

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 22, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Ashford TRS Nickel, LLC 177-1642
Case 19-CA-147032 177-1650

The Region submitted this case for advice as to whether Ashford TRS Nickel, LLC (“Ashford”) and its affiliated entities that own the Sheraton Anchorage Hotel (“Hotel”), are a single and/or joint employer with Remington Lodging & Hospitality, LLC (“Remington”) that contracts with Ashford to manage the Hotel. We agree with the Region that Ashford and Remington are a single employer. We also conclude in the alternative that Ashford and Remington are joint employers of the Hotel employees under the Board’s recent decision in *Browning Ferris*.¹

FACTS

Ashford and its related entities invest in the ownership of hotels.² Remington operates a majority of Ashford’s hotel properties, including the Hotel. Ashford, AHT, and Remington are headquartered in the same Dallas, Texas office building (albeit in different suites). Remington is privately held and 100 percent owned by Archie and Monty Bennett. Each Bennett owns a 2.3 percent interest in AHT and serves on its board of directors. In addition, Archie Bennett is the Chairman of Remington and the Chairman Emeritus of AHT; Monty Bennett is the CEO of Remington and the CEO and chairman of AHT.

¹ *BFI Newby Island Recyclery*, 362 NLRB No. 186 (August 27, 2015).

² Ashford TRS Nickel is a subsidiary of Ashford Hospitality Trust, Inc. (“AHT”). AHT stipulated in a prior proceeding in another case, described infra, that it is a single integrated enterprise and a single employer with its affiliated entities, including Ashford TRS Nickel (but excluding Remington). See *Ashford TRS Nickel LLC*, (JD(SF)-55-13), slip op. at 2 n.1 (November 18, 2013) (currently pending before the Board).

Remington and Ashford co-determine labor relations at the Hotel. Specifically, Remington's management of the Hotel is governed by a Hotel Master Management Agreement ("Agreement") that identifies Remington as the entity that "will hire, train, promote, supervise, direct the work of and discharge" Hotel employees but provides Ashford with the authority to control wages and other terms and conditions of employment. For example, the Agreement permits Remington "to fix the employees' terms of compensation and establish and maintain all policies relating to employment, so long as they are reasonable and in accordance with the Applicable Standards and the Annual Operating Budget." The Agreement requires Remington to not only submit to Ashford its Annual Operating Budget for approval, but regularly consult with Ashford on "matters of policy concerning management ... wage scales, personnel, general overall operating procedures, economics and operation and other matters affecting the operation of the Hotel[]." Further, the Agreement provides that employer contributions to employee benefit plans and administrative fees "shall be the responsibility of [Ashford] and shall be a Deduction."

Indeed, Ashford and Remington share legal counsel for Union matters because, as described by Ashford's legal counsel, the companies are "dealing with one hotel as to which [Ashford] is the owner, Remington is the management company."³ Ashford and Remington also acknowledge their mutual interest related to their common opponent, the Union.⁴ One shared legal decision involved Ashford's filing and maintenance of a federal court lawsuit against the Union for boycotting the Hotel.⁵ Monty Bennett, Ashford's and Remington's CEO, decided to file the lawsuit on behalf of Plaintiff "Hotel" and/or "Sheraton Anchorage," without distinguishing Ashford from Remington.⁶ An ALJ decided that Ashford's lawsuit against the Union violated Section 8(a)(1), for which Ashford could be liable, even though it was not the immediate "employer" of the Hotel employees.⁷ The ALJ's decision is currently before the Board.

Finally, Ashford, through AHT, admits that it and Remington lack an arm's-length relationship. Thus, AHT's 10-K Annual Report form filed with the SEC in 2014

³ *Ashford TRS Nickel LLC*, (JD(SF)-55-13), slip op. at 5.

⁴ *See id.*, slip op. at 4-5.

⁵ *See generally Ashford TRS Nickel LLC*, (JD(SF)-55-13).

⁶ *See id.*, slip op. at 5.

⁷ *See id.*, slip op. at 8-9.

acknowledged that the Agreement with Remington was “not negotiated on an arm’s-length basis” and AHT “did not have the benefit of arm’s-length negotiations of the type normally conducted with an unaffiliated third party” in part because “our chief executive officer and chairman of our board has an ownership interest in Remington[.]” AHT admits that its mutual exclusivity agreement with Remington required it to engage Remington to manage its hotels absent a contrary directors’ vote and that it “may choose not to enforce, or to enforce less vigorously, [its] rights under these agreements because of [its] desire to maintain [its] ongoing relationship with ... Remington Lodging.” AHT’s 10-K form reiterated that “[c]onflicts of interest in general and specifically relating to Remington Lodging may lead to management decisions that are not in the stockholders’ best interest.”

UNITE HERE! Local 878 (“the Union”) represents the Hotel employees. Remington and the Union began bargaining for a successor contract in 2009 but have been unsuccessful at reaching an agreement largely because of Remington’s extensive unlawful conduct.⁸

ACTION

We agree with the Region that Ashford and Remington are a single employer. We conclude also in the alternative that Ashford and Remington are joint employers of the Hotel employees under the Board’s recent decision in *Browning Ferris*.⁹

I. Ashford and Remington are a single employer

The Board “considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise[.]”¹⁰ In determining single employer status, the Board and courts consider four factors: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of

⁸ See, e.g., *Remington Lodging & Hospitality, LLC d/b/a The Sheraton Anchorage*, 362 NLRB No. 123 (June 18, 2015) (“Remington I”); *The Sheraton Anchorage*, 363 NLRB No. 6 (September 15, 2015) (“Remington II”); *Ashford TRS Nickel LLC*, (JD(SF)-55-13).

⁹ 362 NLRB No. 186 (August 27, 2015).

