New York Party Shuttle, LLC *and* Fred Pflantzer. Case 02–CA–073340

May 2, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On September 19, 2012, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply to the Acting General Counsel's answering brief. The Acting General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order, as modified.[1]

We affirm the judge's finding that the Respondent discharged Charging Party Fred Pflantzer[2] in violation of Section 8(a)(3) and (1) of the Act when it failed to give him any tour guide assignments after he publicized his union organizational activities and criticized the Respondent's employment practices in similar email and Facebook postings to third parties on February 11, 2012.[3] In particular, we affirm the judge's finding that those communications constituted union activity, even if directed to tour guides of other New York City companies. The February 11 communications were an obvious continuation of Pflantzer's prior organizational activity, activity which was known to the Respondent. Although not mentioned by the judge, this prior activity included a January 21 email that Pflantzer sent to the Respondent's tour guides as well as other guides in the area. This email, similar in content to the February 11 messages, detailed a number of concerns about existing terms and conditions of employment (including bounced paychecks), proceeded to list the benefits of unionization, and referenced approaching the National Labor Relations Board. Pflantzer sent another email on February 2 informing his contacts of their right to be represented by a union, and pasted what appears to be the Board's website summary of "Employer/Union Rights and Obligations" into the text of his message.[4] The judge correctly stated that in response to the unfair labor practice charge and again at the hearing before the judge, the Respondent essentially stated that, notwithstanding other alleged job performance issues, its decision to no longer give Pflantzer tour guide assignments would not have been made but for his February 11 union activity.[5]

In a single-motive case where there is no dispute as to the activity for which discipline was imposed, the dual-motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is not applicable.[6] Thus, the Respondent's sole relevant defense is the claim that Pflantzer's February 11 union activity was unprotected

[1] In accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to compensate discriminatee Fred Pflantzer for the adverse tax consequences, if any, of receiving a lump-sum backpay award. Further, we shall order the Respondent to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

[2] We affirm the judge's finding that the Respondent failed to meet its burden of proving that Pflantzer was an independent contractor, rather than its employee, within the meaning of Sec. 2(3) of the Act. We note that the judge characterized the longstanding common law agency test of independent contractor status as a "right-to-control" test. However, the Board has repeatedly stated that an employer's right to control the manner and means of performing a job is but one of a number of factors to be considered under the common law test, "with no one factor being decisive." *Lancaster Symphony Orchestra*, 357 NLRB No. 152, slip op. at 3 (2011), citing *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). Despite the judge's characterization of the test, he correctly applied it by reviewing and weighing all relevant factors to reach the conclusion that Pflantzer was a statutory employee.

[3] All subsequent dates are in 2012. In accord with the Acting General Counsel's cross-exceptions, we correct the judge's erroneous dating of Pflantzer's email and Facebook entry as sent/posted on February 10, 2012, rather than on February 11. This error does not affect our disposition of any issue in this case.

[4] Pflantzer sent a copy of that email to Tom Schmidt, the Respondent's CEO.

[5] The judge's recitation in his decision of the relevant response to the unfair labor practice charge was incomplete. 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 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 did not work for the Company on February 11, 2012. It was in no way related to any protected activity.

[6] See, e.g., *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, slip op. at 2 fn. 8 (2012).

because his communications on that date contained impermissibly disparaging and libelous statements about the Respondent. For the reasons stated by the judge, we find no merit in this defense.[7] Accordingly, Pflantzer's union activity on February 11 was protected, and the Respondent's discharge of him violated Section 8(a)(3) and (1) of the Act.

Moreover, to the extent that the Respondent's exceptions may be construed as preserving a dual-motive defense, a violation must still be found under a *Wright Line* analysis. Under that analysis, once the Acting General Counsel has carried his initial burden of showing unlawful motivation, the burden shifts to the Respondent to establish that it would have discharged Pflantzer even in the absence of his union or protected activities. The Respondent's admission that Pflantzer's union activity was a motivating factor in his discharge satisfies the Acting General Counsel's initial *Wright Line* burden, and we agree with the judge that the Respondent failed to meet its *Wright Line* rebuttal burden.

