

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

**ASHFORD TRS NICKEL, LLC,
a subsidiary of ASHFORD
HOSPITALITY TRUST, INC.,**

and

Case 19-CA-32761

UNITEHERE! LOCAL 878, AFL-CIO

and

**ASHFORD HOSPITALITY
TRUST, INC., ASHFORD HOSPITALITY
LIMITED PARTNERSHIP, ASHFORD
OP GENERAL PARTNER LLC, ASHFORD
OP LIMITED PARTNER LLC, ASHFORD
TRS CORPORATION, ASFORD ANCHORAGE
GP LLC, and ASHFORD ANCHORAGE LP,
Parties at Interest and Single Integrated
Enterprise with Respondent**

*Rachel Cherem and Mara Anzalone,
for the Acting General Counsel.*

*Karl M. Terrell (Stokes Wagner Hunt Maretz & Terrell),
for the Respondent.*

*Larry Schwerin (Schwerin Campell Barnard Iglitzin & Lavitt),
for the Charging Party.*

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Seattle, Washington on July 16, 2013. UNITEHERE! Local 878, AFL-CIO (the Union) filed the charge in case 19-CA-32761 on September 27, 2010. The Union filed an amended charge in the same case on May 8, 2012. On June 14, 2013, the Acting General Counsel issued a second amended complaint (the complaint) setting hearing for July 16, 2013.

The complaint alleges that Ashford TRS Nickel, L.L.C., a subsidiary of Ashford Hospitality Trust, Inc. (AHT), and a member of AHT's affiliated entities (collectively known

here as “Respondent or Ashford”¹ violated Section 8(a)(1) of the National Labor Relations Act (the Act) -when on September 23, 2010, it filed and maintained a lawsuit in the Federal District Court for the District of Alaska (Federal District Court Lawsuit) against the Union alleging defamatory statements and tortious interference related to the Union’s boycott of Respondent’s hotel. The complaint further alleges that this Federal District Court Lawsuit is preempted, lacks reasonable basis, and was motivated by a desire to retaliate against activity protected by Section 7 of the Act.

On July 1, 2013, Respondent filed its answer denying that it violated the Act through its filing of the Federal District Court Lawsuit.

The parties entered into numerous stipulations of fact, which I approved. They are in the record as Joint Exhibit 1 as well as Joint Exhibits 2 and 3.² (Tr. 8-14.)

On the entire record, including my observation of the demeanor of the witness, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following.

FINDINGS OF FACT

A. Jurisdiction

The parties stipulate and I find that Respondent owns and/or leases hotel properties throughout the United States including Anchorage, Alaska, where it annually derives gross revenues in excess of \$500,000. (Jt. Exh. 1 at 3.) Respondent further admits and I find that at all material times, it is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Exh. 1 at 2-5.) I further find and the parties stipulate that at all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Id.

B. Background

Respondent, a Delaware limited liability corporation with its principal office and place of business in Dallas, Texas, is a subsidiary of AHT, a publicly traded Maryland company engaged

¹ The parties stipulated and I find that Respondent, AHT, and AHT’s affiliated entities, other than Remington and its successor, constitute a single-integrated business enterprise and a single employer within the meaning of the Act because they have common officers, ownership, directors, management, and supervision; have administered a common labor policy; have shared common premises and facilities; have provided services and made sales to each other; have interchanged personnel with each other; have interrelated operations regarding the ownership and/or leasing of hotel properties; and have generally held themselves out to the public as a single-integrated business enterprise. Joint Exhibit 1 at 2-3.

² Abbreviations used in this decision are as follows: “Tr.” for transcript; “Jt. Exh.” for joint exhibit; “R Exh.” for Respondent’s exhibit; “GC Exh.” for Acting General Counsel’s exhibit; “GC Br.” for the Acting General Counsel’s brief; “R Br. for the Respondents’ brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

in the investment ownership of hotels. (Jt. Exh. 1 at 1-2; Tr. 21:9-12, 21-23.) AHT and its affiliated entities, including Respondent, constitute an integrated business enterprise or single employer, which operates as a real estate investment trust (“REIT”). (Tr. 31:8-13; Jt. Exh. 1 at 2.)

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In December 2006, Respondent purchased the Sheraton Anchorage Hotel (“Hotel”) and contracted with Remington Lodging & Hospitality, LLC (“Remington”), also a Dallas based company that shares the same office building location in Dallas with Respondent, to operate the Hotel under a Hotel Master Management Agreement (“Management Agreement”). (Jt. Exh. 1 at 3; Jt. Exh. 2 at 61-71; Tr. 23, 58-59.) Since January 1, 2011, Respondent has engaged Remington Anchorage Employers, LLC (“Remington Anchorage”) to succeed Remington in operating the Hotel pursuant to the same Management Agreement. (Jt. Exh. 1 at 4.)

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The Management Agreement provides that Respondent “appoints Manager [Remington] as its sole, exclusive and continuing operator and manager to supervise and direct, for and at the expense of [Respondent], the management, and operations of the premises.” (Jt. Exh. 2 at 17.) The Management Agreement further provides that Remington “shall consult with [Respondent] on matters of policy concerning management, sales, room rates, wage scales, personnel, general overall operating procedures, economics and operations.” (Jt. Exh. 2 at 31-32.)

