

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Appeal No. 15-1231
Consolidated with 15-1467**

**Petition for Review from a Decision and Order of the National Labor
Relations Board**

**CC1 LIMITED PARTNERSHIP, DOING BUSINESS AS COCA COLA
PUERTO RICO BOTTLERS**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR REHEARING EN BANC FOR CC1

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III. GLOSSARY

- (1) CC1 – refers to Petitioner CC1.
- (2) NLRB – refers to Respondent National Labor Relations Board.
- (3) Board – refers to the NLRB panel that issued the Decision and Order under review in the captioned appeal.
- (4) NLRA – refers to the National Labor Relations Act.
- (5) Opinion and Order - refers to the Opinion and Order entered on August 3, 2018 in the captioned appeal.
- (6) Panel – refers to the Panel that issued the Opinion and Order.
- (7) Union – refers to Unión de Tronquistas de Puerto Rico, International Brotherhood of Teamsters, the union representing the CC1 bargaining unit employees at issue. See Opinion and Order, Addendum at p. 2.
- (8) Shop Stewards – refers to the five bargaining unit employees (Miguel Colón, Carlos Rivera, Francisco Marrero, Romián Serrano, and Félix Rivera) elected to participated in the negotiations at issue on the Union’s behalf as shop stewards. See Opinion and Order, Addendum at p. 2.

IV. FED.R.APP.P. RULE 35(b) STATEMENT

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 35-1, CC1 respectfully petitions this Court to rehear the case en banc. The Federal Rules of Appellate Procedure explicitly recognize that en banc rehearing may be ordered when consideration is necessary to secure or maintain uniformity of decisions *or* when a case involves a question of exceptional importance. See Fed.R.App.P. 35(a). *Both* criteria are met here.

First, the Panel's Opinion and Order conflicts with the U.S. Supreme Court's decision in Emporium Capwell Co. v. W. Addition Cm.ty. Org., 420 U.S. 50, 72 (1975), which established that wildcat strikes are *per se* unprotected under the NLRA. In the Opinion and Order, the Panel held that it "is only when employees' activity undermines the Union's objectives or position as bargaining authority that it loses NLRA protection" and on that basis remanded to the Board for further consideration regarding the underlying facts on record. See Opinion and Order, Addendum to the foregoing Petition, at p. 13. CC1 respectfully avers that Emporium Capwell mandates *reversal* of the Board's decision and dismissed the charges against CC1 as pertains to the wildcat strike at issue.

Second, the issue at hand is one of central and exceptional importance for labor policy in the United States. The treatment of wildcat strikes under the NLRA

directly implicates what the U.S. Supreme Court has long considered a cardinal principle of U.S. labor law – majority rule and collective bargaining. And, **“ilt is perfectly clear not only that the ‘wildcat’ strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the act to promote.”** NLRB v. Draper Corp., 145 F.2d 199, 203 (4th Cir. 1944) (emphasis ours). The Panel’s Opinion and Order, if it stands, will create uncertainty inasmuch as the Panel applied an unworkable exception to Emporium Capwell. Uniformity and clarity is essential for employers; employees and unions needing to make decisions concerning wildcat strikes.

V. MATERIAL FACTUAL AND PROCEDURAL BACKGROUND

CC1 operates a bottling plant in Cayey, Puerto Rico. See Opinion and Order, Addendum at p. 2. Subsequent to the conclusion of a negotiating session for a new collective bargaining agreement, on the night of September 9, 2008, a work stoppage took place that lasted 2 hours and affected CC1’s production. See Opinion and Order, Addendum at p. 3. CC1 contends that the Shop Stewards instigated the work stoppage. Id. As a result, the Shop Stewards were suspended and subsequently discharged from employment. Id. Over a month later, some bargaining unit employees engaged in a wildcat strike from October 20-22, 2008

demanding the reinstatement of the Shop Stewards and that CC1 negotiate *with the Shop Stewards* for a new collective bargaining agreement, despite the Union's position in writing that the strike was not authorized. *Id.* at pp. 4-5. The wildcat strike resulted in CC1 discharging and suspending the illegal strikers. *Id.* at p. 5.

Then, in 2009, General Counsel for the NLRB filed a Complaint against CC1 asserting multiple charges in connection with these events. *Id.* On April 16, 2010 the assigned Administrative Law Judge issued a Decision and Recommended Order (as to which CC1 filed exceptions) finding, *inter alia*, that the wildcat strike was protected by the NLRA. *Id.* at p. 5. Subsequent to a number of procedural events, this culminated in a Decision and Order (CC1 Limited Partnership, 362 N.L.R.B. No. 125 (Jun. 18, 2015)) issued by a three-member panel of the Board, affirming the Administrative Law Judge's decision with some exceptions and dividing over whether the wildcat strike was protected by the NLRA (the majority found in the affirmative). *Id.* at p. 6. The third panel member found that the wildcat strikers were a dissent union faction that supported a losing candidate slate for union office and sought to usurp the incumbent leadership's negotiating authority and its power to determine whether or when to strike in support of bargaining demands, **clearly undermining** "the Union's position as the unit employees' exclusive bargaining representative." CC1 Limited Partnership, 362 N.L.R.B. No. 125, at *6 (Jun. 18, 2015) (Johnson, dissenting).

On July 20, 2015, CC1 filed the Petition for Review in this Court of Appeals initiating the captioned appeal, and in December 2015 the NLRB cross-applied to enforce the Decision and Order; the Honorable Court consolidated the proceedings. On August 3, 2018, this Honorable Court issued an Opinion and Order and corresponding *Per Curiam* Judgment whereby it vacated and remanded for further explanation the Board's conclusion that the wildcat strikers were unlawfully terminated, and in all other respects granting the NLRB's cross-application for enforcement of the Decision and Order.

VI. ARGUMENT

a. The Panel's Opinion and Order Conflicts With, and Effectively Reverses in Part, the U.S. Supreme Court's ruling in Emporium Capwell.

The central question in this case and the subject of this Petition for Rehearing En Banc is whether a "wildcat strike" such as the one that took place at CC1 can constitute protected activity under the NLRA. Emporium Capwell is clearly dispositive of that question – wildcat strikes are unprotected activity. As such and as explained in more detail below, CC1 respectfully avers that the Panel erred in its Opinion and Order by applying an unworkable "exception" to Emporium Capwell crafted by the NLRB and remanding to the Board with further instructions consistent with the contours of the "exception."

A “wildcat strike” is generally considered to be either a strike not authorized by the certified union or a strike in breach of a no-strike clause in a collective bargaining agreement. See, e.g., NLRB v. Draper Corp., 145 F.2d at 202-204. The Board used this term in its Decision and Order, agreed that the October 20-22 work stoppage was a “wildcat strike,” and defined it as “strikes not authorized by the employees’ collective bargaining representative.” See Opinion and Order, Addendum at p. 12; CC1 Limited Partnership, 362 N.L.R.B. No. 125, at *1.

Therefore, although the Supreme Court did not use the term “wildcat strike,” that term is clearly indistinguishable from the facts in Emporium Capwell. In Emporium Capwell, the Supreme Court held that where a group of employees attempt to bypass their duly elected exclusive collective bargaining representative - the union - in favor of attempting to bargain with their employer separately and without their union, that conduct is *unprotected* under the NLRA. In that case, a minority group of the covered employees had picketed the store in question even though such activity was not authorized by the union. As such, the Supreme Court confirmed that the employer did not commit an unfair labor practice under the NLRA by discharging the employees in question. This decision was consistent with preceding Circuit Court decisions universally holding that all wildcat strikes are *per se* unprotected under the NLRA. See, e.g. NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969); Plasti-Line, Inc. v. NLRB, 278 F.2d 482 (6th

Cir. 1960); NLRB v. Draper Corp., *supra*. Meanwhile, this Circuit Court has not had occasion to directly rule upon this issue, but it has held, citing Emporium Capwell, that *promotion* of wildcat strikes in violation of a no-strike clause in a collective bargaining agreement is unprotected conduct under Section 7 of the NLRA. Fournelle v. N. L. R. B., 670 F.2d 331, 335 (D.C. Cir. 1982).

In short, Emporium Capwell affirmed a bright-line rule that wildcat strikes are *per se* unprotected under the NLRA, and it remains good law – Emporium Capwell has never been reversed or limited by the Supreme Court. Notwithstanding, in its Opinion and Order, the Panel adopted an “exception” to Emporium Capwell crafted by the NLRB and adopted by the Seventh Circuit Court of Appeals (see East Chicago Rehab. Ctr., Inc. v. N.L.R.B., 710 F.2d 397 (7th Cir. 1983)), to the effect that a wildcat strike constitutes unprotected activity under the NLRA “only when [it] undermines the Union’s objectives or position as bargaining authority.” See Opinion and Order, Addendum at p. 13. The Panel observed that the Board “looked at whether the negotiation efforts of the CC1 employees were independent of the Union or inconsistent with its strategy” and found that it was “reasonably defensible” for the Board to distinguish between protected and unprotected wildcat strikes in this manner. Id. The Panel went on to discuss evidence on record of a letter from the Union that was distributed to the wildcat strikers on the October 20th whereby the Union **explicitly and in writing**

disavowed the wildcat strike. Id. The Panel then recognized that the wildcat strike continued in spite of the letter. Id. The Panel thus remanded to the Board so that the Board could explain “how CC1’s distribution of the letter [to the striking employees] affected the Board’s decision [...] and also whether the Union’s message to CC1 accurately represented its position.” Id.

