striking employees became aware that their Union disap-
proved of and disavowed the strike. Their continued
striking despite the Union’s opposition undermined
the Union’s exclusive bargaining authority and thus lost the
protection of the Act.

A.

The Respondent represents warehouse employees at the Re-
ponent’s bottling plant. On September 9, 2008, amid
egotiations for a successor collective-bargaining agree-
ent, the Union’s main representative of employees at
the plant along with several shop stewards led employees
on a 2-hour work stoppage, resulting in the Respondent’s
suspension of the stewards. Upon the Respondent’s re-
jection of the Union’s demand for reinstatement of the
stewards and resumption of negotiations, the Union con-
ducted a strike vote, which was unanimously approved
by the employees. The Union requested strike assistance
from its national headquarters but did not commence a
strike.

On October 10, the Respondent discharged the sus-
pended shop stewards. The stewards thereafter called a
meeting, at which the employees again authorized a
strike. The Union took no part in this meeting, however.
Prior to the meeting, the Union had held an internal elec-
tion, resulting in its terminating and replacing its main
representative of employees at the Respondent’s plant.

From October 20 to 22, the discharged stewards led
more than 100 employees in a strike at the Respondent’s
plant. On the first day of the strike, the Respondent’s
counsel faxed a letter to the Union’s Secretary Treasurer,
warning that it would take action against the “the Union
and its representatives” unless the “illegal” strike
stopped. The Union, replying by letter to the Respondent
that same day, “made it abundantly clear that [it] did not
send or authorize the presence of Officers or Union
members to take part in the strike.” 358 NLRB at 1247.
The Union’s letter stated that the strikers “were in viola-
tion of the statutes of the Union” and engaged in “clearly
illegal activity.” The Union assured the Respondent that
it would “be taking legal and union action” against the
“false [union] leaders” who were “threatening . . . the
welfare of the great majority of these workers [of the
Respondent] in order to promote their own ignoble inter-
ests.”

The Respondent made copies of the letter and had its
security guards distribute the copies to the striking em-
ployees on October 20. Most employees continued strik-
ing through October 22. The Respondent suspended or
discharged 86 of the strikers.
B.

Applying Silver State Disposal Service, 326 NLRB 84 (1998), the Board found, in a divided opinion, that the wildcat strike was protected and thus, the Respondent unlawfully suspended and discharged the striking employees. The Board reasoned that the strike supported the Union's strategy and the strikers were simply "mak[ing] good on the [Union's previous] strike threat." 362 NLRB at 1048–1049. The Board explained that the "Union never informed the employees that their strike was unauthorized or that it was inconsistent with the Union's [bargaining] position." Id. at 1048. The Board ascribed little significance to the Union's October 20 letter disavowing the strike, observing that 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." Id. at 1048 fn. 6. The dissent contended that the strike was not protected because it "undermined" the Union's position as exclusive representative and the strikers sought to "usurp" the Union's negotiating authority, thus violating the principles of the Supreme Court's decision in Emporium Capwell. 362 NLRB at 1051 (Member Johnson, dissenting).

C.

The court remanded the case to the Board for further explanation of its conclusion under the Silver State Disposal test that the wildcat strike was protected activity. 898 F.3d at 28. The court homed in on the Union's October 20 letter disavowing the strike, holding that the Board failed to explain how it applied Silver State to the employees who continued to strike after learning [from the October 20 letter] 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. [898 F.3d at 34.]

The court observed that the Board majority's rejection of the view that the strikers were acting in derogation of

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3 Under Silver State Disposal Service, the Board applies a two-part test to determine whether a wildcat strike is protected: (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. See id. at 103.

4 Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 61–62 (1975) (strike is not protected if it is an attempt to engage in separate bargaining from the striking employees' union and interferes with the union's exclusive bargaining representative status).

D.

The court found that the Union's October 20 letter establishes that the "Union disapproved of the strike" and "disavowed it as a move by 'false leaders,'" and that the employees knew the Union disapproved of the strike. Thus, the law of the case is that the employees knew that the Union disavowed the strike but nevertheless persisted in striking. Thus, absent legally sufficient grounds to discount that knowledge, the employees' continued striking was plainly inconsistent with the Union's position and thus unprotected under the Silver State Disposal test. The court's decision permits the Board, on remand, to furnish such grounds. It invites the Board to explain, if it can, why the provenance of the October 20 letter – its distribution by the Respondent's security guards – may warrant discounting the employees' knowledge of the Union's opposition. The court also invited the Board to determine whether the Union's message in the letter accurately represented its position. We find that the letter accurately represented the Union's opposition to the strike and that its distribution by the Respondent's security guards does not warrant discounting the employees' knowledge of that opposition.

First, the October 20 letter distributed by the security guards bears the Union's full letterhead and a footer listing the six union officers composing its Board of Trustees, and it is signed by German Vazquez, the Union's Secretary Treasurer. The letter bears no signs of fabrication and appears entirely authentic, which it in fact was. Indeed, no party to this proceeding contends that the Union's message in the letter did not accurately represent

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5 898 F.3d at 34.
the Union’s position, and we have found no evidence that the Union’s unmistakable disavowal of the strike was other than genuine. The letter’s unequivocal opposition to the strike was fully confirmed on the spot by the conspicuous absence of the entire union leadership from participation in or support of the strike. Striking employees were also well aware that the union leadership had been entirely absent from the preceding employee strike vote, and that the meeting at which the strike vote took place was not conducted by the Union. The distribution of the facially bona fide letter under the circumstances surrounding the strike amply sufficed to establish to the strikers that their Union opposed the strike.

We conclude that the mere distribution of the letter by the security guards cannot negate employees’ knowledge of the Union’s disavowal of the strike and legitimate their conduct in derogation of the Union’s position. That is especially the case where, as here, there is no evidence that the third-party notification to strikers of the Union’s disavowal was the result of manipulation or fraud, nor is there any evidence of misconduct, intimidation, or other coercion by the security guards in distributing the flyers. Thus, we find that the employees’ continued striking after learning of their Union’s opposition undermined the Union’s exclusive representative function and is proscribed by the principles of Emporium Capwell.6

ORDER

The complaint allegation that the Respondent unlawfully suspended and discharged strikers engaged in the October 20–22, 2008, wildcat strike is dismissed.

Dated, Washington, D.C. September 30, 2019

______________________________________
John F. Ring, Chairman

______________________________________
Marvin E. Kaplan, Member

______________________________________
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

6 While we question whether the standard set forth in Silver State Disposal for determining whether an unauthorized strike is protected is consistent with the principles of Emporium Capwell, we find it unnecessary to reach that issue on remand.