

**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 BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO HEARING OFFICER’S REPORT ON OBJECTIONS**

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The Employer, PUNA GEOTHERMAL VENTURE (“Employer” or “PGV”), pursuant to Section 102.69 of the Rules and Regulations of National Labor Relations Board, 29 C.F.R. § 102.69, respectfully submits this brief in support of its exceptions to the Report on Objections of Hearing Officer Dale K. Yashiki (“Hearing Officer”).

INTRODUCTION AND STATEMENT OF THE CASE

This case arises out of a May 14, 2012¹ certification election held at PGV’s geothermal energy plan on Hawai’i Island. The Union’s margin of victory was as slim as they come—with 11 “YES” votes and 8 “NO” votes, the outcome was determined by a mere 2 votes. The slim margin is critical because the election was marred by numerous and repeated instances of objectionable conduct by the Union, its agents, and supporters during the critical pre-election period—including misleading and false statements and bribes to employees by the Union, last-minute electioneering on the line of march by bargaining unit employee Abraham Costa, who is also son of PGV Maintenance Supervisor Abel Costa, a statutory supervisor, and aggressive and threatening pro-Union campaigning by statutory supervisor Abel Costa. The necessary laboratory conditions for a free and fair election where, thus, completely destroyed. There is ample evidence to overturn the election where at least 2 voters, if not more, were coerced in making their choice of a vote. On these grounds, PGV filed timely Objections.

After a hearing on the Objections, the Hearing Officer issued her *Hearing Officer’s Report on Objections* (“Report”), erroneously ruling in favor of the Union on *all* accounts and recommending an order certifying the Union as the collective bargaining representative of the bargaining unit employees. In so ruling, the Hearing Officer prejudged the case in favor of the

¹ Unless otherwise indicated, all dates referenced herein are in 2012.

Union, assisted and instructed Union legal counsel on how to win her case, and utterly rejected factual evidence and legal authority supporting each and every single one of PGV's contentions.

Specifically, the undisputed record evidence demonstrates that Maintenance Supervisor Abel Costa is a statutory supervisor under the Act and engaged in improper supervisory pro-Union conduct; compounding the coercive effect of a supervisor establishing his position in support of the Union, his son and bargaining unit employee, Abraham Costa, was a key supporter and engaged in objectionable last-minute electioneering on the line of march; and the Union made misleading and false statements and bribes to employees on the eve of the election. Despite presenting a litany of evidence supporting Abel Costa's statutory supervisor status—including, but not limited to, his authority to assign and schedule work, discipline, recommend hiring, and adjust grievances—and the Union's agreement to stipulate to that effect, the Hearing Officer would not have it. Instead, the Hearing Officer employed an artillery of tactics to avoid finding statutory supervisor status, including rejection of the parties' stipulation on the issue and conducting a prolonged (over one hour) cross-examination of a PGV witness on the extent of Abel Costa's supervisory authority. This cross-examination was inexplicable: the Hearing Officer said she wanted 20 minutes to elicit further information to support the stipulation—which was offered and accepted to save time—and instead went on a premeditated cross-exam to dash the stipulation over the objection of the Employer. And, the stipulation was already supported by record evidence from extensive testimony already elicited from the witness by PGV counsel on the issue.

The Hearing Officer's conduct reaffirms the Employer's Exceptions to the Regional Director's *Report and Recommendation Regarding Certain Objections and Notice of Hearing Regarding Others* ("R&R"), that the Board's own rule-making impacted the laboratory

environment necessary for a free and fair election in this case. On August 22, the Board rejected the Employer's Exceptions. But the Hearing Officer compounds the problem by her biased rulings, credibility determinations, and overall conduct of hearing. The Employer respectfully submits that the Board should reconsider its rejection of the Employer's Exceptions to the Regional Director's R&R in view of the new evidence of Board bias conduct at the hearing.

The Hearing Officer additionally erred by failing to find that Abraham Costa's pro-Union electioneering and other related misconduct was objectionable, as was the Union's false promises and bribes of Union benefits on the eve of the election.

Such clear and unmistakable bias by the Hearing Officer cannot be overlooked, particularly in this case where the margin of victory in the election was so narrow—just 2 votes. Because the Hearing Officer conducted a partisan hearing to the benefit of the Union and in so doing reached erroneous legal and factual conclusions, her Report should be rejected in its entirety and PGV's Exceptions sustained.

PROCEDURAL BACKGROUND

I. Petition, Election, Results

On April 5, the International Brotherhood of Electrical Workers, Local 1260 ("Union" or "IBEW") filed a petition seeking to represent Puna Geothermal Venture's ("PGV") "operations and maintenance employees." (NLRB Ex. 1(a)). On April 13, the parties entered into a Stipulated Election Agreement for a proposed bargaining unit of: "All full-time and regular part-time operations and maintenance employees." (NLRB Ex. 1(b)). "All other employees, guards, supervisors as defined in the Act[]" were excluded. *Id.*

The Board-governed election was held at PGV on May 14. PGV's operations and maintenance employees voted between the hours of 7:00 and 8:00 a.m. Thereafter, Board Agent, Scott Hovey, tallied the votes: 8 ballots reflected "No" votes; 11 ballots reflected "Yes" votes;

and one ballot was voided. Thus, the Union prevailed in the election by a slim margin of 2 votes. (NLRB Ex. 1(c)).

II. PGV's Objections To Election

On May 21, PGV filed timely objections to the election based on various procedural irregularities surrounding the election and interference with the laboratory conditions required to sustain an election by the Board. (NLRB Ex. 1(d)). On May 29, PGV also properly raised before the Board its Objection that statutory supervisor Abel Costa engaged in coercive conduct that warranted setting aside the election.² Following an investigation, Regional Director Joseph Frankl issued his R&R on June 29. (NLRB Ex. 1(e)). In his R&R, the Regional Director wrongly found that PGV's objections that the Board's own aggressive rule-making agenda created an appearance of partiality and destroyed the laboratory conditions required for a free and fair election in this case were unsupported by evidence, and recommended that the Board overrule Objections 11 through 16. *Id.* PGV filed Exceptions to the Regional Director's R&R on July 16, and the Board rejected the Exceptions on August 22. The Regional Director further found that several of PGV's objections raised substantial and material issues of fact that were to be resolved by an evidentiary hearing:

In particular, the Employer asserted that Abel Costa, its Maintenance Supervisor, acted as an agent of the Petitioner in advocating that employees support the Union; that Petitioner agent Michael Brittain offered to protect employees from termination if they had but one DUI; and that Abel Costa's son, Abraham Costa, a bargaining unit employee, engaged in improper campaigning on the line of march to the polls.

² Although PGV filed its Objections with the Board on May 21, it was not until May 23 that PGV first obtained evidence from its employees that statutory supervisor Abel Costa had engaged in coercive conduct during the critical period. Accordingly, while this specific objection was not articulated in the Objections filed on May 21, clear and convincing evidence exists that PGV was unaware of the basis for this objection until May 23. Thus, PGV properly raised this separate objection in its May 29 submission of evidence with the Board. *Burns Int'l Sec. Servs., Inc.*, 256 NLRB 959 (1981).

Accordingly, the Regional Director ordered a hearing on Employer Objections Nos. 1, 2, 4, 5, and 7.³ *Id.*

III. The Hearing And Hearing Officer's Report On Objections

The hearing on PGV's Objections was held on July 16 to 19. (Report at 2). The only issues litigated at the hearing were whether Maintenance Supervisor Abel Costa was a statutory supervisory and engaged in objectionable pro-union supervisory conduct; Abel Costa's son, Abraham Costa, engaged in improper electioneering in the line of march; and the Union engaged in objectionable conduct that destroyed the laboratory environment for a free and fair election. (*See* Report at 15-37).