Respectfully, the NLRB and Seventh Circuit have misapprehended the holding in Emporium Capwell and thus, the Panel erred in adopting the aforementioned “exception” in its remand instructions to the Board. The Supreme Court’s holding in Emporium Capwell left no room for exceptions; indeed, while emphasizing the “long and consistent adherence to the principle of exclusive representation,” the Supreme Court held that it could not and would not fashion a “limited exception” to that principle *even where*, as in that case, the minority group was protesting allegedly racially discriminatory employment practices affecting that particular group of employees and *even where*, as in that case, this minority group “was not working at cross-purposes with the union.” Emporium Capwell, 420 U.S. at 65-70. Yet that is precisely what the Panel has done here: adopting a limited exception whereby a distinction is made between protected and unprotected wildcat strikes.

Simply put, in accordance with Emporium Capwell, there is no such thing as a “protected” wildcat strike under the NLRA. Given that it is undisputed that the

CC1 bargaining unit employees in question engaged in a wildcat strike -- even after being notified in writing that the Union disavowed the same -- and that they were terminated for doing so, the result mandated by Emporium Capwell here is a *reversal* of the Board's finding that said terminations were unlawful under the NLRA and dismissal of the corresponding charges by the NLRB, rather than a *remand* with instructions to the Board based on an exception that conflicts with Emporium Capwell.

The Board's remand ruling cannot be squared with Emporium Capwell and thus warrants en banc review.

b. The Panel's Opinion and Order Raises Exceptionally Important Questions under the NLRA and of U.S. labor policy.

Separate and apart from the conflict between the Panel's Opinion and Order and U.S. Supreme Court precedent, rehearing en banc is also warranted because the Panel incorrectly resolves a substantial question concerning one of the cardinal principles of labor law: the principle of majority rule and exclusive bargaining.

That principle is set forth in Section 9 of the NLRA and states, in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment [...]

29 U.S.C. § 159(a). The purpose of the NLRA was not to guarantee to employees the right to do as they please but rather to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. N.L.R.B. v. Draper Corp., 145 F.2d at 205 (emphasis ours). According to the U.S. Supreme Court, exclusive means exclusive: Once a majority of employees in a bargaining unit chooses a union, Section 9(a) imposes on the employer a “negative duty to treat with no other.” Children's Hosp. & Research Ctr. of Oakland, Inc. v. N.L.R.B., 793 F.3d 56, 57 (D.C. Cir. 2015), citing Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684, (1944). This is a consequence of the fact that “**[t]he majority-rule concept is today unquestionably at the center of our federal labor policy.**” Children's Hosp. & Research Ctr. of Oakland, *supra*, quoting NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (emphasis ours). Indeed, requiring an employer to bargain only with the majority union prevents “strife and deadlock” by eliminating rival factions that can make demands on the employer. Children's Hosp. & Research Ctr. of Oakland, *supra*, quoting Emporium Capwell, 420 U.S. at 68.

The question for rehearing consideration is the level of protection under the NLRA, if any, for wildcat strikes. The Panel’s remand ruling establishes a precedent that threatens to undercut the ability of employers and unions to preserve orderly collective bargaining and would bring about a cloud of uncertainty

regarding an area of paramount importance in U.S. labor policy. Clarity on this issue is undoubtedly essential for employers, unions, and even unionized employees. As articulated by the Fourth Circuit, “**[n]o surer way could be found to bring collective bargaining into general disrepute than to hold that ‘wildcat strikes’ are protected by the collective bargaining statute.**” N.L.R.B. v. Draper Corp., 145 at 205 (emphasis ours). This is why upholding Emporium Capwell is so important.

Notwithstanding, even assuming *arguendo* that Emporium Capwell does *not* stand for a bright-line rule that wildcat strikes are *per se* unprotected under the NLRA (and hence wildcat strikes may be protected in exceptional circumstances), CC1 respectfully avers that the Panel erred by applying an “exception” --- the aforementioned East Chicago standard -- that strays far from the contours of Emporium Capwell. The problem with the East Chicago “exception” is that it essentially provides protection to wildcat strikers solely if the minority group and the union’s *demands and statements* are not in derogation of the union or contrary to, or inconsistent with, the union’s substantive goals. See Opinion and Order, Addendum at p. 13. Again, in, Emporium Capwell the Supreme Court declined to fashion a “limited exception” for a situation where the minority group “was not working at cross-purposes with the union.” Emporium Capwell, 420 U.S. at 65-70. In other words, the Supreme Court explicitly rejected an approach that would allow

a minority group to bypass the union's bargaining strategy in favor of their own, in furtherance of the same ultimate substantive goal. The Supreme Court rejected such an approach with good reason - allowing a minority group to take actions that undermine the established union strategy can often result in havoc.

Indeed, that sort of havoc is *precisely* what transpired at CC1. As the evidence on record shows, the conflict simmering behind the scenes and driving the wildcat strikers was not between CC1 and the Union but rather between rival Union factions at odds over negotiation strategy. To wit, the Union bargaining committee had previously consisted of the Shop Stewards, but given that the Shop Stewards had already been terminated by CC1 in connection with the prior month's work stoppage, the Union summoned the bargaining unit employees to an assembly to be held on October 12th, for the purpose of appointing a new bargaining committee in order to resume negotiations of the successor collective bargaining agreement. CC1 Limited Partnership, 362 N.L.R.B. No. 125, at *6 (Johnson, dissenting).

The next day, a group of bargaining unit employees told a CC1 official that notwithstanding the Union's chosen strategy, they wanted the *Shop Stewards* - and not the new bargaining committee that was to be elected by the Union - to be the ones to negotiate on their behalf with CC1 as to the new collective bargaining agreement and the Union's demands. Id. However, it was not for that dissident

faction of employees nor for CC1 to decide who would make up the bargaining committee; it was up to *the Union*. The Union could have insisted on the Shop Stewards' reinstatement rather than to replace them with a new bargaining committee, but instead it decided as a matter of strategy to move forward with the election of a new bargaining committee. As the dissenting member of the Board succinctly pointed out in the Decision and Order, while it may be true that the wildcat strikers' demands coincided with the Union's demands, the Union "leadership did not commit to a deadline for achieving these goals or otherwise specify a strike date [... and] [i]t certainly did not leave the final decision to strike in the hands of [CC1]'s employees." Id.

Furthermore, as acknowledged by the Panel in the Opinion and Order, the wildcat strike was explicitly disavowed by the Union. The evidence on record reflects that on October 20, 2008, when the wildcat strike began, CC1 informed Union officials, and the Union then replied assuring CC1 that the strike was not authorized by the Union and that **the Union would be taking legal action against the "false leaders "of the wildcat strike.** See Opinion and Order, Addendum at p. 5. CC1 had its security guards distribute the Union's letter to all the striking employees, and yet the wildcat strike continued 2 more days. Id. It is evident, as the Panel suggested in its Opinion and Order, that the employees who continued to strike after being informed of the Union's clear disapproval were doing so on their

own behalf for their own motives and not in line with the Union's bargaining strategy.

Again, this course of events serves to illustrate the problems that can arise in practice if the East Chicago standard becomes the applicable precedent in the D.C. Circuit. An alternative and reasonable application of Emporium Capwell was best delineated by then-NLRB Chairman William B. Gould IV in his concurring opinion in the case of Silver State Disposal Service, Inc., 326 N.L.R.B. 84 (Aug. 19, 1998). As he explained, consensus on substantive goals between the two parties is to be expected, but not necessarily on the best means to achieve the end result. Id. Therefore, the defining issue in determining whether an unauthorized stoppage is protected should be consensus – or lack thereof -- between the minority group at issue and the union about *strategy*. Id. Chairman Gould effectively discussed why:

For a number of years prior to *Emporium*, I had been of the view that the Court of Appeals for the Fourth Circuit was correct in its interpretation of our Act in *NLRB v. Draper Corp.* when it adopted the view that unauthorized stoppages undertaken once an exclusive bargaining representative has been selected by a majority of the employees inherently derogates the union and the exclusive bargaining representative concept since the employer is obliged to bargain with the union and not individual employees. I am of the view that the errors in the Board thinking and its failure to take into account accurately the implications of *Draper* flow from decisions like the Boards in *Sunbeam Lighting Co.* and the Fifth Circuit's opinion in *NLRB v. R.C. Can Co.* **These decisions proceed on the assumption that, if there is an identity or similarity of objectives between the union and individual employees, an unauthorized stoppage is protected under the Act because the majority representative and exclusive bargaining concepts cannot be**

usurped or derogated under such circumstances. This approach, which seems to constitute the overriding theme in determining whether the conduct is protected or unprotected under our statute, is both naive and misguided. Because the Board and courts have examined this issue so as to determine whether the striking workers and the union have similar goals, if there is dissatisfaction with the bargaining process, sometimes this has been rationalized as frustration with the employer rather than the union. This, of course, is not consistent with the real world and, in any event, highly unsatisfactory because the actual object of employee grievance, i.e., union or employer, may be a difficult inquiry to answer inasmuch as the workers may be dissatisfied with both parties in some or most instances.