¹⁰ *Radio and Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). See also *Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1283-84 (2001).

labor relations.¹¹ Significantly, single employer status is characterized by the absence of an arm's-length relationship.¹² And, while no single factor is controlling,¹³ the Board stresses the latter three factors, and places particular emphasis on common control of labor relations.¹⁴ In this regard, the Board does not require that common officials directly oversee the workforces of both entities. Rather, "it is only necessary to conclude that there had been an ability by one entity to exercise 'clout' over labor relations of others."¹⁵

We agree that Ashford and Remington are a single employer. Although there is no common ownership because of the Bennetts' minority stake in AHT, the other three indicia of single employer status are present. Thus, there exists common management at the top levels of the two companies: Monty Bennett is the CEO of both Ashford and Remington while Archie Bennett is the Chairman Emeritus of AHT and the Chairman of Remington.¹⁶ There is also evidence that the companies' operations are interrelated. Ashford and Remington are located at the same address

¹¹ See e.g., *Dow Chem. Co.*, 326 NLRB 288, 288 (1998) (citing *Radio Union*, 380 U.S. at 256); *Emsing's Supermarket*, 284 NLRB 302, 302 (1987), *enforced* 872 F.2d 1279 (7th Cir. 1989).

¹² See *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 (April 8, 2015); *Emsing's Supermarket*, 284 NLRB at 302. See also *Lebanite Corp.*, 346 NLRB 748, 748 n.5 (2006).

¹³ See, e.g., *Central Mack Sales*, 273 NLRB 1268, 1271-72 (1984); *Blumenfeld Theatres*, 240 NLRB 206, 215 (1979), *enforced* 626 F.2d 865 (9th Cir. 1980).

¹⁴ See, e.g., *HydroLines, Inc.*, 305 NLRB 416, 417 (1991); *Geo. V. Hamilton Inc.*, 289 NLRB 1335, 1337 (1988); *Fedco Freightlines, Inc.*, 273 NLRB 399, 399 n.1 (1984).

¹⁵ *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 5 (citing *Pathology Institute*, 320 NLRB 1050, 1064 (1996), *enforced sub nom. Alpha Bates Corp. v. NLRB*, 116 F.3d 482 (9th Cir. 1997)); *Emsing's Supermarket*, 284 NLRB at 302 ("the fundamental inquiry is whether there exists overall control of critical matters at the policy level[]").

¹⁶ See, e.g., *Royal Typewriter Co.*, 209 NLRB 1006, 1007-10 (1974) (common high level management among parent company and subsidiary), *enforced* 533 F.2d 1030 (8th Cir. 1976); *Soule Glass and Glazing Co.*, 246 NLRB 792, 795 (1979) ("flow of common management personnel from one corporation to the other" supported single employer finding), *enforced in pertinent part* 652 F.2d 1055, 1075 (1st Cir. 1981). See also *Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902, 906-907 (9th Cir. 1964) (single employer finding not precluded where common management only found at top level).

and hold themselves out as one integrated company as plaintiffs in their joint lawsuit against the Union. Indeed, AHT's candid acknowledgment to the SEC that it lacks an arm's-length relationship with Remington exemplifies the companies' single employer relationship. Finally, the Agreement between Ashford and Remington provides Ashford with obvious control over Remington's labor relations by requiring Remington to submit its Annual Operating Budget to Ashford for approval and to routinely consult with Ashford on matters concerning "management ... wage scales, personnel, general overall operating procedures, economics and operation and other matters affecting the operation of the Hotel[]." We agree that this evidence, in total, establishes that Ashford and Remington are a single employer.

II. *Ashford and Remington are joint employers of the Hotel employees*

The Region should also allege in the alternative that Ashford and Remington are joint employers. The Board recently reaffirmed the principle that two or more statutory employers are joint employers of the same employees if they are "both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."¹⁷ In *Browning Ferris*, two statutory employers were found to be joint employers of a single workforce where they had an agreement in which the supplier employer recruited, selected, and hired employees for the user employer that could, in turn, reject and discharge employees and exert control over employees' wages, work shifts, and productivity and safety standards.¹⁸ The Board concluded that the user and supplier were joint employers based on their joint control of employees and employees' terms and conditions of employment, even though the entities' agreement specified that the supplier entity was the sole employer of the employees.¹⁹ The *Browning Ferris* Board noted that the Board will no longer require that a joint employer both *possess* the authority to control employees' terms and conditions of employment and *exercise* that authority directly, immediately, and "not in a 'limited and routine' manner."²⁰ Rather, joint employer status is determined by the *right* to control in the common-law sense, i.e., whether an employer can "affect[] the means or manner of employees' work and terms of employment, either directly or through an intermediary."²¹

¹⁷ *Browning Ferris*, 362 NLRB No. 186, slip op. at 15.

¹⁸ *See id.*, slip op. at 3-6.

¹⁹ *See id.*, slip op. at 3, 18-20.

²⁰ *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); *Laerco Transp.*, 269 NLRB 324 (1984)).

Here, although the companies' Agreement allocates to Remington the responsibility to hire, direct, and discharge employees, it also affords Ashford the right to reject or discharge employees and to control their wages, benefits, and other terms and conditions of employment by approving—or not— Remington's Annual Operating Budget. Indeed, Remington is required to regularly consult with Ashford on these and other issues. This evidence amply demonstrates that Ashford and Remington "share [and] codetermine those matters governing the essential terms and conditions of employment" for the Hotel employees and that they are thus joint employers.²²

Accordingly, the Region should allege, absent settlement, that Ashford and Remington are a single employer and, also, are joint employers of the Hotel employees.

/s/
B.J.K.

H: ADV. 19-CA-147032.Response.Ashford. (b) (6), (b)

²¹ *Id.*, slip op. at 16.

²² *Id.*, slip op. at 15.