

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

**NEW YORK PARTY SHUTTLE,
LLC, ET AL.,**

and

FRED PFLANTZER

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Case No. 02-CA-073340

**RESPONDENTS' REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondents file and serve this Reply in Support of Exceptions to the ALJ Decision.

1. Given the procedural posture of this case, Mr. Pflantzer deserves to receive some backpay from NYPS. Nobody disputes that, but the right number is nowhere near what the Administrative Law Judge (“ALJ”) awarded. Similarly, there is no legal or factual basis for holding other companies liable for that backpay.

2. Mr. Pflantzer may have been terminated for improper reasons,¹ but even the ALJ conceded that Pflantzer committed multiple counts of tax fraud, made multiple false statements under oath in the hearing, and misrepresented the facts to the NLRB’s Compliance Officer. He does not deserve protection, and certainly does not deserve to be trusted by the Compliance Officer, the ALJ, or this Board. Even putting his false sworn statements and speculation aside, Pflantzer admitted under oath that his tips were a wash² and that he never earned the moonlighting money he told Ms. Kurtzleben he earned in 2011.³ The Board does not have the benefit of hearing Ms. Kurtzleben’s opinion of how to adjust her numbers based on Mr. Pflantzer’s sworn testimony

¹ NYPS maintains that Mr. Pflantzer was not terminated. It maintains that it certainly did not terminate him for improper reasons. However, except for its *Noel Canning* challenge, it acknowledges that the Board Order finding wrongful termination governs this proceeding.

² Tr. p. 1634, line 13, through p. 1635, line 23. This testimony means that tips should be excluded from an award altogether. This makes sense, given that the first several backpay calculations excluded tips from the suggested award. *See, e.g.*, R. Ex. 17.

³ Tr. at 1448-1449; *see also* Respondents’ Exhibit 15 (showing no income for NY See Tours in 2011).

and his actual tax returns, because the General Counsel and ALJ did not see fit to allow Respondents to recall her after she relied on information shown conclusively to be false. Instead, Counsel for the General Counsel (“GC”) is asking the Board to give Mr. Pflantzer a windfall of money he never would have earned at NYPS (or otherwise). Respondents file this Reply to the General Counsel’s Answering Brief. For most of the Exceptions, Respondents stand on their Brief.

There is No Jurisdiction Over the Non-NYPS Respondents.

3. In the Response, the GC does not point to any evidence that Respondents had any sales. The GC argues that the sales of single employers are combined to determine jurisdiction, but there is no evidence that any of the companies had any sales, where or when those sales took place, and whether they exceed \$500,000 either individually or collectively. There is also no evidence that any of the companies purchased or sold more than \$5,000.00 outside their home state. The only citation is to a draft exhibit that mentions an estimate of future sales and includes entities that are not parties. (Tr. at 399-403). There is no authority for the proposition that loans between companies can be a basis for jurisdiction, and the GC has never argued such. The non-NYPS Respondents should be dismissed on this basis, and the ALJ’s recommendations regarding *alter ego*, successor liability, and single employer liability are therefore moot and need not be decided by the Board.

Moonlighting Should Not Have Been Deducted From Interim Earnings.

4. This is the most important issue in the Backpay award. There is no basis for a moonlighting offset for interim earnings. The GC’s only argument is that “Pflantzer told Kurtzleben that he was making \$335 a week in moonlighting while working at NYPS.” That would be enough to support moonlighting, if that was the only evidence. But it wasn’t. Pflantzer testified under oath that he did not make *anything* in 2011. Tr. at 1448-1449. His tax return (signed

under oath) said he didn't make *anything* in 2011. Respondents' Exhibit 15 (2011 tax return). The evidence conclusively showed he did not make that amount in *any* other year. The \$335 per week, or \$17,420 per year, must be deducted from Kurtzleben's calculation.⁴ The Board should find a backpay amount as indicated at the bottom of Respondents' Exhibit 13, plus interest and additional tax liability if the Board rejects the Exceptions related to those issues.

Tips Should Be Excluded.

