

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

ASHFORD TRS NICKEL, LLC

and

CASE NO. 19-CA-32761

UNITE-HERE! LOCAL 878

**RESPONDENT'S REPLY
TO THE COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

On June 29, the above-named Respondent, Ashford TRS Nickel, LLC (“Ashford TRS”), filed its Motion for Summary Judgment, demonstrating to this Board that Ashford TRS is not the employer of the employees at the Hotel at issue in this case (The Sheraton Anchorage Hotel & Spa). Based on the undisputed facts set forth by the affidavits attached to the Motion, Ashford TRS cannot be found and held to be an employer under the Board’s “single employer” doctrine (nor under ‘alter ego’ or ‘joint employer’ theories). Ashford TRS has no control whatsoever over labor relations at the Hotel, and therefore no “common control over labor relations.” The existence of such common control is the “most important single factor” in establishing single-employer status. AG Communications Systems Corp., 350 NLRB 168, 169 (2007). As for the other three factors considered under the single employer test, the undisputed affidavit testimony establishes there is no “functional interrelationship of operations” between Ashford TRS and the Remington entities that have managed the Hotel, and only a minimal and nominal degree of “common ownership” and “common management.”

The counsel for the Acting General Counsel, in her opposition, does not dispute that Ashford TRS is not an employer under the single employer doctrine. Counsel, instead, reaches back to a 1971 decision, Fabric Services, 190 NLRB 540 (1971), and advances the broadly stated

assertion that “an employer need not be the employer of the employees who engaged in Section 7 conduct in order to be found to have violated Section 8(a)(1) of the Act.”

As will be shown below, however, the holding in Fabric Services should not be applied or extended to the facts of the present case.

The facts in Fabric Services involved a plant operator (“Fabric Services”) and Southern Bell Telephone Company, which was performing services in its plant. An employee for Southern Bell by the name of Smoak was lawfully on Fabric Services’ property to perform these services, and was wearing at the time a pen pocket protector bearing a union insignia extolling the virtues of joining a particular union (“IT DOESN’T COST – IT PAYS. JOIN CWA-AFL-CIO”). Apparently concerned by the solicitation inherent in this message, Fabric Services directed Smoak to remove the insignia. The resulting 8(a)(1) charge was defended “solely and entirely upon the ground that because it was not Smoak’s employer, it cannot, as a matter of law, be found to have violated Section 8(a)(1) of the Act.” 190 NLRB at 541. Only this defense was addressed in the decision.

Upon holding that the absence of an employer-employee relationship between Fabric Services and Smoak was not an impediment to a finding of liability under 8(a)(1) – unlike under 8(a)(3) – the decision went on, however, to note the following:

In such a situation [‘where only employee Section 7 rights and no discrimination in employment is involved’], the absence of a proximate employer-employee relationship may still have a relevant bearing on the factual question as to whether the conduct complained of was an interfering, coercive or restraining kind.

190 NLRB at 542 (*emphasis added*).

The decision goes on to conclude, under the facts of the case:

Fabric Services, by virtue of its ownership of the property and its power to evict Smoak from its premises, was in a position of sufficient control effectively to enforce its direction to Smoak, in substance, either to remove his union pocket-protector or get off its property.

Id. (*emphasis added*).

Fabric Services, at its essence, is an “access” case. In this line of cases, the courts and this Board have balanced the right of access by union organizers and activists, both non-employees and off-duty employees, to private property in a variety of settings, and related to various exercises of Section 7 rights. See, Republic Aviation v. NLRB, 324 U.S. 793 (1945); Babcock & Wilcox v. NLRB, 351 U.S. 105 (1956); Hudgens v. NLRB, 424 U.S. 507 (1976); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); *and see*, this Board’s more recent decisions related to access – both cited by counsel in her opposition to this Motion for Summary Judgment – New York New York Hotel & Casino, 356 NLRB No. 119 (March 25, 2011), and Nova Southeastern University, 357 NLRB No. 74 (August 26, 2011).