[...]

I have written previously about the importance of timing and the use of economic weaponry as has the Supreme Court in the context of its discussion of the right to lock out. If, for instance, a union wants to delay use of the strike weapon to a time that it deems to be more propitious, it is hard to imagine something that is more inconsistent with the exclusivity concept than a strike at another time. **Yet, under the Board's present approach, so long as identity of substantive goals is found to exist, the activity is protected. This approach creates havoc with union policy, good industrial relations, and the sound administration of our Act which is designed to produce industrial peace and to promote the concepts of exclusivity and majority rule. And it promotes the balkanization with which *Emporium* is at war.**

Silver State Disposal Service, Inc., 326 N.L.R.B. 84, at *8-9 (emphasis ours and footnotes and internal citations omitted). As the dissenting member of the Board correctly concluded, “promotion of the short-term interests of the dissident steward employee group in striking is ‘necessarily destructive’ of the collective bargaining

process and the Union's role as the exclusive bargaining representative." CC1 Limited Partnership, 362 N.L.R.B. No. 125, at *6 (Johnson, dissenting).

A sensible approach that is consistent with Emporium Capwell such as the aforementioned, as opposed to the East Chicago standard, would prevent these problems. It warrants emphasizing that based on the evidence already on record, the wildcat strike was unprotected under *either* standard. The Union and the wildcat strikers were indisputably at odds over negotiation strategy (the dispositive criterion in applying the standard proposed by Chairman Gould). On one hand, the Union decided to move forward with the election of a new bargaining committee and collective bargaining agreement negotiations. On the other hand, the wildcat strikers refused to resume collective bargaining agreement negotiations until their threshold demand was met – the reinstatement of the shop stewards, so that CC1 would bargain with the *shop stewards* and not any newly elected bargaining committee. Moreover, there was a clear divergence between the Union and the wildcat strikers' primary and immediate objectives – the Union's objective was to achieve a new collective bargaining agreement forthwith; whereas the wildcat strikers' objective was the reinstatement of the shop stewards. Accordingly, even under the more lenient East Chicago standard (which essentially confers NLRA protection on wildcat strikers so long as the union and the wildcat strikers' substantive goals are consistent), the wildcat strikers' conduct was unprotected.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed.R.App.P. 32(a)(7)(B) as adjusted by Fed.R.App. 35(b)(2) because, excluding the parts of the documents exempted by Fed.R.App.P. 32(f) and by Circuit Rule 32(e)(1), this document contains 3,755 words and 15 typewritten pages.

2. This document complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type-style requirements of Fed.R.App.P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in font Times New Roman 14.

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CERTIFICATE OF SERVICE

It is hereby certified that today, in accordance with Circuit Rules 25, 31, 32 and 35, the foregoing Petition was filed with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate ECF system, which automatically sends notice of filing to all ECF filers.

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On Petition for Review and Cross-Application
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the National Labor Relations Board

Néstor M. Méndez-Gómez argued the cause for petitioner. With him on the briefs were *María D. Trelles Hernández* and *Jason R. Aguiló Suro*. *Carlos Concepción* entered an appearance.

Jeffrey W. Burritt, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Richard F. Griffin, Jr.*, General Counsel, *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy

Associate General Counsel, and *Usha Dheenan*, Supervisory Attorney.

Before: ROGERS, GRIFFITH, and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: The National Labor Relations Board (“Board”) determined that CC1 Limited Partnership (“CC1”) unlawfully fired several employees who had engaged in work stoppages. Although we agree with the Board that there was substantial evidence that one of the discharged employees played no part in a work stoppage, we remand to the Board for further explanation its conclusion that the later wildcat strike was protected activity. We also dismiss additional claims CC1 makes but failed to properly preserve for our review.

I

A

CC1 operates a bottling plant under the name of Coca Cola Puerto Rico Bottlers in Cayey, Puerto Rico. Its warehouse employees are represented by the Union De Tronquistas De Puerto Rico, Local 901, International Brotherhood of Teamsters (the “Union”). Until October 2008, José Adrián López was the Union’s chief negotiator with CC1 and the principal representative of the employees. Employees Miguel Colón, Carlos Rivera, Francisco Marrero, Romián Serrano, and Félix Rivera were elected to participate in negotiations on the Union’s behalf as shop stewards. The collective-bargaining agreement that had been in place between CC1 and the Union since 2003 expired on July 31, 2008.

During the afternoon of September 9, 2008, CC1 and López met to negotiate a new agreement. López planned to share the status of the negotiations at an 8:30 p.m. meeting in CC1's cafeteria with CC1 employees who worked the late shift. When López arrived at the plant that night, the security guard tried to block his entrance. Over the guard's protests, López entered the plant anyway and held the meeting. During the meeting, a CC1 supervisor interrupted López and told him to leave the plant. López refused, and the two argued. Eventually, the supervisor left the cafeteria to call security, and López led the group of employees to the plant's warehouse to continue the meeting. The shop stewards on site at the time encouraged other employees to abandon their workstations and follow López.

At 8:45 p.m., Colón arrived at the plant to attend the meeting in the cafeteria with López. By that time, the meeting had moved to the warehouse. By 9:00 p.m., Colón joined the meeting at the warehouse, where he found López and about ninety employees. Soon after, police called by CC1's security came, and López told the employees to return to work. All in all, the work stoppage caused by López's meeting cost the company two hours of work from the employees who attended.

On the next day, CC1 suspended Colón and the other shop stewards. According to the letter each received from the company, they were suspended for "invading private property, encouraging others to abandon their job, verbally abusing the supervisors and intentionally paralyzing the production line" the night before. App'x 369. In response, the Union called a meeting at which the CC1 employees unanimously agreed to strike unless management agreed to three demands: (1) reinstate the suspended shop stewards; (2) forgo filing any charges against the Union based on the work stoppage; and (3) return to the table to negotiate a new collective-bargaining

agreement. The next day, a Union officer requested strike assistance from national headquarters.

One month later, the Union had not yet met with CC1 negotiators or planned a strike. On October 9, Colón and the other shop stewards circulated a flyer announcing a meeting on October 12 to discuss a strike. But the meeting was not authorized by the Union. Upon seeing the flyer, one Union official asked Colón not to “divide the membership.” Another Union representative suggested to him that only a strike would ensure reinstatement of the shop stewards. On October 10, CC1 discharged the suspended shop stewards. Two days later at the October 12 meeting called by Colón and the other shop stewards, employees signed a petition authorizing a strike unless CC1 agreed to the Union’s demands. But the Union had no part in the meeting. No Union official attended, and the Union never responded to Colón’s list of employees who had signed the strike petition.

On October 14, the national headquarters approved the Union’s request to provide assistance in a strike. The next day, the Union wrote CC1 to demand that negotiations resume. CC1 agreed, but the Union never replied.

On October 19, the shop stewards met at Colón’s home to prepare to strike. From October 20 until October 22, more than 100 CC1 employees went on strike. Many of them used picket signs and loudspeakers to protest the company’s treatment of López and the firing of the shop stewards. They also demanded that CC1 reinstate the shop stewards and negotiate a new collective-bargaining agreement.

On the first day of the strike, CC1 warned the Union that the company planned to “resort to ulterior actions against the Union and its representatives” unless the strike stopped. App’x

399. Upon receiving CC1's message, the Union explained that the strike was an illegal "wildcat" strike because it was not backed by the Union: "We want to clarify that we have not sent or authorized the presence of Officers or Union members in said stoppage; therefore, the presence there of any Union member would have been of their own accord, not official, and in violation of the statutes of the Union." App'x 403. The Union added that it would take action against the "false leaders" who were "threatening . . . the welfare of the great majority of the [CC1] workers in order to promote their own ignoble interests." *Id.* CC1 distributed the Union's message to the striking employees, some of whom responded by abandoning the strike.

Once the strike ended, CC1 suspended or discharged eighty-six of the striking employees. At the Union's request, CC1 agreed to reinstate suspended employees who signed a so-called "last-chance agreement," which subjected them to immediate termination should they violate any of the agreement's terms.

B

CC1's response to the events surrounding the work stoppage and the strike drew multiple charges. In 2009, the Board's General Counsel issued a complaint alleging that CC1 unlawfully discharged its employees for participating in those actions. After an evidentiary hearing, an Administrative Law Judge (ALJ) determined that discharging Colón violated the NLRA because the evidence showed he had not encouraged the September 9 work stoppage as CC1 claimed. The ALJ determined that the wildcat strike was protected by the NLRA, making CC1's discharge of the striking employees unlawful. The ALJ also concluded that the last-chance agreements were unlawful.

