

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

ASHFORD TRS NICKEL, LLC

and

CASE NO. 19-CA-32761

UNITE-HERE, LOCAL 878

**ANSWER**

COMES NOW, Ashford TRS Nickel, LLC, the Respondent named hereinabove, and hereby sets forth its Answer to the enumerated allegations set forth in the Complaint, and shows as follows:

1(a). Admitted.

1(b). Admitted.

2. Admitted in part and denied in part; Respondent is an operating lessee of the Sheraton Anchorage Hotel, not a “non-retail lessor.”

3(a) Admitted in part and denied in part; Respondent has never derived revenue from Remington Lodging & Hospitality, LLC, , and the hotel is not a “d/b/a” of this entity.

3(b). Admitted in part and denied in part; Remington Lodging & Hospitality, LLC has never been “engaged in the business of operating hotels.” That entity did employ the employees, and in that capacity alone managed the hotel.

3(c). Denied.

3(d). Admitted in part and denied in part; Remington Anchorage Employers, LLC assumed the management agreement on or about January 1, 2011 and, like its predecessor, has employed the employees and in that capacity alone has managed the hotel. However, that entity has never “operate[d]” that hotel, and similarly the hotel was never a “d/b/a” of Remington Lodging & Hospitality, LLC.

3(e). Denied.

3(f). Remington Anchorage Employers, LLC has continued as the employing entity and is a successor, to that extent alone, to Remington Lodging & Hospitality, LLC. All other allegations and inferences in this sub-paragraph are denied.

3(g). Admitted in part and denied in part; Respondent has never derived revenue from Remington Anchorage Employers, LLC, and the hotel is not a “d/b/a” of this entity.

3(h). Denied.

4. Admitted.

5. Mr. Kimichik is an officer of Respondent. All other allegations and inferences are denied.

5(b). The allegation of paragraph 5(b) is unintelligible, and is therefore denied.

6. While Respondent admits the Union began a campaign to encourage the public to boycott the Sheraton Anchorage Hotel, the Union went beyond protected boycott activity, and engaged in tortious interference with the relationships between the Hotel and its guests and customers, and engaged in defamation of the business of the Hotel.

7(a). Admitted.

7(b). Denied.

8. Denied.

9. Denied.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense**

Respondent is not an employer within the meaning of the Act. Remington Anchorage Employers, LLC is the successor employer to Remington Hospitality & Lodging, LLC, both of which – during their respective terms as manager of the hotel – employed the employees, and set, established and maintained all employment policies and practices (subject to its duty to bargain with the Union).

Respondent is an affiliate of Ashford Hospitality Trust, a real estate investment trust (“REIT”). As a REIT affiliate, Respondent is not permitted to manage, and does not in practice manage, the businesses that occupy the premises on the improved real property owned by the REIT, including the employment of employees and control over employment policies and practices. Charges under section 8(a)(1) may be asserted only against employers. The complaint therefore should be dismissed.

#### **Second Affirmative Defense**

The filing and maintenance by Respondent of the lawsuit referenced in paragraph 7(a) of the Complaint (the “**Lawsuit**”) was protected by the rights guaranteed under the United States Constitution, First Amendment, to petition the government for redress of grievances. These rights bar the National Labor Relations Board from attempting to regulate Respondent’s filing and maintenance of the Lawsuit, and from seeking to hold Respondent in violation of section 8(a)(1) of the National Labor Relations Act. The Supreme Court has identified the First Amendment right to initiate litigation (the “right to petition”) as “one of ‘the most precious of the liberties safeguarded by the Bill of Rights.’” BE&K Construction Co. v. NLRB, 536 U.S. 536, 525 (2002).

#### **Third Affirmative Defense**

The Lawsuit was filed in order to obtain the protection of the laws of the state of Alaska, related to legitimate grievances held by Respondent. The assertions and claims set forth in the Lawsuit were not preempted by federal law under the National Labor Relations Act.

#### **Fourth Affirmative Defense**

The Lawsuit had a reasonable basis (or, as alternatively expressed in the case law, was “not objectively baseless”), in that it cannot be found that “no reasonable litigant could realistically expect success on the merits.” The charges asserted in this present action should, therefore, be rejected and denied.

#### **Fifth Affirmative Defense**

The Board may not find and hold that the filing and maintenance of the Lawsuit violated section 8(a)(1) based merely on the fact the Lawsuit was unsuccessful. As the Supreme Court has held and stated, “. . . the genuineness of a grievance does not turn on whether it succeeds.” BE&K, 536 U.S. at 532. “As long as a plaintiff’s purpose is to stop conduct he reasonably believes is illegal, petitioning is genuine, both objectively and subjectively.” Id., at 534. The Respondent possessed a ‘genuine grievance,’ and “reasonably believed” under Alaska state law that the Union was engaged in illegal activity. On this basis, the unfair labor practice charge asserted in this present case must be rejected and denied.

#### **Sixth Affirmative Defense**

As held by the Board majority in BE&K Construction, 351 NLRB 451, 456 (2007), on remand from the Supreme Court, the “filing and maintenance of a reasonably based lawsuit does not violate the Act regardless . . . of the motive for initiating the lawsuit.” Any proffer of evidence or argument for the proposition that Respondent was motivated by anti-union animus or by intent to chill section 7 rights under the Act are irrelevant.

