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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. STATEMENT OF THE CASE

On January 27, 2012, Fred Pflantzer (Pflantzer) filed a charge alleging that New York Party Shuttle, LLC (Respondent) violated §§ 8(a)(3) and (1) of the National Labor Relations Act (Act) by reducing his hours. On March 16, 2012, Pflantzer filed an amended charge which alleges that Respondent discharged Pflantzer because he engaged in union activities in support of Teamsters Local 814 and other protected concerted activity, in violation of §§ 8(a)(3) and (1) of the Act. (GC Ex. 1(a) and (c)).

On May 30, 2012, the Regional Director, Region 2, issued a Complaint and Notice of Hearing, which Respondent answered, denying the violations. (GC Ex. 1(e) and (g)). The Complaint alleges that on or about February 11, 2012, Respondent discharged Pflantzer because he communicated by electronic mail and social media with other employees about terms and conditions of employment affecting Respondent's employees, in violation of §§ 8(a)(3) and (1) of the Act. (GC Ex. 1(e)). Pursuant to the Complaint, a hearing was held before Administrative Law Judge (ALJ) Raymond P. Green on August 7, 2012.

On September 19, 2012, the ALJ issued a decision (ALJD) concluding that Respondent discharged Pflantzer because of his union activities and thus violated §§ 8(a)(1) and (3) of the Act.

On October 17, 2012, Respondent filed exceptions to the following aspects of the ALJD:

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 Acting General Counsel (General Counsel or GC) now answers these exceptions.

II. STATEMENT OF FACTS

For a complete statement of facts, the General Counsel respectfully refers the Board to the General Counsel's Brief dated September 10, 2012.

III. ARGUMENT

Respondent's Exception (a)

Respondent first excepts to the "ALJ's conclusion that Pflantzer was NYPS's employee for purposes of the NLRA (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".

As an initial matter, Respondent fails to acknowledge that Respondent has the burden to show that Pflantzer was an independent contractor. *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (December 27, 2011) ("The party seeking to exclude individuals performing services for

another from the protections of the Act on the grounds that they are independent contractors has the burden of proving that status."). In this regard the General Counsel has no burden; employee status is presumed absent a showing otherwise. *See id*.

Respondent fails to satisfy its burden. It cites no case law in support of its argument, even failing to identify the relevant 'right to control' factors the Board should consider in deciding this question. That omission alone should end the Board's inquiry of whether Respondent satisfied its burden.

To determine whether individuals are statutory employees or independent contractors, the Board applies the common-law agency test, which considers all the incidents of the individual's relationship to the employing entity. *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 846-847 (2004) (citations omitted). The Board generally considers ten factors: (1) the length of time the individual is employed; (2) the method of payment, whether by time or by the job; (3) whether the employer or the individual supplies the instrumentalities, tools, and place of work; (4) whether the individual is engaged in a distinct occupation or business; (5) whether the employer is "in the business"; (6) the skill required in the particular occupation; (7) whether the employer retains the right to control the manner and means by which the result is to be accomplished; (8) whether the parties believe they are creating an employment relationship; (9) whether the work is part of the employer's regular business; and (10) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain. *Id*.

On balance, these factors show Pflantzer was an employee of Respondent. They cut either in favor of employee status or are neutral. Notwithstanding it does not have the burden here, the GC highlights four relevant factors—numbers 2, 3, 8, and 9.

The second factor, method of payment, suggests employee status. Pflantzer was paid by the hour, not the tour. (GC Ex. 6). Had he been paid by the tour, it would suggest he was an independent contractor. *See e.g., Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (models' paid by class, not by the hour, supported finding they were independent contractors).

The third factor favors employee status. Respondent controlled the instrumentalities, tool, and place of work. Pflantzer used Respondent-provided buses driven by Respondent-provided drivers on which he conducted Respondent-designed tours. (Tr. 57-59, 96.) Respondent controlled Pflantzer's work schedule including the specific tours he would conduct and their start times. (Tr. 59-60, 96; Resp. Ex. 4.) Although Respondent did not control the actual words Pflantzer spoke during these tours, the topics he covered were obviously constrained by Respondent's routes and the attractions featured. (Tr. 91.) Moreover, no evidence shows that Pflantzer influenced the direction or design of the tours; instead, it shows Respondent designed the itinerary, the routes, and that drivers were prohibited by Respondent from deviating from those routes. (Tr. 91, 56, 112.)