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Remington is privately held and owned primarily by two individuals, Archie Bennett and Monty Bennett. (Jt. Exh. 2.) The Bennetts each own a non-controlling 2.3% interest in AHT and serve on AHT’s Board of Directors. *Id.* Monty Bennett, an admitted agent of Respondent, serves as CEO of AHT and CEO of Remington. (Tr. 116:1-117:9; R Exh. 1, pp. 5-6; Jt. Exh. 2 at 56; Tr. 58:24-59:1.)

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When the underlying Federal District Court lawsuit was filed by Respondent against the Union in September 2010, Remington was managing the Hotel and was the employer of the employees. Remington Anchorage has also been the manager of the Hotel and the employer of the employees since January 1, 2011. (Jt. Exh. 1 at 3-4.) Respondent is not an employer of the employees of the Hotel. (Jt. Exh. 1.)

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C. Consumer Boycott, Prior Litigation, and Bad Acts Against Union

When Respondent purchased the Hotel, the Union was party to a collective bargaining agreement (“CBA”), effective March 1, 2005 to February 28, 2009, with the Hotel’s former operator. (Jt. Exh. 1 at 5; GC Exh. 4, p. 12). In October 2008, the Union and Remington began negotiations for a new CBA (Jt. Exh. 1 at 20.) In light of Remington’s then-alleged failure to bargain in good faith and unilateral implementation of changes to working conditions, unit employees signed a petition authorizing a consumer boycott in protest in November 2009.³ (Jt. Exh. 1 at 5-6; GC Exh. 2; GC Exh. 4, p. 27).

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³ Respondent incorrectly states in its post-hearing brief that the Union’s consumer boycott started in November of 2010 rather than in November 2009. R. Br. at 7. The Federal District Court Lawsuit was filed in late September 2010.

On November 17, 2009, during a Union rally for the boycott, Remington issued unlawful discipline to employees. (GC Exh. 4, pp. 27, 49-51). Remington also unlawfully suspended and fired Unit members who had distributed boycott flyers to hotel guests and others entering and exiting the Hotel on February 2, 2010. (GC Exh. 4, p. 30). In the subsequent months, Remington’s managers unlawfully solicited signatures for a decertification petition at the Hotel, conducted extensive surveillance of employees, and disciplined employees for participating in Union activity (GC Exh. 4, pp. 63-66; GC Exh. 5, pp. 6-12, 19-21, 25-28). In July of 2010, Remington illegally withdrew recognition of the Union, unilaterally and unlawfully barred Union representatives from Hotel grounds, ceased making payments to the Union Pension Plan, and changed long-established scheduling practices in the banquet department. (GC Exh. 4, pp. 63-66; GC Exh. 5, pp. 6-12, 19-21, and 25-28)

The above-mentioned unfair labor practices were addressed at the hearing in *Remington Hotel Corporation d/b/a The Sheraton Anchorage*, 359 NLRB No. 95 (2013) (“Remington I,”) before Administrative Law Judge Gregory Meyerson in Anchorage, Alaska between August 17, 2010 and January 28, 2011 (GC Exh. 4, p.11). The Board affirmed Judge Meyerson’s decision and found that Remington, as operator of the Hotel, engaged in numerous unfair labor practices, including unlawful withdrawal of recognition from the Union, unlawful discipline to nine employees for violating the Hotel’s employee handbook when delivering the boycott petition to the General Manager, unlawful refusal to bargain, enforcement of overbroad and unlawful work rules, multiple unlawful disciplinary actions and terminations, intentional misrepresentation of financial records and multiple unilateral changes in terms and conditions of employment without notice to or bargaining with the Union. *Remington I*, 359 NLRB No. 95, at 26-30, 46-51, 63-66 (2013).⁴

Respondent’s counsel admits that it is “hard to untangle” the *Remington I* litigation from the instant proceeding and that Remington and Respondent share a community of interest related

⁴ As has been argued frequently over the past year, the Respondent also argues that the Board’s Order denying Respondent’s motion for summary judgment and the Board’s affirming of Judge Meyerson’s decision in *Remington I* are void because the Board lacked a valid quorum when it issued the decision. This argument derives from the D.C. Circuit’s decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingtondale’s Inc.*, 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingtondale’s*, supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). This argument obviously has no merit since, at present, the Board has five members, all of whom were confirmed by the Senate on July 30, 2013, and duly sworn in on various dates in August 2013. In making this finding, I have taken administrative notice of Board’s Press Release dated July 31, 2013, and August 12, 2013, publicly announcing these facts. Also, while there is a current valid Board to review this decision, if applicable, this valid quorum question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. Earlier in the hearing, I orally rejected the same argument by Respondent for the same reasons and I cited many of these cases. Tr. 14-18. Consistent with Board precedent, the Respondent’s affirmative defenses based on *Noel Canning* and a lack of valid Board quorum arguments are rejected.

to the Union, their common opponent. (Tr. 61:7-17; 77:9-24). Respondent and Remington have shared counsel with regard to proceedings involving the Union. (Tr. 60:5-21; 57:13-58:10; 23:3-6). Respondent’s counsel further admitted and opined that “We’re dealing with one hotel as to which [Respondent] is the owner, Remington is the management company.” (Tr. 63:15-18).