Based on the foregoing, we find that the Respondent unlawfully discharged Pflantzer because of his union activity.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, New York Party Shuttle, LLC, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging employees because of their union activity or to discourage employees from engaging in union or protected concerted activity."

2. Insert the following after paragraph 2(b) and renumber subsequent paragraphs accordingly.

"(c) Reimburse Fred Pflantzer an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

"(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Fred Pflantzer it will be allocated to the appropriate periods."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 2, 2013

Mark Gaston Pearce, Chairman
Richard F. Griffin, Jr., Member
Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because of their union activity or to discourage employees from engaging in union or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Fred 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.

WE WILL make Fred Pflantzer whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

[7] We note that the judge's analysis included a finding that Pflantzer's statements were not unprotected under *Atlantic Steel Co.*, 245 NLRB 814 (1979). The *Atlantic Steel* analysis "typically applies when determining whether activity that is initially protected has been rendered unprotected by subsequent misconduct. . . . Here, however, where the Respondent contends that the [email and] Facebook postings were unprotected from the outset, an *Atlantic Steel* analysis is unnecessary." *Hispanics United*, supra, slip op. at 3 fn. 12 (citing *Crowne Plaza La-Guardia*, 357 NLRB No. 95 (2011)).

[8] Thus, we find it unnecessary to rely on the judge's additional finding that the Respondent believed that Pflantzer, if he resumed working in 2012, would try to convince the other employees to unionize. Inasmuch as we affirm the judge's finding that the Respondent's discharge of Pflantzer for his union activity violated Sec. 8(a)(3), and Sec. (1) derivatively, we find it unnecessary to pass on the Acting General Counsel's cross-exception to the judge's failure to find that the discharge independently violated Sec. 8(a)(1).

WE WILL reimburse Fred Pflantzer an amount equal to the difference in taxes owed on receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Fred Pflantzer, it will be allocated to the appropriate periods.

WE WILL remove from our files any reference to the unlawful discharge of Fred Pflantzer, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the discharge against him in any way.

NEW YORK PARTY SHUTTLE, LLC

Alejandro Ortiz, Esq. and *Ruth Weinreb, Esq.,* for the Acting General Counsel.
C. Thomas Schmidt, Esq., for the Respondent.

DECISION

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York, on August 7, 2012. The charge and the amended charge were filed on January 27 and March 16, 2012. The complaint that was issued on May 30, 2012, alleged as follows:

That on or about February 11, 2012, the Respondent discharged Pflantzer because he engaged in union and concerted protected activity by (a) using electronic mail to discuss with employees of other employers in New York about terms and conditions of employment and (b) communicated by way of social media with employees of the Respondent and employees of other employers about terms and conditions of employment.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Employer is engaged in commerce as defined in Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Employer operates an enterprise under the name of On Board Tours that provides a variety of guided tours in New York City. The Company's CEO and general counsel is C. Thomas Schmidt and the person who directly supervises the New York operation is Donald White. It is stipulated that both individuals are supervisors and agents within the meaning of the Act.

A. The Status of Pflantzer

The Charging Party, Fred Pflantzer, started to work for the Respondent as a tour guide in October 2011. The Respondent contends that Pflantzer was an independent contractor and not an employee. I do not agree and conclude that he is an employee within the meaning of Section 2(3) of the Act.

The Respondent either owns or leases tour buses which it is responsible for maintaining. It utilizes a group of about 17 to 18 tour guides on a regular basis and another group of about 8 or 9 bus drivers. The record shows that Pflantzer, and presumably all of the other tour guides, are paid on an hourly basis, and that he received company checks from which were deducted social security taxes and Federal and State income taxes. For tax purposes, tour guides are given W2 statements for filing with the IRS and the New York State Finance Department. Additionally, the Company makes payments into the New York State unemployment insurance fund so that these individuals can be entitled to unemployment insurance in the event of layoffs. All employees, including tour guides, are eligible for a company provided health insurance policy.