The eighth factor also favors employee status. The evidence shows the parties believed they had formed an employment relationship. Respondent provided Pflantzer with IRS Form W-2, as opposed to IRS Form 1099. In addition, Respondent contributed to an unemployment insurance fund on behalf of Pflantzer. (GC Ex. 10, 9, 7; Tr. 61- 62.) These facts support the conclusion that Pflantzer was an employee, not an independent contractor. *See e.g., Lancaster Symphony Orchestra*, 357 NLRB No. 152 (December 27, 2011) (Member Hayes, dissenting) (observing that receiving an IRS Form 1099 rather than IRS Form W-2 is consistent with independent contractor status).

Finally, the ninth factor favors employee status. Tour guides like Pflantzer are essential to Respondent's business. It is a tour company. Without tour guides, Respondent could not operate its business. Compare *BKN, Inc.*, 333 NLRB 143, 145 (2001) (holding that employee-writers clearly performed functions that were an essential part of the employer's normal business), with *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (explaining that the employer is in the business of providing instruction to art students, while models are in the different business of modeling).

Respondent's failure to muster the relevant factors highlights its overall failure to satisfy its burden showing Pflantzer was a contractor. Respondent first acknowledges it withheld taxes from Pflantzer's paycheck and provided him a W-2 Wage and Tax Statement; it argues, however, that this is done as a "as a convenience to them [the workers] for tax reasons." Respondent fails to explain how the issue of worker convenience bears on the question of Pflantzer's status as employee or independent contractor.

Respondent also asserts that "[t]he 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)." Respondent's assertion of "reality" must be supported by evidence which it fails to muster here. It cites lines of the transcript without explaining how those lines have any bearing on its assertion. Again, this lack of explanation of why a given assertion or statement of fact is relevant to its argument is thematic throughout Respondent's argument.

As a further example, Respondent cites the fact that Pflantzer is licensed as a tour guide from New York City's Department of Consumer Affairs which enables him to work for any tour company. That fact is irrelevant here or, if relevant, its relevancy is not explained by Respondent. By itself, an individual's license to perform a given trade or profession has no

bearing on the question of whether that individual works as an employee or contractor. As an illustration, consider a field attorney for the NLRB. A field attorney has a license to practice law in a given jurisdiction. That license permits him to practice law in any capacity in that jurisdiction. He is employed by the government today but could be employed by a law firm tomorrow. His ability to change jobs does not bear on the question of, when working for a particular employer, how much or to what extent that employer has the right to control the terms and conditions of the attorney's work.

Finally, Respondent cites the fact that the words Pflantzer used to describe the sights during tours were his choice alone, i.e., he wasn't reading from a script provided by Respondent. Respondent again fails to explain why this fact shows or suggests Pflantzer is an independent contractor. The assertion suggests that an individual who is hired in part for his or her public speaking skills must be an independent contractor. Under this rationale, an NLRB field attorney, who presents cases for trial including opening statements and questions for witnesses, are independent contractors unless the Regional office provides scripts for the attorneys to read from. This reasoning ignores the fact that certain employees are hired precisely for their talents with language and oratory.

In conclusion, then, Respondent fails to satisfy its burden to show Pflantzer was an independent contractor. Accordingly, the Board should adopt the ALJ's conclusion that Pflantzer was an employee of Respondent.

Respondent's Exception (b).

Respondent next excepts to 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)".

The ALJ's recommended Order is not inconsistent. It is true the ALJ found that Respondent's conduct was not unlawful until February 11, 2012. This finding was based on Respondent's admission from its position statement. During the investigation counsel for Respondent filed a document with the Region office entitled "Response to Charge of Fred Pflantzer," which reads in part:

> As of February 10, 2012, . . . 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 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).