Remington and the Union were again opposite each other before Administrative Law Judge John J. McCarrick in a second case tried in Anchorage, Alaska between October 16 and December 14, 2012 (“Remington II”). Judge McCarrick further found that Remington violated the Act in numerous ways, including maintaining and enforcing unlawful employee conduct rules, interrogating employees about their union activities, engaging in surveillance of employees’ union activities, unlawfully disciplining and discharging employees involved with union activities and the adverse NLRB hearing testimony. *Remington Hotel Corporation d/b/a The Sheraton Anchorage*, 19-CA-32599, et. al., [JD(SF)-22-13(ALJ McCarrick, June 6, 2013)](*Remington II*).

D. The Federal District Court Lawsuit

On September 23, 2010, Respondent filed the Federal District Court Lawsuit, a lawsuit (“Initial Complaint” or “Respondent’s Complaint”) in the Federal District Court of Alaska (“District Court”) against the Union alleging tortious interference with the Hotel’s existing and prospective clients and defamation against Hotel management in an alleged scheme to damage the Hotel. (Jt. Exh. 3 at Doc. 1, p. 2.) Respondent filed the suit based on the decision of Monty Bennett, CEO to AHT and Remington. (Tr. 116; Jt. Exh. 3; Tr. 63.) Respondent’s counsel conceded that they discussed this filing with Remington.⁵ (Tr. 63.).

In this initial filing, Respondent defined “Plaintiff” as the “Hotel” or the “Sheraton Anchorage” and did not distinguish itself from Remington. (Jt. Exh. 3 at Doc 1, p. 2). In the Initial Complaint, Respondent claimed that through its consumer boycott the Union threatened and harassed individuals in and around the Hotel with the aim of damaging the Hotel’s business and bringing the Hotel back to the bargaining table. *Id.* Respondent did not allege “malice” on the part of any Union representative at all and also did not specify who made the alleged threats and did not mention when or where these events took place. (GC Br. at 8-9). The initial complaint also sought damages in an amount to be proven at trial, and its litigation expenses, including reasonable attorney’s fees under Alaska state law.

On the same day the Initial Complaint was filed, during the ongoing *Remington I* hearing, Remington filed a Petition for Writ of Mandamus in the District Court against the Regional Director of Region 19 of the NLRB. The Writ, which was denied, sought to stay the *Remington I* hearing until a vote on the decertification petition, reopen Remington’s unfair labor practice charges due to new evidence, and dismiss unfair labor practice charges relating to the discharge

⁵ Respondent’s attorney admits that “this [was] a situation where it’s obviously logical that the Ashford [Respondent] and Remington [Hotel] people are coming together to discuss this with counsel” and that there was “communication back and forth between Remington [Hotel] and Ashford [Respondent] related to this underlying lawsuit.” Tr. At 63. Specifically, Respondent’s counsel identified emails dated July 16, 2010 and September 14, 2010. Tr. 57. Respondent’s counsel further admitted that “the initial discussion of the idea of bringing this [Federal District Court [L]awsuit ... didn’t arise until July of 2010, didn’t arise back in November 2009, when the boycott first began. Tr. 53.

of 4 employees who had been subsequently reinstated and delay further unfair labor practice hearings to allow Remington to participate in the investigation of new charges filed by the Union (the litany of unlawful acts alleged and proven in *Remington I* and *Remington II* along with the filing of the denied writ of mandamus referred to above are collectively referred to hereafter as “Bad Acts”). (Jt. Exh. 3, Doc. 46 at 43.)

On October 25, 2010, the Union filed a Motion to Dismiss the Initial Complaint, arguing that the defamation and tortious interference claims lacked sufficient specificity and failed to demonstrate plausible entitlement to relief given the pleading standard for First Amendment rights. The Union argued that the tortious interference claims should be independently dismissed because they are preempted by the Act. (Jt. Exh. 3 at Doc. 20, p. 8).

On November 24, 2010, Respondent filed its First Amended Complaint to clarify its relationship with Remington (Jt. Exh. 3 at Doc. 23, p. 2). Respondent filed an opposition to the Union’s Motion to Dismiss, arguing that Alaska tort and defamation law governed because the Union’s conduct removed the consumer boycott from the bounds of protected activity. (Jt. Exh. 3 at Doc. 24, pp. 1-16). In addition to the opposition, Respondent included a sworn statement from the Hotel’s General Manager, Dennis Artiles, who described a conversation with a representative for the Louisiana Center for Women in Government and included a flier entitled “Anchorage Hotel Workers Rising Fight,” which discussed the ongoing labor disputes at both the Hotel and the Anchorage Hilton, a nearby hotel not involved here. (Jt. Exh. 3, Doc. 31-4 at 15.) Artiles referenced and attached 3 letters dated December 2009, February 2010, and May 2010, received by the Hotel from potential customers; none of the letters mention violence or specific threats. (Jt. Exh. 3, Doc 24-1 at 5-7.) The representative purportedly told Artiles that a Union representative told her that their attendees would be required to cross “vigorous picket lines” and Artiles stated he believed that the individual understood this to be a threat to the safety of her attendees.