CC1 challenged the ALJ's decision, which the Board affirmed with some exceptions. *CCI Limited Partnership*, 358 N.L.R.B. 1233 (2012). As to the firing of Colón, the Board found that he had not encouraged the work stoppage and, even if he had, his actions would have been protected by the NLRA. *Id.* at 1234 & n.5. As to the wildcat strike, the Board agreed that it was protected activity because it supported the Union's strategy. *Id.* at 1235-36. To this latter point, the Board looked at the two factors set forth in *Silver State Disposal Service, Inc.*, 326 N.L.R.B. 84, 103 (1998): "(1) whether the employees [attempted] to [bypass their union and] bargain directly with the employer and (2) whether the employees' position [was] inconsistent with the union's position." *CCI*, 358 N.L.R.B. at 1235. The Board determined that the employees were striking as individuals on behalf of the Union, reasoning the Union never told the employees not to strike and that they did not know the Union was pursuing separate negotiations with management. *Id.* at 1235-36. The Board also concluded that the employees' three demands of CC1 were consistent with the Union's position. *Id.* In its order, the Board required CC1 to provide backpay to the discharged employees. *Id.* at 1238.

The Board denied CC1's motion for reconsideration. Order Denying Motion for Reconsideration, 2013 WL 298118 (N.L.R.B. Jan. 24, 2013). CC1 sought review in our court, but we held its petition in abeyance until the Supreme Court decided *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In *Noel Canning*, the Court held that the recess appointments of three members of the Board, two of whom were on the 2012 panel, were unlawful. *Id.* at 2557, 2578. As a result, the Board set aside the 2012 decision. Order, 2014 WL 2929759 (N.L.R.B. June 27, 2014). Meanwhile, CC1 reached settlement agreements with all of the employees involved except for four

who had been discharged for striking and Colón. *CC1 Limited Partnership*, 362 N.L.R.B. No. 125, at 1 n.1 (June 18, 2015).

In 2015, a lawfully appointed panel of the Board reviewed de novo the ALJ's decision and "affirm[ed] the [ALJ's] rulings, findings, and conclusions . . . to the extent and for the reasons stated" in the 2012 decision and order. *Id.* at 1. The new panel unanimously found that CC1 had unlawfully discharged Colón "by terminating [him] for his participation in the [September] walkout." *Id.* at 3 n.7. But the panel divided over whether the October wildcat strike was protected activity. The dissent argued that the strike was not because it "undermined the Union's position as . . . exclusive collective bargaining representative," *id.* at 5, and diluted the "united front" that gives unions the bargaining power to make their negotiations effective, *id.* (quoting *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 70 (1975)). In the dissent's view, the striking employees were a "dissident" faction that intended to "usurp" the Union's exclusive negotiation authority. *Id.* In the view of the majority, the striking employees were simply "ma[king] good on the [Union's previous] strike threat." *Id.* at 3. As with the 2012 order, the Board ordered CC1 to provide backpay in a lump sum to the unlawfully discharged employees, *id.* at 4, but newly required CC1 to reimburse employees for any tax penalties triggered by the award, *id.* The Board also ordered CC1 to "[c]ease and desist from . . . [c]oercing employees into signing overbroad 'last chance' agreements as a condition of their reinstatement" and to remove any references to those agreements from the files of the employees who signed one. *Id.*

In July 2015 CC1 petitioned our court for review, and in December 2015 the Board cross-applied to enforce its decision. We consolidated the cases and consider now whether the Board

properly determined that CC1 violated the NLRA by firing Colón and the striking employees.

II

The Board had jurisdiction over this matter pursuant to 29 U.S.C. §§ 151, 160(a), and we have jurisdiction under § 160(f).

Even though “[w]e review the [Board’s] orders under a deferential standard,” we cannot affirm a decision made without a “reasoned explanation.” *Int’l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006) (internal quotation marks omitted). We will affirm a decision that applies a “reasonably defensible” interpretation of the NLRA, even if we “might prefer another view of the statute.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). And we uphold the Board’s policy judgments that are not arbitrary or capricious. *Int’l Transp.*, 449 F.3d at 163.

The Board’s factual findings are “conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citations and internal quotation marks omitted). We will accept the credibility determinations made by an ALJ and adopted by the Board unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupported.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation marks omitted).

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III

A

CC1 asserts that it fired Colón because he encouraged the September 9 work stoppage, which was unlawful.* The Board responds that CC1 was motivated instead by Colón's support for the Union. "It is well settled that an employer violates the NLRA by taking an adverse employment action . . . in order to discourage union activity." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001) (citing *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980)). To demonstrate that the employer's motivation was unlawful, the General Counsel must present to the Board "a prima facie showing sufficient to support the inference that protected [i.e., union-related] conduct was a motivating factor in the . . . adverse action." *Id.* (alterations in original) (quoting *TIC-The Indus. Co. Se., Inc. v. NLRB*, 126 F.3d 334, 337 (D.C. Cir. 1997)). "Once a prima facie case has been established, the burden shifts to the company to show that it would have taken the same action in the absence of the unlawful motive." *Id.* at 126. "[O]ur review of the Board's conclusions as to discriminatory motive is [especially] deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075-76 (D.C. Cir. 2016) (internal quotation marks omitted).

Before the ALJ, the General Counsel argued that CC1's reason for discharging Colón must have been unlawful because the company's professed explanation, his encouragement of the work stoppage, never happened. The ALJ found that Colón arrived at the plant *after* the employees had already left their

* We do not reach the issue of whether the conduct CC1 alleges was protected activity because, as we determine below, this conduct was a pretext to discharge Colón and not CC1's true motivation.

work stations to gather at the warehouse, leaving no opportunity for Colón to encourage the work stoppage. Only Armando Troche, a CC1 supervisor, testified that he saw Colón telling employees to stop working. The ALJ did not credit this testimony because he believed, mistakenly as it turned out, that Troche hadn't mentioned Colón's conduct in his pretrial affidavit. Despite the ALJ's mistake, he found other reasonable grounds to discount what Troche claimed. Colón and two corroborating witnesses testified that he had not encouraged the work stoppage. Moreover, Troche's testimony focused on the shop stewards as a group, mentioning Colón only to say that when he arrived he joined in the other shop stewards' conduct. App'x 307.

We cannot second-guess “the ALJ's credibility determinations, as adopted by the Board, unless they are patently insupportable.” *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 265 (D.C. Cir. 1993) (quoting *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988)). Because there is scant evidence that Colón encouraged the work stoppage and plenty of evidence that he did not, we defer to the Board.

If Colón did not encourage the work stoppage, as we conclude, the Board was justified to infer that some other conduct must have motivated CC1, and the General Counsel successfully made a prima facie case that such conduct was protected activity. *See Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (stating that the Board “can infer from falsity of employer's stated reason for discharge that motive is unlawful” (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966))). The burden shifted to CC1 to present an alternative, lawful motivation, but the company still offers none, instead standing behind its argument that “Colón

did indeed encourage employees to engage in a work stoppage.” CC1 Br. 44.

It is possible of course that CC1 fired Colón based on a mistaken but good-faith belief that he had encouraged the work stoppage. See *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (D.C. Cir. 2012). But CC1 does not make this argument. See *N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007). Regardless, the Board concluded from the ALJ’s findings that CC1 did not believe in good faith that Colón had encouraged the work stoppage. For example, the ALJ determined that CC1 “conducted a superficial investigation as it concerned Shop Steward Col[ón], and manufactured evidence in its desire to lump together the actions of the four other Shop Stewards with those of Col[ón].” App’x 21. The ALJ also found that “none of the Shop Stewards including Col[ón] were ever provided the opportunity to state their position concerning the events of September 9, but rather were summarily suspended on September 10.” *Id.* These findings certainly cast suspicion on the possibility that CC1 fired Colón because it made a good-faith mistake. See *Inova Health Sys. v. NLRB*, 795 F.3d 68, 84 (D.C. Cir. 2015) (doubting that a company fired its employee for her unprofessional conduct, as it claimed, when that company’s investigation into her behavior was “one-sided” and incomplete).

In these circumstances and given our deferential standard of review, we affirm the Board’s conclusion that CC1 did not fire Colón because it believed that he had encouraged the September 9 work stoppage. See *Fort Dearborn Co.*, 827 F.3d at 1072. And because CC1 didn’t satisfy its burden to demonstrate an alternative, lawful reason for firing him, we affirm the Board’s conclusion that CC1 fired Colón for unlawful reasons. See *Shamrock Foods Co. v. NLRB*, 346 F.3d

1130, 1135 (D.C. Cir. 2003) (explaining that once the General Counsel shows that a company had unlawful motivations, the burden to demonstrate a lawful motivation shifts to the company) (citing *Wright Line*, 251 N.L.R.B. at 1089).

B

CC1 argues that it was lawful to fire the employees who participated in the October strike because it was a wildcat strike, which is not protected by the NLRA. The Board agrees that the October strike was a wildcat strike, but believes that it was protected by the NLRA.