Hearing Officer Dale K. Yashiki issued her Report on Objections in this case on August 27, 2012. In her Report, the Hearing Officer erroneously concluded that PGV failed to meet its burden of proof in establishing that (1) either Abel Costa and/or Abraham Costa were Union agents (Report at 11-15); (2) Abel Costa imposed improper supervisory influence on PGV employees (Report at 15-33); and (3) the Union engaged in any objectionable conduct that destroyed the laboratory conditions requisite for a free and fair election (Report at 33-37).

³ These objections are as follows:

Objection 1. The Union engaged in objectionable conduct by contacting the Employer's employees preceding the election in a manner intended to coerce them through threats and the potential for union retaliation against employees.

Objection 2. The Union engaged in objectionable conduct by contacting the Employer's employees preceding the election and threatening job loss.

Objection 4. The Union engaged in objectionable conduct by making promises of Union benefits to employees.

Objection 5. The Union engaged in objectionable conduct by making false and misleading statements to employees with the intent to coerce them prior to and during the election.

Objection 7. The Union destroyed the laboratory environment for a free and fair election by engaging in electioneering on the line of march to vote.

Id.

According to the Hearing Officer, because of the foregoing, PGV failed to meet its burden of proving any of the five objections filed with the Board and presented to the Hearing Officer. (Report at 17-37). Finding PGV's five objections "without merit," the Hearing Officer recommended they all be overruled and that the Union be certified as the collective bargaining representative for the petitioned-for bargaining unit of PGV employees. (Report at 37).

STATEMENT OF FACTS

I. PGV Background

A. PGV's Operations

PGV, situated in Pahoia, Hawaii, is in the business of generating and selling clean, renewable energy. (Tr. 72-73). PGV's state-of-the-art technology generates power by tapping deep into the heart of the Big Island of Hawaii - to the vast underground cauldron of Kilauea's volcanic heat - converting steam into electricity for Hawaii Island residents. PGV is the only commercial producer of geothermal energy in Hawaii, producing geothermal-generated electricity for Hawaii Electric Light Company ("HELCO"). PGV's operations supply approximately 20% of the Big Island's electricity. (Tr. 73).

B. PGV's Personnel Structure

PGV currently employs approximately 28 individuals, including hourly employees, managers, and supervisors. (Tr. 125, 126). Mike Kaleikini, the Plant Manager, is the most senior manager at the facility. (Tr. 122). Additional management personnel include Maintenance Manager William Wiebe and Maintenance Supervisor Abel Costa. (Tr. 123, 124). In the administration function of PGV, the personnel include Administrative Supervisor Tito Agbayani and Safety Coordinator Ron Quesada. (Tr. 123). There is a vacant Production Manager position, the functions of which are handled currently by Kaleikini. (Tr. 127, 131).

Functionally, PGV is divided into operations and maintenance. Maintenance Supervisor Abel Costa oversees the maintenance department and reports directly to Wiebe. (Tr. 123-24). There are *no other* supervisors in operations or maintenance at PGV. (*Id.*). Directly reporting to Costa are nine maintenance employees working across four departments: mechanical, wellfield, electrical and instruments (“I&E”), and purchasing. (Tr. 127-29). Of those nine employees, three are lead personnel. (Tr. 128). Unless operational needs dictate otherwise, all 11 employees in the maintenance department, including Wiebe and Costa, work set shifts Monday through Friday, 7:00 a.m. to 3:30 p.m. (Tr. 96, 279). Wiebe and Costa share an office in the administrative building; the mechanics work in the maintenance shop and the field; and the purchasing agent works in the warehouse. (Tr. 287, 216; Employer’s Ex. 9).

In the Operations Department, there are 10 Operator Technicians of varying levels (Op. Tech. I, II, III, and IV). (Tr. 129-30). One of the 10 operators is Abel Costa’s son, Abraham Costa⁴, who is an Op. Tech. IV. (Tr. 456). Because the plant must operate 24 hours a day, operators work in three-man crews and each crew works a 12-hour shift. (*Id.*). There are never more than 3 operators on shift at any given time; and one operator⁵ is stationary during the shift at the “control board,” while the other two operators rove the facility. (Tr. 176, 279).

II. Abel Costa’s Supervisory Role At PGV

Costa has worked at PGV for approximately 12 to 15 years. (Tr. 59). He was initially hired as a Mechanic, promoted to Maintenance Technician Supervisor in approximately 2007⁶, and promoted again to Maintenance Supervisor in 2011. (Tr. 258, 262).

⁴ Throughout this brief, Maintenance Supervisor Costa will be referred to simply as “Costa.” Where reference is made to Costa’s son, the name “Abraham” will be used.

⁵ The Op. Tech IV employees rotate working in the position of the “control board.” (Tr. 144).

⁶ This position is also referred to as Mechanic Supervisor in the Transcript.

A. Costa Assumed Numerous Supervisory Responsibilities in His Maintenance Technician Supervisor Role

Since assuming the role of Maintenance Technician Supervisor in 2007, Costa has taken on numerous supervisory responsibilities. (Tr. 258). A litany of Costa's supervisory authority and responsibilities is outlined in the hearing transcript. Specifically:

- Costa had primary responsibility for the discipline, adjustment of grievances, assignment of work, and prioritizing of work of the three mechanics working directly under him: Aaron Gacusana, John Ramirez, and Raymond Saiki. (Tr. 259-60).
- Costa could (and did) initiate both verbal warnings and “coaching,” a written form of discipline at PGV that results in the permanent recording of the written disciplinary document in the employee's file. He also issued a written warning to an employee. (Tr. 260, 110; Employer's Exs. 3-4).
- Costa exercised unfettered, independent authority in assigning overtime and recalling employees to work special shifts. (Tr. 260-61).
- Costa provided “leadership” to the mechanics, “guiding them ... in the right direction.” (Tr. 261).
- Costa played a meaningful role in the mechanics' performance appraisals, which are used by PGV to determine pay increases and promotions of employees, by evaluating their work performance and providing input to Wiebe. (Tr. 261).

B. Costa's Supervisory Responsibilities Increased in His Maintenance Supervisor Role

In or around September 2011, Costa's role at PGV grew from supervising three mechanics to supervising the *entire* maintenance department—a total of nine employees (including the three mechanics he has been supervising since 2007, one purchasing agent, two well field employees, and three I&E employees).⁷ (Tr. 60-61, 262-63). Costa received a new job description on September 30, 2011 reflecting his numerous supervisory duties:

- Essential function: *Supervises the planning and scheduling of all routine and non-routine Maintenance Technician activities.*

⁷ Costa's role in assigning and prioritizing work, disciplining, assigning overtime, and adjusting the grievances of the three mechanics has not diminished since his promotion in 2011 and remains current to date. (Tr. 259-61).

