

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37**

PUNA GEOTHERMAL VENTURE,)	
)	
Employer,)	
)	
v.)	Case No. 20-RC-078220
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 1260,)	
)	
Petitioner.)	

**PUNA GEOTHERMAL VENTURE’S EXCEPTIONS
TO THE HEARING OFFICERS REPORT ON OBJECTIONS**

The Employer, PUNA GEOTHERMAL VENTURE (“PGV” or the “Employer”), pursuant to Section 102.69 of the Rules and Regulations of National Labor Relations Board, 29 C.F.R. § 102.69, respectfully submits the following exceptions to the Hearing Officer’s Report on Objections (“HOR”).

1. To the Hearing Officer’s rulings, credibility findings, and conduct of the hearing, (*see generally* HOR), because such rulings, findings, and conduct were biased to the benefit of the Union and the detriment of the Employer, and were further contrary to the record evidence and applicable precedent. Tr. 86-181, 246-52.
2. To the Hearing Officer’s conduct of the hearing, because such conduct was in violation of the Board’s practice and procedure. Tr. 86-181, 246-52.
3. To the Hearing officer’s conduct of the hearing, because such conduct evidenced bias against the Employer’s position and compounds the appearance of bias and impropriety by the Board. Tr. 86-181, 246-52.
4. To the finding that the Employer failed to establish that Abel Costa and Abraham Costa were agents of the Union (HOR at 12, 15, 33, 35), because such finding is

contrary to the record evidence and applicable precedent, and irrelevant to the issue of Abel Costa's improper supervisory pro-union conduct and Abraham Costa's objectionable electioneering and related misconduct. Tr. 16-19, 28-30, 34, 54-57, 65, 206, 223-29, 274, 335-36, 391-93, 395, 472.

5. To the finding that the Employer "presented no evidence to contradict Brittain's, Abel Costa's and Abraham Costa's testimonies that the Union never authorized either of the Costas to act on its behalf," (HOR at 12), because such finding is contrary to the record evidence and applicable precedent. Tr. 16, 18-19, 28, 30, 34, 54-57, 65, 335-36, 391-93, 395, 472.

6. To the finding that the Employer "provided no evidence that the Union was aware of the statements made by Abel Costa at the first meeting, or that the Union was aware of statements he made to any other employee," (HOR at 12), because such finding is irrelevant to the issue of Abel Costa's improper supervisory pro-union conduct.

7. To the finding that the Employer "failed to establish that the Union was aware of any of Abraham Costa's communication or conduct with employees," (HOR at 12), because such finding is contrary to the record evidence and applicable precedent, as well as irrelevant to the issue of Abraham Costa's objectionable electioneering and related misconduct. Tr. 28, 30, 37, 200-01, 208-09, 390-95, 471, 472.

8. To the failure to find that Abraham Costa acted on behalf of the Union when he organized the May 12 pro-union barbeque, two days before the election, at which Union agent Michael Brittain and several employees of the Employer attended and discussed the election, because such finding is fully supported by the record evidence and applicable precedent. Tr. 353, 390-95, 472.

9. To the finding that Brittain never asked either Abel Costa or Abraham Costa to act on the Union's behalf, nor was aware that they were acting on behalf of the Union, (HOR at 11), because such finding is contrary to the record evidence and the reasonable inferences to be drawn therefrom. *See supra* ¶¶ 4-8.

10. To the conclusion that the discussion at the March 28 Union meeting between Brittain and Abel Costa concerning Abel Costa's exclusion from the bargaining unit because of what the Union perceived as his supervisory status, weakens the Employer's allegation that Abel Costa was seen by others as the Union's agent, (HOR at 12), because such finding is contrary to applicable precedent.

11. To the finding that "Brittain made it clear to employees multiple times that he (Brittain), and only he, was the person to contact should [employees] have questions or concerns," (HOR at 15), because such finding is contrary to the record evidence. *See supra* ¶¶ 5-8.

12. To the failure to find that the Union, specifically Brittain, engaged in any misconduct, wrongdoing or other action that improperly influenced and/or invalidated the election, because such finding is fully supported by the record evidence.

13. To the finding that the Employer's objections failed to provide "a clearly-articulated allegation that the results of the election were tainted by the pro-union remarks and/or conduct of their alleged statutory supervisor, Abel Costa," (HOR at 15-16), because such finding is contrary to the record evidence and applicable precedent. *See infra* ¶¶ 17-57.

14. To the finding that the Employer, as the party objecting to the conduct of the election, did not meet its "heavy burden of proof" of establishing the validity of its objections to the election, (HOR at 16), because such finding is contrary to the record evidence and applicable precedent. *See infra* ¶¶ 15-69.

