UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

PUNA GEOTHERMAL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION REGARDING CERTAIN OBJECTIONS

The Employer, PUNA GEOTHERMAL VENTURE, ("PGV" or "the Company"), pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.69, submits the following brief in support of its exceptions to the Regional Director's Report and Recommendation Regarding certain Objections.

INTRODUCTION AND STATEMENT OF THE CASE

As the Board is well aware, the agency's rulemaking initiatives over the past year—seeking to require employers to post an "Employee Rights Notice" in the workplace and to modify and expedite procedures for conducting union certification elections—have drawn sharp criticism from an array of commentators and constituencies, including employer groups and advocates, members of Congress, and current and former Board members. Many have charged that the Board's actions compromise the agency's ability to fulfill its statutory obligation to oversee representation elections, as they could be viewed as suggesting agency bias in favor of

union organizing. This case validates these concerns, moving them from the realm of the hypothetical to the actual.

As explained below, during the critical period preceding a representation election at PGV's geothermal energy plant, the Company posted the Board-issued Employee Rights Notice on a bulletin board reserved for important communications to employees. Significantly, the Company posted the Notice in accordance with NLRB statements announcing that all employers would be required to do so. PGV employees who would later vote in the union election saw the notice, and after the election (which the Union won by two votes), at least one employee in the small voting unit explained that he understood the Notice to be an expression of the Board's preference for unionization. Given this evidence specifically demonstrating the Notice's impact on the election at issue, together with well-documented public comments (of which the Board may properly take judicial notice[1]) suggesting that the NLRB's rulemaking initiatives signal a preference in favor of unions, the Regional Director erred in overruling PGV's objections to the election based on perceived agency bias. When a potentially outcome-determinative number of voting employees believes the Board is partial toward unionization, it is impossible for an election to occur under conditions necessary to ensure a free and fair result. The election at issue should, therefore, be overturned and a rerun election ordered. Alternatively, at a minimum, these issues should be set for hearing to build an appropriate record of the Board's current rulemaking activity and its impact on the Board's role as impartial arbiter of the representation process.

[1] Facts that are not subject to reasonable dispute may be given judicial, or "official" or "administrative" notice. *See*, *e.g.*, *E & I Specialists*, 349 NLRB 446, 455 (2007) (Rand McNally publication showing distances between cities); *Rhee Brothers, Inc.*, 343 NLRB 695, 697-98 n.5 (2004) (the week date of a given calendar date); *Metro Demolition Co.*, 348 NLRB 272, 272 n.3 (2006) (Board may take administrative notice of its own proceedings).

STATEMENT OF FACTS

This case arises out of a May 14, 2012 certification election held at PGV's geothermal energy plant on Hawai'i Island. The Employer provides a large percentage of power for the Big Island from clean, renewable geothermal power sources. The proposed bargaining unit consisted of a group of 20 operating and maintenance employees at the plant, who voted to determine whether they would be represented by the International Brotherhood of Electrical Workers, Local 1260 ("IBEW 1260" or "the Union").

The pre-election campaign period was marred by numerous and repeated instances of coercive conduct by the Union and its agents and supporters, including giving misleading and false statements and bribes to employees, engaging in improper last-minute electioneering on the line of march, and aggressive, threatening pro-Union campaigning by a statutory supervisor. These actions destroyed the laboratory conditions needed for a free and fair election. Ultimately, however, they also appeared to pay dividends (in the short-term at least), as IBEW 1260 won the May 14 election. The Union's margin of victory, however, was as slim as they come—with 11 employees voting "YES," and 8 voting "NO," the outcome was determined by just 2 votes.

Following the vote, PGV filed objections to the election with Region 20 based on the Union's coercive conduct during the pre-election critical period, as well as during the voting itself. Following an investigation, on June 29, 2012, Regional Director Joseph Frankl issued a Report and Recommendation Regarding Certain Objections and Notice of Hearing Regarding Others ("RDR"). In his RDR, the Regional Director found that material and substantial issues of fact existed concerning the Union's misstatements, bribes, and threats, and concerning the pro-

Union campaigning that was carried out by a statutory supervisor. Accordingly, the Regional Director set these objections for hearing on July 16, 2012.[2]

On the other hand, the Regional Director overruled PGV's objections 11-15, which state:

> 11. The NLRB created an appearance of bias and destroyed the laboratory environment for a free and fair election by issuing Rule 76 Fed. Reg. 54,006 requiring the posting of the Employee Rights Notice.
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> 12. The NLRB created an appearance of bias and destroyed the laboratory environment for a free and fair election by issuing Rule 76 Fed. Reg. 54,006 in a manner that misled employers, including the Employer in this case, to post the notice in a way that compromised the Employer's right to free speech in the National Labor Relations Act and the U.S. Constitution.
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> 13. The NLRB created an appearance of bias and destroyed the laboratory environment for a free and fair election by acting outside of jurisdiction under law when issuing rules prior to the election in this case.
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> 14. The NLRB created an appearance of bias and destroyed the laboratory environment for a free and fair election by issuing Rule 76 Fed. Reg. at 80,140 eliminating procedures and adding procedures to promote union organizing before the election in this case.
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> 15. The NLRB created an appearance of bias and destroyed the laboratory conditions for a free and fair election by statements made by individual Board Members supporting rules to promote, aid, and abet union organizing prior to the election in this case.

In support of the Company's objections premised on employee perception of NLRB bias, PGV presented evidence to the Region that on April 17, 2012, the Company's administrative supervisor, Tito Agbayani, posted the Board's Employee Rights Notice on PGV's bulletin board located in the plant's CSC building. This bulletin board routinely contains important legal notices and is the official posting location for the Company's communications to its employees.

PGV posted the Employee Rights Notice because the Board had repeatedly announced that pursuant to the agency's rulemaking authority, all employers subject to the NLRA would be

[2] The hearing date was subsequently continued to July 17, 2012.

required to post the notice in conspicuous workplace locations (including on employee intranet sites, if applicable) by no later than April 30, 2012. 76 Fed. Reg. 82133 (Dec. 30, 2011). Further, in public announcements describing the posting requirement, including on the agency's website, the Board had strongly urged employers to post the notice prior to the deadline. Supervisor Agbayani's posting of the Employee Rights Notice on April 17 was thus born of PGV's decision to act in accordance with the Board's urging and in anticipation of what had been communicated by the agency to be a mandatory posting requirement for all employers.

The Company's actions in this regard are explicable in view of the authority and influence the Board has during representation proceedings. PGV was involuntarily the subject of an organizing drive under the Board's jurisdiction at a time when the Board was encouraging voluntary compliance with its notice posting. As a consequence, PGV could rightfully assume that failure to comply would impact the processing of the petition and the treatment the Company could come to expect by the Board as it administered a matter vital to employees and management. A government agency both handling a case and encouraging parties to do what the agency wants, when that act could be illegal, is coercive and unwarranted in the representation context. Nowhere does the NLRA authorize this kind of activity.

The Employee Rights Notice was displayed on PGV's bulletin board for nine days during the critical period preceding the IBEW 1260 election. On April 26, 2012, after learning that the Board's impending rule requiring posting of the Employee Rights Notice had been enjoined by the U.S. Court of Appeals for the District of Columbia Circuit, the Company removed it. Coincidentally, however, the timing of the pre-election proceedings in this case was such that the Company was required that same day to post, on the same bulletin board, the Board-issued election notice it had received from Region 20. Thus, employees viewing the bulletin board

reserved for Company postings and communications would have read, in an unbroken sequence, an official Board-issued notice explaining and affirming their rights to be represented by a union, followed immediately by an official Board-issued notice advising them of the details for an election by which they could choose to be represented by IBEW 1260.

As to impact, this is not a theoretical case. The record demonstrates more than that it was *possible* employees *could have read* the Board-issued notices on PGV's bulletin board. Employees did read them. In support of its objections, PGV presented evidence to the Region that at least one bargaining unit member read the Employee Rights Notice and interpreted it to mean that the NLRB was encouraging him to join a union. Given the relative small size of the unit at issue, it can be presumed that this same information that led to an employee's perception of NLRB encouragement of unionization was likewise seen by other employees as well.

STATEMENT OF QUESTIONS INVOLVED

I. Whether the Regional Director erred when he overruled PGV's objection that the NLRB's aggressive rule-making agenda for 76 Fed. Reg. 82133 [Notice Posting] and 76 Fed. Reg. 80138 [Election Procedures] created an appearance of partiality in favor of the Union, destroying the laboratory conditions required for a free and fair election. Exception Nos. 1-16, 18.