#### **Seventh Affirmative Defense**

The present case constitutes the “future appropriate case” upon which all members of the Supreme Court would conclude, consistent with the Court’s interpretation of cases arising under the Sherman Antitrust Act, that the Board may “prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process.” 536 U.S. at 537 (concurrence by Scalia, noting Breyer’s agreement in his concurring opinion with this proposition”). Accordingly, only if the Board were to conclude that the Lawsuit was objectively baseless, which Respondent denies, may it reach the question of whether the Lawsuit was subjectively intended to abuse process.

### **Eighth Affirmative Defense**

The Lawsuit was not subjectively intended to abuse process, nor was it retaliatory. On this basis alone, the present charge must be rejected and denied.

### **Ninth Affirmative Defense**

The Alaska U. S. District Court in reaching its decision in the Lawsuit did not make a finding or holding that the lawsuit was objectively baseless, and its ruling may not be viewed by the Board as the equivalent of “objectively baseless.”

### **Tenth Affirmative Defense**

In fact, the Union in the underlying Lawsuit never even asserted that the filing and maintenance of the Lawsuit was objectively baseless and/or for purposes of harassment. The Union, represented by competent counsel, was well aware of its ability to advance such assertions, by initiating the process available under Rule 11 of the Federal Rules of Civil Procedure for precisely this purpose. Further, under subsection (c)(3) of Rule 11, the Alaska U.S. District Court could have, on its own (*sua sponte*), entered a ruling that the Lawsuit was objectively baseless and/or filed and maintained for purposes of harassment, but declined to do so. Accordingly, it has been established that the Lawsuit was not objectively baseless and was not filed/maintained for purposes of harassment. More specifically, in view of the foregoing, there was no finding or holding by the U. S. District Court in Alaska, or even an allegation, that the Lawsuit was filed “for any improper purpose, such as to harass . . . or to needlessly increase the cost of litigation”; and no finding or even allegation that Respondent’s “claims . . . and other legal contentions are [not] warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.” F. R. Civ. P. 11. The Board is bound by this decision by an Article III court, and may not now substitute its judgment for the judgment of that court and rule to the contrary.

### **Eleventh Affirmative Defense**

The distinctions advanced by Justice Breyer in his concurring, non-controlling opinion, but nonetheless relied upon by the minority decision of the Board in BE&K, 351 NLRB 451 (2007), concerning differences between the Sherman Act and the NLRA are unavailing in view of the far more important consideration advanced by Justice Scalia in his concurring and more persuasive opinion (as recognized by the Board majority): An executive agency cannot be granted the “power to punish a reasonably based suit filed in an Article III court whenever it concludes – insulated from *de novo* review by the substantial evidence standard of [Section 10(e) and (f)] – that the complainant had one motive rather than another,” and that to grant such power would inhibit the First Amendment right to petition by making such petitioning a “risky venture, dependent upon the findings of a body that does not have the independence prescribed for Article III courts.” Indeed, as Justice Scalia concluded: “It would be extraordinary to interpret a statute which is silent on this subject to intrude upon the courts’ ability to decide for *themselves* which postulants for their assistance should be punished.” BE&K, 536 U.S. at 538.

### **Twelfth Affirmative Defense**

If the Lawsuit is found by the Board to have been objectively baseless, which Respondent denies, the First Amendment “breathing space” principles still protect the Lawsuit from Board regulation and a finding of 8(a)(1) illegality, particularly in view of the fact the U.S. District Court, in this case, did not make findings or impose sanctions under Rule 11, and the fact that sanctions under Rule 11 weren’t even alleged or asserted.

### **Thirteenth Affirmative Defense**

On information and belief, the money used to defend the Lawsuit was not from the funds of the Union local – UNITE-HERE, Local 878 – in which employees of the Hotel are members, but was from the funds of UNITE-HERE International Union, which is a non-employee union. In the event the Board

should find an 8(a)(1) violation, the Board may not order reimbursement of legal costs and attorneys' fees incurred by Unite-Here International Union, as such an order would be beyond the remedial powers of the Board.

#### **Fourteenth Affirmative Defense**

In the event the Board should find an 8(a)(1) violation, which Respondent denies, the Board may not order reimbursement of legal costs and attorneys' fees incurred by Unite-Here Local 878, as such an Order would be beyond the remedial powers of the Board.

#### **Fifteenth Affirmative Defense**

The National Labor Relations Act was enacted to protect only the rights of employees to engage in concerted, protected activity. "By its plain terms [as set forth in Section 7], thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere v. NLRB*, 502 U.S. 527, 532 (1991) (emphasis in original). On this basis alone, and in conjunction with other principles noted above, particularly with respect to the balancing of rights under the First Amendment and under the National Labor Relations Act, the charge in the present case should be rejected and denied.

#### **NOTICE OF INTENT TO FILE MOTION FOR SUMMARY JUDGMENT**

Notice is hereby given that Respondent intends to promptly file a motion for summary judgment on the ground set forth in the First Affirmative Defense set forth above.

Respectfully submitted, this 28th day of June, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Answer was electronically filed with the Division of Judges and Region 19 using the NLRB's filing system at [www.nlrb.gov](http://www.nlrb.gov) and was sent to the following via email and regular mail as follows:

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This 28th day of June, 2012.

s/s Karl M. Terrell