claiming that NYPS admitted its buses were unsafe for employees and passengers. Pflantzer's statements do not satisfy either prong of the *Jefferson Standard* test, in that they do not relate to an ongoing employment dispute, and they are disloyal, reckless, and maliciously untrue. The disparaging nature of the statements is plain, given that the statements were untrue and directly impact NYPS's business. The real motivation behind Pflantzer's communications was to gain advantage in competing with NYPS on behalf of his own tour company, at which he admitted he was working at the time of the email. In total, the statements amount to a raw disparagement of NYPS, and fall outside the protection of the NLRA under *Jefferson Standard*.

25. Additionally, Pflantzer is unquestionably disloyal to NYPS in situations that place its business in competition with his own. Pflantzer admitted that he owns and operates NY See Tours, a tour company that operates a website in competition with NYPS and that copied the OnBoard Tours "NY See It All! Tour." As recognized by the Board in *ATC/Forsyth & Associates*, an employee cannot shield his acts of competition by claiming protection under the Act. 341 NLRB 501 (2004). Pflantzer could hardly be more directly and more clearly attempting to compete with NYPS. He operates a competing business. He markets that business, NY See Tours, over the Internet, as does NYPS. The run of the NY See Tours, as presented on its website, http://www.nyseetours.com, is substantially similar to NYPS's tours. The customers drawn to NY See Tours would likely otherwise be NYPS customers. Pflantzer cannot be

loyal to NYPS while he has a personal interest in NY See Tours. This alone is a suitable basis for termination, as recognized in *ATC/Forsyth*, and as NYPS had done with other tour guides, including Luke Miller, another former NYPS tour guide that who was dismissed from NYPS's employment when management learned that he was launching a competing tour business.

D. *Wright Line* Applies On These Facts and Is Dispositive

26. In cases involving a challenged discharge of an employee, the correct substantive standard for evaluating propriety of a reinstatement order is whether the discharge would have occurred "but for" the protected activity; if discharge would have occurred absent the protected activity, no unfair labor practice existed. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 902 (1st Cir. 1981) (citing National Labor Relations Act, § 8(a)(3)). Here, NYPS presented evidence that Pflantzer was not assigned to tours for several reasons, all but one of which were completely unrelated to anything colorably protected under the Act: (1) not requesting scheduling for tours with NYPS's managing director; (2) having generally less availability and less incentive to work NYPS tours as compared to other tour guides; (3) exhibiting personal conflicts with NYPS drivers and other employees, (4) seasonal issues resulting in fewer tours being operated and fewer tour guides needed, and (5) making unprofessional, untrue, and disparaging statements about NYPS to third parties, particularly without first bringing these to the underlying concerns to the attention of management.

27. The concerns outlined above, amount to legitimate grounds for termination. As stated above, the ultimate reason Pflantzer was never called back to work tours was his competing tour business, but he would likely not have been assigned

to other tours for any of the reasons enumerated just previously, none of which relate to any protected activity under the NLRA. As such, NYPS is seen to have acted for motives unrelated and not designed to chill any protected activity.

E. Pflantzer Was An Independent Contractor

28. NYPS recognizes that employment taxes were taken out from Mr. Pflantzer's paycheck and the company issued Pflantzer an IRS Form W-2 Wage and Tax Statement. However, that is done for many NYPS workers as a convenience to them for tax reasons. The reality is that NYPS contracts with tour guides such as Mr. Pflantzer to lead tours consistent with the routes planned and advertised to NYPS passengers (Tr. at 55:16-24; 56:13-17). Pflantzer, like other NYPS tour guides, holds an individual license from the Department of Consumer Affairs as a tour guide that enables him to work for any tour company or on his own (Tr. at 89:4-7; 21-23; 90:4-5). Pflantzer controlled the tour narration he gave on the tour and where he walked the guests when they exited the bus at each stop (Tr. at 112:3-7; 13-16). Most importantly, he never worked regular hours. He was called to work only on days and at times at which NYPS had tours for him to guide. (*See* Tr. at 9:19-10:13). That fact demonstrates that he was an independent contractor, but more importantly it shows that there is no basis for back pay or other damages, because there is no way to calculate how often he would have worked and during what periods.

VI. PRAYER

WHEREFORE, Respondent New York Party Shuttle, LLC respectfully prays that the Board grant it relief from the Decision of the Administrative Law Judge and that it be granted judgment in accordance with the law and facts, that declaration issue that NYPS

has not engaged in unfair labor practices under the Act, that Pflantzer take nothing by this action, and that NYPS be granted such other and further relief, both general and special, at law and in equity, to which it may be justly entitled.

October 17, 2012

Respectfully submitted,

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ATTORNEYS FOR EMPLOYER

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the National Labor Relations Board through its Regional Director on the 17th day of October 2012 in the manner indicated below.

Karen P. Fernbach, Regional Director
National Labor Relations Board, Region 2
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New York, NY 10278-0104

By Overnight Courier

Fred Pflantzer
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By Overnight Courier

_____
C. Thomas Schmidt