

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

**NEW YORK PARTY SHUTTLE, LLC,  
d/b/a ONBOARD TOURS, WASHINGTON DC PARTY  
SHUTTLE, LLC, d/b/a ONBOARD TOURS, ONBOARD  
LAS VEGAS TOURS, LLC, d/b/a ONBOARD TOURS,  
NYC GUIDED TOURS, LLC, and  
PARTY SHUTTLE TOURS, LLC, a Single Employer, and  
NEW YORK PARTY SHUTTLE, LLC, d/b/a ONBOARD  
TOURS and its Alter Ego and/or *Golden State* Successor,  
NYC GUIDED TOURS, LLC**

**and**

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

**FRED PFLANTZER, an Individual**

**COUNSEL FOR THE GENERAL COUNSEL'S LIMITED EXCEPTION  
TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION**

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**COUNSEL FOR THE GENERAL COUNSEL’S LIMITED EXCEPTION  
TO THE ADMINISTRATIVE LAW JUDGE’S SUPPLEMENTAL DECISION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files the following Limited Cross-Exception to the Supplemental Decision of the Administrative Law Judge in this matter, which was issued by Administrative Law Judge Kenneth W. Chu on July 9, 2019:

The Administrative Law Judge’s proposed Order omits as part of the remedy that Respondents must immediately reinstate Fred Pflantzer to his former job or, if that job no longer exists, to a substantially equivalent position.

In support of this cross-exception, Counsel for the General Counsel respectfully submits the following citations to the record and argument:

On May 2, 2013, the Board issued a Decision and Order finding that NYPS<sup>1</sup> violated Section 8(a)(3) and (1) of the Act. (GCX 1(a) (*New York Party Shuttle, LLC*, 359 NLRB 1046 (2013)).)<sup>2</sup> The Board ordered NYPS to offer Pflantzer 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. *Id.*

On February 29, 2016, the Regional Director for Region 2 of the Board issued a Compliance Specification and Notice of Hearing. (GCX 1(d).) On March 31, 2017, the Regional Director issued an Amended Compliance Specification and Notice of Hearing, which alleged that the Respondents constitute a single employer within the meaning of the Act, maintained that

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<sup>1</sup> The named Respondents will be abbreviated herein as follows: New York Party Shuttle, LLC (“NYPS”), “Washington DC Party Shuttle, LLC (“DCPS”), OnBoard Las Vegas Tours, LLC (“OBLV”), Party Shuttle Tours, LLC (“PST”), and NYC Guided Tours, LLC (“NYCGT”).

<sup>2</sup> “ALJD” refers to the Administrative Law Judge’s July 9, 2019 Supplemental Decision. Record references in this brief are to the hearing transcript (“Tr.”), Joint Exhibits (“JX”), the General Counsel’s exhibits (“GCX”), and Respondents’ exhibits (“RX”). “Excs.” and “Br.” refer to Respondents’ Exceptions and Brief in Support of Exceptions, respectively.

Pflantzer is entitled to unconditional reinstatement, and set forth the amount of backpay owed to Pflantzer until he is validly offered reinstatement. (GCX 1(f).) Paragraph 7 alleged that NYPS had improperly conditioned Pflantzer's full reinstatement on his divesting any interest in his own tour business and paragraphs 8(a), 8(c) and 8(d) alleged that Pflantzer's backpay continues to be owed until a valid offer of reinstatement is made. (GCX 1(f).) In their Answer to the amended compliance specification, Respondents denied that Pflantzer is entitled to reinstatement and backpay because of his competing business. (GCX 1(j) (answer), (s) (first amended answer).)

On May 24, 2017, the Regional Director issued a Second Amendment to Compliance Specification, which alleged at Paragraph 26 that the backpay "is continuing to accrue until such time as a valid offer of reinstatement is made. . . . Full compliance with the Board Order will be achieved upon effectuation of the make-whole remedy and the tender of a valid offer of reinstatement to Pflantzer." (GCX 1(k).) It further stated, after paragraph 27, the following: "General Counsel seeks an Order requiring Respondents to immediately reinstate Fred Pflantzer to his former job or, if that job no longer exists, to a substantially equivalent position, and to pay backpay in the amounts set forth above." *Id.*

On June 20, 2017, Counsel for the General Counsel moved for partial summary judgment on paragraphs 7 and 8(a), (c), and (d) of the Amended Compliance Specification, arguing was an issue that the Board resolved adverse to NYPS in the underlying unfair labor practice proceeding. On November 16, 2017, the Board issued a Supplemental Decision and Order granting the Motion for Partial Summary Judgment. *New York Party Shuttle, LLC d/b/a Onboard Tours, Washington D.C. Party Shuttle, LLC*, 365 NLRB No. 147 (2017).

In his Supplemental Decision, the Administrative Law Judge recognizes that Pflantzer has not been made a valid offer of full reinstatement and that he is still entitled to that remedy, as the

date of such an offer will affect the total excess tax on backpay owed by Respondents. (ALJD p. 1-2, 40.) The recommended order, however, does not provide that Respondents must immediately offer Fred Pflantzer full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, in accordance with the Board's decision as enforced by the Fifth Circuit in 2013 (GCX 1(a) and (b)), and the Board's order granting CGC's motion for partial summary judgment (GCX 1(aa)). (See ALJD pp. 40-41.)

Traditionally, the full make-whole remedy in a Section 8(a)(3) discharge case consists of reinstatement with backpay from the time of the unlawful discharge until the employer extends an offer of reinstatement. *NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 603 (4th Cir. 1977); accord *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941). Here, it is undisputed that Pflantzer has not to date been validly offered reinstatement, either by NYPS or any other named Respondent, as evidenced by Respondents' assertion that reinstatement is not warranted. As set forth in the underlying November 16, 2017 Supplemental Decision and Order, the Board has "rejected any contention that Pflantzer was discharged for operating a competing business finding that the Respondent had failed to meet its *Wright Line* burden to show that it would have discharged Pflantzer even in the absence of his union or protected activities." (GCX 1(aa) at p. 3.)

Accordingly, General Counsel respectfully requests that the Board grant this limited cross-exception to the Administrative Law Judge's Supplemental Decision and order Respondents, having been found to be a single employer, and/or NYCGT as an alter ego and *Golden State*<sup>3</sup> successor, to offer Pflantzer full reinstatement to his former job or, if that job no longer exists, to

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<sup>3</sup> *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973).

a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

Dated at New York, NY this 24th day of September, 2019.

Respectfully submitted,

/s/ Nicole Lancia \_\_\_\_\_

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## CERTIFICATE OF SERVICE

The undersigned, an attorney for the General Counsel, hereby certifies that she caused a true and correct copy of the foregoing to be filed electronically with the National Labor Relations Board on September 24, 2019, and served electronically on the same date at the following addresses:

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Dated: September 24, 2019

Sincerely,

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