II. Whether the Regional Director erred in failing at a minimum to conduct a hearing on the issue whether the NLRB's aggressive rule-making agenda for 76 Fed. Reg. 82133 [Notice Posting] and 76 Fed. Reg. 80138 [Election Procedures] created an appearance of partiality in favor of the Union, destroying the laboratory conditions required for a free and fair election. Exception No. 17.

III. Whether the Regional Director erred when he overruled PGV's objection that the NLRB's aggressive public representations and early compliance notices for 76 Fed. Reg. 82133 caused PGV to comply in a way that created a perception among employee voters that the Board favored the Union in the certification election. Exception Nos. 1-16, 18.

IV. Whether the Regional Director erred in failing at a minimum to conduct a hearing on the issue whether the NLRB's aggressive public representations and early compliance notices for 76 Fed. Reg. 82133 caused PGV to comply in a way that created a perception among employee voters that the Board favored the Union in the certification election. Exception Nos. 17.

V. Whether the Regional Director erred when he overruled PGV's objection that the NLRB destroyed the necessary conditions for a free and fair election by seeking compliance with 76 Fed. Reg. 82133 before its effective date when in fact the rule is illegal and *ultra vires* under law. Exception Nos. 1-16, 18.

VI. Whether the Regional Director erred in failing at a minimum to conduct a hearing on the issue whether the NLRB destroyed the necessary conditions for a free and fair election by seeking compliance with 76 Fed. Reg. 82133 before its effective date when in fact the rule is illegal and *ultra vires* under law. Exception Nos. 17.

ARGUMENT

I. AN ELECTION SHOULD BE SET ASIDE WHERE IT IS SHOWN THAT OBJECTIONABLE CONDUCT HAD A "TENDENCY TO INTERFERE WITH EMPLOYEE FREE CHOICE" SUCH THAT IT "MATERIALLY AFFECTED" THE OUTCOME

Section 9 of the NLRA vests the Board with the responsibility of providing fair election procedures and safeguards to ensure that employee free choice in an election is uninhibited. 29 U.S.C. § 159. Where the results of an election are the product of coercive influence and, therefore, do not represent the free and uninhibited choice of the employees, the Board has the authority to set aside the results and order a new election. *See NLRB Casehandling Manual*, Pt. 2 § 11436.

In assessing whether to set aside an election, "all of the facts and circumstances" must be examined "to determine whether the atmosphere was so tainted as to warrant such action." *Madison Square Garden CT, LLC*, 350 NLRB 117, 119 (2007) (citing *Gen. Shoe Corp.*, 77 NLRB 124 (1948), *enf'd.*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952)). In undertaking this analysis, the Board has long considered the "critical period"—*i.e.*, the date the petition is filed through the date the election is held, *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1277-78 (1961)—as the particularly significant time-frame for ascertaining whether objectionable conduct has occurred. However, even pre-petition conduct will be considered

where it "adds meaning and dimension to related post-petition conduct." *Dresser Indus.*, 242 NLRB 74, 74 (1979); *Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 598 n.13 (2004); *NLRB v. Island Film Processing Co.*, 784 F.2d 1446, 1452 n.8 (9th Cir. 1986) (pre-petition activity appropriately considered where it is not too remote) (citing *NLRB v. R. Dakin & Co.*, 477 F.2d 492, 494 (9th Cir. 1973)).

In evaluating the pre-election activity, the Board applies an objective standard, finding conduct to be objectionable if it has "the tendency to interfere with the employees' freedom of choice" such that "it materially affect[s] the results of the election." *Madison Square Garden CT, LLC*, 350 NLRB at 119; *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). In deciding whether such interference has occurred, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. *Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (citing cases).

II. THE NLRB'S RULEMAKING INITIATIVES REGARDING THE EMPLOYEE RIGHTS NOTICE AND EXPEDITED ELECTION PROCEDURES CAUSED BARGAINING UNIT EMPLOYEES TO BELIEVE THE NLRB WAS ENCOURAGING THEM TO VOTE FOR UNION REPRESENTATION