15. To the finding that the Employer objected “not to the Union’s interference with employees’ Section 7 rights, but the Union’s coercion and threatening of employees,” (HOR at 16-17), because such finding is contrary to the record evidence and applicable precedent.

16. To the conclusion that the Employer’s argument—that the phrase “interfere with” and “coercion” are two distinct methods by which a party could undermine employees’ Section 7 rights—“weakens” the merits of the Employer’s Objections, (HOR at 17), because such finding is contrary to applicable precedent.

17. To the finding that there was no evidence introduced by the Employer to support its Objection 1 that the Union coerced employees through threats of Union retaliation, (HOR at 17), because such finding is contrary to the record evidence and applicable precedent. Tr. 18-19, 271.

18. To the recommendation that the portion of the Employer’s Objection 1 concerning threats be overruled, (HOR at 17), because such recommendation is contrary to the record evidence and applicable precedent. Tr. 18-19, 271.

19. To the recommendation that the Employer’s Objection 1 be overruled in its entirety, (HOR at 17, 33), because such recommendation is contrary to the record evidence and applicable precedent.

20. To the finding that after the March 28 meeting, Abel Costa refrained from speaking in favor of the Union, (HOR at 18), because such finding is contrary to the record evidence. Tr. 25, 29, 271.

21. To the failure to find that Abel Costa is a supervisor within the meaning of Section 2(11) of the Act, because such finding is fully supported by the record evidence and applicable precedent.

22. To the finding that Abel Costa was unclear as to his supervisory status or believed he had no supervisory authority (HOR at 6-7, 19-20), because such finding is contrary to the record and irrelevant to the determination of supervisory status under applicable precedent in any event. Tr. 60-61, 80-81, 83-84, 91-97, 102-05, 110, 112-13, 135-36, 138-39, 145-48, 163, 174-80, 183, 187, 190, 196-97, 227-28, 258-69, 272-73, 284, 308-10, 312; Employer's Exs. 1-7; *see also infra* ¶¶ 25-48; HOR at 32 (Abel Costa "perceives himself to supervise three mechanics.").

23. To the refusal to accept the parties' stipulation to Abel Costa's supervisory status, because such refusal was contrary to the record evidence and applicable precedent. *See supra* ¶ 22.

24. To the finding that Abel Costa believed he had no supervisory authority, even after he was given a job description for his Maintenance Supervisor position detailing his supervisory duties and Wiebe informed maintenance employees that Abel Costa was their supervisor, (HOR at 19-20), because such finding is contrary to the record evidence and irrelevant to the determination of supervisory status under applicable precedent. Employer's Ex. 1 at 1-2; Tr. 259-69; HOR at 32 (Abel Costa "perceives himself to supervise three mechanics.").

25. To the failure to find that Abel Costa exercises independent judgment in the scheduling of all maintenance activities for the Employer, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 80, 96, 135-37, 177-79, 195-96.

26. To the failure to find that Abel Costa exercises independent judgment in the assignment of work of employees, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Employer's Ex. 1; Tr. 95, 97, 175, 259-60, 309.

27. To the failure to find that Abel Costa exercises independent judgment in the assignment of overtime and staffing of employees, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 83-84, 96, 102, 106, 177, 260-61, 265-66, 309.

28. To the failure to find that Abel Costa responsibly directs the work of and is held accountable for the work of his direct reports, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Employer's Ex. 6; Tr. 163, 180, 183.

29. To the failure to find that Abel Costa exercises independent judgment in initiating and effectuating discipline of several employees, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Employer's Exs. 3-5; Tr. 112, 144-46, 148, 174-75, 196, 260, 309-10.

30. To the failure to find that Abel Costa has effectively recommended employees for hire and participates in the hiring process, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 104-05.

31. To the failure to find that Abel Costa adjusts employee grievances, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 102, 138-39, 260.

32. To the failure to find that Abel Costa exercises independent judgment in the evaluation of his subordinates, as to render him a statutory supervisor under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 103, 176, 261-62.

33. To the failure to find secondary indicia supportive of Abel Costa's supervisory status under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 83-84, 190, 197, 227, 263-64, 284; *id.* at 91-92, 94-95, 272-73, 308, 312; *id.* at 179-80; *id.* at 187; Employer's Exs. 2, 7.

34. To the failure to find that Abel Costa is perceived by his direct reports as their "boss," a secondary indicia supportive of supervisory status under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 83-84, 190, 197, 227, 263-64, 284.

35. To the failure to find that Abel Costa is treated as management by the Employer, a secondary indicia supportive of supervisory status under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 91-92, 94-95, 272-73, 308, 312; Employer's Ex. 2.

36. To the failure to find that Abel Costa is paid substantially more than his direct report, a secondary indicia supportive of supervisory status under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 179-80.