Respondent then moved to file a Second Amended Complaint, which was filed on January 18, 2011 in order to further specify its allegations. (Jt. Exh. 3 at Docs. 36-37.) The Respondent added that the Union told Hotel guests and clients that the Hotel was “doing illegal things,” by firing workers and that the Hotel intended to “strip its employees of their core benefits.” Respondent also added that the Union made repeated, uninvited and harassing phone calls to the Alaska Primary Care Association. (Jt. Exh. 3 at Doc. 31-1, p. 13).

On May 5, 2011, in response to the Union’s statement of supplemental authority, Respondent filed its Third Amended Complaint, which the Union moved to dismiss, again arguing that Respondent failed to allege unlawful statements or conduct.

E. District Court Findings Regarding the Federal District Court Lawsuit

On August 4, 2011, the District Court granted the Union’s Motion to Dismiss the Third Amended Complaint and dismissed the lawsuit (the “Federal District Court Lawsuit”) with prejudice. (Jt. Exh. 3 at Doc. 58). With regard to the defamation claims, the District Court found the statements were made during the course of a labor dispute and that traditional Alaska state law standards do not apply. The District Court further found the amended complaint lacking

and that the Respondent, as operating lessee of the Hotel, must prove that a statement, made during the course of a labor dispute, of or concerning the complainant, contained an actual or implied assertion of objective fact, which was not true and was made with actual malice. (Jt. Exh. 3 at Doc. 58, pp.1 & 7). The District Court dismissed the claim that the statement that the Hotel “proposed to strip [the employees] of their core benefits” because the statement was referencing the Anchorage Hilton, not the Respondent. (Jt. Exh. 3 at Doc. 58, p. 7-8). The District Court also concluded that the statement that the Hotel was “guilty of doing illegal things, by illegally terminating workers” would be understood as nothing more than rhetorical hyperbole and as the Union’s subjective view rather than a statement of fact given the context of a labor dispute. (Jt. Exh. 3 at Doc. 58, p. 8-9.) The District Court found that even if the statement were a statement of fact, the Respondent failed to sufficiently allege the element of actual malice. (Jt. Exh. 3 at Doc. 58, p. 10-11.)

As with the defamation claim, the District Court found that in the context of a labor dispute, tortious interference claims must be a statement of or concerning the complainant, containing an actual or implied assertion of objective fact, which was false and made with actual malice. (Jt. Exh. 3 at Doc. 58, at 7, 12). The District Court found that the Union’s statements about vigorous picket line, and repeated unwelcome phone calls were protected by the First Amendment and the National Labor Relations Act. (Jt. Exh. 3 at Doc. 58, p. 12.) The District Court also noted that the Respondent did not provide any factual support for the essential element of actual malice and the tortious interference claims were found to be facially implausible. (Jt. Exh. 3 at Doc. 58, p. 12.)

The District Court further found that even if Respondent had alleged plausible tortious interference claims, the claim would be dismissed as preempted by federal labor law under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and that no exception to preemption existed, particularly because Respondent failed to identify any specific conduct marked by violence and imminent threats to the public order. (Jt. Exh. 3 at Doc. 58, p. 13-16.) Respondent decided to forgo its appeal of these District Court findings and so they have become final. (Tr. 96.)

II. Issues

1. Whether Respondent can be held liable under Section 8(a)(1) of the Act, even though it is not the immediate employer of the employees of the Sheraton Anchorage Hotel?
2. Whether Respondent’s tortious interference state law claims are preempted by the Act and therefore their filing violates Section 8(a)(1) of the Act?
3. Whether Respondent’s defamation claim is objectively baseless and filed with retaliatory motive and therefore in violation of Section 8(a)(1) of the Act?

III. Analysis

1. Respondent can be held liable under Section 8(a)(1) because of its control over the employees of Sheraton Anchorage Hotel.

Respondent argues that it cannot be held liable for the alleged 8(a)(1) charge asserted here because it is not the employer of the employees of the Sheraton Anchorage Hotel.

That an employer is not the employer of the employees claiming Section 8(a)(1) protection, does not relieve them of statutory responsibility under the Act. *Fabric Services, Inc.*, 190 NLRB 540, 542 (1971). In *Fabric Services*, Respondent Fabric Services, Inc. owned the plant facility on which Southern Bell Telephone and Telegraph Company, a New York corporation, conducted its operations. *Id.* at 541. A Fabric Services personnel manager ordered Gerald Smoak, a Southern Bell employee at this plant, to remove Union supporting insignia on his pocket protector. *Id.* Fabric Services defended itself against the alleged unfair labor practice charge by relying entirely and solely on the grounds that it cannot be found to have violated Section 8(a)(1) because it was not Smoak’s employer. *Id.* The Board held that Fabric Services was liable because by virtue of its ownership of the plant facility and its power to evict Smoak from its premises, Fabric Services was in a position of “sufficient control” to remove his union supporting pocket protector or otherwise directly interfere with his ability to show such support while performing his work. *Id.* at 542. To support its broad reading of the Act, the Board cited Section 2(3) of the Act, which states “The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act specifically states otherwise.” *Id.* In addition, Section 2(9) of the Act defines “labor dispute” as including “any controversy... regardless of whether the disputants stand in the proximate relationship of the employer and employee.” *Id.* The Board emphasized that Fabric Services, “having “knowingly participated in the effectuation of an unfair labor practice, [Fabric Services] placed itself within the orbit of the Board’s corrective jurisdiction.” *Id.*

