

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
WASHINGTON, D.C.**

CC1 LIMITED PARTNERSHIP D/B/A COCA COLA PUERTO RICO BOTTLERS Respondent Employer	Cases No. 24-CA-11035, et al.
And CARLOS RIVERA, et als. Charging Parties	
And	
UNIÓN DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS Respondent Union	
And CARLOS RIVERA et als. Charging Parties	
And Migdalia Magriz, at als. Charging Parties	

**CC1's STATEMENT OF POSITION TO THE NATIONAL LABOR RELATIONS
BOARD**

COMES NOW, **CC1 LIMITED PARTNERSHIP D/B/A COCA-COLA PUERTO RICO BOTTLERS**, hereinafter referred to as “**CC1**”, through the undersigned attorneys, and respectfully states and prays as follows:

I. INTRODUCTION

By letter dated April 10, 2019, the National Labor Relations Board (“NLRB” or the “Board”) notified the parties in the captioned case that it has accepted the remand from the United

States Court of Appeals for the D.C. Circuit, see CC1 Limited Partnership v. Nat'l Labor Relations Bd., 898 F.3d 26, 28 (D.C. Cir. 2018). To that end, the Board further notified the parties that it would be accepting optional statements of position (confirming to Section 102.46(h) of the Board's Rules and Regulations) from the parties with respect to the issues raised in the remand. By agreement of CC1 and General Counsel and Order of the Board, the deadline to file position statements was extended to July 8, 2019. See Board's May 21, 2019 letter.

The threshold issue on remand is whether, in light of the Court of Appeals' directive on remand, the Board ought to conclude that the termination of the wildcat strikers (as discussed further below) was lawful.¹ The General Counsel for the Board filed its position statement on June 5, 2019. In it, **the General Counsel now joins CC1 in urging the Board to dismiss the remaining charges at issue against CC1.** Both the General Counsel and CC1 now agree, for the first time, that the wildcat strike at issue was indeed unprotected and thus, the termination of the wildcat strikers lawful. Moreover, the Respondent Union has informed the undersigned it will be filing a notice with the Board that it joins in the foregoing brief by CC1.

We respectfully submit that the parties' unanimity – and especially the reversed position of General Counsel -- strongly compels a ruling on remand that the termination of the wildcat strikers was lawful, dismissing the remaining charges at issue against CC1. Notwithstanding, CC1 believes it will be useful for the Board to have all the arguments and pertinent underlying facts at its disposal. To that end, CC1 hereby submits its complete position statement.

¹ The D.C. Circuit specifically remanded the case so that the Board can explain the importance of the provenance of the letter at issue and also whether the Union's message to CC1 accurately represented its position. See CC1 Limited Partnership v. Nat'l Labor Relations Bd., *supra*.

II. FACTUAL AND PROCEDURAL BACKGROUND

CC1 operates a bottling plant in Cayey, Puerto Rico. At that time of the wildcat strike at issue, Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (hereinafter the “Union”) represented the CC1 bargaining unit employees. On the night of September 9, 2008, subsequent to the conclusion of a negotiating session for a new collective bargaining agreement, a work stoppage took place that lasted 2 hours and affected CC1’s production. CC1 contends that the Shop Stewards² instigated the work stoppage. As a result, the Shop Stewards were suspended and subsequently discharged from employment on October 10, 2008. See Joint Exhibit 4. Over a few weeks later, some of the 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 position in writing of the Union that the strike was not authorized. The wildcat strike resulted in CC1 discharging and suspending the illegal wildcat strikers on October 23, 2008. See Joint Exhibit 5.

In 2009, General Counsel filed the captioned Complaint against CC1 in connection with the measures taken by CC1 in response to these work stoppages, including the discharge or suspension of the Shop Stewards and wildcat strikers. On April 16, 2010, the assigned Administrative Law Judge (“ALJ”) issued a Decision and Recommended Order finding, *inter alia*,

² The term “Shop Stewards” as used herein 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.

that the wildcat strike was protected by the National Labor Relations Act (“NLRA”)³. Subsequently, after the parties filed exception briefs and after a number of procedural events, on June 18, 2015, a three-member panel of the Board issued a Decision and Order 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, but the third panel member found that the wildcat strikers were a dissenting 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 (Jun. 18, 2015), at *6 (Jun. 18, 2015) (Johnson, dissenting). CC1 appealed the Decision and Order before the United States Court of Appeals for the D.C. Circuit, and on December 2015 the NLRB cross-applied to enforce the Decision and Order. On August 3, 2018, the Court of Appeals for the D.C. Circuit issued an Opinion and Order and corresponding *Per Curiam* Judgment whereby it vacated and remanded to the Board for further explanation the Board’s conclusion that the wildcat strikers were unlawfully terminated, and in other respects granting the NLRB’s cross-application for enforcement of the Decision and Order⁴. CC1 Limited Partnership v. Nat’l Labor Relations Bd., 898 F.3d 26 (D.C. Cir. 2018).