A. Perceived NLRB Bias "Materially Affected" the Results of this Election

As noted above, this was a very close election: PGV's operating and maintenance employees voted 11-8 for IBEW 1260 representation, meaning that just two ballots swung the

outcome in the Union's favor. When the federal agency with power over the employees' representation rights engages in high-profile and widely-debated rulemaking to institute mandatory requirements or procedure changes that are characterized as pro-union and partisan during the campaign period leading up to an election, there is a serious question whether such actions "materially affect" the election results. Here, one employee has actually come forward since the election to explain that he saw the Employee Rights Poster on PGV's bulletin board during the critical period preceding the vote and interpreted it to mean that the NLRB was encouraging him to vote for the Union. In a unit of only 20 employees, it can be presumed that other employees likewise saw and believed the same. And, in an election involving a unit of this small size and ultimately decided by a two-ballot margin, every vote is material. *Caron Int'l,* 246 NLRB 1120 (1979) (size of unit is relevant factor in resolving question whether misconduct affected election results). Thus, the issue raised by these objections is whether employees could justifiably perceive NLRB bias leading up to their NLRB-conducted election, because if so, the record evidence and Board precedent clearly establish that it materially affected the outcome and warrants remedial action.

B. The Perception that the NLRB is Encouraging Employees to Vote for Union Representation has a "Tendency to Interfere with Employee Free Choice"

In fulfilling its statutory role of conducting union representation elections, "it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *Gen. Shoe Corp.,* 77 NLRB 124, 127 (1948). *A fortiori,* "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election even though the conduct may not constitute an unfair labor practice." *Id.* Thus, the touchstone in evaluating the legitimacy of a union certification election is whether employees had an

opportunity to cast their votes in favor, or against, union representation in an atmosphere free from activities or circumstances that might tend to coerce or otherwise interfere with their choice.

1. Ensuring Employee Free Choice Necessitates the Avoidance of Even an Appearance of Agency Bias

The Board has long recognized the rather self-evident principle that conducting an election under circumstances in which voters are led to believe the NLRB favors one party (or outcome) over another is incompatible with the statutory mandate of promoting employee free choice. In *SDC Investment*, 274 NLRB 556 (1985), for instance, the Board instructed that an election should be set aside where the particular campaign technique "is likely to have given voters the misleading impression that the Board favored one of the parties to the election." *Id.* at 557. Similarly, in *Midland National Life Insurance Company*, 263 NLRB 127 (1982), the Board overturned an election in a case where a party's misrepresentation to potential voters involved the misuse of the Board's election processes. *Id.* at 131-33; *cf.*, *Hudson Aviation Serv.*, 288 NLRB 870, 870 (1988) (confidence in the Board election process and standards can be undermined when Board agents fail to maintain strict neutrality in what they say while conducting Board elections. Their conduct may threaten the "indispensable perception of Board neutrality."); *Athbro Precision Eng'g Corp.*, 166 NLRB 966, 966 (1967), *vacated sub nom. Electrical Workers v. NLRB*, 67 LRRM 2361 (D.D.C. 1968), *acquiesced in* 171 NLRB 21 (1968), *enf'd.* 423 F.2d 573 (1st Cir. 1970) (election must be set aside when conduct of Board election agent tends to destroy confidence in the election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain).

The standard for evaluating real or apparent agency bias in the election context is similar to that which applies in the adjudicatory context. It is axiomatic that a party entitled to

fundamental due process must be given a fair trial free not only from actual bias, but one in which the probability of unfairness or even *the appearance of impropriety or partiality* is avoided. *See, e.g.*, *In re Murchinson*, 349 U.S. 133, 136 (1955); *Offutt v. U.S.*, 348 U.S. 11, 14 (1954). Administrative tribunals, in this regard, are held to the same high standards of impartiality as judges. *See, e.g.*, *Barry v. Browning*, 825 F.2d 1324, 1330 (9th Cir. 1987); *Am. Cynamid Co. v. FTC*, 363 F.2d 757, 763-64 (6th Cir. 1966); *Inland Steel Co. v. NLRB*, 109 F.2d 9, 20-21 (7th Cir. 1940).

In *Habeas Corpus Resource Center v. United States Department of Justice*, No. C 08–2649 CW, 2009 WL 185423 (N.D. Cal. Jan. 20, 2009), for instance, the District Court for the Northern District of California enjoined a Department of Justice rulemaking initiative based on "serious questions" of alleged agency bias in connection with the promulgation of the rule. *Id.* at *9. Specifically, the court found that the chief of the Capital Case Unit in the DOJ's Criminal Division (the agency's prosecutorial branch) was a member of the working group developing the regulation, and her professional background suggested that she may have had a conflict of interest that rendered her involvement in drafting the rule inappropriate. *Id.* The court also noted that Senator Kyl of Arizona, who introduced the relevant portions of the Patriot Act amendments in the Senate, and Representative Lungren, the former Attorney General of California, exerted pressure on the DOJ as it drafted the rule. *Id.* In addition, the evidence suggested that even though the notice of proposed rule-making stated that working group members met with both prosecution and defense interests when creating the rule, the DOJ was never open to suggestions from members of the latter group. *Id.* Based on these facts, the court concluded that "[a]lthough it would be premature to determine at this point whether the DOJ's rule was so tainted by bias that it was not a valid exercise of rulemaking authority, the evidence

