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 REPLY

TO THE GENERAL COUNSEL'S ANSWERING BRIEF

TO RESPONDENT'S EXCEPTIONS

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Upon the sound reasoning provided by the dissent in J.A. Croson & Co., 359 NLRB No. 2, *18 (2012), this Board should reject the "overbroad" and "sweeping standard" set forth in the majority decision in that case. That 2-1 majority decision, relying solely upon dicta in footnote 5 in Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983), held that where the Board makes *its own determination* a lawsuit is preempted, the door to the First Amendment is slammed shut. If the Supreme Court's decision in BE&K Construction, 536 U.S. 516 (2002) means anything, it stands for the following two propositions: that *any* petition to a court deserves the *appropriate* protection of the First Amendment, and the mere fact that a particular petition was not successfully received by a particular court does not end the inquiry. The First Amendment petition clause, among the "most precious of the liberties safeguarded by the Bill of Rights," BE&K, 536 U.S. at 525-34, is far too important to allow the Board – a non-Article III tribunal – from declaring an entire class of litigation automatically exempt from its protection. As the dissent stated further, paraphrasing Seventh Circuit authority from the antitrust context, "it is critical that we do not transform the [NLRA] into a means by which to chill vital conduct protected under the First Amendment." *Id.*, citing, Mercatus Group, LLC v. Lake Forest Hospital, 641 F3d 834, 847-48 (7th Cir. 2011).

"Plainly," as the dissent in Croson states, "the First Amendment interests protected by the Supreme Court's holding in BE&K Construction exists whether a reasonably based, state court lawsuit is unsuccessful under State law because of a failure of proof, or because it is preempted by Federal labor law." The sweeping, overbroad standard applied in Croson does not withstand

constitutional scrutiny. As the dissent explained, Croson improperly "condemn[s] the entire class of preemptive lawsuits as falling outside of the [First Amendment] petition clause, despite the fact that many such suits present genuine grievances and are brought with a reasonable belief that the Courts in which they are filed properly have jurisdiction." *Id.* Thus, as the dissent concluded, "if a lawsuit is found preempted, but the respondent had a reasonable belief that the state court had jurisdiction [or, as here, that a federal court had state law jurisdiction on diversity grounds], the standard the Board established on remand in BE&K applies." 359 NLRB at *19. "Nothing in the BE&K Court's decision or the Board's decision on remand singles out preempted lawsuits as lacking First Amendment protection." 359 NLRB at *18.

As shown in its Exceptions brief, Ashford had reason to believe the Union had pursued the boycott by intimidating prospective hotel guests with threats of violence, and reasonably believed therefore that its lawsuit advanced meritorious, *non-preempted* claims under state law. The state of Alaska has a "compelling state interest" in the "maintenance of domestic peace," which overrides the Board's preemptive authority to regulate a national labor relations policy. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247-48 (1959). The scope of this state interest includes protection against, and remedial redress for, acts of "intimidation and *threats* of violence." Id. Although the district court judge in Anchorage applied an overbroad reading of Rule 12(b)(6), thereby denying incorrectly Ashford the opportunity to pursue discovery and obtain evidence showing that threats of violence were indeed utilized by the defendant Union – as the evidence attached to the Complaint suggested – that doesn't change the fact that Ashford *reasonably believed* such evidence could be found, and reasonably believed therefore that preemption did not apply. *Cf.*, NLRB v. Allied Mechanical Services, 734 F 3d 486, 493 (6th Cir. 2013) ("But our narrow construction [affirming dismissal of Allied's lawsuit in

the *first* 6th Circuit decision] does not require a conclusion that an alternate, broad construction was not a possible outcome of the litigation," and stating further: "This chance of success — even if small — makes clear that Allied's secondary-boycott claims, while unsuccessful, were not objectively baseless").

Moreover, as the Sixth Circuit instructed in Allied Mechanical Services, 734 F3d at 491-93, Board cases of this type – involving not only First Amendment considerations, but involving also a determination of the objective merits of federal lawsuits – do not warrant the usual "substantial evidence" standard of deference. As in Allied Mechanical, this case "deeply implicates the First Amendment right to bring suit." 734 F3d at 491-92. And thus, "[the] courts, more than agencies, have expertise in determining the scope of that right . . . [and] also has more expertise than the Board in determining the objective merit of federal lawsuits." Id.

These principles of non-deference apply equally to the issue of preemption, as this is a matter reserved to the courts. Preemption goes to the very heart of federalism and state's rights, and is the product of extensive jurisprudence across a far broader landscape than labor policy. Though, when granted, it serves to define Board jurisdiction, the Board itself is not mandated by the N.L.R.A. to determine which claims in court are preempted or not. Accordingly, decisions by the Board touching on preemption are not accorded the usual deference.