Wildcat strikes are governed by sections 7 and 9 of the NLRA. In most circumstances, section 7 protects an employee who claims his labor rights through “concerted activities,” such as strikes. 29 U.S.C. § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”); *see also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). An employer who disciplines an employee for exercising a protected right to strike violates the NLRA. 29 U.S.C. § 158(a)(1); *Consolidated Commc’ns, Inc. v. NLRB*, 837 F.3d 1, 7 (D.C. Cir. 2016). Section 9 provides that a lawfully elected union is the *exclusive* bargaining representative of the employees. 29 U.S.C. § 159(a) (“Representatives . . . selected for the purposes of collective bargaining . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment”).

The exclusive bargaining authority granted unions by section 9 sometimes creates a tension, which the NLRA does not clearly resolve, with labor rights granted employees by section 7. The Supreme Court addressed this tension in *Emporium Capwell Co. v. Western Addition Community Organization*, holding that a strike is not protected activity when it interferes with an elected union's exclusive representation. 420 U.S. at 62. Even so, the Court did not strip the NLRA's protection from all wildcat strikes. By electing a union, employees do not "waive[] all rights to protect themselves against an employer's unlawful actions." *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 105 (7th Cir. 1971); see also *Bridgeport Ambulance Serv., Inc.*, 302 NLRB 358, 363-64 (1991) (explaining that a wildcat strike was still protected activity because "the employees' demands and statements during this period w[ere] not in derogation of the Union or contrary to, or inconsistent with, the Union's bargaining position"), *enf'd*, 966 F.2d 725, 729 (2d Cir. 1992) (agreeing that *Emporium Capwell* does not transform all unauthorized concerted activity into unprotected activity). It is only when employees' activity undermines the Union's objectives or position as bargaining authority that it loses NLRA protection.

In light of *Emporium Capwell* and *Silver State*, the Board looked at whether the negotiation efforts of the CC1 employees were independent of the Union or inconsistent with its strategy. *CCI*, 362 N.L.R.B. No. 125 at 1. "The resolution of any statutory ambiguity latent in the NLRA is a task that the Congress, in the first instance, has entrusted to the Board, not this Court," *Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB*, 793 F.3d 56, 59 (D.C. Cir. 2015), and we think the Board's interpretation is "reasonably defensible," *Ford Motor Co.*, 441 U.S. at 497. See *Children's Hosp.*, 793 F.3d at 59 (deferring to the Board's understanding of the "interplay" between NLRA provisions that, on their faces, seemed to

conflict); *E. Chi. Rehab. Ctr., Inc. v. NLRB*, 710 F.2d 397, 402-03 (7th Cir. 1983) (“[I]f the Board chooses to distinguish between wildcat strikes that undermine the union’s position as exclusive collective bargaining representative and ones that do not . . . we must let it.” (citations omitted)). However, the Board failed to explain how it applied *Silver State* to the employees who continued to strike after learning the Union disavowed it as a move by “false leaders.” Because the employees knew the Union disapproved of the strike, it seems that the employees who continued to strike might have been doing so on their own behalf for their own reasons. The Board dismissed this suggestion because “[t]he Union sent a letter to [CC1] stating that the strike was not authorized, but it was [CC1]—not the Union—that photocopied the letter and asked security guards to give it to the strikers.” *CCI*, 362 N.L.R.B. at 2 n.6.

It is unclear to us how CC1’s distribution of the letter affected the Board’s decision. Perhaps the Board thought the striking employees’ *knowledge* of the Union’s position wasn’t important unless that knowledge came from the Union itself. But that’s just a guess, and we can’t rely on guesses. We cannot determine if the Board based its decision on a reasonably defensible interpretation of the NLRA if we do not know how the Board reached its conclusions. See *Int’l Transp.*, 449 F.3d at 163. In short, we cannot determine if there was substantial evidence for the Board to find that the wildcat strike was protected activity. We remand this issue so that the Board can explain the importance of the provenance of the letter and also whether the Union’s message to CC1 accurately represented its position.

C

CC1 makes two additional arguments, one about the remedy granted by the Board and another about the Board’s

decision that the last-chance agreements were unlawful. But we dismiss them both without considering their merits because CC1 fails to properly raise them on appeal.

First, CC1 argues that we should reverse the Board's order to compensate Colón and the striking employees for the tax consequences of the backpay award. CC1 failed to raise this argument before the Board, and section 10(e) of the NLRA provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) ("[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.").

CC1 argues that the exception for "extraordinary circumstances" applies here because the Board did not impose the tax remedy until its 2015 decision. But the unusual procedural history in this case that led to a second Board decision did not deprive CC1 of an opportunity to timely challenge the ordered remedy. And CC1 does not offer an excuse for failing to move for reconsideration of the Board's 2015 order on this ground. *See Woelke*, 456 U.S. at 665-66 (noting that the section 10(e) bar applies to issues that the parties did not raise before the Board but were nonetheless decided by the Board if the parties failed to object to the findings in a petition for reconsideration or rehearing); *see also Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 551 (D.C. Cir. 2016). We are therefore "powerless" to review it. *Enter. Leasing*, 831 F.3d at 550 (internal quotation marks omitted).

Second, CC1 argues that because it hadn't realized the last-chance agreements were at issue in this case, we should not enforce the Board's finding that they were unlawful. But CC1

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raised this for the first time in its reply, not opening, brief and thus forfeited this claim. *See N.Y. Rehab. Care Mgmt.*, 506 F.3d at 1076; *New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (stating that petitioners waive arguments that they fail to raise in their opening briefs) (citing *Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 911-12 (D.C. Cir. 2002)). As a result, summary enforcement is appropriate. *See Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) (“[I]t is our longstanding rule that ‘[t]he Board is entitled to summary enforcement of the uncontested portions of its order[s].’” (second and third alterations in original) (quoting *Flying Food Grp., Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006))).

IV

We vacate and remand for further explanation the Board’s conclusion that the striking employees were unlawfully terminated for engaging in protected activity. In all other respects, we deny CC1’s petition for review and grant the Board’s cross-application for enforcement.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1231

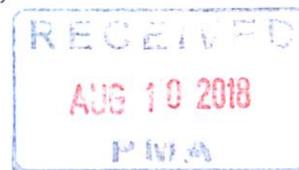
September Term, 2017

FILED ON: AUGUST 3, 2018

CC1 LIMITED PARTNERSHIP, DOING BUSINESS AS COCA COLA PUERTO RICO BOTTLERS,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT



Consolidated with 15-1467

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: ROGERS, GRIFFITH, and SRINIVASAN, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the petition for review and cross-application for enforcement of an order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the Board's conclusion that striking employees were unlawfully terminated for engaging in protected activity be vacated and remanded for further explanation; in all other respects, the petition for review be denied and the cross-application for enforcement be granted, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: August 3, 2018

Opinion for the court filed by Circuit Judge Griffith.

ADDENDUM - 000017

CC 1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers and Hector Sanchez-Torres and Jan Rivera-Mulero and Jose Suarez and Luis J. Rivera-Morales and Miguel Colon and Carlos A. Rivera-Rivera

Union De Tronquistas De Puerto Rico, Local 901, International Brotherhood of Teamsters and Migdalia Magriz and Silvia Rivera. Cases 24-011018, 24-CA-011035, 24-CA-011044, 24-CA-011057, 24-CA-011059, 24-CA-011065, 24-CA-011193, 24-CA-011194, 24-CB-002706, and 24-CB-002707

CORRECTION

On June 18, 2015, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding in which an inadvertent error appears. Please substitute this decision for the one previously issued.

Dated Washington, D.C. September 9, 2015



NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

CC 1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers and Hector Sanchez-Torres and Jan Rivera-Mulero and Jose Suarez and Luis J. Rivera-Morales and Miguel Colon and Carlos A. Rivera-Rivera

Union De Tronquistas De Puerto Rico, Local 901, International Brotherhood of Teamsters and Migdalia Magriz and Silvia Rivera. Cases 24-011018, 24-CA-011035, 24-CA-011044, 24-CA-011057, 24-CA-011059, 24-CA-011065, 24-CA-011193, 24-CA-011194, 24-CB-002706, and 24-CB-002707

June 18, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On September 18, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 129. On January 24, 2013, the Board issued an Order Denying Motion for Reconsideration. Thereafter, the Respondent Employer filed a petition for review of both decisions in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order and the Order Denying Motion for Reconsideration, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued orders setting aside the Decision and Order and the Order Denying Motion for Reconsideration and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order reported at 358 NLRB No. 129 and the January 24, 2013 Decision Denying Motion for Reconsideration. We agree with the rationale set forth therein, as further explained below. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported

at 358 NLRB No. 129, which we incorporate by reference.¹ The Order, as further modified here, is set forth in full below.²

1. The Union and the Employer except to the judge's finding that the employees were engaged in protected concerted activity when they participated in a 3-day strike to protest the Employer's suspension and termination of the shop stewards. Citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 63 (1975), they argue that the strike was an unprotected "wildcat" strike.³ We agree that the strike was not authorized, but we do not agree that it was unprotected.

Not all wildcat strikes—i.e., strikes not authorized by the employees' collective-bargaining representative—are unprotected. See *East Chicago Rehabilitation Center*, 710 F.2d 397, 400 (4th Cir. 1983), cert. denied 465 U.S. 1065 (1983), and *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 105 (7th Cir. 1971).⁴ In assessing whether em-

¹ We have also considered the vacated Order Denying Motion for Reconsideration, which we incorporate by reference. We agree with and adopt the findings (a portion thereof) and rationale it sets forth.