submitted by Plaintiff at least raise[d] serious questions on the matter," and enjoined the rule. *Id.* at *9-10.

Here, the Board engaged in extremely controversial rulemaking that has spawned lawsuits and public outcry from Congress, business, and civic enterprises. Court rulings have called into question the lawfulness of the Board's rulemaking activity. The Board acted at its peril with regard to its statutory obligations to render fair, neutral, and impartial representation proceedings during what it knew would turn into a set of pitched, goliath legislative and judicial battles over its authority in representation cases.

2. Proof is Abundant that the NLRB's Rulemaking Initiatives Give an Appearance of Partiality in Favor of Union Organizing and that the Board Could Foresee this Activity Jeopardizes Representation Proceedings

The NLRB's well-publicized rulemaking initiatives requiring employers to post the Employee Rights Notice and revising existing election rules and procedures are widely considered to evidence agency bias in favor of union organizing. At the very least, these initiatives create *an appearance of bias* in favor of unionization, which compromises the Board's ability to perform its statutory function of ensuring that employee free choice will prevail in representation elections. Board Member Hayes made this point very clearly in his dissent from the final rule concerning the Employee Rights Notice:

> My colleagues seek through promulgation of this rule to reverse the steady downward trend in union density among private sector employees in the non-agricultural American workforce. Theirs is a policy choice which they purport to effectuate with the force of law on several fronts in rulemaking and in case-by-case adjudication … I am confident that a reviewing court will soon rescue the Board from itself and restore the law to where it was before the sorcerer's apprentice sent it askew.

Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54042 (Aug. 30, 2011).

Member Hayes' views in this regard have been echoed by a host of business leaders and employer advocacy groups, members of Congress, and other current and former NLRB officials. For instance, during a congressional hearing before the Committee on Education and the Workforce held on September 22, 2011, Rep. John Kline of Minnesota, Chairman of the Committee, remarked that "[i]n late August the National Labor Relations Board introduced a series of sweeping changes to federal labor policy. Through three decisions handed down in one afternoon, the board restricted workers' right to a secret ballot election; undermined employers' ability to maintain unity in the workplace; and created new barriers for those who wish to challenge union representation." *Culture of Union Favoritism: Recent Actions of the National Labor Relations Board: Hearing Before the Comm. On Educ. and the Workforce*, 112th Cong. 1 (2011), http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68366/pdf/CHRG-112hhrg68366.pdf.

Witnesses who testified at the Congressional hearing agreed that the Board's notice posting and election rules suggest agency bias in favor of union organizing:

- Curtis Mack, former Regional Director of Region 10 from 1976 to 1981, and NLRB trial attorney from 1970 to 1972, testified that: "[t]he posting is not required by the [NLRA] and does not serve the purposes of the Act. The Board has existed for seventy-five (75) years but only now has found it necessary to require employers to post a notice advising them of their rights under the Act[;]" "[t]he punitive nature of the rule demonstrates that its goal is not to notify employees but to further union efforts to gain traction at the expense of employee choice[;]" and that, overall, "the poster creates the impression that the Board favors unions and is not neutral." *Id.*

- George King, a labor and employment partner at Jones Day, testified that "the Board's Notice of Proposed Rulemaking (NPRM) regarding representation case procedures may be the most egregious example of the Board overreaching to change precedent and procedure without any basis whatsoever for doing so. . . The Board's proposed expedited (quickie) election rules lack a factual foundation, are not consistent with the federal rules of civil procedure and sound administrative law principles, and violate fundamental due process rights of employees and employers." King further stated that the Board was using a "one-sided and extremely biased approach with respect to how the important process of conducting secret ballot elections should be carried out by the Agency" by, for

examples, requiring all comments to be filed within a 60-day period, refusing to extend that period, and rushing through the comments received by a number of employer groups. *Id.*