All of these cases, including Fabric Services, involved a primary exercise of Section 7 rights by employees or non-employee union agents engaged in organizing (with the exception of Hudgens, which involved access related to a communication effort by striking picketers, another primary exercise of a Section 7 right¹).

The holding in Fabric Services – particularly given its single-issue disposition noted above – should not be assessed or relied upon, as counsel seeks to do, as a one-size-fits-all holding for the overly broad proposition that *any entity* under *any circumstances* can be held liable at *any time* under Section 8(a)(1), without regard to whether the entity so charged is or is

¹ Albeit, a “low hierarchy” exercise of a Section 7 right, as shown and discussed below.

not the employer of the employees whose Section 7 rights are at issue. The holding in Fabric Services itself, as quoted above, recognized that the “absence of a proximate employer-employee relationship may still have a relevant bearing” on precisely this issue of 8(a)(1) liability, and proceeded to resolve the issue raised by the defense in that case by focusing on the exercise of “control” that Fabric Services was able to impose directly on Smoak’s exercise of his primary Section 7 rights. Implicitly, the *absence* of such control – and the corresponding absence of any direct causal impact on an employee or group of employees while in the exercise of primary Section 7 rights – yields the conclusion that where there is no employee-employer relationship, there is no 8(a)(1) liability, as a matter of law.

The more fundamental inquiry calls for the balancing of an entity’s property rights against the rights of employees under Section 7 of the Act. Hudgens, 424 U.S. at 521-522 (“Accommodations between employees’ Section 7 rights and employer’s property rights . . . ‘must be obtained with as little destruction of one as is consistent with the maintenance of the other’.” [*citation omitted*]).

Both sides of the fulcrum must be weighed and considered. The Supreme Court has noted, on the ‘Section 7’ side of the balancing: “What is ‘a proper accommodation’ in any situation may largely depend upon the content and the context of the Section 7 rights being asserted.” Id. This Board, in New York New York, 356 NLRB No. 119, at p. 9, *citing*, United Food & Comm’l Workers v. N.L.R.B., 74 F3d. 292, 298 (D.C. App, 1996), noted authority by the federal appellate courts “for finding certain Section 7 rights weightier than others.” The D. C. Circuit Court has stated:

Supreme Court precedent clearly establishes that, as against the private property interests of an employer, union activities directed at consumers represent weaker

interests under the NLRA than activities directed at organizing employees. A long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employee's own employees being the strongest, [compared, first, to *non-employee* organizing] . . . [and] attempting to communicate with an employer's customers, being weaker still."

74 F3d. at 298; *see also*, N.L.R.B. v. Great Scot, Inc., 39 F3d. 678, 682 (6th Cir., 1994) ("Under the section 7 hierarchy of protected activity imposed by the Supreme Court," non-employee activity in which the "targeted audience was not [an employer's] employees but its customers . . . warrants even *less* protection than non-employee organizational activity." [*emphasis in original*]).

The foregoing low-hierarchy of consumer-directed action is significant to the present case, in that the action of the union here that led to the filing of the lawsuit by Ashford TRS was the union's pursuit of a consumer boycott aimed at the Hotel.

To this authority, the Board in New York New York added its view that an equally if not more important consideration was the fact that the employees at issue in that case – who had been handbilling their employer's restaurant inside a casino complex, on the casino's owner's property – "*were exercising their own rights* under Section 7 in organizing *on their own behalf*" at the time of the alleged 8(a)(1) violation by the casino owner. Id. (*emphasis added*). Implicitly, therefore, alleged 8(a)(1) conduct which does *not* "interfere with, restrain or coerce" *employees while engaged* in "exercising their own rights" – such as the lawsuit aimed at the union-directed boycott effort here – falls farther down the hierarchy scale.