Here, as in *Fabric Services*, I find that sufficient control is met because Respondent owns the Hotel that Remington is operating per their Management Agreement. Beyond merely owning the Hotel, Respondent was the operating lessee of the Hotel. (Jt. Exh.3, Doc. 58 at 1.) Moreover, the Management Agreement states that Remington is required to consult with Respondent in matters of policy concerning management, sales, room rates, wage scales, personnel, general overall operating procedures, economics and operations.⁶ The Management Agreement also provides for Respondent’s involvement and management and thus presents an even more compelling case of sufficient control over Hotel employees than the relationship scrutinized in *Fabric Services*.

⁶ Respondent argues that the Respondent “turned all management duties – including all matters related to the employment of the employees – over to Remington [the Hotel].” R. Br. At 36. I reject this argument based on the aforementioned Management Agreement language and the consulting requirement between the Hotel and Respondent and due to the admitted “community of interest”, the Union being a common opponent, the joint privilege, and overall interconnected relationship between the two.

While it is not necessary to prove an interconnected relationship between Respondent and Remington, their proximity and overlapping dealings in litigation add legitimacy to the argument that Respondent exercised sufficient and significant control over Remington employees.

Respondent’s counsel, Mr. Terrell, represented Remington in *Remington I* and the Writ of Mandamus. Remington’s in house counsel, Todd Stoller, is designated custodian of records here. Respondent’s counsel also asserted a joint privilege with Remington with regard to documents and communications, recognizing the Union as a common opponent and that Respondent and Remington also shared a community of interest for this “common opponent.” (Tr. 23, 57, 60, 63, 77.) As Acting General Counsel notes, Respondent defined “Plaintiff” as the “Hotel” or “Sheraton Anchorage” in its Initial Complaint in the Federal District Court Lawsuit.

Moreover, as stated above, Respondent’s counsel admits that it is “hard to untangle” the *Remington I* litigation from the instant proceeding and that Remington and Respondent share a community of interest related to the Union, their common opponent. (Tr. 61:7-17; 77:9-24).

Respondent and Remington have shared counsel with regard to proceedings involving the Union for almost 5 years now. (Tr. 60:5-21; 57:13-58:10; 23:3-6). Respondent’s counsel further admitted and opined that “We’re dealing with one hotel as to which [Respondent] is the owner, Remington is the management company.” (Tr. 63:15-18). “It’s the employees in the [H]otel and the collective bargaining relationship that is at issue.” (Tr. 72.)

Respondent contends that *Fabric Services* is outdated and should be reversed. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board. I am bound to follow Board precedent that has not been reversed by the Supreme Court or the Board itself. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

Thus, while Respondent is not the direct employer of the employees of Sheraton Anchorage, I find that Respondent is liable under the Act as an employer for the 8(a)(1) charges asserted here for the reasons explained below.

2. Respondent’s allegations of tortious interference of: (1) contractual relations; and (2) prospective economic advantage under Alaskan state law are preempted by the Act and its filing violates Section 8(a)(1) because consumer boycott activity is protected under Section 7 of the Act.

The Supreme Court concluded that the Act does not prohibit lawsuits filed in state or federal courts, unless they are both objectively baseless and contain retaliatory motive. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson’s v. NLRB*, 461 U.S. 731 (1983). However, footnote 5 in *Bill Johnson’s* creates an exception for lawsuits beyond the jurisdiction of the state courts due to federal preemption. *Id.* at 737, fn. 5. Moreover, The Board has interpreted this footnote to mean that preempted lawsuits are outside the scope of First Amendment protection. *Federal Security, Inc.*, 359 NLRB No. 1 slip op. at 13 (2012).

The threshold question in any preemption analysis involving the Act is whether “it is clear or may fairly be assumed” that the activity which a State purports to regulate is protected or

prohibited by the Act. *Federal Security, Inc.* at 7, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). If that question is answered in the affirmative, the inquiry is at an end and “state jurisdiction must yield.” *Id.*

5 Section 7 of the Act provides that “Employees shall have the right to self-organization, to join, form, or assist labor organizations, to bargain collectively through representation of their choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. Section 157. The Board has held that the protection of consumer boycott activity falls within Section 7 of the Act. *Sears, Roebuck & Co.*, 436 U.S. 180 at 206 n. 42, 98 S.Ct. 1745 (1978); *NLRB v. Calkins*, 187 F.3d 1080, 1086 (9th Cir. 1999). As pointed out by the General Counsel, the Board has long held that a request that customers not patronize an employer in the context of a labor dispute constitutes Section 7 activity (*Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252-1254 (2007); *Arlington Electric*, 332 NLRB 845, 846 (2000)) and that providing notice that lawful conduct, such as a protected consumer boycott, will occur is also protected under the Act (*NLRB v. Servette, Inc.* 377 U.S. 46, 57 (1964).