- Rep. Todd R. Platts from Pennsylvania, and a former union member (Teamsters Local 430) agreed: "[W]hen you look at all the issues the NLRB has actively taken a pro-union [stance]." *Id.*

On October 12, 2011, Rep. John Kline held a hearing on the proposed H.R. 3094, Workforce and Democracy Fairness Act. *House Comm. on Educ. and the Workforce Holds a Hearing on the Workforce and Democracy Act*, 2011 WL 4851219 (2011). In explaining the purpose of the legislation as requiring the Board to "change course" from its troubling election rule, and "reaffirm key protections workers and employers have received for decades," Rep. Kline reiterated his statements from the September 2011 congressional hearing that the Board's election rule was one "clear" indication that "the [B]oard is promoting unionization by stifling employers' free speech and crippling workers' free choice." *Id.*

Charles Cohen, who served as an NLRB member from 1994 to 1996, voiced similar sentiments during his congressional testimony:

> The proposed rule would also effectively gut an employer's ability to mount a lawful, effective information dialogue with its employees on whether or not to select union representation. What has the board come up with in these proposed rules?
>
> It has proffered the gimmick of an emasculated hearing, summary judgment standards, offers of proof, preclusive rules to limit issues, regional director decisions devoid of explanation at time of issuance, and frenetic time deadlines that disregard other obligations of employers and their counsel -- all in an attempt to get to that election as soon as humanly possible and without giving the employer time to communicate with its employees.
>
> Board member Brian Hayes, dissenting from the issuance of the proposed rules, wrote, quote, "Make no mistake. The principle purpose of this radical manipulation of our election process is to minimize, or rather to effectively eviscerate, an employer's legitimate opportunity to express its views about collective bargaining."

Id.

Employee rights advocacy groups like the National Right to Work Legal Defense Foundation have voiced similar concerns: "The Final rule achieves much of what Organized Labor wanted and failed to get with their so-called Employee Free Choice Act—quickie elections to effectively silence employers and keep employees uninformed." Nat'l Right to Work Legal Def. Found., Inc., *NLRB Watch: With "Quickie Elections" Rule, NLRB Quick to Sell Out Workers*, http://www.nrtw.org/en/nlrb-watch/nlrb-watch-nlrb-s-ambush-election-rule-invalidated (last visited July 10, 2012).

Recently, Senator Mike Johanns of Nebraska made similar remarks in a news teleconference on April 19, 2012: "The [B]oard really needs to understand is its job is to ensure fair elections and to have a level playing field, a fair shake for everybody, management and union, not to compromise employees' rights simply to benefit one side over the other." *Sen. Mike Johanns, R-NEB., Holds a News Teleconference*, 2012 WL 1357522 (Apr. 19, 2012).

Adding further fuel to this fire are public comments by the one of the two-member Board "majority" that passed these rules changes, which again demonstrate (or at least give rise to a reasonable belief) that the Board's efforts are directed at achieving union organizing success. In a 1993 article in the Minnesota Law Review, Member Becker wrote that employers have no "cognizable" interest in the outcome of union organizing drives and elections. Craig Becker, *Democracy in the Workplace: Union Representation and Federal Labor Law*, 77 Minn. L. Rev. 495, 500 (1993). He observed:

> Similarly, employers should have no right to raise questions concerning voter eligibility or campaign conduct. Because employers have no right to vote, they cast no ballots the significance of which can be diluted by the inclusion of eligible employees . . . Because employers lack the formal status either of candidates vying to represent employees or voters, they should not be entitled to charge that unions disobeyed the rules governing voter eligibility or campaign conduct. On the questions of unit determination, voter eligibility, and campaign conduct, only

> the employee constituency and their potential union representatives should be heard.

Id. at 587-88.

On this record of public controversy, the Board encouraged employers, including those currently subject to Board jurisdiction in pending representation proceedings, to post its Notice without delay—*i.e.*, to comply on the very subject of the rulemaking being debated (and litigated) before the debate was concluded and, indeed, before even the effective date set forth in the rule. Thus, as the Board was being publicly rebuked for its partisanship, it used the otherwise legitimate devices of its administrative authority to implement its will on employers already embroiled in NLRB proceedings. There is no question that employers and employees subject to a government agency bent on getting its will and with very real power over them would want to appease the agency and give in. This coercion appears calculated as the Board called for voluntary compliance with a rule it contended would shortly become law. From the perspective of litigation, perhaps the Board can argue that it is privileged to engage in rulemaking. But, no one can take seriously the upshot of this argument when it comes to elections run by the Board: there is no privilege to upset the parties heading into a representation election with unbridled power to tilt the scales to unionization when the Act protects employee rights to engage, *and to refrain*, from forming, joining, or assisting a labor organization. 29 U.S.C. § 157.