The Employer's motion to sever and remand Cases 24-CA-011018 (a portion thereof), 24-CA-011032, 24-CA-011034, 24-CA-011041, 24-CA-011042, 24-CA-011045, 24-CA-011046, 24-CA-011047, 24-CA-011048, 24-CA-011050, 24-CA-011058, 24-CA-011059, 24-CA-011072, 24-CA-011081, 24-CA-011088, 24-CA-011095, 24-CA-011116, and 24-CA-011189 to the Regional Director for further processing pursuant to a non-Board settlement agreement between the Respondent Employer and the Charging Parties in these cases is granted. Accordingly, these cases are remanded to the Regional Director for Region 12 of the National Labor Relations Board for further appropriate action. The caption and the Order and notice have been amended to reflect the severance of the foregoing cases.

The settled charges include the allegations that the Employer violated Sec. 8(a)(3) and (1) by suspending and then discharging shop stewards Carlos Rivera, Francisco Marrero, Romian Serrano, and Felix Rivera. Accordingly, we need not pass on the parties' exceptions to the judge's dismissal of those allegations.

² Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), we shall modify the judge's recommended Order to require the Respondent Employer and Respondent Union to reimburse the discriminatees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to require that the Respondent Employer file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters. We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

³ In *Emporium Capwell*, a minority group of employees, dissatisfied with the contractual grievance procedure, refused to participate in it. Contrary to the union's advice, the employees picketed their employer's store in an attempt to circumvent the union and bargain separately with the employer. 420 U.S. at 50. The Court found such conduct unprotected because it undercut the principle of exclusive representation set forth in Sec. 9(a) of the Act.

⁴ As the court explained in *Jones & McKnight*,

[T]he fact that none of the strike activity was sanctioned by the Union is of no import . . . By authorizing a bargaining agent to represent them, the employees cannot be said to have waived all rights to protect

employees who engage in an unauthorized strike lose the protection of the Act, two factors are controlling: (1) whether the employees are attempting to bargain directly with the employer and (2) whether the employees' position is inconsistent with the union's position. See *Silver State Disposal Service*, 326 NLRB 84, 85 fn. 8, 103-104 (1998); see also *Sunbeam Lighting Co.*, 136 NLRB 1248, 1253 (1962), enf. denied 318 F.2d 661 (7th Cir. 1963); *NLRB v. R. C. Can Co.*, 328 F.2d 974, 978-979 (5th Cir. 1964). Here, the Employer and the Union have failed to establish that the employees were attempting to bargain directly with the Employer or that their position was inconsistent with the position of the Union. Therefore, we affirm the judge's finding that the striking employees were engaged in protected concerted activity, that the Employer violated Section 8(a)(3) and (1) by suspending and/or terminating them for that activity, and that the Union violated Section 8(b)(1)(A) by imposing sanctions on three of the stewards for that activity.

a. On September 9, 2008, the employees engaged in a walkout to protest the Employer's unilateral change of its off-duty employee access policy. No party contends that the walkout was unprotected. The next day, the Employer suspended all five of the shop stewards. Subsequently, the Union met with the Employer to discuss the suspensions and made the following demands: (i) the shop stewards must immediately be reinstated; (ii) the Employer must agree not to file any unfair labor practice charges against the Union for engaging in the work stoppage; and (iii) the Employer must agree to immediately return to the negotiating table. The Employer flatly rejected the demands. The Union then filed a grievance over the suspensions, but there is no evidence that the Union took any action to process the grievance or informed the employees that it was working on a settlement. At a meeting with bargaining unit employees on September 15, the Union discussed its demands and conducted a strike vote, which was approved unanimously. The Union then requested strike funds from its parent international, the International Brotherhood of Teamsters.

On October 10, the Employer escalated the dispute by terminating the five shop stewards. On October 12, the terminated stewards held a meeting with the bargaining unit employees at which the bargaining unit employees again authorized a strike in support of the Union's three demands to the Employer. No union officers were pre-

themselves against an employer's unlawful actions, since their individual action in such circumstances is not an attempt to undermine their representative's position, but to protest the employer's circumvention of the policies of the Act.

445 F.2d at 105.

sent at the meeting, but on October 14, the stewards faxed the strike authorization petition to the Union.⁵ Upon learning of the second strike vote, the Union did not advise the employees that a strike would be inconsistent with the position of the Union or that a strike was not authorized at that time. Instead, on October 15, the Union wrote to the Employer, demanding that negotiations resume as soon as possible and threatening to take "legitimate actions, protected by law, in order to protect [employee] rights." The Employer agreed to resume negotiations, but did not agree to the Union's other two demands—that it reinstate the stewards and refrain from filing Board charges against the Union for the September 9 walkout. There is no evidence that the Union followed up on the Employer's request for bargaining dates, intended to resume negotiations absent an agreement on the other demands, or informed the bargaining unit of the Employer's response or that negotiations were set to resume.

The employees commenced the strike they had authorized on the morning of October 20. About 109 employees participated, and the strike lasted 3 days. The same three demands that had been made by the Union were again made by the employees during the strike. The Union never informed the employees that their strike was unauthorized or that it was inconsistent with the Union's position regarding the terminated stewards or with any other union objective.⁶ The Employer terminated 34 employees and suspended 52 others for participating in the strike.

b. The judge found that the terminations and suspensions violated Section 8(a)(3) and (1), and we agree. See, e.g., *National Steel Supply*, 344 NLRB 973, 976 (2005), enf. 207 Fed.Appx. 9 (2d Cir. 2006) (finding an 8(a)(3) violation where employees were terminated for engaging in lawful strike); *Flat Dog Productions*, 331 NLRB 1571, 1573 (2000), enf. 34 Fed.Appx. 548 (9th Cir. 2002) (same).

Our dissenting colleague does not take issue with the legal principles regarding wildcat strikes set forth above. He asserts, however, as a factual matter that the strikers

⁵ Prior to the October 12 meeting, a union officer asked shop steward Colon not to "divide the membership" by voting to authorize a strike at the Employer. We do not, however, view this conversation as indicating that a strike would be in opposition to the Union's position. Strikes can have serious economic consequences, and employees may be hesitant to authorize one even when they have been wronged. Moreover, in an earlier conversation with one of the Union's attorneys, the attorney informed Colon that the only way to have the shop stewards reinstated was to engage in a strike.

⁶ The Union sent a letter to the Employer stating that the strike was not authorized, but it was the Employer, not the Union, that photocopied the letter and asked security guards to give it to the strikers.

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acted in direct opposition to the Union's position and strategy and that the strike was therefore unprotected. The evidence simply does not support that argument. Rather, the evidence shows that the Employer committed a serious unfair labor practice by suspending (and later terminating) a shop steward because he engaged in a protected concerted walkout.⁷ The Union immediately demanded reinstatement of the suspended shop stewards and conducted a strike vote. When the Employer terminated the stewards, the employees again voted to strike in support of the Union's demands and informed the Union of their intention. The Union neither said anything against it nor did it do anything to dissuade the employees; in fact, it threatened to take action against the Employer if the Employer did not agree to negotiate over the matter. Later that week, the employees made good on the strike threat. The fact that, by then, the Employer had offered to resume negotiations for a new collective-bargaining agreement does not establish that the Union had changed its position regarding a strike.⁸ Indeed, the employees continued to voice the Union's demands on the picket line, and the Union made no effort to halt their conduct or disavow those demands.

The Employer also argues that the strike was illegal because the employees demanded that the Employer negotiate with the shop stewards rather than the Union, and because the stewards were acting as a labor organization. We reject those arguments. The record shows only that

⁷ We have adopted the judge's finding that the Employer violated Sec. 8(a)(3) and (1) by terminating shop steward Miguel Colon for his participation in the walkout. As stated above, the remaining four shop stewards have settled the charges pertaining to them, so we have made no findings regarding the lawfulness of their terminations. However, we refer to all of the affected stewards in describing the relevant events.

⁸ The evidence does not show that employees were aware that the Union and the Employer had discussed resuming negotiations. At the time of the strike, the employees knew only that the Union had agreed to strike if their demands were not met.