This speaks for itself. As of February 10, 2012, Pflantzer remained eligible to work for Respondent. However, "as a result" of Pflantzer's February 11, 2012 communication he became "no longer eligible" to work for Respondent. With this document, Respondent provided a timeline of when it discriminated against Pflantzer—after reading his February 11 communication. By ruling Pflantzer ineligible to work for it because of his email or post, Respondent discriminated against him because of his protected concerted activity and thus acted unlawfully. Because Respondent did not discriminate against Pflantzer until Pflantzer wrote the email and post (February 11), Respondent did not act unlawfully until at least February 11. Accordingly, Respondent's exception regarding the ALJ's inconsistency must be disregarded.

Respondent's Exception (c).

In its third exception, Respondent excepts to 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)".

This exception ignores the evidence. In its position statement Respondent admitted that Pflantzer's protected concerted activity, i.e., his February 11 email/post, was the reason for its decision to terminate Pflantzer. Accordingly, this exception must be rejected.

Respondent's Exception (d).

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

This exception misapprehends to some extent the ALJ's conclusion. It is true the ALJ concluded that Pflantzer's email and post were protected concerted activity. This conclusion, however, was based on his finding that February 11 email and post were union-related activity and thus protected concerted activity. (ALJD 6:4-9.) The ALJ thus concluded that a discharge based on this email/post violated § 8(a)(3) of the Act and (presumably) derivatively violated § 8(a)(1) of the Act. (ALJD 7:5-7.)

The GC agrees with the ALJ's finding that the email/post were union-related activity and thus protected concerted activity. The GC also urges, however, that the Board find that the email and post were protected concerted activity independent of any union-related content. In other words, the GC urges that the Board find that Respondent violated Section 8(a)(1) independent of its 8(a)(3) violation. This requested finding is detailed in the GC's cross-exceptions and supporting brief.

Respondent, for its part, argues that Pflantzer did not engage in union-related activity because "[t]he record contains no credible evidence of Pflantzer's unionizing efforts." Respondent misses the point. In his email and post Pflantzer discusses the benefits of unionizing. Respondent admitted in its position statement (and now in its exceptions) that Pflantzer's email or post were a motivating factor in its decision to discharge Pflantzer.

Accordingly, Respondent discriminated against Pflantzer—by making him ineligible to work for it—because of his union-related activity, in this case, his email and post. Respondent also argues, by implication, that this activity was not protected concerted activity regardless of its union-related content. Respondent's view misapprehends Board law.

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 definition, 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. 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. The facebook post was placed on a page designated for tour guides. 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" in *Eastex, Inc*. 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."

Respondent's Exception (e).

Respondent next excepts to the "finding that Pflantzer's communications about NYPS were not libelous (ALJ Decision at 6:24-25)".

Labor speech must be evaluated under the "malice" standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) to determine whether an allegedly defamatory communication loses the protection of the Act. This test requires a determination of whether the statements were made with knowledge of their falsity or with reckless disregard for their truth or falsity. *See, e.g., Cincinnati Suburban Press*, 289 NLRB at 968 (no evidence of malice); *Mitchell Manuals, Inc.*, 280 NLRB 230, 232 (1986) (no evidence that statements were deliberately or maliciously false); *Linn v. Plant Guard Workers*, 383 U.S. 53, 65 (1966); *Letter Carriers (Old Dominion Branch No.* 496) v. *Austin*, 418 U.S. 264, 280-82 (1974).

Reckless disregard of truth or falsity has been defined as having "serious doubts as to the truth" of a statement or having a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also, e.g., Valley Hospital Medical Center*, 351 NLRB at 1253 (explaining that nurse's statements were not maliciously false because statements were based on her own experiences and experiences of coworkers). Under this test, otherwise protected communications with third parties may be so "maliciously untrue [as] to lose the Act's protection." *See, e.g., Emarco, Inc.*, 284 NLRB at 833; *Mountain Shadows Golf Resort*, 330 NLRB at 1240.

