

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

ASHFORD TRS NICKEL, LLC,
a subsidiary of ASHFORD HOPSITALITY
TRUST, INC.

and

CASE NO. 19-CA-32761

UNITE-HERE, LOCAL 878

RESPONDENT'S EXCEPTIONS

TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

COMES NOW, the above-named Respondent, Ashford TRS Nickel, LLC, and sets forth the following Exceptions to the recommended decision by Administrative Law Judge Gerald M. Etchingham dated November 18, 2013, and shows the following:

1. The ALJ erred in recommending a holding that Respondent Ashford TRS Nickel can be held liable – notwithstanding the undisputed fact it is not the employer of the employees of the Sheraton Anchorage hotel – based on its supposed “control” over those employees. In committing this error, the ALJ applied Fabric Services, 190 NLRB 540 (1971), which this Board should either reverse or not extend to the factual circumstances of this case, and the ALJ made inappropriate findings of fact related to so-called “control” by Respondent over the hotel employees, findings which this Board on *de novo* review should reject.

2. The ALJ erred in section III.2 of his Analysis by relying on a so-called exception found in footnote 5 in Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983), and stating based thereon that “preempted lawsuits are outside the scope of First Amendment protection.”

The proper test, as announced in BE&K Construction v. NLRB, 536 U.S. 516 (2002) and in the remand decision by the Board at BE&K Construction, 351 NLRB 451 (2007), is whether – regardless of the success or failure of the lawsuit (i.e., here, regardless of whether ruled preempted or not) – the lawsuit was reasonably based (i.e., a reasonable litigant could realistically expect success on the merits), and, if so, the motive in the filing of the lawsuit is irrelevant.

3. The ALJ erred in finding that the underlying lawsuit at issue was not reasonably based; that is, the ALJ erred by contrarily finding that the lawsuit was objectively baseless, defined as a lawsuit as to which “no reasonable litigants could realistically expect success on the merits.” BE&K Construction, 351 NLRB 451, 451 NLRB No. 29, at **11 (2007).
4. Because the underlying lawsuit was reasonably based, the ALJ erred in proceeding to analyze the Respondent’s motive in filing the lawsuit, as motive is irrelevant when the lawsuit is reasonably based.
5. The ALJ erred by failing to recognize that an NLRB administrative law judge and the Board do not possess expertise in matters relating to application of the First Amendment and do not possess expertise in matters relating to determining the objective merit of federal lawsuits, and thus failed to recognize that ALJ and Board decisions involving these interests do not warrant the same level of deference usually accorded to Board decisions in matters limited solely to national labor policy.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Exceptions to the Administrative Law Judge's Recommended Decision was electronically filed with the Board's e-filing system and with the Executive Secretary's Office and emailed to the following counsel:

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Dated: January 17, 2014

/s/ Karl M. Terrell

Karl M. Terrell