³ However, the ALJ concluded that the September 9, 2008 work stoppage was unprotected and thus the discharge of the Shop Stewards by CC1 was legal, with the exception of Miguel Colón who arrived at the plant after the work stoppage had concluded.

⁴ As to all other aspects, the Board has already issued its Compliance Package; those aspects are not at issue here.

As anticipated above, then, CC1 hereby tenders the foregoing position statement for the purpose of establishing why, in light of the Court of Appeals’ directive on remand, the Board ought to conclude that the termination of the wildcat strikers was lawful and thus dismiss the remaining charges⁵ at issue against CC1. Again, **the General Counsel has reversed its prior position and now concurs with CC1** that “the Board should find that the strike was no longer protected once employees were notified of the Union’s contrary position, and that [CC1] lawfully discharged them for engaging in this unprotected activity [...] [and] the General Counsel urges the Board to conclude that the remaining complaint allegations should be dismissed.” See General Counsel’s Position Statement, at p.4.

As discussed in further detail below, the Board also ought to overrule *Silver State* and apply the standard suggested in the concurring opinion of *Silver State* for assessing the protection of wildcat strikes under the NLRA. Regardless, substantial evidence on the record compels a conclusion that the wildcat strike was *unprotected*.

III. **DISCUSSION**

a. The Board ought to overrule *Silver State* and apply a new standard for assessing the protection of wildcat strikes under the NLRA.

It is beyond cavil that the Board, as well as all federal courts, are bound by the precedent in the United State Supreme Court’s decision in Emporium Capwell Co. v. W. Addition Cm.ty.

⁵ During the pendency of Board proceedings, CC1 and representatives of all of the employees involved in this case engaged in settlement discussions. See Decision and Order (362 NLRB No. 125), p. 1. Eventually, CC1 reached Non-Board Settlement Agreements with all but five (5) of the individual charging parties – shop steward Miguel Colón (discharged in connection with the September 9, 2008 work stoppage) and four (4) other employees that were discharged in connection with the October 20-22, 2008 wildcat strike – Héctor Sánchez Torres; Jan Rivera-Mulero; José Suárez; and Luis J. Rivera Morales. The remaining charges at issue on remand are those of the latter – the four (4) aforementioned wildcat strikers.

Org., 420 U.S. 50, 72 (1975). 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 ruled that the employer did not commit an unfair labor practice under the NLRA by discharging the employees in question.

In its Decision and Order, as pertains to CC1's dismissal of the employees engaged in the aforementioned October 20-22 wildcat strike⁶, the Board applied a standard it had crafted in previous decisions, most notably in Silver State Disposal Service, Inc., 326 N.L.R.B. 84, 103 (1998); R.C. Can Co., 140 N.L.R.B. 588, 595-96 (1963); and Sunbeam Lighting Co., 136 N.L.R.B. 1248, 1253-55 (1962). We hereinafter refer to this standard as the *Silver State* standard. In accordance with the *Silver State* standard, in assessing whether or not a wildcat strike constitutes "protected activity" under the NLRA, the Board looks to two factors: (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. Silver State Disposal Service, Inc., 326 N.L.R.B. at 85, fn 8, and 103-04; see also CC1 Limited Partnership, 362 N.L.R.B. No. 125 (Jun. 18, 2015). Only one Circuit Court of Appeals has since then adopted that standard - the Seventh Circuit. See East Chicago Rehab. Ctr., Inc. v. N.L.R.B., 710 F.2d 397 (7th Cir. 1983).

CC1 contends that even if it applies the *Silver State* standard, the Board ought to rule on remand that the dismissal of the wildcat strikers was lawful (and, again, so does the General

⁶ The Board acknowledged and accepted in the Decision and Order that said strike was indeed a "wildcat strike."

Counsel now), for the reasons discussed in the next section. Notwithstanding, rather than only engaging in that exercise, the Board ought to take also the opportunity provided by the D.C. Circuit Court of Appeals' directive on remand and re-examine the *Silver State* standard.