3. Employee Voters in the PGV/IBEW 1260 Election Actually Perceived the NLRB to be Encouraging them to Vote in Favor of the Union

The instant case demonstrates that the debate surrounding the legality of Board's recent rulemaking activities is not simply an academic exercise for labor lawyers and political candidates. Rather, the record shows that Board's actions directly affected the outcome of election held at PGV on May 14, 2012.

Consider, as an initial matter, the timing of events. On April 13, the date the parties entered into a Stipulated Election Agreement, the District Court for South Carolina, Charleston Division found that the NLRB exceeded its authority in violation of the Administrative Procedure Act in promulgating the final rule requiring posting of the Employee Rights Notice. *Chamber of Commerce v. NLRB*, No. 2:11-cv-02516-DCN, 2012 WL 1245677 (D.S.C. Apr. 13, 2012) (based on the statutory scheme, legislative history, history of evolving congressional regulation in the area, and a consideration of other federal labor statutes, the court finds that Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner). Four days later, on April 17, the Court of Appeals for the D.C. Circuit enjoined enforcement of the final rule pending further judicial review. Order at 1, *Nat'l Ass'n of Mfrs. v. NLRB*, No. 12-5068 (D.C. Cir. Apr. 17, 2012). That same day, Chairman Pearce stated, "We continue to believe that requiring employers to post this notice is well within the Board's authority, and that it provides a genuine service to employees who may not otherwise know their rights under our law." *National Labor Relations Board, NLRB Chairman Mark Gaston Pearce on Recent Decisions Regarding Employee Rights Posting*, Apr. 17, 2012, http://www.nlrb.gov/news/nlrb-chairman-mark-gaston-pearce-recent-decisions-regarding-employee-rights-posting.

As stated above, on April 17, 2012, PGV posted the Employee Rights Notice on its bulletin board. The Company's actions were understandable and encouraged by the Board. Even today, the Board continues to send mixed messages to employers. The final rule was enjoined—yet the Board continues to provide copies of the Employee Rights Poster on its website for employers to download and post. National Labor Relations Board, *Employee Rights Notice Posting*, http://nlrb.gov/poster (last visited July 15, 2012). And, although the rule is

enjoined, the Board continues to advise employers that, "If an employer knowingly and willfully fails to post the Notice, that failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA." National Labor Relations Board, *Frequently Asked Questions – Poster*, http://nlrb.gov/faq/poster#t245n1744 (last visited July 15, 2012). By encouraging compliance with an invalid rule, the Board is putting employers in the position of promoting an invalid and unlawful agenda.

Compounding the appearance of bias stemming from the Board's promulgation and continued communications about the enjoined Employee Rights Notice, the Board has simultaneously been engaged in promulgating a final rule facilitating expedited union elections. Representation—Case Procedures, 76 Fed. Reg. 80138 (Dec. 22, 2011). Indeed, despite sharp dissension between the members of Board, public controversy and receipt of over 65,000 written comments, the Board passed an expedited election rule on December 20, 2011. *Id.* During the critical pre-election period in this case, Acting General Counsel Solomon issued a memorandum outlining in detail how regional offices will implement new representation case procedures. Lafe Solomon, GC Memorandum 12-04, Guidance Memorandum on Representation Case Procedure Changes (Apr. 26, 2012), *available at* https://www.nlrb.gov/publications/general-counsel-memos. These new election procedures were implemented and enforced on April 30, only to be invalidated by the federal district court for the District of Columbia on May 14, the day of PGV's election. *Chamber of Commerce v. NLRB*, No. 11-02262 (JEB), 2012 WL 1664028, at *1 (D.D.C. May 14, 2012).[3] One day later, Acting General Counsel Solomon withdrew the

[3] The "final rule" also was issued in violation of the Administrative Procedure Act because it was by arbitrarily issued in contravention of the Board's well-established practice with respect to overturning precedent only by the affirmative vote of three members. *Chamber of Commerce v. NLRB*, 2012 WL 1664028, at *10.

guidance to regional offices he issued prior to the effective date and advised regional directors to revert to their previous practices for election petitions starting today.