- Essential function: *Supervises all activities in the plant, mechanical repair and wellfield.*
- Essential function: *Routinely communicates with lead technicians in regard to all activities in the plant, mechanical repair shop and wellfield.*
- Essential function: *Provides guidance to the maintenance technicians as needed.*
- Essential function: *Assists in supervising, training and development of plant personnel.*
- Essential function: *Responsible for the process management of all maintenance related plant processes.*
- Essential function: *Troubleshoot, supervise repair and maintenance of all Mechanical, EI&C, and Wellfield equipment as required to support plant operations.*
- Essential function: *Be proficient in the use of the computerized maintenance management system to requisition parts, maintain the spare parts inventory, and generate work orders. Proficient in budget planning and control.*
- Essential function: *Practices situational leadership, environmental and safety stewardship.*
- Education, Experience and Skills Required: *Experience in maintenance management systems, inventory management, and planning and scheduling desirable.*
- Education, Experience and Skills Required: *Incumbent must possess excellent supervisory and leadership skills.*
- Education, Experience and Skills Required: *Must demonstrate a strong aptitude in problem solving.*

(Employer's Ex. 1 at 1-2)(emphasis added).⁸

⁸ Costa claims he was unclear about his supervisory responsibilities, (Tr. 263), but this was explained in great detail. Costa was angered by employees who seemed to reject his authority in the in the wellfield and instrumentation and control. (Tr. 266, 268-69). They kept circumventing him and going to Wiebe. (*Id.*). Wiebe repeatedly informed employees they must go to Costa as their supervisor, not him. (Tr. 263-67). Clearly, these employees' conduct was contrary to what the Employer and Costa wanted. The fact that employees did not always act in accord with Employer direction has no bearing on Costa's status where the Employer took steps to enforce his appointment. Costa admitted that throughout, he was the supervisor for the mechanics—he was never in doubt about his authority over them. (Tr. 269). Finally, undisputed record evidence supports the finding that Costa is and was a supervisor, *e.g.*, the job description; Wiebe informing all maintenance employees that they answer to Costa; Costa's role in assigning work, discipline, hiring, and adjustment of grievances of employees; and the fact that Costa's supervisory

1. Costa Exercises Independent Judgment in the Assignment of Work, Including Overtime, and Staffing of Employees

As Maintenance Supervisor, one of Costa's key functions is the scheduling of all maintenance activities for PGV. (Tr. 135-36). Costa is individually responsible for the annual budgeting, calendaring, scheduling and staffing of the maintenance activities. (Tr. 136-37). Scheduled maintenance activities occur 14 times a year, inclusive of two significant plant-wide outages. (Tr. 135, 179). In planning the outages, Costa assembles the scope of work generated from Mainsaver (the maintenance program of which he is administrator), gathers the work orders, generates all the preventative maintenance work orders, and distributes them to the proper parties. (Tr. 80-81, 96, 178-79). Costa is called upon to exercise independent judgment in carrying out the scheduling and staffing of maintenance activities because although the number of scheduled maintenance activities rarely varies, the timing, duration, and nature of the scheduled maintenance activities can greatly vary due to equipment problems and operational needs. (Tr. 136).

Moreover, Costa assigns work to all maintenance employees on a daily basis. (Employer's Ex. 1; Tr. 95; 309). While PGV has guiding principles relating to the assignment of work—lost production, availability of materials, and availability of personnel—Costa is expected to exercise his own judgment in determining the order and priority of work to be completed. (Tr. 175, 259-60, 309). In this respect, Costa's authority to assign of work differs materially from that of the maintenance leads, who assign individual tasks *but only after* Costa has delegated the responsibility to them. (Tr. 97). Costa also has independent authority to change the work assignments made by leads. (Tr. 97).

authority is recognized by management and his direct reports. (*See infra* Section II.B.1 through 11; Employer's Ex. 1).

It is further undisputed that Costa exercises independent judgment in assigning overtime to and calling in employees to work special shifts. (Tr. 102, 177, 260-61, 309). Costa also exercises independent judgment in granting vacation requests and other scheduling matters, and his judgment in this regard is not reviewed or “second guessed” by anyone at PGV. (Tr. 265-66).

2. Costa Effectively Recommends Discipline of Employees

In his two supervisory roles, Costa has been “instrumental” in the recommendation and initiation of discipline, up to and including termination, for several employees. (Tr. 145-46). PGV senior management does not independently investigate Costas’s discipline recommendations; instead, relying heavily on his judgment and making decisions off of his documentation. (Tr. 174-75; 310). Specifically, the undisputed record evidence demonstrates that:

- In 2009, Costa wrote up an employee for safety and workplace violations. (Employer’s Ex. 3). This written “coaching” is the first step of formal discipline and was recorded in the employee’s personnel file. (Tr. 110).
- In 2010, Costa issued a “more serious disciplinary action” by giving an employee a “warning” in front of two other managers. (Employer’s Ex. 4; Tr. 113). This warning, like the 2009 coaching, was placed in the employee’s file. (Tr. 112).
- In May 2012, Costa recommended an employee’s discipline for insubordination. Notably, when Costa was describing the employee’s acts of insubordination he stated, “No one should talk to any employee like that, let alone a Maintenance Supervisor.” (Employer’s Ex. 5 at 1). PGV acted on Costa’s recommendation and issued a verbal warning to the employee. (Employer’s Ex. 5 at 3).
- In his five-year tenure as a supervisor, Costa has recommended employee discipline 5 to 6 times. (Tr. 145). PGV has followed Costa’s recommendation for discipline *every single time*. (Tr. 148).

Costa’s authority to initiate and implement employee discipline is recognized by his direct reports. (*See* Tr. 196-97) (Douglas Maeda, Purchasing Agent, testifying he is aware of

Costa issuing discipline to maintenance employees for safety violations and of Costa's overall discipline authority).

3. Costa's Independent Authority to Adjust Employee Grievances

Costa's job duties as Maintenance Supervisor also involve the independent handling of complaints and conflicts that may arise within his nine-man crew. In his hearing testimony, Costa recounted that the maintenance employees regularly bring their complaints to him. (Tr. 260). His manager Wiebe credibly testified that he expects and trusts Costa "to handle all the complaints he could. . . ." (Tr. 102). To the extent Costa brings employee concerns to Wiebe, Wiebe "let[s] Abel take care of it." (Tr. 138). In fact, Wiebe could not recall a time where he has stepped in and taken a dispute out of Costa's hands. (Tr. 139).

4. Costa Effectively Recommends the Hiring of Employees

Costa has effectively recommended the hire of several employees at PGV, both in the operations and maintenance departments. It is undisputed that Costa recommended three employees who were ultimately hired (and remain employed) by PGV: Maintenance Technician John Ramirez; Maintenance Technician Aaron Gacusana; and his son, Op. Tech. IV Abraham Costa. (Tr. 104, 190). As maintenance employees, Ramirez and Gacusana directly report to Costa. (Tr. 190). And, for at least one employee, Costa also recommended his starting rate of pay. (Tr. 104-05). Out of a 20 employee bargaining unit, Costa has recommended the hiring of 15% of the unit and PGV has never rejected Costa's recommendation of a maintenance employee hire. (Tr. 105).

5. Costa Provides Meaningful Feedback Critical to Employees' Performance Reviews

Costa provides meaningful feedback on employee performance in a manner that affects their pay and standing with PGV. (Tr. 103). Costa is the primary observer of the maintenance

employees' performance and provides input into the evaluation process when he feels an employee has done "exceptional work" or gone "above and beyond the call of duty." (Tr. 176, 261-62). Indeed, he has provided input on the Maintenance Technician's performance reviews since 2007. (Tr. 261). Given the significance of performance reviews on an employee's terms and conditions of employment, the evaluations are then approved by Vice President of Operations Ohad Zimron. (Tr. 151).