The tour guides typically notify White on each Thursday about their availability for the following week. White typically responds on Saturday or Sunday, giving each tour guide and driver their weekly schedule.[1] In doing so, he decides what routes they are to cover and how to pair up the drivers and guides so as to make a harmonious team. The Company provides a variety of different tours and the routes for each one is determined by management. That is, once a tour route has been set, neither the driver not the guide has the option to vary it. However, each guide has his or her own talking points which is not directed or controlled by the Company.

Schmidt agrees that it is very rare for there to be a written contract between the Company and a tour guide and that there was no such contract with Pflantzer. Once Pflantzer has notified the Company of his availability for a given week, he works exclusively for the Respondent on the schedule that he receives. I do note, however, that Pflantzer has his own tour guide company, which he operates out of his home and has notified White that he is often not available on weekends when he operates his own business.[2]

The test of whether an individual is an independent contractor or an employee is the common law of agency right-to-control test. *NLRB v United Insurance Co*., 390 U.S. 254, 256 (1968). Pursuant to that test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved but also the means to be used to achieve those ends. On the other hand, where the control is reserved only as to the result, an independent contractor relationship exists. *Gold Medal Baking Co.,* 199 NLRB 895 (1972). See also *Standard Oil Co*., 230 NLRB 967, 968 (1987).

In *BKN, Inc*., 333 NLRB 143 (2001), the Board listed a number of factors to be taken into account. These include: (a) The extent of control that the employing entity exercises over the details of work; (b) Whether or not the one employed is

[1] The initial schedules will depend on the amount of customers who sign up for tours for the upcoming week. To ensure coverage, White will also assign a few guides and drivers to on call status, as it is not unusual for new customers to be acquired during the week.

[2] Tour guides are licensed by New York's Department of Consumer Affairs and once having obtained a license can work as a guide for any company providing such services or independently on his or her own behalf.

engaged in a distinct occupation or business; (c) The kind of occupation, including whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) The skill required in the particular occupation; (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) The length of time for which the person is employed; (g) The method of payment, whether by the time or by the job; (h) Whether or not the work is part of the regular business of the employer; (i) Whether the parties believe they are creating the relation of master and servant; and (j) Whether the principal is or is not in business. (Restatement of the Law (Second) of Agency § 220, pp. 485–486.) See also *NLRB v. United Insurance Co.*, 390 U.S. 254; *Community for Creative Non-Violence v. Reid*, 490 U.S. 730.

In my opinion, the parties understood their arrangement to be that of employer/employee. There was no written contract or other documents describing their relationship as anything other than that of employer and employee. This is confirmed by the fact that Pflantzer was issued a W2 statement for tax purposes and had Federal, State, and Social security taxes deducted from his earning. Additionally, he worked on a regular basis for the Company on tours that were set by the company's management and with work partners who were determined by management. It is true that he had discretion in determining how he would address the customers, but his discretion was constrained by the fact that the tour route (and therefore the things to be pointed out), were established by the Company and could not be deviated from either by him or the driver. The bus, obviously being the main tool of the trade, is provided by the Respondent, whereas the skill of communicating to tourists is the principle asset brought by a tour guide.

There are some aspects of this relationship which could favor either proposition, but on balance, it is my opinion, that the evidence supports the conclusion that Pflantzer had an employment relationship with the Respondent and was not an independent contractor.