The facts here are distinguishable from those in the cases cited by the Employer. In *Energy Coal Partnership*, 269 NLRB 770 (1984), the union and the employer were engaged in contract negotiations, and, despite an interim agreement on many issues, employees became frustrated with the slow-moving process. Against the recommendation of the union, the employees voted to strike. Picketing continued for 2 days, despite the union's refusal to sanction the strike and its efforts to persuade the strikers to cease. Only after the employer secured a temporary restraining order did the strikers cease their activities. In *NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786 (5th Cir. 1970), the court found that employees who walked out to protest a coworker's discharge waited until after the walkout began to notify the union and seek its approval. Thus, the union did not have an opportunity even to consider whether and how to protest the discharge. *Id.* at 791. Here, by contrast, the Union had decided that redressing the suspension and termination of the shop stewards was a key union objective, it discussed its goals with regard to the suspensions and terminations (including the reinstatement of the stewards) with the unit employees, and it took a vote to authorize a strike if those objectives were not met.

the strikers demanded that the Employer reinstate the stewards, who by then had been terminated, and acknowledge them as the Union's representatives on the bargaining committee.⁹ The evidence does not show that the employees demanded that the Employer bypass the Union and deal directly with the shop stewards. And there is no evidence that the shop stewards were acting as a "labor organization."¹⁰

In sum, although the strike was not authorized by the Union, the Employer and the Union have not established that the employees were attempting to bargain directly with the Employer or that the employees' position was inconsistent with the position of the Union. Thus, the strike was not illegal. We adopt the judge's finding that the employees were engaged in a protected unfair labor practice strike and that the Employer violated Section 8(a)(3) and (1) of the Act by suspending and/or terminating them for their participation in the strike.¹¹

2. We agree with the judge, for the reasons stated in the Decision and Order reported at 358 NLRB No. 129, that the Respondent Union violated Section 8(b)(1)(A) by fining and expelling union members Migdalia Magriz, Maritza Quiara, and Silvia Rivera. We shall order the Union to reinstate their seniority rights and to make them whole for any loss of earnings and other benefits suffered as a result of their lost seniority. We leave the specifics of the seniority-reinstatement remedy to compliance. Contrary to the judge, we do not order the Respondent Union to reinstate them to full membership and their shop steward positions or to rescind the fines levied against them. Those remedies are beyond the scope of Section 8(b)(1)(A).

ORDER

A. The National Labor Relations Board orders that CC 1 Limited Partnership d/b/a Coca Cola Puerto Rico Bot-

⁹ We disagree with our dissenting colleague that the strikers sought to "usurp the Union's choice of representatives." There is no evidence that the Union had already selected a new bargaining committee or informed the Employer that a new committee was ready to bargain. The evidence shows only that the Union held a meeting for the purpose of selecting a new committee.

¹⁰ Sec. 2(5) of the Act defines a "labor organization" as follows:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

No evidence supports the claim that the shop stewards were acting as an organization or committee for the purpose of dealing with the Employer concerning conditions of employment.

¹¹ In the absence of exceptions, we adopt the judge's finding that none of the employees accused by the Employer of sabotage or violence during the October strike engaged in such conduct, and therefore none of them lost the protection of the Act.

tlers, Cayey, Puerto Rico, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees because they engaged in union or protected concerted activities and/or encouraged other employees to do so.

(b) Coercing employees into signing overbroad "last chance" agreements as a condition of their reinstatement.

(c) Discharging, suspending, or otherwise discriminating against employees because they participated in a protected strike.

(d) 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.

(a) Within 14 days of the date of this Order, offer unfair labor practice strikers Hector Sanchez-Torres, Jan Rivera-Mulero, Jose Suarez, Luis J. Rivera-Morales, and employee Miguel Colon, reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Miguel Colon, from September 10, 2008, and the unfair labor practice strikers listed above in paragraph 2(a) from October 20, 2008, for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest in the manner set forth in the amended remedy of the Decision and Order reported at 358 NLRB No. 129, as amended in this decision.

(c) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and/or discharges of Miguel Colon, and the unfair labor practice strikers listed above in paragraph 2(a), and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

(e) Within 14 days of the date of this Order, remove any reference to the last chance agreement from the files of all employees who signed the agreement as part of their reinstatement, and within 3 days thereafter, notify them in writing that this has been done, and that the last

chance agreement will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Cayey, Puerto Rico, copies of the attached notice marked "Appendix A."¹² Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent Employer's authorized representative, shall be posted by the Employer in English and Spanish 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 Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. If the Employer has gone out of business or closed the facility involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since September 9, 2008.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

B. The National Labor Relations Board orders that the Union De Tronquistas De Puerto Rico, Local 901, International Brotherhood of Teamsters, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Imposing unlawful sanctions on members that affect their terms and conditions of employment.

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

¹² If this Order is enforced by a judgment of the 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."

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

(a) Restore the seniority rights of Migdalia Magriz, Maritza Quiara, and Silvia Rivera.

(b) Make whole Migdalia Magriz, Maritza Quiara, and Silvia Rivera for any loss of earnings and other benefits suffered as a result of their lost seniority plus interest in the manner set forth in the amended remedy of the Decision and Order reported at 358 NLRB No. 129, and this decision.

(c) Compensate members entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

(d) Within 14 days after service by the Region, post at the Respondent Union's office copies of the attached notice marked "Appendix B."¹³ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Union's authorized representatives, shall be posted in English and Spanish and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members 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 Union customarily communicates with its members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by the Respondent Employer, if willing, at all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 18, 2015

Mark Gaston Pearce,

Chairman

¹³ If this Order is enforced by a judgment of the 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."

Kent Y. Hirozawa,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

I disagree with the majority's conclusion that the 3-day October 2008 strike was protected. The strike's participants were employees in a dissident union faction that supported a losing candidate slate for union office but nevertheless sought to usurp the incumbent leadership's negotiating authority and its power to determine whether or when to strike in support of bargaining demands. Both the Respondent Employer and the Respondent Union have clearly established that the employees' actions were in direct opposition to the Union's position and strategy. Accordingly, I would dismiss allegations that the Employer violated Section 8(a)(3) and (1) by disciplining those employees who engaged in the unprotected wildcat strike and that the Union violated Section 8(b)(1)(A) by fining and expelling members working for another employer because they participated in the unprotected strike.

In evaluating the protected nature of an alleged wildcat strike, the Board "distinguish[es] between wildcat strikes that undermine the union's position as exclusive collective bargaining representative and ones that do not." *East Chicago Rehabilitation Center v. NLRB*, 710 F.2d 397, 402-403 (7th Cir. 1983). In drawing these distinctions, we must be particularly cognizant of the Supreme Court's observation that a union serving as the exclusive bargaining representative of an employee unit "has a legitimate interest in presenting a united front on [bargaining] issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 70 (1975). In other words, free allowance of wildcat strikes is an affront to not just the Union, but also the Act and its statutory command of exclusive representation contained in Section 9.

In this case, it is undisputed that the Union did not authorize and opposed the October 20 strike. Further, unlike my colleagues, I would find that the strike clearly undermined the Union's position as the unit employees' exclusive bargaining representative. The Union's position here must be evaluated based on the actions and authority of its legitimate leadership. Although that leadership called for an employee strike authorization vote on September 15, 2008, and thereafter sought required ap-

proval from its International for funding, it did so on a contingent basis. The Union would initiate a strike only if the Employer failed to agree to (1) resume contract negotiations, (2) reinstate the five stewards who were suspended and subsequently discharged as the result of a September 9 work stoppage, and (3) not file charges against the Union based on that incident.

The incumbent union leadership did not commit to a deadline for achieving these goals or otherwise specify a strike date. It certainly did not leave the final decision to strike in the hands of the Respondent's employees and the stewards who would then go on to unsuccessfully oppose this leadership in the subsequent early October union election. The losing slate of candidates was also supported by Jose Adrian Lopez, who was the Local 901 business representative and chief negotiator for the Respondent's unit employees. The discharged stewards were the other members of the prior bargaining committee. The Union terminated Lopez on October 6, replacing him with Angel Vázquez.

No union officials were present when the dissident group, led by the stewards, convened a meeting on October 12 to authorize a strike on their own. In fact, the Union conducted a separate meeting with employees on that day at a different location for the purpose of selecting a new bargaining committee. Three days earlier, newly-appointed Union Business Agent Vasquez approached the stewards as they distributed flyers announcing their meeting. Vasquez, the Union's legitimate representative, expressly asked them *not to divide the membership* by voting to authorize a strike. In defiance of that request, the stewards held their meeting with about 50 employees, who thereupon signed a petition to Secretary-Treasurer Vasquez to "request once again

1. The immediate reinstatement of the delegates [i.e., the 5 stewards].
2. The solution of the collective bargaining agreement *through the bargaining committee chosen by the membership.* [emphasis added]
3. If the company does not agree to the previous requests, the Union will be obligated to implement any of the two (2) strike votes almost unanimously that we voted on 9/15/08 and 10/12/08."

On October 13, the Employer's Operations Director Carlos Trigueros met with first-shift employees and told them the Employer was willing to resume contract negotiations, upon the Union's request. Union Secretary-Treasurer Vasquez made this request in writing on October 15. On the next day, the Employer's attorney-negotiator, Miguel Maza, replied, "Please let us know the time, date, and place, and we shall be there to reinitiate

said negotiations." Accordingly, the Union was on the verge of achieving one of its stated bargaining demands.

Meanwhile, the October 12 petition was faxed to the Union's office. No union official acknowledged or replied to it; nor did the steward group attempt to discuss the matter with union officials. On October 19, the stewards met with about 30–40 employees and determined to strike the next day. They did not notify the Union of the meeting or of their intention to strike.

When the strike and picketing began on October 20, the Employer faxed a letter to Secretary-Treasurer Vasquez, stating in relevant part

As we let you know in our phone conversation, at this very moment an illegal strike is taking place at the Coca Cola Puerto Rico Bottlers facility in Cayey. This is not in accordance with what we discussed at our recent meeting, where you assured me there would be no strike. Furthermore, last Thursday we confirmed in writing your letter from the previous day where you invited us to negotiate and we replied that we were available immediately for said negotiation.

