UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

NEW YORK PARTY SHUTTLE, LLC
Respondent

and **Case No. 02-CA-073340**

FRED PFLANTZER,
Charging Party

ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING ARGUMENT

Alejandro A. Ortiz
Counsel for the Acting
General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

Dated at New York, New York
November 14, 2012

Pursuant to Section 102.46(e) of the National Labor Relations Board's Rules and Regulations, the Acting General Counsel (GC or General Counsel), by its Counsel Alejandro A. Ortiz, files the following cross exceptions, with supporting argument,[1] to the Decision and Recommended Order of Administrative Law Judge Raymond P. Green (ALJD).

CROSS-EXCEPTIONS AND SUPPORTING ARGUMENT

1) The ALJ erred in his findings of fact by omitting several words in his reproduction of a paragraph from Respondent's counsel's position statement. In his decision the ALJ recited the paragraph as follows:

> Mr. Pflantzer had to be redirected in 2011 on a number of occasions for insubordination, unprofessional behavior, and for other minor infractions. On a number of occasions, he was unable to maintain a professional demeanor with the Company's drivers, which is critical for a tour to be successful. No disciplinary actions were taken in regard to these issues because they had not risen to that level. As of February 10, 2012, despite the above issues, Mr. Pflantzer sent a very unprofessional written communication to a number of parties containing false and defamatory statements about the Company in an apparent effort to harm the Company. As a result, he is no longer eligible to work for the Company. 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.

ALJD at 5:30-42[2] (footnote omitted). The paragraph should read as follows, with the missing words in bold:

> Mr. Pflantzer had to be redirected in 2011 on a number of occasions for insubordination, unprofessional behavior, and for other minor infractions. On a number of occasions, he was unable to maintain a professional demeanor with the Company's drivers, which is critical for a tour to be successful. No disciplinary actions were taken in regard to these issues because they had not risen to that level. As of February 10, 2012, despite the above issues, **Mr. Pflantzer was eligible to be scheduled shifts when the high season returned. However, on February 11, 2012,** Mr. Pflantzer sent a very unprofessional written communication to a number of

[1] The General Counsel combines its cross-exceptions and argument pursuant to § 102.46(b)(1) of the NLRB's Rules and Regulations, which states in part that "[i]f no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, . . ."

[2] References to the ALJ's Decision will follow the format "ALJD [page number(s)]: [line number(s)]"

> parties containing false and defamatory statements about the Company in an apparent effort to harm the Company. As a result, he is no longer eligible to work for the Company.

(GC Ex. 5 ¶5).

The bolded language is crucial to a proper understanding of this case for two reasons. First, it exposes as pretext other reasons Respondent has offered for why it fired Pflantzer. This is because despite whatever other issues Pflantzer may have had at work, by Respondent's own admission, as of February 10 he remained eligible to work when the high season returned. This changed the very next day, February 11, after Pflantzer wrote the at-issue email and facebook post. "As a result" of these messages, Pflantzer ceased being eligible to work for Respondent. Second, the bolded language further establishes the timing of when Respondent discriminated against Pflantzer—after his February 11 email and post.

2) The ALJ erred in his analysis when he referred to the date of the email and facebook entry as February 10. (ALJD 6:4 and 6:21.) They were both written on February 11, 2012. (GC Ex. 3 and 4.)

3) The ALJ erred in his conclusions of law by not finding that Respondent violated § 8(a)(1) of the Act independent of its violation of § 8(a)(3). (ALJD 7:5-7). While the ALJ did not make this explicit, he appears to have found that Respondent violated § 8(a)(1) derivatively after finding that Respondent violated § 8(a)(3). *Id*. The GC agrees that a § 8(a)(1) violation follows by necessity from a § 8(a)(3) violation. Its exception is limited to urging that the Board find an independent § 8(a)(1) violation.