B. The Discharge

At some point during his employment, Pflantzer started communicating to other employees of the Company about the idea of getting a union. This was somewhat generalized and neither he, nor anyone else, actually took the step of contacting a union. Nevertheless, the Company's management was aware of this and they claim that this talk started in or around November 2011. Pflantzer's recollection is that he talked to about six or seven other employees regarding unionization in or around December 2011 or January 2012. In describing complaints that some of the drivers had about Pflantzer, White testified that some told him that Pflantzer was bothering them about getting a union.

The month of December is generally a very busy month as there are many tourists in the city at that time. However, the evidence shows that after January 1, the Company's business typically declines rather drastically and that it runs substantially fewer tours. According to White, business begins to pick up in late February and returns to a normal level in or around March. He also testified that in February he generally starts to reach out to drivers and tour guides who haven't worked for a while and to start interviewing new prospective people to do these jobs.

In January 2012, the Company's schedule of tours dropped and Pflantzer and several other tour guides were simply not scheduled to work. As the complaint alleges that Pflantzer was not discharged until February 11, 2012, it is conceded by the General Counsel that the failure to schedule him for work during all of January and half of February was not unlawful.

On February 11, 2012, Pflantzer sent an email to employees of another company called City Sights from which he had resigned before starting to work at New York Party Shuttle. This email was *not* sent to any employees of the Respondent.

On the same date, he posted a message on a Facebook site called NYC Tour Guides, which according to Pflantzer, is a closed site, accessible only to New York City tour guides who have been invited to join this site. He testified that he did not know if any employees of the Respondent were members of or had access to this web site and there was no other evidence to show if this was the case.

The email stated in pertinent part:

> As you probably know, I am no longer at CitySights. I resigned, said goodbye and went over to OnBoard Tours in October, thinking the grass and tips would be greener. Well as often the case, I found it to be untrue.
>
> Believe it or not CitySights is a worker's paradise compared to OnBoard! At OnBoard you will receive no health insurance, sick days, vacation days or one single benefit. You will ride around on unsafe buses, without the benefit of a PA system, or sometimes even a seat.
>
> There is no union to protect you; you are subject to arbitrary disciplinary actions and out-right dismissal without recourse. If the company were to be sold, which is what I believe will happen there is no successor clause to protect your jobs.
>
> And perhaps most egregious of all of the flaws, PAYCHECKS BOUNCE, yes that's right, they bounce.
>
> Needless to say, I started to agitate for a union. Guess what happened, I stopped being called for work. I disappeared off the work sheet, not fired outright, but in effect kicked to the curb.
>
> My hat is off to USWU 1212 for the excellent work they have done preserving your jobs.
>
> As you all well know, we have a right to organize in this country, a right protected by the US Government.
>
> I am currently at the NLRB bringing charges against this dysfunctional company.
>
> So before you jump ship, talk to me, I'll be glad to fill you in on all the gory details.

The Facebook posting, that incorporates much of the previously described email, states as follows:

> I was recently placed on the Do Not Call List at OnBoard Tours. Prior to that I worked at CitySights, we have all heard the horror stories about CS and for the most part they are true.
>
> But believe it or not, CitySights is a worker's paradise com-

> pared to OnBoard! At OnBoard you will receive no health insurance, sick days, vacation days or one single benefit. You will ride around on unsafe buses, without the benefit of a PA system, or sometimes even a seat.
>
> There is no union to protect you; you are subject to arbitrary disciplinary actions and out-right dismissal without recourse. If the company were to be sold, which is what I believe will happen there is no successor clause to protect your jobs.
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> And perhaps most egregious of all of the flaws, PAYCHECKS BOUNCE, yes that's right, they bounce.
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> Needless to say, I started to agitate for a union. Guess what happened, I stopped being called for work. I disappeared off the work sheet, not fired outright, but in effect kicked to the curb.
>
> My hat is off to USWU 1212 for the excellent work they have done preserving your jobs.
>
> As you all well know, we have a right to organize in this country, a right protected by the US Government.
>
> I am currently at the NLRB bringing charges against this dysfunctional company.
>
> Do not under any circumstances seek employment at this company, they should be boycotted by all.

