

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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

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

Charles S. Birenbaum
Derek G. Barella
Marlén Cortez Morris
WINSTON & STRAWN LLP
101 California Street
San Francisco, California 94111-5802
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
cbirenbaum@winston.com
dbarella@winston.com
mcmorris@winston.com

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<i>Athbro Precision Eng'g Corp.</i> , 166 NLRB 966 (1967), <i>vacated sub nom. Electrical Workers v. NLRB</i> , 67 LRRM 2361 (D.D.C. 1968), <i>acquiesced in</i> 171 NLRB 21 (1968), <i>enf'd.</i> 423 F.2d 573 (1st Cir. 1970)	10
<i>Barry v. Browning</i> , 825 F.2d 1324 (9th Cir. 1987)	11
<i>Cambridge Tool & Mfg. Co.</i> , 316 NLRB 716 (1995)	8
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<i>Cedars-Sinai Med. Ctr.</i> , 342 NLRB 596 (2004)	8
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<i>Chamber of Commerce v. NLRB</i> , No. 11-02262 (JEB), 2012 WL 1664028 (D.D.C. May 14, 2012)	18
<i>Dresser Indus.</i> , 242 NLRB 74 (1979)	8
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<i>Gen. Shoe Corp.</i> , 77 NLRB 124 (1948)	9
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<i>Hudson Aviation Serv.</i> , 288 NLRB 870 (1988)	10
<i>Ideal Electric & Mfg. Co.</i> , 134 NLRB 1275 (1961)	7, 19
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<i>Metro Demolition Co.</i> , 348 NLRB 272 (2006)	2
<i>Midland National Life Insurance Company</i> , 263 NLRB 127 (1982)	10
<i>In re Murchinson</i> , 349 U.S. 133 (1955)	11

<i>Nat’l Ass’n of Mfrs. v. NLRB</i> , No. 12-5068 (D.C. Cir. Apr. 17, 2012)	17
<i>NLRB v. Island Film Processing Co.</i> , 784 F.2d 1446 (9th Cir. 1986)	8
<i>Offutt v. U.S.</i> , 348 U.S. 11 (1954)	11
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OTHER AUTHORITIES

Craig Becker, <i>Democracy in the Workplace: Union Representation and Federal Labor Law</i> , 77 Minn. L. Rev. 495 (1993)	15, 16
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-112hrg68366/pdf/CHRG-112hrg68366.pdf	13
House Comm. on Educ. and the Workforce Holds a Hearing on the Workforce and Democracy Act, 2011 WL 4851219 (2011)	14
Lafe Solomon, GC Memorandum 12-04, Guidance Memorandum on Representation Case Procedure Changes (Apr. 26, 2012), available at https://www.nlr.gov/publications/general-counsel-memos	18
<i>NLRB Casehandling Manual</i> , Pt. 2 § 11436.....	7
National Labor Relations Board, <i>NLRB Chairman Mark Gaston Pearce on Recent Decisions Regarding Employee Rights Posting</i> , Apr. 17, 2012, http://www.nlr.gov/news/nlr-chairman-mark-gaston-pearce-recent-decisions-regarding-employee-rights-posting	17
National Labor Relations Board, <i>Employee Rights Notice Posting</i> , http://nlrb.gov/poster (last visited July 15, 2012)	17
National Labor Relations Board, <i>Frequently Asked Questions – Poster</i> , http://nlrb.gov/faq/poster#t245n1744 (last visited July 15, 2012)	18

National Right to Work Legal Defense Foundation, Inc., *NLRB Watch: With “Quickie Elections” Rule, NLRB Quick to Sell Out Workers*, <http://www.nrtw.org/en/nlr-watch/nlr-watch-nlr-s-ambush-election-rule-invalidated> (last visited July 10, 2012)15

Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54042 (Aug. 30, 2011)12

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