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

September 30, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On June 18, 2015, the National Labor Relations Board issued its Decision and Order in this proceeding.¹ The Board found, *inter alia*, that the wildcat strike engaged in by the employees of the Respondent, CC 1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers, constituted protected activity under Section 7 of the Act, and that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and/or terminating employees for their participation in the protected strike.

The Respondent filed a petition for review of the Board's Order, and the Board cross-applied for enforcement. On August 3, 2018, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board for further explanation of its conclusion that the wildcat strike was protected activity. *CC 1 Limited Partnership v. NLRB*, 898 F.3d 26, 28 (D.C. Cir. 2018).²

By letter dated April 10, 2019, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position with respect to the issues raised by the court's opinion. The Respondent and the General Counsel each filed a statement of position.

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

The Board has reviewed the entire record in light of the court's decision, which is the law of the case. We find that the wildcat strike was not protected once the

striking employees became aware that their Union disapproved 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 Union represents warehouse employees at the Respondent's bottling plant. On September 9, 2008, amid negotiations for a successor collective-bargaining agreement, 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 rejection of the Union's demand for reinstatement of the stewards and resumption of negotiations, the Union conducted 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 suspended 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 election, 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 violation 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 interests."

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

¹ 362 NLRB 1047, reaffirming and incorporating by reference 358 NLRB 1233 (2012).

² The court also affirmed the Board's finding that the Respondent unlawfully discharged shop steward Miguel Colon. 898 F.3d at 32-34.

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.³ The Board reasoned that the strike supported the Union's strategy and the strikers were simply "ma[king] 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*.⁴ 362 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

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).

the Union despite the clear October 20 notice rested only on the fact that the Union's letter was distributed to the strikers by the Respondent's security guards. It was "unclear" to the court how the Respondent's distribution of the letter affected employee knowledge of the Union's position, however, and the court remanded for clarification:

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. . . . 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 [the Respondent] accurately represented its position. [898 F.3d at 34–35 (emphasis in original).]

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.⁵ 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

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.