To wit, CC1 contends that Emporium Capwell was consistent with preceding Circuit Court decisions universally holding that all wildcat strikes are *per se* unprotected under the NLRA, and that Emporium Capwell affirmed the bright-line rule that 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., 145 F.2d 199, 203 (4th Cir. 1944). However, CC1 is not asking the Board to go that far here. Instead, it is simply asking the Board to *adjust* the *Silver State* standard, such that it is consistent with Emporium Capwell and, just as importantly, with the protection of a cardinal principle of U.S. labor law – majority rule and collective bargaining.

The problem with the *Silver State* standard is that it essentially provides protection to wildcat strikers when 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. However, 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 has explicitly rejected an approach that would allow a minority group to bypass the union's bargaining strategy in favor of their own, even when both strategies are 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, regardless of similar goals by the union and the minority group.

That sort of havoc is *precisely* what transpired at the CC1 bottling plant in this case. As the evidence on the record shows, the conflict simmering behind the scenes and driving the wildcat strikers was not between CC1 and the Union, but rather between rivals of the Union and/or 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 on October 10, 2008 in connection with the September 9, 2008 work stoppage, the Union summoned the bargaining unit employees to an assembly to be held on October 12, 2008 for the purpose of appointing a new bargaining committee in order to resume negotiations of the successor collective bargaining agreement. See *CC1 Limited Partnership*, 362 N.L.R.B. No. 125, at *6 (Johnson, dissenting). The evidence on the record shows that the Shop Stewards, who already had their own rogue assembly scheduled for the next day, then re-scheduled it for October 12th so as to conflict with the Union's legitimate assembly. And, when confronted by Union officials, the Shop Stewards simply stated that it would be up to each bargaining unit employee to decide which assembly to attend.

The next day, on October 13, 2008 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 union's 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 and resume bargaining without the Shop Stewards and to handle the termination of the

Shop Stewards through the grievance procedure. See Joint Exhibit 12. In fact, the Union appointed a new representative for CC1 and an interim Shop Steward. See Joint Exhibits 14 and 15. Accordingly, on October 15, 2008 the Union sent a letter to CC1 to resume negotiations and CC1 replied on October 16, 2008 agreeing to resume the bargaining of the successor collective bargaining agreement. See Joint Exhibit 16 and 17. The dissenting member of the Board succinctly pointed out in the Decision and Order, that 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." CC1 Limited Partnership, 362 N.L.R.B. No. 125, at *6 (Johnson, dissenting).

Furthermore, the wildcat strike was explicitly disavowed by the Union. Id. The evidence on the 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. Id. CC1 had its security guards distribute the Union's letter to all the striking employees, and yet the wildcat strike continued for 2 more days. Id. It is evident, as the Court of Appeals 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. CC1 Limited Partnership v. Nat'l Labor Relations Bd., 898 F.3d at 34.

Again, this course of events serves to illustrate the problems that can arise in practice with the *Silver State* standard and why it is inconsistent with and out of touch with Emporium Capwell and U.S. labor policy. As to the latter, it warrants mentioning that 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. 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). 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. And, “[i]t 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 at 203.

CC1 thus asks the Board to adjust the *Silver State* standard for this and all future cases - not in a manner subjectively concocted by CC1, but **rather as previously suggested by then-NLRB Chairman William B. Gould IV in his concurring opinion in *Silver State***. As explained by then-Chairman Gould, consensus on substantive goals between the two parties is to be expected, but not necessarily on the best means to achieve the end result. Silver State Disposal Service, Inc., 326 N.L.R.B. at *8 (Gould, W., concurring). 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. at *8-9(Gould, W., concurring) (emphasis ours and footnotes and internal citations omitted). Indeed, as the dissenting member of the Board in the Decision and Order at bar 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).

The Gould approach is consistent with Emporium Capwell and would prevent these problems. It warrants reiterating that the *Silver State* standard undercuts the ability of employers such as CC1 (and unions such as the Union here, for that matter) to preserve orderly collective bargaining and creates 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 F.2d at 205. This is why the reevaluation of the *Silver State* standard is so critical at this juncture, with ramifications far beyond this case.

As pertains to this case, the reality is that on remand and under the D.C. Circuit Court of Appeals’ directives, the Board should conclude under *either* standard (the *Silver State* standard or the Gould standard) that the wildcat strike was unprotected under the NLRA. We discuss this in the following section.

b. On remand, substantial evidence on the record compels a conclusion that the wildcat strike was *unprotected*.