20 Respondent’s Federal District Court Lawsuit did not merely involve some peripheral concern of the Act because it targeted the Union’s consumer boycott activity that, as stated above, contacting an Company’s customer’s, giving notice, and participating in a consumer boycott are protected within Section 7 of the Act. See *Federal Security, Inc.*, at 10 (“We cannot construe the Respondents’ lawsuit as ‘a merely peripheral concern’ of the Act, because it targets activities that are ‘at the heart of Board processes.’”).

25 I note that, in the past, the Board has found unlawful under the Act union conduct such as throwing of rocks and placing tacks in the roads, assaulting employees and supervisors, damaging vehicles, preventing people and vehicles from entering onto company premises, threats from pickets, fights; beatings, and mass picketing activity that, when directed at employees, would unlawfully restrain and coerce them. In contrast, I note the Board has found that lesser conduct directed at employees, where “[n]o one is injured, nothing was thrown, no one was prevented from going to work or leaving, and no vehicle was harmed or excluded from the premises,” remains protected under the Act. In the context of strikes and boycotts, the Board has only found extreme conduct, such as actual physical violence, threats of actual violence, outrageous behavior; or maliciously untrue or reckless statements to lose Section 7 protection under the Act. *Detroit Newspaper Agency*, 342 NLRB 223 (2004); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Absent outrageous or violent conduct, tortious interference claims are wholly preempted in the context of labor disputes. *Milum Textile Services Co.*, 357 NLRB slip op. at 4 (citing *In re Sewell*, 690 F.2d 403, 408 (4th Cir. 1982)).

40 Respondent’s argument is that the Union’s consumer boycott lost its Section 7 protection because its representatives threatened the Hotel’s actual and prospective clients. Respondent’s only specific example is Remington Hotel General Manager Artiles’ unsubstantiated belief that

the remark to potential guests about having to cross vigorous picket lines was perceived as a threat.⁷ The District Court found that the statement about crossing “vigorous” picket lines cannot possibly be perceived as threats and were protected under the Act because they did not constitute outrageous or violent conduct. (Jt. Exh. 3, Doc. 58 at 13.) Since the only statement specified was not a threat, the Union’s consumer boycott remained protected by the Act. See also GC Exhs. 2-3.

The filing and maintenance of a preempted lawsuit may violate Section 8(a)(1) if it tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights, regardless of motive or whether the lawsuit is objectively baseless. *J.A. Croson Co.*, 359 NLRB No. 2 slip op. at 7 (2012); *Webco Industries*, 337 NLRB 361, 363 (2001). Lawsuits that punish and deter conduct protected by Section 7 are unlawful. *Federal Security, Inc.*, 359 NLRB No. 1 (2012).

Here, in filing its Federal District Court Lawsuit claiming economic injury due to the consumer boycott, notice thereof, and the Union’s contact with the Hotel’s customers which sought to impose damages including Respondent’s attorney’s fees against the Union, I find that Respondent intended to punish and deter employees from participating in the protected activity as the lawsuit, though ultimately proven unsuccessful, imposed a costly and prohibitive burden on the Union’s invocation of and participation in the protected consumer boycott. As a result, I find that the Federal District Court Lawsuit was barred by Federal labor law in the absence of any evidence of actual malice. Thus, Respondent’s filing and maintenance of its preempted tortious interference claims as part of its Federal District Court Lawsuit violates Section 8(a)(1) of the Act.

3. Respondent’s Federal District Court Lawsuit also violates section 8(a)(1) because the lawsuit is both objectively baseless and filed with retaliatory motive

As stated above, when a lawsuit lacks a reasonable basis of law or fact and contains retaliatory motive, the Board may prohibit it as an unfair labor practice. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson’s v. NLRB*, 461 U.S. 731, 748-749 (1983). To avoid chilling the First Amendment right to petition, the Board in *BE&K* concluded that the Act only prohibits lawsuits that are both objectively and subjectively baseless. *BE&K* at 528.

A lawsuit is objectively baseless or lacks a reasonable basis of law or fact if no reasonable litigant could realistically expect success on the merits. *BE&K II*, 351 NLRB 451, 457 (2007) (quoting *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993)). The Board has held that retaliatory motive may be inferred from, among other things, the fact that the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected

⁷ Artiles’ credibility was further shown to be unreliable in *Remington I*, where the Board affirmed ALJ Meyerson’s credibility finding that in November 2009, Artiles instructed the Hotel’s former director of catering “to fabricate numbers” or “pad” and intentionally misrepresent the Hotel’s loss because of the Union boycott when, in fact, instead of losing money, the Hotel was making money and leading the region in sales at the time of the boycott. (GC Exh. 4 at 27-28.) As discussed further in the next section of this decision, I find that this misleading conduct on the part of Respondent’s Hotel’s management before the filing of the Federal District Court Lawsuit is extraordinary and when combined with the litany of Bad Acts alleged and found against the Hotel and its management from 2009-2013 evidence Respondent’s retaliatory motive in filing its baseless Federal District Court Litigation.

activity; and that the lawsuit obviously lacked merit. *Allied Mechanical Services*, 357 NLRB No. 101, slip op. at 10-11 (2011), enforcement denied, *NLRB v. Allied Mechanical Services, Inc.*, ___ F.3d ___ (6th Cir. Oct. 30, 2013).⁸

5 In *Milum Textile Services Co.*, 357 NLRB No. 169 p. 4-5 (Dec. 30, 2011), the Board found that an employer’s failure to present any factual evidence of actual malice is an indication of a baseless suit where libel and tortious interference claims were alleged. The Board concluded that no reasonable litigant could reasonably expect success on the merits when a
10 litigant has no evidence to establish a critical element of its case. *Id.* at 5.