6. Costa's Performance is Measured by His Supervisory Skill Set and Tied to the Performance of His Direct Reports

Over the last couple of years, PGV has evaluated Costa on his supervisory skills, including leadership, delegation, planning and organizing, administration, personnel management, training skills, and troubleshooting—performance factors which only PGV supervisors are evaluated upon. (Tr. 180, 183; Employer's Ex. 6 at 4). To the extent Costa has fallen short in fulfilling PGV's supervisor expectations (once in late 2011), Costa has been coached on and acknowledged the Company's expectations of him as a supervisor. (Tr. 161-62, 164, 279-80, 282).

To date, through his hard work, Costa has not had any problems with his team's performance. But as Wiebe testified, "if [Costa] would allow his employees or a team working on the job to go through with a procedure that was wrong or didn't work and he knew about it, [Costa] would definitely be held responsible." (Tr. 163).

7. Costa Responsibly Directs Employees

Due to Costa's depth of knowledge and expertise, his role of Maintenance Supervisor includes the responsibility of training and developing of plant personnel. (Employer's Ex. 1 at 1). Indeed, Costa is expected to bring "less experienced employees up to a higher level of experience." (Tr. 80).

8. Costa is Regarded as the “Boss” by His Direct Reports

Not surprisingly, Costa’s direct reports view him as their supervisor. Maeda credibly testified that he views Costa as his “boss.” (Tr. 197). Likewise, at least four maintenance employees refer to Costa as their “boss,” and “everyone [in the maintenance department] knows that [Costa] is their supervisor.” (Tr. 190, 284). Furthermore, Wiebe actively reinforced Costa’s supervisory authority in staff meetings. In one such meeting, Wiebe explained Costa’s supervisory role to all maintenance employees, stressing that any workplace concerns should be brought to Costa’s attention first. (Tr. 83, 263-64, 284). This was corroborated by Maeda’s testimony that Wiebe “reiterated to [the maintenance employees] a number of times ... ‘you guys are still to report to Abel. Abel is the first person you go to, your chain of command. Abel first.’” (Tr. 227-28). At this same meeting, Costa requested the maintenance employees to approach him first with time-off requests and provide him with a daily update of the plan for the following day’s work. (Tr. 83-84).

9. PGV Treats Costa As Part of Its Management Team

Further, PGV views and treats Costa as part of its management team. (Tr. 308). Costa is included on PGV’s management-only emails and in management-only staff meetings. (Tr. 91-92, 94-95). In fact, Costa was included in the management-only strategy meetings relating to the IBEW campaign at PGV, and trained on the “dos and don’ts” of supervisor behavior during union organizing. (Tr. 272-73, 312).

Costa also participates in off-site trainings available only to managers. In October 2010, at PGV’s behest, Costa attended an employment law seminar in Hilo Hawaii that was attended only by other PGV managers. (Employer’s Ex. 2 at 1). The all-day training included topics such as New Developments in Discrimination Law; Navigating the ADA, Federal and State Leave Laws; Annual Employee Handbook Updates and Review; Bulletproof Internal Investigations;

and Hiring and Firing, which are relevant to managers and supervisors but inappropriate for employees. (Employer's Ex. 2 at 2).

10. Costa Is Routinely Delegated Wiebe's Authority in His Absence

In the absence of the Maintenance Manager (either Wiebe or his predecessor Aaron Lewis), Costa is regularly delegated full authority for the maintenance department, including approving capital expenditure, emergency expenditures, and the purchase of O&M materials. (Employer's Ex. 7 at 1-10; Tr. 187).

11. Costa's Pay Differentials

Costa earns at least 10% more than the next highest paid maintenance employee and approximately 15% more than the lowest paid maintenance employee. (Tr. 179). Similarly, Costa earns a bonus of about 10% higher than the next highest paid employee. (Tr. 180).

III. IBEW Campaign At PGV

A. Costa, Working in Concert with His Son Abraham Costa, Also an Employee of PGV, Spearheaded the Organizing Efforts in Favor of the Union

PGV employees across both maintenance and operations were under the clear impression that Maintenance Supervisor Costa spearheaded the Union organizing drive at PGV. (Tr. 36, 39-40, 198-99, 202; Employer's Ex. 10). Working in concert with his supervisor father, Op. Tech. IV Abraham Costa, overtly ran the in-house organizing committee and acted as the employee liaison with the Union: regularly conversing with Union Business Agent Michael Brittain; coordinating meetings at the local union hall; notifying employees about union meetings; collecting authorization cards; hosting a Union meeting at his house; and electioneering in favor of the union. (Tr. 28, 20, 37, 200-01, 208-09, 471-72).

The father and son combination packed a one-two punch for the IBEW given Costa's supervisory standing and Abraham's role in union organizing. Employees at PGV were tag-

teamed by Costa and Abraham. (Tr. 29). As explained in detail below, Costa and Abraham presented themselves as a united front in favor of union organizing—standing next to each other in employee meetings during the critical period, voicing criticism of PGV management, sharing material employment information with one another in attempts to sway an employee’s vote, keeping tabs on employee attendance at union meetings, electioneering, and soliciting and collecting union authorization cards. (Tr. 29, 206, 223-29, 274).

1. Union-Organizing Meetings

a) March 28 Meeting

On March 28, the Union hosted its first of four organizing meetings for the PGV employees. The meeting was held at the IBEW 1260 union hall. (Tr. 16). In attendance from the Union were Michael Brittain, Director of Organizing and Strategic Research; Brian Ahakuelo, Business Manager, & Russell Yamanoha, Assistant Business Manager. (Tr. 333). In attendance from PGV were Costa and approximately 10-15 employees, including: three of Costa’s direct reports; his son Abraham, and PGV Op. Tech. III Taylor Sumida. (Tr. 17, 270).

Abraham acted on behalf of the Union notifying PGV employees about this (and subsequent) Union meetings. (Tr. 16).

At the outset of the March 28 meeting, Union agent Brittain had a lengthy conversation with Costa about his job title and supervisory status. (Tr. 335-36). Despite telling Costa that “we’re not interested in representing supervisors,” the Union *inexplicably* allowed Costa to stay and participate in the organizing meeting. (Tr. 335-36). Allowing Costa to stay discredits the Union’s business agent, Michael Brittain: he would only allow Costa to stay to lend the appearance of Costa’s support to the Union’s organizing! He should have sent Costa away, but he did not. And it went well for the Union. During the meeting, Costa made his pro-union sympathies known in no uncertain terms to all attendees. During a one-on-one conversation

between Costa and Sumida on the patio of the Union hall, Costa informed Sumida that the “*main thing was to stick together, sign the cards and not let PGV know because they would retaliate against us ...*” (Tr. 18) (emphasis added). Costa reinforced this statement at the end of the meeting, while all the employees were milling around the Union hall parking lot, telling the group that they “should just stick together, not say nothing to nobody.” (Tr. 18-19). All the employees in attendance at the meeting heard these comments. (Tr. 19). Even Costa admitted that he told a group of employees that “we need to stick together” and, thus, he “may have encouraged them” in favor of the Union. (Tr. 271, 450-51). Sumida’s testimony was never contradicted by another witness and the Hearing Officer has no ground upon which to discredit his testimony.

b) April 4 Meeting

Only 6 days after the initial union organizing meeting, the Union held a second meeting to gather authorization cards. (Tr. 54-55, 65). Abraham again acted as “the lead guy” on the Union’s behalf, notifying employees of the details of the meeting. (Tr. 28). Approximately 17-20 PGV employees attended, including at least 5 of Costa’s direct reports and Abraham. (Tr. 34, 56-57).