In its Opinion and Order, the Court of Appeals observed that in the Decision and Order at bar, the Board “looked at whether the negotiation efforts of the CC1 employees were independent of the Union or inconsistent with its strategy.” CC1 Limited Partnership v. Nat’l Labor Relations Bd., 898 F.3d at 30. The Court of Appeals went on to discuss evidence on the record of the letter from the Union (alluded to above) that was distributed to the wildcat strikers on October 20, 2008 and whereby the Union explicitly and in writing strongly disavowed the wildcat strike; the Court then acknowledged that the evidence shows that the wildcat strike continued in spite of the letter. Id. at 34. In light of this, the Court of Appeals 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 [to conclude that the wildcat strike was protected under the NLRA] and also whether the Union’s message to CC1 accurately represented its position.” Id. at 34-35. Without that detail, the Court of Appeals explained, it could not “determine if there was substantial evidence for the Board to find that the wildcat strike was protected activity.” Id.

CC1 contends, first and foremost, that even in the absence of the letter, substantial evidence on the record compels a conclusion that the wildcat strike was *unprotected*. As established above and on the record in this case, the Union and the wildcat strikers were indisputably at odds over negotiation strategy (the dispositive criterion, it should be noted, 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 *Silver State* 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.

Regardless, the letter is, of course, of great importance. Again, it establishes that the striking employers **knew** they were striking in opposition to the Union's position, and yet they continued to strike. In fact, after the letter was distributed, a number of the striking employees abandoned the strike and returned to work. The Court of Appeals concludes as much in its Opinion and Order and is understandably unclear as to why the Board thought that the fact that CC1 and not the Union distributed the letter caused the Board to refrain from concluding that the wildcat strikers indeed knew that they were striking in opposition to the Union's position. The fact that it was CC1 that distributed the letter is inconsequential – it is undisputed that the letter was the Union's. It was in the Union's letterhead and signed by its Secretary-Treasurer - clearly authentic. See Joint Exhibit 19. As succinctly explained by the dissenting Board member in the Decision and Order, “[t]o the extent that the strikers’ knowledge of [the Union’s position] is even relevant to finding the [wildcat strike] was unprotected, distribution of the Union’s letter to them proved knowledge regardless of whether it was [CC1] rather than the Union who distributed it.” CC1 Limited Partnership, 362 N.L.R.B. No. 125 (Jun. 18, 2015), at *6 (Jun. 18, 2015) (Johnson, dissenting). In fact, the letter was actually posted on the plant bulletin board on October 16th – four days before the wildcat strike began. See Transcript of Hearings before ALJ, pp. 382, 957-58. And,

the evidence on the record also shows that each of the four wildcat strikers at issue on remand *did* in fact continue to participate in the wildcat strike. Moreover, during the wildcat strike, some of the Shop Stewards demanded through a loudspeaker that CC1 bargain directly with *them*. See Transcript of Hearings before ALJ, p. 280, ln. 7-21; p. 307, ln.18-21; p. 419, ln.18-13; p. 420, ln. 1-8. In furtherance of their purpose to supplant the Union, during the wildcat strike, the leaders of the wildcat strike distributed and were compelling the employees to sign authorization cards for a rival union, *Movimiento Solidario Sindical*. Id. at p. 934, ln.11-18; Joint Exhibit 23. Taken as a whole, the Shop Stewards were clearly seeking to replace the Union.

As such, no reasonable finder of fact could view this clear, undisputed Union letter as anything other than direct and explicit evidence that the wildcat strike constituted both an attempt to usurp the Union's bargaining position and conduct in direct contravention with the Union's position. Therefore, on remand, the compelled conclusion is that the October 20-22 wildcat strike constituted unprotected activity under the NLRA. **The General Counsel and the Union, as mentioned above, now both concur with this conclusion.**

IV. CONCLUSION

As discussed in the foregoing position statement, the issue at hand is not really about a conflict between CC1 and the Union, but rather about a bitter conflict between rival Union factions at odds over negotiation strategy. This conflict was the catalyst for the October 20-22, 2008 wildcat strike that forced CC1's hand. Somehow, in a miscarriage of justice, it was CC1 who was left holding the bag for the chaos wrought by the warring Union factions. This happened to CC1 not only because the Board's panel as to the Decision and Order at bar unjustifiably dismissed crucial evidence on record, but also because as discussed above, the *Silver State* standard is inconsistent

with U.S. labor policy and Supreme Court precedent, and ought to be adjusted forthwith to avoid further unfair outcomes of this nature.

RESPECTFULLY SUBMITTED

Dated: **July 8, 2019**

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on this same date a true copy of this document was e-filed with the National Labor Relations Board and served by electronic mail upon the following parties on July 8, 2019:

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