5. Respondents briefed the issue of tips extensively in its original Brief. The GC's responses ignore the most salient fact—Pflantzer admitted that his tips were “a wash,” meaning that the tips he earned from his interim earnings were equal to what he would have earned at NYPS. Based on that sworn testimony (and not what he told Ms. Kurtzleben in an informal interview), the Board should reject the ALJ's inclusion of tips. The notion that both sides' tips number is “equally uncorroborated” and therefore the discriminatee's made up number prevails is preposterous. If that were the legal standard, there would never be a need for a hearing on backpay because a discriminatee could make up whatever numbers she wanted. The evidence is that tips were a wash and should not be included. Any other decision is an unjust windfall for Mr. Pflantzer and rewards him for lying to the Compliance Officer.

Comparator Employee Edwin Jorge Worked 45% More Hours than Pflantzer.

6. The GC chose to use the comparator employee method and chose Edwin Jorge as the comparator employee. The Casehandling Manual requires that the comparator's work, earnings, and other conditions of employment be comparable to Mr. Pflantzers. They were not.

⁴ It is not surprising that the latest version of the backpay calculation is inaccurate. It is at least the sixth iteration that was presented in this case, and each one shows different amounts for backpay in 2012-2014, despite the fact that nothing changed in those years. *Compare* R. Ex. 11 (final version), *with* R. Ex. 17 (lower gross backpay, lower interim earnings), *with* R. Ex. 18 (different tips calculation), *with* R. Ex. 19 (much higher gross backpay, much higher interim earnings).

They chose this method because it maximized backpay, not because it was the right choice – or even a reasonable choice. By her own admission, the Compliance Officer chose Jorge, not because he was a reasonable comparator, but because he was the least unreasonable comparator. Tr. at pp. 138-139 (stating Jorge was chosen because he was the only tour guide who worked at NYPS during the entire backpay period). If the comparator method is to be used, and there is no “true” comparator so the compliance officer has to choose the closest one, then the officer must adjust the comparator’s hours to reflect the difference between the two. It is unfair to Respondents and creates an unjust windfall for Pflantzer for the GC to ask Respondents to compensate Pflantzer for the hours worked by a guide that worked 45% more hours than Pflantzer.

7. The GC suggests that Respondents failed to propose an alternative method “let alone a better one.” Respondents disagree. Respondents proposed an adjusted comparator method that adjusts Jorge’s hours to reflect the difference between his hours and Pflantzers. That method is more accurate and more fair, given the empirical evidence of the difference in the guides’ hours.

Pflantzer’s Reinstatement in 2014 was Proper and Terminated the Backpay Obligation.

8. The GC suggests that the Summary Judgment Order determined that Pflantzer’s reinstatement was improper.⁵ Not true. The GC has not ever introduced any evidence to support the notion that Pflantzer was terminated improperly by NYCGT in 2014. The only evidence on this issue in the summary judgment proceedings was in the Schmidt Declaration. That issue was not tried in the compliance specification hearing. Technically, the ALJ did not find that he was terminated improperly.⁶

⁵ NYPS concedes that the issue of why Pflantzer was terminated in 2012 cannot be relitigated. However, NYCGT is entitled to contend, and did contend, and did introduce uncontradicted evidence, that Pflantzer was warned that if he was rehired he could not continue competing with NYCGT because it had a policy precluding tour guides from competing with the business. Mr. Pflantzer refused to close down his business, and he was terminated as a result.

⁶ Respondents will address this issue at greater length in its Answer to the GC’s Cross Exception.

9. When the Board granted Summary Judgment in this case, it did so on the basis that Respondents are not entitled to relitigate issues previously decided. As it relates to Pflantzer's competing business, the Board's ruling was that Respondents could not relitigate whether Mr. Pflantzer was terminated in February 2012 because of his competing business. However, whether Mr. Pflantzer's supervisor in 2011-2012 (witness Ron White) terminated him because of his competing business is irrelevant to whether his supervisor in 2014 (Fred Moskowitz) terminated him for operating a competing business.