Although Costa was not present at the meeting, he remained in forefront of employees’ minds; and Abraham, being his son, was understandably seen by employees’ at the meeting as a representative of his father. At the beginning of the meeting, Rick DuVoisin, PGV Op. Tech. IV, asked Abraham “Where’s your dad?” Abraham responded that although Costa had arranged the meeting, he could not be seen as supporting the union because of his supervisor status. (Tr. 56). This conversation took place inside the Union hall, in the proximity of several other employees, allowing other employees, including Michael Jumalon, PGV Op. Tech. II, to overhear it. (Tr. 30, 56).

c) May 12 Union BBQ Hosted by Abraham Costa

Knowing that Abraham was running the in-house organizing committee, Brittain called Abraham the week prior to the election to inform Abraham that he was available in Hilo to answer employee questions and that the Union hall was available for meetings. (Tr. 391-92, 395). During this conversation, Abraham invited Brittain to a pro-Union barbecue he was hosting. On Friday, May 12, a mere two days before the scheduled NLRB election, Abraham hosted the pro-Union barbecue at his house, which was attended by Brittain and at least PGV 5 employees. (Tr. 393, 472).

2. Costa's Lack of Participation in PGV Campaign and Noted Bad Behavior

In response to the Union organizing effort, PGV launched an informal informational campaign aimed at its employees. (Tr. 190). Costa sat in on the PGV strategy meetings and received PGV campaign literature but refrained from actively participating in PGV's campaign with employees. (Tr. 190). Maeda, Costa's direct report, testified that he never heard Costa campaign on behalf of PGV and "he sure didn't do anything to stop the Union, from a management point of view." (Tr. 200). Costa agrees he never attempted to correct the employees' impression that he was in favor of union organizing. (Tr. 271).

Costa not only abstained from campaigning on behalf of PGV, but actively sought to undermine PGV's position with bargaining unit employees. In the first all-staff meeting after the Union filed its petition, Costa urged all PGV managers to leave so that the PGV employees could have a frank discussion with corporate management about workplace issues. (Tr. 223-24). At Costa's behest, PGV management left the meeting. However, unexpectedly Costa stayed behind in the meeting, joining the employee chorus of expressing displeasure with PGV management to corporate management. Costa's continued presence and participation in the meeting struck PGV

employees as “odd” and “surprising.” (Tr. 224, 226). At least one of Costa’s direct reports noted:

[The meeting] was a lot to do with the communication of managers. It was kind of odd because Abe and Abel were standing right next to each other and Abe would say something and Abel would back him up and add more to his comments. (Tr. 225).

I was surprised that [Abel] was there because I thought he shouldn’t have been in there. When he was saying all the managers should leave, I thought he was going to leave too. But seeing as he was still there, again, it just reiterated in my mind that he favored the Union for the company. (Tr. 226).

At least one employee approached Costa two weeks prior to the election, believing that “pretty much everyone was talking to him” about the Union. (Tr. 29:17-24). During this conversation, Costa reiterated his warning from the March 28 meeting that “everybody’s got to stick together.” (Tr. 25:9-14).

Moreover, on May 9, only 6 days before the election, Wiebe and Costa had a conversation about the recent termination of the Production Manager, Kellet Park. Costa told Wiebe, “If it could happen to Kellet it could happen to anyone.” (Employer’s Ex. 8; Tr. 191-92). This statement alone did not cause Wiebe concern until the following day when he had one-on-one conversations with the three different mechanics and every single mechanic echoed Costa’s quote and expressed a new found concern in their job security. (Employer’s Ex. 8; Tr. 192). Wiebe was so concerned about the impact that Costa’s statement may have had on the three bargaining unit employees that he documented the incident to Plant Manager Mike Kaleikini. (Employer’s Ex. 8). Wiebe intends to address the incident on Costa’s next performance review. (Employer’s Ex.; Tr. 193).

3. Lingering Effect of Costa’s Conduct

The impact of Costa’s attendance and statements made at the March 28 meeting had a lasting and profound impact on PGV employees. Sumida, testified that he was “surprised” to see

Costa at the Union meeting because he understood that supervisors weren't supposed to be at the meeting. (Tr. 17-18). Maeda, Purchasing Agent and direct report to Costa, testified:

... Raymond [Mechanic] had mentioned to me in my office when they were trying to get me to go to the second meeting ... that Abel was actually at the first meeting, which I didn't know. (Tr. 203).

So hearing that Abel was actually at the first meeting recently, it kind of threw me off a little bit, know that he originally stopped the Union a long time ago ... So hearing the fact that he was actually there and knew that they were trying to organize at the time, it was an eye opener to me at that time. (Tr. 202).

A few weeks after the March 28th meeting, and well into the critical period, Craig Dubczak, wellfield employee and direct report to Costa, approached Sumida, and said, "[J]ust remember what Abel said to just stick together and not say anything ... just make sure we stick together." (Tr. 19, 24).

At no time between the March 28 meeting and the election of May 14, did Costa disavow his pro-union statements or otherwise attempt to correct any employee's impression that he was in favor of union organizing. (Tr. 271). *And only 2 votes decided this election.* The Hearing Officer's attempt to contradict the clear lingering impact of Costa's behavior on the employees is not warranted and clouded by her decision to pre-judge the case.

B. IBEW 1260's Promises to PGV Employees On Eve of Election

On the eve of the election, Union agent Brittain called the night-shift operators at the PGV control room, Op. Tech. IV Jordan Hara, Op. Tech. III Taylor Sumida, and Op. Tech. III Michael Jumalon, to discuss Union representation benefits. (Tr. 20). Jumalon asked Brittain about DUI infractions, which were a particularly hot topic at PGV at the time of the election because Dubczak, Sumida, and Abraham all had at least one DUI infraction at the time. (Tr. 26, 38). In recalling the conversation about DUI's, Sumida testified:

And Mike [Brittain] said that, you know he just mentioned what he could do, like what he's done for other HELCO employees in the union and that, you know, they

could get other positions that didn't require a driver's license or, you know, try and work something out with the company or just try to bargain somehow to keep the employee employed. (Tr. 21).

Based on this conversation, Sumida testified that he understood PGV employees with DUIs would be treated the same as HELCO employees—namely, that the Union would protect their jobs if they voted in favor of Union representation. (Tr. 21). Sumida's testimony comports with Brittain's recollection of the evening:

You know, I told them it's not as simple -- I can't come in and say the Union is going to protect you, because if you -- if driving is something you have to do and you have a CDL, you would have lost your license for getting a DUI. If you were to just -- I relayed my experience as a control room operator. I'm not required to have a license, so if I had a DUI, Hawaiian Electric wouldn't fire me. I let them know if, you know, a lineman gets a DUI, Hawaiian Electric, what they do is they work with the Union to find the guy another job. So I can think of one case where a lineman actually got two DUIs and was required to find another job. He became a condenser cleaner. And I said, but you know, everything is negotiable. I mean, there's no -- I can't come in there and tell the company, you can't fire people, you can't have policies. But I can, I guess, advocate for them, would be the right thing. (Tr. 354-55).

C. Electioneering and Coercion in the Line of March by the Costas

The IBEW election at PGV was held on May 14, 2012, with voting times between 7:00 a.m. and 8:00 a.m. The voting booth was located in PGV's warehouse. (NLRB Ex. 1(b)).

On that day, after being called by an operator informing him that he was the last to vote, Maeda left his temporary work station at 7:45 a.m. in the administrative building and walked to his truck in order to drive to the voting area. (Tr. 203-04; Employer's Ex. 9). On his way to the truck, in front of all the employees in the smoking area, Abraham approached Maeda. (Tr. 206).