37. To the failure to find that Abel Costa is routinely delegated Wiebe's authority in Wiebe's absence, a secondary indicia supportive of supervisory status under the Act, because such finding is fully supported by the record evidence and applicable precedent. Tr. 187; Employer's Ex. 7.

38. To the finding that the record evidence regarding Abel Costa's status as a supervisor "is at best sparse. There are gaping holes in the evidence and much of what exists in the record consists of conclusory statements without much more," (HOR at 27), because such finding is contrary to the record evidence and applicable precedent. *See supra* ¶ 22.

39. To the finding that the Employer failed to provide evidence of “the nature of the work” that is performed by employees under Abel Costa’s supervision, and “what criteria or guidelines are applied by Abel Costa when he assigns work,” (HOR at 27), so as to determine whether Abel Costa’s assignment of work was “routine” or “exercised utilizing independent judgment” and rendered him a supervisor under the Act, because such finding is contrary to the record evidence. Tr. 95, 97, 175, 259-60, 309; Employer’s Ex. 1.

40. To the finding that “the evidence raises a question” as to whether Abel Costa assigns overtime utilizing independent judgment, or does so more routinely, (HOR at 27), because such finding is contrary to the record evidence. Tr. 259-60, 309.

41. To the finding that the Employer failed to provide “specific examples” to support its assertion that Abel Costa is held accountable for the work of his direct reports, (HOR at 27), because such finding is contrary to the record evidence. Tr. 163, 180, 183; Employer’s Ex. 6.

42. To the finding that the evidence concerning Abel Costa’s supervisory authority in the areas of adjusting grievances, effectively recommending new hires, and providing feedback in his employees’ performance reviews is “underdeveloped in the record,” (HOR at 27), because such finding is contrary to the record evidence. Tr. 104-05, 138-39, 176, 260-62.

43. To the finding that “the evidence of secondary indicia is sparse and filled with conclusory statements,” (HOR at 27), because such finding is contrary to the record evidence. Tr. 83-84, 91-95, 179-80, 187, 190, 197, 263-64, 227-28, 272-73, 284, 308, 312; Employer’s Exs. 2, 7.

44. To the finding that “there is no evidence as to what is discussed at ‘management’ meetings,” (HOR at 27-28), because such finding is contrary to the record evidence. Tr. 91-92, 95-95, 272-73, 308, 312; Employer’s Ex. 2.

45. To the finding that “Abel Costa’s testimony regarding the difficulty he has been experiencing in supervising five individuals in the I & E and wellfield sections of the Maintenance Department and his perceived lack of support from Wiebe raise significant questions as to whether Abel Costa truly has supervisory authority over those individuals,” (HOR at 28), because such finding is contrary to the record evidence and is irrelevant to the determination of supervisory status under applicable precedent. Tr. 83-84, 190, 197, 227, 263-64, 284.

46. To the finding that Abel Costa did not supervise the mechanics, who “already report to their lead” and “appear to be over-supervised, which creates doubt about Abel Costa’s supervisory status,” (HOR at 28-29), because such finding is contrary to the record evidence and applicable precedent. Tr. 60-61, 97, 259.

47. To the crediting of the “not compelling testimony” of Op. Tech. 4 Robert Culnan, who testified that “he believed, based on his own experience as a lead operator, Abel Costa was like a maintenance foreman or a lead person,” and not a supervisor under the Act, (HOR at 29), because such finding is contrary to the record evidence and applicable precedent.

48. To the failure to conclude that Abel Costa is a supervisor under the Act, despite finding “some evidence that Abel Costa may possess some supervisory authority,” (HOR at 29), because such finding is fully supported by the record evidence and applicable precedent.

49. To the finding that “the determination of [Abel Costa’s] supervisory status is unnecessary, because even if he was found to be a supervisor, his conduct was not

objectionable,” (HOR at 29), because such finding is contrary to the record evidence and applicable precedent. Tr. 18-19, 36, 39-40, 198-99, 202, 271, 450-51; Employer’s Ex. 10

50. To the failure to find that the pro-union conduct by statutory supervisor Abel Costa tainted the laboratory conditions requisite for a fair election, because such finding is fully supported by the record evidence and applicable precedent.

51. To the failure to find that Abel Costa’s statement to Taylor Sumida at the March 28 Union meeting that “the main thing was to stick together, sign the cards and not to let PGV know because they would retaliate against us. . .” constituted improper pro-union supervisory conduct that warranted setting aside the election, because such finding is fully supported by the record evidence and applicable precedent. Tr. 18-19; *see also id.* at 25.

52. To the failure to find that Abel Costa’s statement to employees of the Employer after the March 28 meeting that “everybody should just stick together, not say nothing to nobody . . .” constituted objectionable pro-union supervisory conduct that warranted setting aside the election, because such finding is contrary to the record evidence and applicable precedent. Tr. 18-19.

