PIETRANTONI MENDEZ & ALVAREZ LLC

Puerto Rico Labor & Employment Alert

NLRB ISSUES KEY DECISION ON WILDCAT STRIKES

On September 30, 2019 the National Labor Relations Board issued a key decision holding that a two-day wildcat strike was not a protected activity under the National Labor Relations Act and thus, that the Employer did not violate the Act by suspending and/or terminating the strikers, CC1 Limited Partnership d/b/a Coca Cola Puerto Rico et al and Union de Tronquistas, Local 901, et al., 368 NLRB 84 (2019). See Opinion and Order at https://apps.nlrb.gov/link/document.aspx/09031d4582d9d057.

The case, litigated by Charter Member Néstor Mendez Gomez, with Special Counsel Juan Carlos Pérez Otero and Limited Partner Jason Aguiló, is the culmination of 11 years of legal proceedings by the Employer, the Coca-Cola Bottler for Puerto Rico, including two appeals to the Court of Appeals for the District of Columbia ("DCCA"), to have the NLRB recognize that a 2008 wildcat strike was not a protected activity.

The decision is significant not only because the NLRB overturned a 2012 and a 2015 decision that had found that the wildcat strike was a protected activity, but because it was the result of a DCCA decision which the NLRB referred to as the law of the case. CC1 Limited Partnership v. Nat'l Labor Relations Bd., 889 F.3d 26 (D.C.Cir. 2018). Moreover, the Board implicitly acknowledged that its holding in Silver State Disposal Service, 326 NLRB 84 (1998) for determining whether an unauthorized strike is protected is not consistent with the principles established by the US Supreme Court in Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975). The Board has now implied it is of the position that an unauthorized strike by a group of employees without direct support of union officials must demonstrate that it was carried out in support of both the union's ultimate purpose and its strategy and methods in order to be considered protected activity under the Act.

In this case, although the Union had previously voted to strike, it subsequently decided to hold the strike in abeyance while it negotiated a new collective bargaining agreement. A dissident group went ahead and called for and carried out the strike, purportedly for the same purposes as the original Union strike vote. On the first day of the strike, the Union sent a letter to the Employer clearly stating it had not authorized the same and that the strikers were an unauthorized dissident faction of the Union. This letter was copied by the Employer, which had its security guards distribute the same to the strikers, many of whom continued the strike for an additional day. The Employer subsequently terminated most of the striking employees, the 2012 decision ensued, and the Employer appealed to the DCCA. While said appeal was pending, the NLRB set aside the 2012 decision pursuant to N.L.R.B. v. Noel Canning, 573 U.S. 513 (2014). After the NLRB issued its 2015 decision, this time with one dissent, the Employer successfully appealed the same to the DCCA, obtaining a remand to the NLRB for an explanation as to how it had decided that the strikers had not tried to bargain directly with the Employer or assumed a position contrary to the Union's. The court questioned whether the NLRB "thought the striking employees *knowledge* of the Union's position wasn't important unless that knowledge came from the Union itself".

In its new unanimous decision, the Board found that the wildcat strike was not protected once the striking employees became aware that their Union disapproved of and disavowed the strike, even when they were notified by the Employer's security guards and not directly by the Union. The NLRB found that the continued striking despite the Union's position undermined the latter's exclusive bargaining authority and thus lost the protection of the Act.

Finally, we note that since the 2008 strike the Employer has negotiated various collective bargaining agreements with different unions and significantly expanded its investments and employment in Puerto Rico.

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