Maeda recounted the event as follows:

All of the employees were basically sitting in the smoking area, which is a picnic table, and Abraham drove up as I was walking towards my truck, and I think Mark Nakasato was actually in the car with him, and Abraham called me over and said, you know, "So what?" Like what, nodding his head.

And I said, "Don't worry about it."

And he said -- he told me something that was very odd. He told me, "I heard you're frustrated because now you're taking on new responsibilities since Kellert Park got fired." (Tr. 204:10-21).

This first encounter is significant for two reasons. First, Maeda reports to Costa. (Tr. 74; *see also id.* at 469). Second, Abraham's comment concerning Maeda's frustration with taking on new responsibilities was information disclosed by Maeda to his supervisor Costa—and *only* Costa—a few days prior to the vote. (Tr. 204-06). Thus, Abraham was privy to this information only through his father Costa—layering on the coercive aspect of Costa's impact on the bargaining unit. Maeda was "upset" that Costa was using this information to coordinate efforts with his son Abraham in order to persuade him to vote for the Union. (Tr. 206).

But the Costas' electioneering efforts towards Maeda did not stop there. After the first encounter, Maeda had to briefly step inside to take a phone call. (Tr. 204-05). A few minutes later, when Maeda was entering his truck to drive to the voting location, Abraham walked over to Maeda's passenger window and stated, "We need your vote. We need your vote." and "... it's going to be close," implying that Abraham knew how every employee was voting. (Tr. 210-11). Immediately after this encounter Maeda made his way to the warehouse to vote in the election. The Hearing Office obviously credited Abraham Costa over Maeda, but there is no rationale for this: Maeda is not biased and has no reason to lie. Abraham was a Union protagonist of great import and effect as described above.

D. Aftermath of the Election

"[A]fter many years of hard work and dedication, we now have union representation thanks to one of our employees ... Abel Costa[.]" (Tr. 58). That was the sentiment among PGV employees the day after the vote. At an all-hands morning meeting the day after the vote, Operator Technician DuVoisin expressed his frustration with Costa's pro-union electioneering, stating:

[A]fter many years of hard work and dedication, we now have union representation thanks to one of our employees ... Abel Costa, would you care to say a few words or take a bow. (Tr. 58:5-11).

Costa did not deny this, simply stating “we need to talk about this after.” (Tr. 58). In explaining his actions, DuVoisin credibly testified:

First, I was upset that the Union got voted in. And, secondly, I felt like Abel was trying to play Wizard of Oz, he’s hiding behind the curtain, pulling levers, trying to get things done without anybody knowing about it, without management knowing about it. So I pulled the curtain back on him. (Tr. 58).

Another PGV employee was so disturbed by Costa’s conduct that he (or she)⁹ sent a letter of complaint to Ormat Technologies Human Resources Department in June or July of 2012. (Employer’s Ex. 10). In pertinent part, the letter states:

Abel Costa is the total instigator for this whole union thing, and don’t let him fool you. Abel and his Abe Costa been trying to force the union down everyones throat. To me this has become harassment, and I am getting ready to press charges soon. (Employer’s Ex. 10).

STATEMENT OF QUESTIONS INVOLVED

- I. Whether the Hearing Officer exhibited bias in her rulings, credibility findings, and conduct of the hearing, to the benefit of the Union and the detriment of the Employer, requiring reversal of her Report on Objections. Exception Nos. 1-3, 14, 23, 69-70.
- II. Whether the Hearing Officer erred in failing to find that Abel Costa was not a supervisor under Section 2(11) of the Act. Exception Nos. 14, 21-49.
- III. Whether the Hearing Officer erred in concluding that the pro-Union electioneering and related conduct of statutory supervisor Abel Costa did not taint the laboratory conditions requisite for a fair election. Exception Nos. 4-6, 9-10, 13-58, 69.
- IV. Whether the Hearing Officer erred in concluding that the pro-Union electioneering and related conduct of Abraham Costa did not destroy the laboratory conditions requisite for a fair election. Exception Nos. 4-5, 7-9, 14, 64-69.
- V. Whether the Hearing Officer erred in concluding that the Union did not destroy laboratory conditions for an election by bribing employees during the critical period. Exception Nos. 11-12, 14, 59-63, 69-70.

⁹ The letter was sent anonymously.

ARGUMENT

I. The Hearing Officer Exhibited Bias In Her Rulings, Credibility Findings, And Conduct Of The Hearing, To The Benefit Of The Union And The Detriment Of The Employer, Requiring Reversal Of Her Report On Objections

The Hearing Officer committed prejudicial error in failing to conduct an impartial election objections hearing and issuing biased rulings that were unsupported by record evidence and applicable precedent. Accordingly, her Report must be reversed in its entirety and PGV's Exceptions sustained.

“It is the Board’s solemn obligation to insure that its decisions and those of its judges are free from partiality and the appearance of partiality.” *Trim Corp. of Am., Inc.*, 347 NLRB 264, 264 (2006). In furtherance of this obligation, the Board has long recognized that in conducting an election objections hearing, “[t]he hearing officer is not an advocate of any position but *must be impartial* in his/her rulings and in conduct both on and off the record.” NLRB Casehandling Manual, Part 2, Representation Proceedings (“Manual”) § 11424.3(b) (emphasis added). Although the hearing officer must ensure the record is fully developed, the hearing officer “should exercise *self-restraint*, should give the parties prior opportunity to develop points, and should *refrain from needlessly ‘taking over.’*” *Id.* (emphasis added). Further, the hearing officer “should keep the record as short as is commensurate with its being complete . . . by *receiving stipulations* (Sec. 11222). . . .” *Id.* (emphasis added); *see also id.* § 11222 (“[T]he hearing officer should endeavor during the hearing to secure stipulations, wherever possible, in order to narrow the issues and to shorten the record.”). This is because “it is essential not only to avoid *actual* partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the *appearance* of a partisan tribunal.” *Dish Network Serv. Corp.*, 345 NLRB 1071, 1071 (2005) (citing cases) (emphasis added).

Completely disregarding these directives, the Hearing Officer prejudged the case and “took over” the hearing, favoring the Union every step of the way. In particular, the Hearing Officer erroneously found there was insufficient evidence to conclude that Costa is 2(11) supervisor, utterly ignoring record evidence to the contrary. (Report at 18-29). Citing the fact that Costa may sometimes have to cooperate with upper management on issues such as discipline, hiring, and the adjustment of grievances (Tr. 137-39, 145-48, 174), the Hearing Officer conveniently overlooked a litany of Costa’s supervisory authority, including, but not limited to Costa’s: Maintenance Supervisor job description detailing his supervisory responsibilities (Tr. 76); effective recommendation of employee discipline, up to termination (Tr. 86-87, 106-16, 138-39, 145-46, 174-75; Employer Exs. 3-5); inclusion in management-only trainings, meetings, and emails (Tr. 92-95); independent scheduling and assignment of work, including overtime, based upon “personnel availability and qualifications” (Tr. 95-97, 102, 135-37, 153-55, 175, 177); adjustment of grievances (Tr. 102-03, 137-39); provision of meaningful feedback in performance evaluations for employees (Tr. 103, 175-76); effective recommendation of hiring (Tr. 104-05); and evaluation on his own supervisory skills (Tr. 181; Employer’s Ex. 6)—all indicia amply demonstrating supervisory authority under the Act. *See also* discussion *infra* Section II.