In the present case, unlike *all* of the access cases reviewed above, there was no primary exercise of a Section 7 right involved. Ashford TRS has not been charged with 'interfering with, restraining or coercing' any organizing activities, or with 'interfering with, restraining or

coercing' communication efforts by employees conducted in or on the property of the Hotel. Ashford TRS, in fact, took no direct action of any sort against any individual employee or group of employees while in the act of exercising a primary Section 7 right. Ashford, instead, filed a lawsuit against the union.

The Supreme Court in Lechmere, *supra*, brought into focus the importance of the distinction between the exercise of primary Section 7 rights by employees and the mere derivative rights of unions. The Court's holding was premised on the following noted statutory foundation, as set forth in the first paragraph of its analysis, in Section II of the opinion:

Section 7 of the NLRA provides in relevant part that 'employees shall have the right to self-organization, to form, join, or assist labor organizations.' Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.' By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their non-employee organizers.

502 U.S. at 531-32. (*emphasis added; citations omitted*). The court then noted its past recognition, in the context of an earlier access case, Babcock & Wilcox, *supra*, of the merely derivative right of "unions" and "non-employee union organizers." Such derivative rights may, but only "in certain limited circumstances," restrict a property owner's "right to exclude non-employee union organizers from his property." *Id.* (*citations omitted*); *see also*, Prune Yard Shopping Center v. Robins, 447 U.S. 74, 82 (1980) ("[O]ne of the essential sticks in the bundle of property rights is the right to exclude others").

On the 'property rights' side of the fulcrum, there are, of course, other property rights in the "bundle of sticks" of such rights. This Board, for example, recently recognized that property owners have a "legitimate interest in preventing interference with the use of its property,"

which it recognized as a “property right or a ‘management interest,’ perhaps ultimately derived from property ownership.” This property right or management interest is “entitled to appropriate weight.” New York New York, 356 No. 119, at p. 10.

Ashford TRS, by filing the state-law lawsuit in the U.S. District Court in Anchorage, asserted its property right interest in not being subjected to tortious interference with its business relationships and in not being subjected to the defamation of its business. The property right or management interest in “preventing interference with the use of its property,” identified in New York New York, as shown above, naturally includes the use and enjoyment of profits generated by the property.

In addition, by filing this suit, Ashford TRS engaged in an exercise of its First Amendment right to “a redress of grievances,” which the Supreme Court has identified as “one of the most precious of the liberties safeguarded by the Bill of Rights’.” BE&K v. N.L.R.B., 536 U.S. 516, 524 (2002), *citing*, United Mine Workers v. Illinois Barr Association, 389 U.S. 217, 222 (1967). *See*, Respondent’s Answer – Second through Twelfth Affirmative Defenses.

Accordingly, upon the balancing of rights at issue in this case, this Board must grant summary judgment and dismiss the charge. The filing of the lawsuit did not “interfere with, restrain or coerce” individual employees engaged in an exercise of primary Section 7 rights. The lawsuit was aimed only at the union, which enjoys only derivative rights, and the lawsuit was prompted by a consumer boycott which, as shown, ranks low in the hierarchy of protected activity under Section 7. When the foregoing is balanced against Ashford TRS’s property-rights protection against interference with its property, as well as balanced against the immense importance of its rights under the First Amendment, summary judgment dismissal is warranted.

* * * * *

In the small handful of cases, like Fabric Services, where the Board has taken the extraordinary step of extending 8(a)(1) liability to non-employers, the Board has done so based on special circumstances, where (a) the expediency of alter ego, joint- or single-employer theories were unavailable, and (b) violations of Section 7 rights were otherwise proven, and it was felt there was a need to find liability in order to uphold the policies of the Act. Those circumstances turn usually on situations where the respondent to the charge is in a position of power – or “control,” as was the focus in Fabric Services – and exercises that power through its position of influence in relation to the actual employer, thereby fomenting a violation.

However, in most of these cases of special circumstance, as will now be shown, liability can still be imposed on the respondent to the charge by focusing on the motivation behind the conduct of the respondent *vis a vis* its own employees.