In a reply letter on the same day, Vasquez assured the employer that the strike was not authorized and that the Union opposed it:

Our interest is, and we have so informed the company, to negotiate a collective bargaining agreement for the benefit of employees who work there. We want to clarify that we have not sent or authorized the presence of Officers or Union members in said stoppage; therefore, the presence there of any Union member would have been of their own accord, not official, and in violation of the statutes of the Union. Likewise, if any person claimed he/she was representing the Union, said claim would be a false representation. It is clear to us that the actions that took place there were outside the Union and its Constitution, and that the only ones responsible for the legal consequences are those who participated in and abetted said actions. Jeopardizing the employment of fathers and mothers with this clearly illegal activity is a wrong and irresponsible decision. It is those who decided to do this that will eventually have to legally respond, both financially and to the Union, for their foolish actions.

Finally, I want to let you know that we shall be taking legal and union action against those who seeking to be false leaders try to play with the fate of the workers of Coca Cola. We will not allow this small group to continue threatening and undermining

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the welfare of the great majority of these workers in order to promote their own ignoble interests.

It is undisputed that the Employer's security guards distributed the Union's letter to striking employees. Nevertheless, the strike continued for 2 more days. During this period, the strikers were joined by nonemployee union members Migdalia Magriz, Maritza Quiara, and Silvia Rivera. When the strike ended, the Employer discharged or suspended a number of former strikers. Subsequently, the Union fined and expelled Magriz, Quiara, and Rivera for their participation in the strike.

In sum: (1) The Union, through new Business Agent Vasquez, informed the discharged stewards on October 12 that it considered their separate group activity and strike vote to be divisive of the membership. (2) There is no evidence that the stewards, who were not officials of the Union, had any reason to believe they had a continuing role on the negotiating committee after lead negotiator Lopez was terminated and the Union convened a meeting to establish a new committee on October 12. Thus, at least by October 12, the Union intended to select a new bargaining committee which would not include the discharged stewards and would have a lead negotiator other than discharged Business Agent Lopez. Yet the stewards and their supporters demanded that both the Union and the Employer negotiate with a committee including the stewards. (3) The stewards and employee supporters continued to plan a strike, independent of any union involvement, even knowing that the Employer was willing to restart negotiations. (4) In agreeing to resume bargaining, the Union, through Secretary-Treasurer Vasquez, had assured the Employer there would be no strike. (5) The Union's letter to the Employer did more than indicate that the strike was not authorized. It conveyed the Union's adamant opposition to a strike undertaken by "false leaders" who were acting contrary to the Union's policy and bargaining strategy. (6) Finally, the striking employees were aware of this letter and, if they did not already know, that they were striking in opposition to their exclusive bargaining representative's position.

Adopting the rationale of the vacated Board decision, my colleagues apparently agree that the superficial congruence of the Union's and strikers' bargaining demands and the failure of the Union to directly communicate its opposition to the strike prior to, or during its occurrence somehow defeats the argument that the strike was not inconsistent with the Union's position and did not undermine its status as the exclusive bargaining representative. The evidence is overwhelmingly to the contrary. The wildcat strike initiated by the steward group was clearly inconsistent with the Union's position not to

strike at that time, jeopardized its success in achieving the goal of restarting contract negotiations, and sought to usurp the Union's choice of representatives on the bargaining committee.¹ To the extent that the strikers' knowledge of these facts is even relevant to finding their strike was unprotected, distribution of the Union's letter to them proved knowledge regardless of whether it was the Employer rather than the Union who distributed it.

In my view, the Board must take great care not to give such weight to individual Section 7 rights as to erode the majoritarian principles embodied in Section 9. To this point, the Fourth Circuit long ago cogently stated

It is perfectly clear not only that the 'wild cat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the act to promote. Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work. Section 9 of the act.²

In the circumstances of this case, my colleagues' promotion of the short-term interests of the dissident steward employee group in striking is "necessarily destructive" of the collective-bargaining process and the Union's role as the exclusive bargaining representative. Unlike them, I would find that the Employer and Union lawfully disciplined the strikers, and I would dismiss the complaint allegations relating to these actions.

Dated, Washington, D.C. June 18, 2015

Harry I. Johnson, III,

Member

NATIONAL LABOR RELATIONS BOARD

¹ In order to find the wildcat strike to be unprotected, it is not necessary to find, as the Employer contends, that the stewards group sought recognition as a labor organization.

² *NLRB v. Draper Corp.*, 145 F.2d 199, 203 (4th Cir. 1944).

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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 discharge, suspend, or otherwise discriminate against you for engaging in union or protected concerted activities and/or encouraging other employees to do so.

WE WILL NOT coerce you into signing overbroad "last chance" agreements as a condition of your reinstatement.

WE WILL NOT discharge, suspend, or otherwise discriminate against you for participating in a protected strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer unfair labor practice strikers Hector Sanchez-Torres, Jan Rivera-Mulero, Jose Suarez, Luis J. Rivera-Morales, and employee Miguel Colon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed

WE WILL make the above-named individuals whole for any loss of earnings and other benefits resulting from their suspension or discharge, less any net interim earnings, plus interest.

WE WILL compensate employees entitled to backpay under the terms of the Board's Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of employees, and WE WILL, within 3 days thereafter, notify each of them in

writing that this has been done and that the suspensions and discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the last chance agreement from the files of all employees who signed the agreement as part of their reinstatement, and WE WILL, within 3 days thereafter, notify each employee in writing that this has been done and that the last chance agreement will not be used against them in any way.

CC 1 LIMITED PARTNERSHIP D/B/A COCA-COLA
PUERTO RICO BOTTLERS

The Board's decision can be found at www.nlr.gov/case/24-CA-011018 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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 impose unlawful sanctions on you that affect your terms and conditions of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL restore the seniority rights of Migdalia Margiz, Maritza Quiara, and Silvia Rivera.

WE WILL make the above members whole, with interest, for any loss of earnings and other benefits suffered as a result of their loss of seniority.

WE WILL compensate members entitled to backpay under the terms of the Board's Order for the adverse tax

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consequences, if any, of receiving lump-sum backpay awards.

UNION DE TRONQUISTAS DE PUERTO RICO,
LOCAL 901

The Board's decision can be found at www.nlr.gov/case/24-CA-011018 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



CERTIFICATE AS TO PARTIES, INTERVENORS, AND AMICI

Pursuant to Circuit Rule 28(a)(1), Petitioner CC1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers (“CC1”) certifies as follows:

1. The parties before the National Labor Relations Board (“NLRB”) were: (a) Counsel for the General Counsel for the NLRB; (b) Petitioner CC1; (c) individual charging parties as against CC1, represented by José Budet: (1) Carlos Rivera, (2) Carlos Rivera-Sandoval, (3) Benjamín Rodríguez-Ramos, (4) Edwin Cotto-Roque, (5) Héctor Sánchez-Torres, (6) Jariel Rivera-Rojas, (7) Héctor Vázquez-Rolón, (8) Jorge Ramos-Arroyo, (9) José Rivera-Ortiz, (10) Vidal Arguinzoni, (11) Miguel Cotto-Collazo, (12) Jan Rivera-Mulero, (13) Luis Bermúdez, (14) Héctor Rodríguez, (15) Juan Rivera-Díaz, (16) José Collazo-Flores, (17) Gabriel Rojas-Cruz, (18) José Rivera-Barreto, (19) Josué Rivera-Aponte, (20) José Suárez, (21) Jorge Oyola, (22) Pedro Colón-Figueroa, (23) José Sánchez, (24) Luis Ocasio, (25) Luis Rivera-Morales, (26) José Rivera-Martínez, (27) Virginio Correa, (28) Carlos Rivera-Rodríguez, (29) Luis Meléndez, (30) Dennes Figueroa; (31) Eddie Rivera-García, (32) Giovanni Jiménez, (33) Rafael Oyola-Meléndez, (34) Carlos Ortiz-Ortiz, (35) Miguel Colón; (d) the respondent Unión de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters, and (e) individual charging parties as against respondent Union: (1)

Carlos Rivera, (2) Dennes Figueroa, (3) Miguel Colón, (4) Luis Bermúdez, (5) Migdalia Magriz, (6) Silvia Rivera, (7) Jesús Baez Ortiz, (8) Humberto Miranda Barroso, (9) Orlando Hernández Doble, and (10) Raymond Reyes Rivera.

2. No amici appeared before the NLRB.
3. The parties before this Court are: (a) Petitioner CC1 and (b) the NLRB.
4. No amici have appeared before this Court at this time.

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DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. PROC. 26.1 AND D.C. CIR. RULE 26.1

Pursuant to Circuit Rule 26.1, Petitioner CC1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers (“CC1”) certifies:

CC1 is a Florida limited partnership engaged in owning and operating a Coca Cola bottler and a beverage distributor in Puerto Rico and other places. It has no parent corporation and no publicly held corporation owns 10% or more of its limited partnership interest.

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