It is not just the Hearing Officer’s slanted rulings that support a showing of bias: it is her aggressive prosecutorial actions against the Employer’s positions and attempts to assist Union legal counsel who is inexperienced in Board hearings. First, the Hearing Officer improperly rejected the Parties’ stipulation that Abel Costa is a statutory supervisor, despite the above record evidence supporting its entry. *Compare* Tr. 97-101, 166-71 with Manual § 11424.3(b) (granting hearing officer power to enter stipulations) and *Tulsa Typographical Union No. 403*, 274 NLRB

1424, 1424, 1427 (1985) (allowing stipulation as to status of shift foremen as 2(11) supervisors where the record contained evidence that shift foremen actually handled and received employee grievances). In so doing, the Hearing Officer:

- Initially suggested to the Union that “you’re not in a position to agree at this point that [Costa] is a supervisor” (Tr. 89).
- Then proceeded to conduct a needless protracted (over one hour) cross-examination of a witness put forth by the Employer concerning the extent of Abel Costa’s supervisory authority. (Tr. 121, 157; *see also id.* at 121-66).
- Injected her own views of what she thought the primary indicia of statutory supervisory status should be, misclassifying primary indicia as secondary indicia, thus impermissibly raising the burden of proof to be met by PGV to establish Section 2(11) status. For instance, the Hearing Officer classified factors such as the authority to assign work and effectively recommend employee discipline as secondary indicia—“I think they are secondary indicia.” (Tr. 99-101). The Hearing Officer also elicited additional testimony on numerous supervisory indicia factors, despite her express recognition that Board law “requires [only] *one*” primary indicia factor and despite the fact that PGV had provided sufficient and credible testimony that Costa had the authority to independently assign and schedule work. (Tr. 100-01).

Second, in contravention of her duty to create a concise record, Manual § 11424.3(b), the Hearing Officer ignored the developed record, trivialized her ability to schedule the hearing in a way that minimized interference on the Employer’s operations, and unduly continued the hearing to a third day to the benefit of the Union. (Tr. 246-52). The Hearing Officer even counseled Union counsel on the Jencks Act procedure and ended up wanting to take over from the Union to do more thorough cross-examinations.

Finally, the Hearing Officer’s bias is also patently obvious in her decision to discredit certain testimony of a senior PGV executive, Ohad Zimron, (Report at 29 n.18), when such testimony was not inconsistent with the testimony of other witnesses. (Tr. 144-46, 309). It is settled law that the Board examines credibility determinations *de novo* where the hearing officer makes such determinations based on factors other than demeanor. *See Standard Dry Wall*

Prods., Inc., 91 NLRB 544, 545 (1950). The hearing officer “cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp h[er] resolution by uttering the magic word ‘demeanor.’” *Permaneer Corp.*, 214 NLRB 367, 389 (1974). Here, there is no reason to resist relying upon Mr. Zimron’s testimony *other than bias* against the Employer, as the record facts from testimony and documents do not create doubt about his testimony.

In view of the Hearing Officer’s bias, the Employer’s presentation of evidence that the Board’s rule-making affected the results of the election, the narrow margin of the election in this case, and the “Board’s solemn obligation to insure that its decisions and those of its judges are free from partiality and the appearance of partiality,” *Trim Corp.*, the wisest course is to order a rerun election. At the very least, the Board should reconsider the Employer’s Exceptions on the Regional Director’s Report on those objections.

II. The Hearing Officer Erred In Concluding That Costa Is Not A Supervisor Under Section 2(11) Of The Act

The Hearing Officer’s findings that Costa was not a supervisor under Section 2(11) of the Act fall well short under established Board precedent and facts.

A. The Hearing Officer’s Conclusion that Costa is Not a Statutory Supervisory is Contrary to Well-Established Board Law

Section 2(11) of the Act defines the term “supervisor” as:

any individual having *authority*, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (emphasis added); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003). “The statutory language is phrased in the disjunctive and the Board has held that possession of any *one* of the enumerated powers is sufficient to qualify and individual as a

supervisor.” *Mays Electric Co., Inc.*, 343 NLRB 121, 123-24 (2004) (citing *Cal. Bev. Co.*, 283 NLRB 328 (1987)) (emphasis added); *Arlington*, 339 NLRB at 818 (“An individual need possess *only one* of the enumerated indicia of authority in order to be encompassed by Section 2(11). . . .”) (emphasis added). Significantly, it is not required that the employee “regularly and routinely exercise the powers set forth in the statute. It is the *existence* of the power which determines whether or not an employee is a supervisor.” *Arlington*, 339 NLRB at 818 (quoting *NLRB v. Roselon S., Inc.*, 382 F.2d 245, 247 (6th Cir. 1967)) (emphasis added). Further, the burden of proving statutory authority rests with the party asserting that the employee is a supervisor—PGV in this case. *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706, 712 (2001).

Applying these principles to the facts of this case, as explained in detail below, PGV has amply met its burden of proving that Costa possesses supervisory authority within the meaning of Section 2(11) of the Act, and the Hearing Officer’s contrary determination must be overturned.

B. The Undisputed Evidence Establishes that Costa Was a Statutory Supervisor at All Relevant Times

The undisputed record evidence provides a litany of Costa’s supervisory authority and responsibilities that were completely ignored by the Hearing Officer. Specifically, Costa is primarily responsible for the assignment of work and staffing, discipline, hiring, adjustment of grievances, and performance evaluations of employees. Costa also responsibly directs, and is held accountable for the performance of, the employees falling under his supervision. Furthermore, Costa is perceived by his direct reports as the “boss;” is treated by PGV as a member of management; is subject to a significant pay differential for his supervisory role; and is routinely delegated the authority of his superior. The Hearing Officer’s conclusion therefore

fails because there is no evidence that PGV failed to meet its burden to demonstrate Costa's statutory supervisory status.

1. Costa Exercises Independent Judgment in the Assignment of Work, Including Overtime, and Staffing of Employees

It is undisputed that PGV has vested the authority in Costa to direct, prioritize, and assign the work, including the assignment of overtime and scheduling of vacation requests, of the maintenance technicians, wellfield employees, I&E technicians, and purchasing agent. (*See supra* Section II.B.1; Tr. 83-84, 102, 177, 260-61, 265-66, 309). Settled Board law recognizes that such authority to direct and assign work, including overtime, is a primary indicia of supervisory status. *Arlington*, 339 NLRB at 817-19 (Board reversing hearing officer's conclusion that "maintenance supervisor" was not a statutory supervisor because he "prioritize[d] all the maintenance work;" "assign[ed] all of the maintenance work at his discretion" without input from his manager; granted time off; and "assign[ed] hours of work, including overtime"); *RCC Fabricators, Inc.*, 352 NLRB 701, 701 (2008) (Board affirming ALJ's finding that foremen were statutory supervisors based on the finding that "they exercised independent judgment when assigning, and effectively recommending the assignment of, employees to departments and significant overall tasks."); *Alois Box Co., Inc.*, 326 NLRB 1177, 1179-80 (1998) (Board affirming hearing officer's ruling that a production supervisor in maintenance department was a supervisor under the Act where he assigned work to employees, including overtime, independent of schedule put together by the plant manager; granted employees permission to leave early or arrive late; conversed with employees and told them when to stop jobs and start others; listened to employee requests for certain machines or jobs; moved employees to different machines based on production needs; and neither party adduced

any evidence that he contacted the plant manager or some other superior before making any changes concerning production).¹⁰

Here, as discussed above, the credible testimony from both PGV bargaining unit employees and management demonstrates that Costa has independently directed and assigned the work of three mechanics since 2007, and of the entire nine-man crew of maintenance department since 2011. (Employer's Ex. 1; Tr. 95, 259-60, 309). Costa has further instructed all maintenance employees to approach him with time-off requests, (Tr. 83-84), and his manager Wieber does not second guess Costa's scheduling or overtime decisions. (Tr. 265-66).