15 Here, as in *Milum*, I find that Respondent had no hope of success on its equally baseless claims against the Union as it failed to properly allege actual malice with factual support. The term ‘actual malice’ did not appear in the Federal District Court Lawsuit until the Third Amended Complaint was filed. One of the allegedly defamatory statements did not even relate
20 to the Hotel, but rather to the Anchorage Hilton. After Respondent’s numerous attempts to allege defamation, the District Court granted the Union’s Rule 12(b)(6) motion and found that Respondent did not sufficiently allege actual malice and finally dismissed the amended complaint with prejudice. The Respondent decided to forgo its appeal of these District Court findings and so they have become final.⁹ (Tr. 96.)

25 As stated above, the tortious interference claims were obviously preempted by Federal labor law and never had merit. In addition, the defamation cause of action was also objectively baseless as there was a similar lack of actual malice on the part of the Union in publishing any statements. Furthermore, there was the lack of actual damage suffered by the Respondent as the result of any statements or acts by the Union given the fact that the Hotel and Respondent did not
actually lose money from the protected activities referenced in the lawsuit but, instead, made money and lead the region in sales at the time of the protected consumer boycott.¹⁰ (See GC Exh. 4 at 27-28; fn 4 herein.) Thus, Respondent’s Federal District Court Lawsuit which challenges the Union’s consumer boycott through its allegations of preempted tortious

⁸ On application for enforcement to the U.S. Court of Appeals for the Sixth Circuit, the Appellate Court on October 30, 2013, in a 2-1 decision denied the petition for enforcement of the Board’s order and disagreed with the Board’s earlier analysis in the same case. For the same reason stated earlier in this decision challenging the ongoing validity of the Board’s *Fabric Services* decision, the Board’s *Allied Mechanical Services* decision remains binding legal precedent and any questions concerning the legal integrity of the October 2011 Board Decision in *Allied* are properly addressed to the Board. I am bound to follow Board precedent that has not been reversed by the Supreme Court or the Board itself. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

⁹ “The showing of lack of merit required in order to prevail on a Rule 12(b)(6) motion to dismiss is more demanding than the showing required for summary judgment or a directed verdict in that the allegations of the complaint are assumed to be true for purposes of a motion to dismiss, while a plaintiff must have evidence to support its material allegations in order to survive a motion for summary judgment or directed verdict.” *Allied Mechanical Services*, slip op. at 7, fn 37.

¹⁰ Respondent argues that “the evidence points only to a non-employer hotel owner which filed a lawsuit because it had suffered, over the preceding 10 months, real losses as a consequence of an over-zealous boycott by [the Union’s] national and local leadership. R. Br. At 36. I dismiss this argument as it is baseless and contrary to the fact that Respondent and the Hotel actually led the region in sales during the stated time period.

interference claims and defamation is objectively and subjectively baseless as these legal theories are not colorable and no reasonable litigant could realistically expect success on the merits of the lawsuit especially when Respondent had no evidence to establish actual malice - a critical element of each claim in its Federal District Court Lawsuit.

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Respondent argues that because its Federal District Court Lawsuit was reasonably based, its motive for filing the lawsuit is irrelevant and its filing protected by the First Amendment. As stated above, I find that Respondent's filing of its Federal District Court Lawsuit was not reasonably based and was, instead, baseless. Moreover, I further find that Respondent is not entitled to First Amendment protection in the filing of its lawsuit because it is both objectively and subjectively baseless.

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Here, Respondent demonstrates the requisite retaliatory motive in multiple ways. First, the lawsuit was retaliatory on its face as it targeted protected conduct and sought money damages and attorney fees from the Union based on its statutorily protected conduct – conducting a consumer boycott and complaining about unlawful suspensions for collective bargaining purposes. See *Allied Mechanical Services*, slip op. at 10 (lawsuit that on its face addressed protected strikes and job targeting programs unlawful and supports a finding of retaliatory motive). See also *Petrochem Insulation*, 330 NLRB 47, 50 (1999), enf, 240 F.3d 26 (D.C. 2001) (Because the litigant could have no realistic expectation of prevailing on the merits of its lawsuit, it must have filed the lawsuit for some other reason.). The pleading itself makes mention of a series of Union acts, including participation in and advertising of the consumer boycott and complaints of illegal suspensions, allegedly to bring the Hotel back to the bargaining table. (Jt. Exh. 3 at 2-5.)