In a response to the unfair labor practice charge Schmidt, gave a statement to the Regional Office in which he stated:

> 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.[3] 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.

Moreover, at the hearing, the Respondent reiterated its position that the decision made in February not to utilize Pflantzer anymore would not have been made but for the February 2012 communications made by him.

Analysis

In my opinion, Pflantzer's February 10 email (and his follow up Facebook entry), constitute communications that are protected by Section 7 of the Act. In those communications, Pflantzer stated that he had made some efforts to get a union; that the employees of the Company needed a union; and that the law protected employees in their right to organize a union. This is, in effect, union related activity. *C.S. Telecom*, *Inc*., 336 NLRB 1193 fn. 3 (2001), and *Acme Bus Corp*., 320 NLRB 458, 479 (1995).[4]

The evidence shows to my satisfaction that the Company, based on the February 10 communications, believed that Pflantzer, if he resumed working in 2012, would make efforts to convince the other employees to unionize. Thus, while asserting as a defense that other employees had complained about being bothered by Pflantzer, White described this as meaning that these employees had been talked to by Pflantzer about unionization. I therefore conclude that the reason that the Company decided to not utilize Pflantzer as a tour guide after February 2012 was because it believed that if he returned to work, he would engage in union activity. As such, it is my opinion that this would violate Section 8(a)(1) and (3) of the Act. *Approved Electric Corp*. 356 NLRB No. 45 (2010).

The Respondent asserts that Pflantzer's February 10 communications are libelous and are therefore not protected by the Act. I do not agree.

Pflantzer's communications were indeed rather harsh about the Company as to its dealings with employees. But that does not make them libelous. In fact, virtually all of the accusations made by Pflantzer were true and therefore cannot be deemed to be libel. 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. The statements regarding the employee benefits were substantially correct and even if slightly off, would not constitute the type of statements that would lose the protection of the act either under *Atlantic Steel Co*., 245 NLRB 814 (1979), or *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953). (The latter case holding that disparaging statements about working conditions are protected but that statements that disparage the employer or its products may not be protected.) See also *Montauk Bus Co.*, 324 NLRB 1128, 1138 (1997), and *Darphin USA, Inc*., 326 NLRB 1153, 1156 (1998).

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. Indeed, the testimony by Respondent's witness was that had it not been for his February communications Pflantzer would have been retained.

For all of the foregoing reasons, I conclude that the Respondent discharged Pflantzer because of his union related activity and/or the Respondent's belief that he would have engaged in

[3] As noted above, White testified that some of the drivers complained to him that Pflantzer was bothering them about organizing a union.

[4] In *Acme Bus Corp*., the Board held that even though an employee may be acting alone, a worker attempting to form, join, or assist a union is nevertheless protected by Sec. 7 of the Act, and an employee's action in publicizing her labor dispute is within the scope of activities protected by that section. *Carpenters Local 925*, 279 NLRB 1051, 1059 fn. 40 (1986); *Cincinnati Suburban Press*, 289 NLRB 966, 967 (1988).

union activity if was reemployed. Pursuant to *Wright Line*, 251 NLRB 1083 (1980), the Respondent has not met its burden of showing that it would have discharged Pflantzer for reasons other than his union activity.

CONCLUSIONS OF LAW

1. By discharging Fred Pflantzer because of his union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

2. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, New York Party Shuttle, LLC, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their activities on behalf of or support for union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Fred Pflantzer full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Fred Pflantzer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Fred Pflantzer and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its New York facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 10, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 19, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their union activity or to discourage employees from engaging in union or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL make whole Fred Pflantzer for the loss of earnings he suffered as a result of the discrimination against him.

WE WILL reinstate Fred Pflantzer to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful discharge of Fred Pflantzer and notify him, in writing, that this has been done and that these actions will not be used against him in any way.

NEW YORK PARTY SHUTTLE, LLC