Employers bear the burden of proving that employee statements were false and that those false statements were made with knowledge of falsity or reckless disregard of truth or falsity. *See, e.g., MVM, Inc.*, 352 NLRB 1165, 1173 (2008) (employer "has not even succeeded in showing that the allegations in the letter . . . were untrue, much less carried its burden of proving

that those allegations were *maliciously* untrue") (emphasis in original); *See also, e.g., Springfield Library and Museum*, 238 NLRB 1673, 1673 (1979); *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

Respondent appears to take issue with Pflantzer's assertions regarding health insurance and unsafe buses. It writes that "Ron White established that [Respondent] offers health insurance and other benefits and that the company's buses were not unsafe." As an initial matter, Respondent does not cite where in the record Mr. White purportedly established these facts. Accordingly, this assertion should be disregarded.

Respondent also ignores its stipulations at trial. Respondent stipulated that its paychecks had bounced and its buses had failed Department of Transportation inspections. (GC Ex. 3, 4; Tr. 36, 39, 122-124.). It also ignores the fact that Pflantzer received no benefits from Respondent such as health insurance. (Tr. 39-41, 127.) Accordingly, Pflantzer's assertions regarding benefits, paychecks, and buses were either true (if a statement of fact, i.e., paychecks have bounced) or, if a statement of opinion, were protected regardless of their truth. Respondent obviously cannot satisfy its burden to show that Pflantzer's email and post were malicious; thus, the Board should reject this exception.

Respondent's Exception (f).

Respondent excepts to 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)".

The Board should reject this exception for several reasons. First, Respondent mischaracterizes the ALJ's factual findings. Although the ALJ did acknowledge that Pflantzer

had his own business in the same industry as Respondent, the ALJ did not find that Pflantzer infringed on Respondent's goodwill.

Second, Respondent misunderstands its burden. Under the burden-shifting test from *Wright Line*,[1] after the GC satisfies its burden to show that protected activity was a motivating factor in the employer's action, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, 332 NLRB 1363, 1366 (2000), (citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984)). In other words, the question is not, as Respondent seems to believe, whether the employer had a legitimate "motivating consideration" for its action. The question, rather, is whether it can prove it would have taken the same action regardless of the employee's protected conduct.

Respondent failed to prove this at trial. As stated by the ALJ:

> I also reject any contention that Pflantzer's discharge was warranted or motivated by the fact that he operated a competing company. This fact had been known to the Respondent for some time and was not asserted to either Pflantzer or the Board's regional office as a reason for his termination.

(ALJD 6:37-40.)

Respondent in this regard attempts to compare itself to the employer in *ATC/Forsythe & Associates*, 341 NLRB 501 (2004). The employer in *ATC/Forsythe* was a company called ATC Tempe which provided bus service to the city of Tempe, Arizona. The General Counsel in that case contended that an employee engaged in protected activity when he met with city officials

[1] 251 NLRB 1083 (1980).

and, among other things, offered his dissident union group "as an organized alternative to ATC Tempe either as city employees, or as an alternate service provider." *Id*. at 503. This activity came to the attention of the employer, which accused the employee of interfering with its contractual relationship with the city and offered the employee an opportunity to explain his activities. The employee refused to cooperate with the employer's investigation and as a result was fired. The Board held that the employee's activities were not protected because one of the objects of his meeting with city officials—as admitted by the employee—was an intention to take business from his employer. *Id*.

This case is distinguishable from *ATC/Forsythe* and similar cases. First, the protected activity here is unrelated to Pflantzer's business. Pflantzer's messages make no reference to NYSee Tours, the name of Pflantzer's business. He does not say to the tour guides, for example, that given the poor conditions at Respondent, they should consider working for him.

Second, there is no evidence that Pflantzer sought to take business from Respondent. Respondent cites the example of another former tour guide, Luke Miller, who also had his own business and, according to Respondent, was fired for it. It ignores, however, an obvious distinction between Miller and Pflantzer. Respondent presented evidence that Miller solicited Respondent's customers. (Tr. 118.) It did not present evidence showing that Pflantzer did the same thing.