53. To the finding that although Abel Costa testified that he remembered telling employees of the Employer at the March 28 Union meeting that “we need to stick together,” he “never did anything to try to influence” employees of the Employer to vote for the Union (HOR at 7), because such finding is contrary to the record evidence. Tr. 18-19, 271, 450-51.

54. To the finding that “[t]he facts of this case more closely resemble the facts in *Northeast Iowa Telephone Co.*,” 346 NLRB 465 (2006), (HOR at 31-32), because such finding is contrary to the record evidence and applicable precedent.

55. To the conclusion that “Abel Costa’s unclear supervisory position, unclear authority, and limited prounion conduct could not be found to interfere with employees’ free choice,” (HOR at 32), because such finding is contrary to the record evidence and applicable precedent. *See supra* ¶¶ ____.

56. To the finding that “Abel Costa’s conduct, even if it was determined that it was objectionable, did not materially affect the outcome of the election,” (HOR at 32, 33), because such finding is contrary to the applicable precedent.

57. To the finding that the Employer presented no evidence of the Union threatening any employee with job loss, (HOR at 33), because such finding is contrary to the record evidence and applicable precedent. Tr. 18-19, 271.

58. To the recommendation that the Employer’s Objection 2 be overruled, (HOR at 34), because such recommendation is contrary to the record evidence and applicable precedent. *See supra* ¶ 57.

59. To the finding that the Employer “presented no evidence” of the Union engaging in objectionable conduct by making promises “of any kind to employees,” (HOR at 34), because such finding is contrary to the record evidence and applicable precedent. Tr. 20-21, 354-55.

60. To the recommendation that the Employer’s Objection 3 be overruled, (HOR at 35), because such recommendation is contrary to the record evidence and applicable precedent.

61. To the finding that the Employer “presented no creditable evidence” of the Union having engaged in objectionable conduct by making false and misleading statements to employees with the intent to coerce them prior to and during the election, (HOR at 35), because such finding is contrary to the record evidence and applicable precedent. Tr. 20-21, 354-55.

62. To the recommendation that the Employer's Objection 4 be overruled, (HOR at 35), because such recommendation is contrary to the record evidence and applicable precedent.

63. To the failure to find that the Union destroyed the laboratory environment for a free and fair election by engaging in electioneering on the line of march to vote, (HOR at 35-36), because such finding is fully supported by the record evidence and applicable precedent. Tr. 203-11; Employer's Ex. 9.

64. To the finding that "there was no evidence" that the exchanges between Abraham Costa and Maeda on May 14, in which Abraham Costa pressured Maeda to vote in favor of the Union in direct sight of the entire bargaining unit, took place in a no electioneering area (HOR at 10, 35-36), because such finding is contrary to the record evidence and applicable precedent. Tr. 203-06, 210-11; Employer's Ex. 9.

65. To the failure to find that Abraham Costa repeatedly engaged in coercive electioneering in the line of march to the polls, because such finding is fully supported by the record evidence and applicable precedent.

66. To the failure to find that Abraham Costa's interactions with Maeda on May 14 were objectionable acts of bullying and coercion that warranted setting aside the election, because such finding is fully supported by the record evidence and applicable precedent.

67. To the finding that the facts in the cases cited by the Employer in its Brief in support of its Objection 5, *Parsec, Inc.*, 353 NLRB No. 096 (2009) and *Hollingsworth Management Service*, 342 NLRB 556 (2004), are "clearly distinguishable," (HOR at 36-37), because such finding is contrary to the record evidence and applicable precedent. Tr. 204-06, 210-11; Employer's Ex. 9.

68. To the recommendation that the Employer's Objection 5 be overruled, (HOR at 37), because such recommendation is contrary to the record evidence and applicable precedent.

69. To the finding that the Employer's five Objections to the Union's conduct are without merit and should be overruled, (HOR at 37), because such finding is contrary to the record evidence and applicable precedent. *See supra*.

70. To the recommendation that Petitioner be certified as the collective bargaining representative for the bargaining unit, (HOR at 37), because such recommendation is contrary to the record evidence and applicable precedent.

WHEREFORE, the Employer requests that the above-noted Exceptions to the Hearing Officer's Report on Objections be sustained.

Respectfully submitted,

PUNA GEOTHERMAL VENTURE.

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CERTIFICATE OF SERVICE

The undersigned counsel for the Employer, Puna Geothermal Venture, hereby certifies that she caused a true and correct copy of the foregoing PUNA GEOTHERMAL VENTURE'S EXCEPTIONS TO THE HEARING OFFICERS REPORT ON OBJECTIONS to be served upon the following counsel of record on this 24th day of September, 2012, by electronic mail, where indicated, and U.S. Mail:

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