10. Evidence at the hearing confirmed (as did Schmidt's Declaration filed in response to the Motion for Summary Judgment) that NYPS had a policy of terminating tour guides who operated competing businesses (Tr. at 487-88, 759, 767, 1040-42). Mr. Moskowitz was the manager at the time Mr. Pflantzer was reinstated, warned, and terminated. (Tr. at 1040-42 (Moskowitz testimony)). There was no evidence that his termination in 2014 was wrongful. The ALJ did not make a finding that he was wrongfully terminated in 2014. For purposes of computing backpay, the GC and the ALJ just assumed, without litigating, that NYPS would not have terminated Pflantzer for operating a competing company in "the year of the Groupon" when NY See Tours began selling more tours in competition with NYPS, or thereafter. The ALJ ignored the conclusive evidence that, by 2014, NYPS had a policy of terminating tour guides who operated competing businesses. (Tr. at 487-88, 759, 767, 1040-42). The fact that a previous ALJ found that Pflantzer was not terminated for operating a competing business in 2012 has no relevance to whether he was terminated for that legitimate reason in 2014, after the first ALJ hearing took place. Holding that Mr. Pflantzer could never be terminated for directly competing with his employer's business would not advance the purposes of the Act and would create bizarre circumstances in the workplace. What if he had stolen a little bit of money in 2012 but stole a greater amount in 2014?

What if he had sexually abused one employee in 2012 but abused three in 2014? Here, his business was much larger in 2014 (as evidenced by his tax returns, which showed zero income in 2011 while he was employed at NYPS and tens of thousands of dollars from 2012 to 2015).

11. Mr. Pflantzer was given a written warning after his reinstatement that if he did not cease competing with NYPS that he would be terminated. He elected to continue competing with the company and was terminated for that reason. The evidence at the hearing was that *but for his competition* he would have continued working at NYPS until its closure.

The Single Employer and *Alter Ego* Recommendations are Without Merit.

12. The GC in its answering brief pointed to a handful of facts that support the various elements of the single employer and *alter ego* doctrines. The fact that Tom Schmidt is the CEO of multiple companies does not mean the companies have “common management.” Other than that one person, every other management employee at each Respondent company was different and many of them testified they never had a management role other Respondent companies. The overwhelming evidence was that Tom Schmidt’s role was primarily related to legal issues (insurance and liability, employee misconduct, bus leases and inter-company loans, verification of company policies and procedures, and similar items). As an officer of the companies, he occasionally played a role in hiring the Managing Directors for the various Respondents and City Info Expert and other companies. But local control and “day to day operations” were handled by the Managing Director, Vice President, or President of the individual companies. The fact that one person is the CEO of multiple companies does not make those companies alter egos or single employers. If Vincent Ford, Fred Moskowitz or Ron White had authority to manage DCPS, and if Tyree Cook or Larry Lockhart had authority to make decisions for NYPS or OBLV, or PST, or NYCGT, the ALJ recommendation might be justified, but that is not the case. Rather, multiple

witnesses testified that each company managed its own affairs. Ownership among the companies was similar at certain times, but it was never common or identical. There was no evidence that the ownership of any to entities was ever identical. The evidence recounted in Respondent's Brief established conclusively that the various Respondents had separate operations and separate control of labor relations. None of that evidence was refuted. Instead, the GC pointed out that the companies used outside consulting companies like Galago Investments to manage their bookkeeping and sales and that they shared a logo. There is no authority that either of those things is a factor in a vicarious liability analysis. The ALJ's recommendations regarding *alter ego* and the single employer doctrine should be rejected by the Board.

NYCGT Cannot Be a *Golden State* Successor.

13. The GC did not address the fact that, to be a *Golden State* successor, the Respondent must have acquired the offending company (or at least all of its assets). There was no evidence that happened here. Under Exceptions Nos. 37-39, Respondents briefed this issue. The ALJ has mis-cited *Lebanite* for the proposition that no acquisition is necessary, but that opinion found no successor liability, and the proposed successor had acquired all the assets of the predecessor. There is no authority to contrary.

The non-NYPS Respondents are Not Liable Because of the *Noel Canning* Decision.

14. NYPS disagrees with the Board's and ALJ's findings that it cannot assert that the underlying Order was *ultra vires*. It asks the Board to reverse that decision to avoid an injustice here. NYPS should have the opportunity to brief and argue the underlying ALJ decision to this Board, which is properly appointed.