Thus, the PGV election occurred in the midst of the tumult surrounding the Board's promulgation of *two* invalid rules advancing pro-union agendas, all of which creates an appearance of bias and uncertainty for employers and employees alike. Employers like PGV who had elections pending during this period were literally caught in a maelstrom of injunctions, ever-changing enforcement dates, and perceived NLRB bias towards unions. Further, from the employees' perspective, the evidence shows that during the critical period preceding the election,[4] PGV employees actually observed the Employee Rights Notice on the Company's bulletin board and interpreted the language as "slanted in favor of unions" and "did not give equal discussion to an employee's right not to join a union." At a minimum, this series of events must be viewed as having had "a tendency to interfere" with employee choice. A rerun election is therefore required.

At the very least a hearing is warranted to explore whether the grounds for invalidating the Board's rules warrant overturning any election results as the fruit of this rulemaking environment. The APA violations currently being litigated in federal court could directly apply to case outcomes like this one, where elections were conducted during the rulemaking at issue.

This result should hold regardless of the eventual outcome of the judicial review over the Board's rulemaking. The Board chose its path knowing that it would inflame broad public debate and concern running to the core purposes of the agency. The only fair thing to be done in

[4] The "critical period," began on April 5. *See Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). While much of the actual activity surrounding the NLRB's rulemaking initiatives occurred prior to April 5, employees who would go on to vote in the PGV union election became aware of these activities—and thus were impacted by them—during the critical period immediately preceding the vote.

a case like this one is to remove the taint lingering over the proceedings and rerun the election. The Union is not prejudiced in the least by a rerun. The employees, however, and the employer should not be bridled with such an imbalanced, unfair proceeding.

4. The Totality of the Circumstances Warrants a Rerun Election

The coercive conduct at issue in the objections ordered to hearing should be considered together with the appearance of partiality in the Board's recent rulemaking. *Madison Square Garden CT, LLC*, 350 NLRB 117, 119 (2007) (citing *Gen. Shoe Corp.*, 77 NLRB 124 (1948), *enf'd*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952)) ("In assessing whether to set aside an election, the Board looks to all of the facts and circumstances to determine whether the atmosphere was so tainted as to warrant such action."). This case does not present the Board's activity in isolation. If two votes went the other way here, the outcome would have been different. At the time numerous employees were subject to coercion on-site, off-site, and in the pre-election period, by a supervisor, his son, and the Union, the environment wrought by the Board's rulemaking cannot go unnoticed and unconsidered by the parties and workers. At some point, the thresholds for laboratory conditions are breached for a small bargaining unit that has little experience with the Union or the Board. The Employer and its work force provide a critical amount of electrical supply for the Big Island of Hawai'i from clean, renewable power sources; the Board should not let this significant employer and its operations and maintenance employees down during this chapter of their operational life.

CONCLUSION

The Board should not condone rulemaking that leads to public, forceful, and aggressive Board statements for early compliance, including on its website and notice download availability, for what turns out to be an illegal notice reversed by at least one federal court for being *ultra vires*—outside of the Board's jurisdiction. It is simply not sound public policy to urge employers to post voluntary notices that affect the results of an election and then fail to order a fair rerun when the Board's own actions impacted the voting. Nothing in the NLRA approves in spirit or expressly the use of illegal rules to jeopardize the fairness of an election, and the when the Board's own processes result in this kind of result, the only fair thing to do is remedy it. The rulemaking at issue goes further than Board efforts at voluntary compliance with an illegal notice: the "quickie election" rule also reversed by one federal court compounds the problem. Together, the rules demonstrate procedural irregularity troubling the courts. They lead to the impression that the Board is "doing what it can" to favor union organizing. The appearance of bias is unavoidable. For those caught up in it, the Board should take extra care to ensure the fairness of its procedures. In this case, ordering a rerun is necessary.

For these reasons, PGV respectfully requests that the Board overturn the results of the certification election held on May 14, 2012, and order a rerun election. Alternatively, the Board should remand this matter to Region 20 with instructions to hold a hearing on PGV's Objections 11-15.

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 BRIEF IN SUPPORT OF EXCEPTIONS TO THE REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION REGARDING CERTAIN OBJECTIONS to be served upon the following counsel of record on this 16th day of July, 2012, by U. S. Mail and electronic mail:

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