The Board has justified its decisions in this small handful of cases by pointing to the wording of Section 2(3), which defines “employee” to include “any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise.” Notwithstanding the broadness of the reach of this definition, the fact remains that Section 8(a) of the Act imposes liability only on “an employer” who commits any of the prohibited acts listed at 8(a)(1) through (5). While the term “employee” is given expansive scope, the term “employer” is not, and 8(a) is concerned specifically with violations committed by “an employer.” In ordinary English usage and common sense, this connotes violations only by “an employer” toward its employees. It is the employment of its employees which defines its status as “an employer.”

Had Congress intended the availability of 8(a) liability against non-employers, it could have easily made that clear by, for example, including language in 8(a) that parallels 2(3). Ashford TRS respectfully submits that the broad definition in Section 2(3) was inserted only for limited purposes, such as was as recognized by the Supreme Court in its 1941 decision in Phelps Dodge, *supra*. (holding that the Board, in ordering the reinstatement of striking workers, had the authority to also order reinstatement of two additional pro-union *former* employees, rejecting the argument that these individuals -- who resigned prior to the strike – were not “employees” whom the Board could order reinstated).²

In Fabric Services, as discussed above, the Board imposed 8(a)(1) liability on a plant operator which, had it been the actual employer, would have been held blatantly in violation. The ALJ, whose decision was adopted in Fabric Services, concluded that Smoak’s rights – which he clearly possessed *vis a vis* his own employer, Southern Bell – should “not be curtailed simply because [he came] in contact with customers in the course of [his] work.” Smoak was lawfully on the plant operator’s premises engaged in work for Southern Bell. Liability was properly imposed on Southern Bell, by virtue of its agreement to the request of Fabric Services to enforce the banishment of the insignia. Ashford submits it was unnecessary for the Board in Fabric Services to also impose liability also on Fabric Services, and overreached its authority in doing so by ignoring the plain language in 8(a), which is aimed only at violations *by* “an employer.” Ashford calls on this Board to reverse Fabric Services.

² This Board in New York New York, 356 NLRB No, 119, at p. 5, cites footnote 3 in Hudgens, *supra*, as support for application of 8(a)(1) to a non-employer. The footnote, however, constitutes dicta, and certainly was not the basis for the Court’s holding in that case.

The result in cases like Fabric Services can be upheld, however, provided the Board establishes a requirement that an employer in a position similar to that of Fabric Services would be held liable only to the extent its motivation in committing the violation was to prevent the exposure to *its own employees* of information concerning unionization and the right to organize. This will often be the case, and an easy element for the General Counsel to prove. Indeed, though not discussed in Fabric Services, such motivation provides the only possible explanation for the actions of that plant operator. Liability under 8(a)(1) could have been imposed without doing violence to the language in 8(a)(1) that proscribes violations only by “an employer.”

Ashford TRS notes, however, that should the Board adopt this modification to the holdings in cases like Fabric Services, it would not be available to impose liability here. The facts in the present case do not suggest in any possible way that Ashford TRS was motivated in filing the lawsuit to curtail the Section 7 rights of its own employees (its employees are primarily white collar, and based in Dallas, Texas).

In the absence of reversal or modification to Fabric Services, its holding must not be extended to situations such as are found in the present case. As shown above, the fundamental inquiry calls for a balancing of a property owner’s rights against the rights of employees under section 7. The balance to be struck here, for the reasons shown above, distances this case from Fabric Services and the only two other cases cited by the counsel for the Acting General Counsel in her opposition – New York New York, supra, and Nova Southeastern University supra.

CONCLUSION

For the reasons stated above, Ashford TRS respectfully asks this Board to grant summary judgment, and dismiss the 8(a)(1) charge.

Respectfully submitted, this 9th day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent's Reply to the Acting General Counsel's Opposition to Respondent's Motion for Summary Judgment was electronically filed with the Division of Judges and Region 19 using the NLRB's filing system at www.nlr.gov and was sent to the following via email and regular mail as follows:

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This 9th day of August, 2012.

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