15. More importantly, the other Respondents were not parties to that hearing, case, or appeal. Thus, they have never had the opportunity to contest the validity of the underlying Order.

Respondents briefed this issue in Exceptions 4 and 5. As applied to the non-NYPS Respondents, the Order is invalid, even if the Board rules that it is effective against NYPS. The GC's only argument against this point is to say that the non-NYPS Respondents never asked the Fifth Circuit to vacate its opinion. However, they were not parties to that appeal, and did not have a reason to challenge the Order until the GC sought to hold them liable for a backpay award in this matter. The GC cites *Calvert* for the notion that Respondents are precluded by the Fifth Circuit decision, but *Calvert* holds no preclusion because the Board did not meet its burden, just as it has not done so here. The non-NYPS Respondents should have had the chance to contest the Order before the ALJ, but they certainly can contest it before the Board now. The Order was void as applied against the non-NYPS Respondents, and the Board should dismiss them from this proceeding.

16. The GC also argues that the *Noel Canning* issue is not jurisdictional and can be waived, citing *RELCO Locomotives*. Even if that were true, it is not true for the non-NYPS Respondents because they never waived the argument. But it is not accurate. The *RELCO Locomotives* Court decided the case before the United States Supreme Court issued its opinion in the case, and the *RELCO* Court noted that the DC Circuit found Noel Canning's argument to be an "extraordinary circumstance" that could be raised on appeal. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 791 (8th Cir. 2013). Of course, that holding was affirmed by the Supreme Court. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Subsequently, other circuits have found the DC Circuit's reasoning in *Noel Canning* more persuasive. *See, e.g., Advanced Disposal Services East, Inc., v. NLRB*, 820 F.3d 592 (3rd Cir. 2016) (citing cases).

Respondents Should Have Been Allowed to Recall the Compliance Officer.

17. The Compliance Officer, Ms. Kurtzleben, created her backpay calculation entirely based on Mr. Pflantzer's unsworn comments to her. She never looked at his bank statements,

which she had been given, and she never looked at his sworn tax return. Prior to the hearing, Mr. Pflantzer privately told her that he earned \$35 per tour in tips at NYPS and that he only kept \$5 when he worked at other companies. After the backpay calculation was finalized and after Ms. Kurtzleben testified for the GC, Pflantzer swore under oath that his tips were a “wash.” Respondents were not allowed to recall her to confront her with this contradiction. Similarly, Pflantzer told her that he made \$335 per week moonlighting in 2011 while working for NYPS. Without verifying it in any way, she reduced his interim earnings throughout the entire backpay period by that amount. After she testified, Pflantzer admitted he did not do any moonlighting tours in 2011 (which means he did none while working for NYPS), that he never made \$17,420 of net profit in any year since 2012, and that his 2011 tax return confirms he conducted no tours for NY See Tours in 2011. Respondents were denied the right to cross examine Ms. Kurtzleben based on these admissions. Therefore, the Board should accept Respondents’ alternate calculation of Backpay and exclude tips and moonlighting from the calculation.⁷

CONCLUSION

The Board should reject the GC’s flawed backpay calculation and accept Respondents’ unrefuted contrary model, set forth in Respondents’ Exhibit 13, or, in the alternative Respondent’s Exhibit 14. There is no jurisdiction over the non-NYPS Respondents, so they should be dismissed. The recommendations on *alter ego*, *Golden State* successor, and single employer liability are contrary to the evidence and the law. Respondents disproved every element of each theory. The Board should reject the ALJ’s recommendations.

⁷ Respondents provided the ALJ with an electronic copy of their backpay calculation that allows assumptions to be changed to calculate differing amounts. Respondents would be happy to provide an electronic copy of the exhibit to the Board upon request.

October 8, 2019

Respectfully submitted,

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DECLARATION OF SERVICE

I certify and declare, under penalty of perjury, that a true and correct copy of the foregoing document was served on the National Labor Relations Board through its Regional Director on the 8th day of October, 2019, in the manner indicated below.

John J. Walsh, Jr., Regional Director

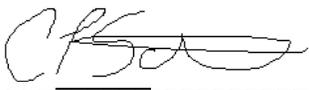
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