The ALJ in this regard found that the email/post were union-related activity and thus protected concerted activity. (ALJD 6:4-9.) He did not find, however, that the email and post were protected concerted activity independent of any union-related content. (*See id*.) It is this

finding the GC urges. In other words, the GC urges that the Board find that Respondent violated Section 8(a)(1) independent of its 8(a)(3) violation.

The Board's test for whether activity is "concerted" is whether the activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1996) (*Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481(D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988). Under this test, Pflantzer's email and post were "concerted" regardless of any union-related content. This conclusion is based on two related points. First, Pflantzer's email and post were "concerted" even though he alone wrote them and, second, they were "concerted" even though their recipients were employees of another employer.

As to the first point, Pflantzer's email and post were concerted though he wrote them alone. They were "concerted" because he addressed them to other employees. He sent the email to former colleagues at City Sights, another tour company. (ALJD 4:4-12.) The facebook post was placed on a page designated for New York City tour guides. (*Id*.) Because he addressed his messages to fellow employees, Pflantzer engaged in "concerted" activity. *See e.g., Three D, LLC*, No 34-CA-12915, JD(NY)-01-12, at 1(A.L.J. Op. Jan. 3, 2012)(facebook discussion among employees concerted activity); *Timekeeping Systems, Inc.*, 323 NLRB 244, 247 (1995) (e-mail regarding vacation policy sent by employees to fellow employees and management concerted activity).

As to the second point, it is true that the "employees" to whom Pflantzer wrote were not employed by Respondent. That fact, however, is irrelevant to the question of whether the activity was "concerted." As the Supreme Court observed in *Eastex, Inc.*, the definition of "employee" under the Act is expansive. *See Eastex, Inc. v. NLRB,* 437 U.S. 556, 564-65 (1978).

It expressly includes "any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." *Id* at 564. The Court explained that "[t]his definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." *Id*.

Relying in part on the Court's explanation in *Eastex, Inc.*, the Board recently reaffirmed its view that the term "employee" is to be read broadly. In *Reliant Energy*, 357 NLRB No. 172 (December 30, 2011), the Board found that a single employee of a contractor engaged in concerted activity when he accepted union authorization cards and answered union-related questions from employees of an employer other than his own. In reaching its conclusion the Board expressly relied on the Supreme Court's approval of a broad reading of the term "employee." Similar to the employee in *Reliant Energy*, the employee in this case, Pflantzer, engaged in "concerted" activity when he reached out to employees of an employer other than his own, in this case, City Sights.

In addition to being "concerted," Pflantzer's messages were protected because he wrote them for the purpose of "mutual aid or protection." This is plain from the messages themselves. In them he addresses group concerns about terms and conditions of employment such as benefits, paychecks, and the safety of the tour buses. (*See* GC Ex. 3 and 4.) With these messages he sought to warn other tour guides of the conditions of employment at Respondent and, given those conditions, to discourage them from seeking employment there. (*Id*.) He thus engaged in group activity for the purpose of "mutual aid or protection." *See e.g. Cadbury Beverages, Inc*., 324 NLRB 1213 (1997) (employee engaged in activity for mutual aid and protection by warning

other employee about matters affecting terms and conditions of employment); *Jhirmack Enterprises*, 283 NLRB 609 (1987) (same).

CONCLUSION

For the reasons advanced above, the General Counsel urges the Board to correct the ALJ's factual errors and to find that Respondent violated § 8(a)(1) of the Act independent of any § 8(a)(3) violation.

Dated November 14, 2012
at New York, New York

Respectfully submitted,

Alejandro A. Ortiz
Alejandro A. Ortiz
Counsel for the Acting General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278

CERTIFICATE OF SERVICE

This is to certify that on November 14, 2012, I caused the foregoing Acting General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision and Supporting Argument to be served, via electronic mail, addressed as follows:

C. Thomas Schmidt
The Schmidt Law Firm
By email: firm@schmidtfirm.com
Counsel for Respondent

Fred Pflantzer
By email: nyseetours@gmail.com
Charging Party

Alejandro Ortiz
Alejandro Ortiz

Dated this 14th day of November, 2012