Indeed, Respondent presented no evidence showing that the two businesses even appealed to the same customers. Its assertion that Pflantzer competed with it seems based on an assumption that two businesses in the same industry and in the same geographic area by necessity compete with each other. That may be the case but not always. Consider the restaurant industry. A premium steakhouse in New York City does not compete for the same

customers as a McDonald's in New York City. Considerations of cost, quality, and convenience attract different types of customers. In this case, given the lack of evidence one can only speculate as to what types of customers are drawn to Respondent's business versus Pflantzer's business. For these reasons, the Board should reject this exception.

Respondent's Exception (g).

Respondent next excepts to the ALJ's conclusion "that Pflantzer was terminated for unionizing, when the record contains very little mention of unionizing efforts by Pflantzer".

This exception ignores its admission from its position statement that it fired Pflantzer because of Pflantzer's email/post. (GC Ex. 5 ¶5.) As discussed, these were protected activities because, among other things, they discuss the benefits of unionizing. Given Respondent's admission, its exception is misplaced and the Board should reject it.

Moreover, Respondent ignores a key distinction between Pflantzer's previous union-related activity (of which Respondent admits it was aware[2]) and his activity on February 11, 2012. Pflantzer's previous union-related activity was limited to discussions to employees within the company. (*See* Tr. 69-70.) His February 11 email and post, in contrast, were addressed to employees outside the company. (ALJD 4:4-12.) The fact that Pflantzer took his complaints to persons outside the company appears to have been the straw that broke the camel's back. That is, Respondent was willing to tolerate Pflantzer's previous union activity, apparently because it was limited to discussions with employees inside the company. The evidence shows it was not willing to tolerate Pflantzer taking his concerns outside the company. The Board should thus reject this exception.

[2] (Tr. 92:2-18.)

Respondent's Exception (h).

With its last exception, Respondent excepts to the ALJ's "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)."

Respondent again misapprehends labor law. With its reference to "publicizing a labor dispute" Respondent alludes to the Supreme Court's decision in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953)). As discussed in the GC's post-hearing brief, that case has no bearing here. In *Jefferson Standard*, the Supreme Court upheld an employer's discharge of employees who publicly criticized the quality of the employer's product and business practices without relating their complaints to any labor dispute with the employer. The Court found the employees' conduct amounted to disloyal disparagement of their employer and was therefore outside the Act's protection. *See Mastec Advanced Technologies*, 357 NLRB No. 17 (July 21, 2011) (citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953)).

The facts here fall outside the reach of *Jefferson Standard* for several reasons, two of which follow. First, the messages here were addressed to a discrete group of employees (New York City tour guides), not the public at large, as were the employee messages in *Jefferson Standard*. *See NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

Second, the messages here did not criticize the employer's product or business practices, as did the employee messages in *Jefferson Standard*, which attacked the employer's public policies and had no discernible relation to a labor dispute. *Id*. at 476. Pflantzer's messages instead discussed terms and conditions of employment with Respondent such as employee benefits, paychecks, and the safety of the buses on which the tour guides work. (*See* GC Ex. 3, 4.) They

were thus connected to a "labor dispute," a term which is defined broadly under the Act and "includes any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9). Moreover, these concerns were not imagined. As the ALJ observed, "virtually all of the accusations made by Pflantzer were true . . . It was admitted that there were occasions when the checks issued to employees were not covered by sufficient funds. It was also admitted that the Company had received a number of safety violations." (ALJD 6:25-29.) There existed, accordingly, a "controversy" about terms and conditions of employment and thus a "labor dispute."

Given Respondent's apparently narrow view of the term "labor dispute," the Board should reject its final exception.

IV. CONCLUSION

For all the reasons discussed above, the Board should reject Respondent's exceptions and adopt the ALJ's recommended order in its entirety.

Dated November 14, 2012
at New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 14, 2012, I caused the foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to be served, via electronic mail, addressed as follows:

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Dated this 14th day of November, 2012