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Secondly, as established above, the lawsuit was not simply “unsuccessful,” it was baseless and obviously lacked merit because a necessary element of each claim was consistently deficient despite multiple opportunities to amend. See *Allied Mechanical Services*, slip op. at 12 (Filing of baseless action though not in and of itself dispositive suggests a retaliatory motive.). Finally, the timing of the Federal District Court Lawsuit filing in September 2010, in light of the filed ULP charges, the 2009 consumer boycott, numerous NLRB hearings and testimony, and prior findings that the Hotel and its management acted unlawfully against the Union through its litany of Bad Acts beginning in 2009 through at least 2011, strongly suggests an extraordinary type of unlawful animus against the Union, an admitted common opponent, as an added tactic to further punish and financially injure the Union and restrict its protected activities. I find that Respondent had a retaliatory motive in bringing the Federal District Court Lawsuit against the Union under these unique circumstances.

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Stated differently, I find that Respondent's Federal District Court Lawsuit was nothing more than one more baseless, yet retaliatory, act in the Respondent's and the Hotel's continued retaliatory efforts to conduct an extraordinary full out financial war against the Union to punish it and deplete its resources as part of their overall strategy of non-stop unfair labor practices and Bad Acts against the Union in 2009-2011. While it may not be uncommon for ill will or animus to exist between litigants in a single garden variety legal dispute or when a new owner/employer inherits the presence of an unwanted union at its establishment, the admitted “community of interest” retaliatory motives displayed here by Respondent and its Hotel against the Union as

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evidenced by the multitude of Bad Acts and the filing of the unsupported Federal District Court Litigation are extreme, unique and extraordinary. I further find that Respondent's unlawful animus against the Union became known as part of Respondent's strategy once charges were filed by the Union alleging and later proving unlawful acts and continued to be proven with alarming regularity as the NLRB hearings commenced and Union members testified from 2010-2012. In particular, the filing of the Federal District Court Litigation was the well-orchestrated retaliatory response to the Union's attempt to bargain in good faith for a new CBA, the continuing ULP's, the Union's protected consumer boycott, the NLRB hearings, the failed attempt to illegally withdraw recognition of the Union, the General Manager's misstatement of Hotel sales over the 10 month period leading to the lawsuit, and the denied filing of a Writ of Mandamus. Thus, I am convinced beyond all doubt and find that Respondent's retaliatory motive has been proven and Respondent violated Section 8(a)(1) when it filed and maintained its baseless Federal District Court Lawsuit.

CONCLUSIONS OF LAW

- 1.) Ashford TRS Nickel, L.L.C., Ashford Hospitality Trust, Inc., and the AHT affiliated entities, a single business enterprise and single employer, (Respondent) is and has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2.) The Union, Unite Here!, is a labor organization within the meaning of Section 2(5) of the Act.
- 3.) By instituting and pursuing its Federal District Court Lawsuit against the Union on September 23, 2010 that is preempted by federal law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designated to effectuate the policies of the Act.

The Respondent, having unlawfully instituted and pursued a lawsuit against the Union, shall also reimburse the Union for any litigation expenses directly related to its defense in the Federal District Court Lawsuit filed on September 23, 2010 plus interest. *J.A. Croson Co.*, 359 NLRB No. 2 slip op. at 13 (2012). Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (DC Cir. 2011). Such a remedy is standard in cases, where the respondents have filed unlawful lawsuits or arbitrations under Board law. *Federal Security*, supra, 359 NLRB at 14; *Standard Drywall*, supra, 357 NLRB at 5; *Duane Reade*, supra, 342 NLRB at 1015.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

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The Respondent, Ashford TRS Nickel, L.L.C., Ashford Hospitality Trust, Inc. (AHT), and all AHT affiliated enterprises, a single business enterprise and single employer, its officers, agents and representatives shall

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1. Cease and desist from

(a) Instituting and pursuing any lawsuit against the Union that is preempted by federal law or that lacks a reasonable basis and is motivated by intent to retaliate against activity protected by Section 7 of the Act.

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

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

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(a) Reimburse the Union for all legal and other expenses incurred related to the defense in the Federal District Court Lawsuit filed by Respondent against the Union on September 23, 2010, with interest compounded on a daily basis as described in the remedy section of this decision.

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(b) Within 14 days after service by the Region, post at its Sheraton Anchorage, Alaska Hotel (“Hotel”), copies of the attached notice marked “Appendix.”¹² Copies of the notice, on forms provided by the Regional Director for Region 19, 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.

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Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 Hotel employees and former Hotel employees employed by the Respondent at any time since September 23, 2010.

¹¹ 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.

¹² 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.”

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 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.

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Dated, Washington, D.C. November 18, 2013

Gerald M. Etchingham,
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

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 do anything to prevent you from exercising the above rights.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act (the “Act”).

WE WILL NOT institute, pursue, and/or maintain any lawsuit against Unite Here! Local 878 (the “Union”) that instituting and pursuing its Federal District Court Lawsuit against the Union on September 23, 2010 that is preempted by federal law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act.

WE WILL reimburse the Union for all legal and other expenses incurred in the defense of our September 23, 2010 Federal District Court Lawsuit filed against the Union, with interest compounded daily.

ASHFORD TRS NICKEL, L.L.C., a subsidiary of
ASHFORD HOSPITALITY TRUST, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.