II. This Board Should Reject the General Counsel's Argument to Adopt the ALJ's Recommended Decision on the Subjective Motive Prong, and Has Failed to Point to Any Findings in the Record Showing a Retaliatory Motive in the "Heightened Sense" Required by the Supreme Court.

As shown by Ashford's Exceptions, the ALJ erred in concluding the subjective motive was met, as the ALJ relied only upon the "more run-of-the-mill type of animus that the [Supreme] Court was reluctant to penalize in its discussion in BE&K." Allied Mechanical, 734

F3d at 494, *citing*, BE&K, 536 U.S. at 533-35. As shown further, in the majority opinion in BE&K, 536 U.S. at 526, the Court instructed that it has required, in the antitrust context, a "heightened sense" retaliatory motive (Exceptions brief, pp. 33-34). Applying this standard, the Sixth Circuit in Allied Mechanical held the evidence in the record in that case was "not substantial enough to show that Allied's motive was specifically to punish the unions through litigation costs," and that, "[r]ather, the record indicates that the retaliatory motive, if any, related to the 'ill will [that] is not uncommon in litigation'." 734 F3d at 495, citing to BE&K, 536 at 534. As this Board has adopted, in the BE&K remand decision, the 'antitrust' standard (the lawsuit must be both objectively baseless and with an improper subjective motive), this Board must apply the "heightened sense" retaliatory-motive standard, as the Sixth Circuit has done, and as the Supreme Court has taught.

The General Counsel argues that "even if the Board were to adopt the Sixth Circuit" standard, that "standard would nevertheless be met in the instant case." (Answering brief, pp. 36-37). The General Counsel points, however, only to lip service found in the ALJ's recommended decision, wherein the ALJ referred merely to the lawsuit as "an added tactic to further punish and financially injure the Union." Of course, *any* lawsuit has the obvious consequence of imposing costs on an opposite party. Surely, this fact alone is not enough to meet "heightened sense" motive mandated by the Supreme Court. If so, every lawsuit filed in this context would meet the standard. The Supreme Court, obviously, requires more than this.

Attempting to fill this gap, the General Counsel points, at page 36, to references in the ALJ decision to certain testimony in *Remington-I* – first, to testimony by a former hotel director of catering to the effect the general manager urged her to fabricate or "pad" the hotel's loses due to the boycott, [ALJD, p.11, n. 7], and, second, the ALJ plucked a reference from the *Remington-*

I record to the effect that the hotel "led the region in sales." [ALJD, p.12, n. 10]. Based only on this, the ALJ made the soaring inferential leap that Respondent's lawsuit was marked by a "lack of actual damage . . . given the fact Respondent did not actually lose money from the protected activities referenced in the lawsuit." [ALJD, p 12, lines 24-27]. The General Counsel's argument fails for *four* reasons.

First, the afore-referenced evidence from *Remington-I* in no way supports the grandly overstated conclusion of "lack of damage[s]," and that the hotel "did not actually lose money." This leap amounts to grossly unsupported speculation on the ALJ's part. Second, the third amended lawsuit in the district court, in fact, included specific allegations and dollar figures, demonstrating the losses incurred and damages suffered. [**Joint Exhibit 3 – Pacer doc. 50**]. If these numbers were 'padded,' that would have been a matter to be litigated (had the district court not erred in dismissing the lawsuit) and, even if the hotel did lead "the region in sales," that fact would not be in any manner inconsistent with other proof that the hotel, nonetheless, incurred losses due to non-preemptive tortious interference and defamation. Third, by pointing to these evidentiary items, as the ALJ has done and as the General Counsel has argued, both have missed the point. Respondent is not required in the context of the First Amendment issue presented here to prove, in this case, that in fact it suffered actual damages and "actually" lost money. Respondent is required only to show, with respect to the damages element of its causes of action in the district court, that it "realistically expected success on the merits." BE&K, 351 NLRB No. 29, **9 and **10. And fourth, this evidence was cited by the ALJ as (misplaced) support for his conclusion reached with respect to the objective prong, not the subjective-motive prong. [ALJD, p. 12, line 21 – p.13, line 4]. As for the subjective prong, again, the ALJ's recommended decision – which cited to the reversed decision by the Board in Allied Mechanical Services, 357

NLRB No. 101, at 10-11 [ALJD, p. 11, line 37 – p. 12, line 3] – pointed only to the "run-of-the-mill" evidence of animus which has been rejected by the Sixth Circuit, in reliance on the Supreme Court's decision in BE&K.

CONCLUSION

For the reasons stated, and upon the authority cited, both above and in Respondent's first brief, the ALJ's recommended decision should be rejected.

Respectfully submitted, this 21st day of February, 2014

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Reply Brief to the General Counsel's Answering Brief to Respondent's Exceptions 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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