2. Costa Has Effectively Recommended the Discipline of Employees

The ability to initiate and effectuate discipline, as here, is further proof of Costa's supervisory indicia. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004). Board law requires neither the unilateral imposition of discipline by a supervisor, nor that the discipline automatically lead to an action "affecting employment," in order to find that a supervisor effectively recommends discipline so as to bring him within the realm of 2(11) status. *Progressive Transp. Servs., Inc.*, 340 NLRB 1044, 1045-46 (2003).

For instance, in *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), the Board reversed the hearing officer's conclusion that two supervisors of the employer's housekeeping department were not statutory supervisors because they exercised independent judgment in effectively recommending employee discipline to the director of housekeeping. *Id.* at 1474. In reversing the hearing officer, the Board found that the supervisors had "the authority to bring employee rule infractions and misconduct" to the director, "thereby initiating the disciplinary process; and,

¹⁰ See also *Mays Electric Co. Inc.*, 343 NLRB 121, 121, 124 (2004) (Board affirming ALJ's finding that foreman "possessed supervisory status due to his authority to assign work," to about 12 employees; and that his authority to assign work involved the exercise of independent judgment because "[h]e was required to be familiar with the blueprints and specifications of the project and to use his knowledge of the employees' specific skills in matching each electrician to the specific job assignments).

in the process of doing so, they can write up recommendations for [the director] concerning what level of discipline they consider to be appropriate relative to the infraction or misconduct at issue.” *Id.* “Further, and most significantly, when they decide to bring disciplinary issues to [the director’s] attention, it appears that [the director] does not conduct an independent investigation of the incident in question.” *Id.* at 1474-75. The director testified that his policy was to routinely sign off on the disciplinary recommendations made by the two supervisors; and, in fact, for all such recommendations he received from one supervisor, the director followed her recommendations “in *all* cases.” *Id.* at 1475.

Similarly, in *Venture Industries*, 327 NLRB 918 (1999), the Board found that line and department supervisors were supervisory status under the Act because they issued oral and written reprimands to employees, which were sent to HR to be placed in the employees’ personnel files; recommended suspensions as part of progressive discipline system; and their recommendations were followed by the employer 75 percent of the time. *Id.* at 919.

Here, as in *Mountaineer Park* and *Venture Industries*, Costa has been instrumental in discipline of several employees, up to and including termination. (*See supra* Section II.B.2). The uncontroverted documentary evidence shows three separate instances of Costa initiating discipline; two of which remain in the employees’ personnel file. (Employer’s Exs. 3-5). And, PGV has followed every single disciplinary recommendation Costa has made and does not independently investigate his recommendations for discipline. (Tr. 148, 174-75, 310).

3. Costa Has Effectively Recommended Employees for Hire and Participated in the Hiring Process

Similar to the authority to discipline, the authority to effectively recommend the hire of an employee is a key indicia of Costa’s supervisor status. *Kroger Co.*, 342 NLRB 202, 211 (2004) (Board affirming ALJ’s findings that an advanced pharmacy technician was a supervisor

because her authority to interview and to recommend whether or not to hire job applicants established her supervisory status). Costa has effectively recommended the hire of two of his direct reports, John Ramirez and Aaron Gacusana, and the starting pay rate of one such employee. (Tr. 104-05). He also recommended that PGV hire his son Abraham. (Tr. 104). In sum, Costa effectively recommended the hire of 15% of the 20 person bargaining unit; and to date, PGV has not declined Costa's recommendation for hire of a maintenance employee. (Tr. 105).

4. Costa Adjusts Employee Grievances

“There can be no doubt that [the] adjustment of employee grievances is indicative of supervisory authority.” *HS Lordships*, 274 NLRB 1167, 1174 (1985). The hearing testimony credibly establishes that Costa was single-handedly responsible for receiving and handling employee complaints. (Tr. 260). In fact, Wiebe confirmed in his testimony that he expects Costa to handle employee complaints and cannot recall a time where he has stepped in and taken a dispute out of Costa's hands. (Tr. 138-39). Accordingly, Costa exercises the necessary statutory supervisor power to adjust employee grievances at PGV.

5. Costa Provides Meaningful Feedback in Employee Performance Reviews

Since 2007 Costa has provided meaningful feedback in the performance reviews of maintenance employees, which are then utilized by PGV for purposes of determining promotions and pay raises. (*See supra* Section II.B.5; Tr. 176, 260-61). Under extant Board law, Costa's exercise of independent judgment in the evaluation of his subordinates is a further primary indicia of supervisory status. *See, Vencor Hosp. – L.A.*, 328 NLRB 1136, 1139 (1999) (“[T]he Board has consistently found supervisory status when [employees alleged to be supervisors] independently perform employee evaluations which lead directly to personnel actions. . .”).

6. Costa Responsibly Directs and is Held Accountable for the Work of His Direct Reports

Costa’s responsibility for the work of those he directs aligns with Board law finding statutory supervisor status. *See Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). In *Oakwood*, the Board found that in order found to “responsibly direct” others under Section 2(11) of the Act, a putative supervisor must be “accountable” for the actions of those he supervises, “such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 691-92. Here, PGV has sufficiently demonstrated that Costa’s performance is measured by his supervisory skills and the performance of his team. Costa’s performance review is based, in part, on his supervisory skills—a performance criteria that only PGV supervisors are evaluated on. (Employer’s Ex. 6; Tr. 180, 183). In fact, Costa has been formally disciplined when he failed to live up to PGV’s expectations of him as a supervisor. (*See supra* Section II.B.6). Moreover, Wiebe credibly testified that, “if [Abel] would allow his employees or a team working on the job to go through with a procedure that was wrong or didn’t work and he knew about it, he would definitely be held responsible.” (Tr. 163).

7. Secondary Indicia Supportive of Statutory Supervisor Finding

In addition to entirely dismissing the foregoing primary indicia of Costa’s statutory supervisor status, the Hearing Officer committed further error in disregarding secondary indicia of Costa’s supervisory authority. Under settled Board law, secondary indicia is also relevant to the statutory supervisor determination, once primary indicia is found to exist, as here. *RCC Fabricators*, 352 NLRB at 714, n.28.

a) Costa is Perceived by His Direct Reports as Their “Boss”

The uncontroverted evidence shows that every employee in the maintenance department

knows that Costa is their supervisor. (Tr. 190, 284). Maeda testified that he regards Costa as his “boss.” (Tr. 197). And Wiebe has even taken upon himself to reinforce Costa’s authority with the maintenance employees during his promotion from Maintenance Technician Supervisor to Maintenance Supervisor. (*See supra* Section II.B.8; Tr. 83, 263-64, 284). The appearance and regard of by the PGV maintenance employees of Costa’s supervisory authority are supportive indicia of supervisory status under well settled Board precedent. *See McClatchy Newspapers, Inc.*, 307 NLRB 773, 779 (1992) (Board affirming ALJ’s ruling that press operators were statutory supervisors where because they had the authority to and did assign work based on independent judgment, “both management and the bargaining unit employees reasonably regarded the press operators as supervisors and representatives of management”); *Atlanta Newspapers*, 306 NLRB 751, 751, 756 (1992) (Board affirming ALJ’s finding that two “men-in-charge” were supervisors under the Act where, among other things, they were in charge of a crew of seven to eight employees and were “considered the boss of the crew and [we]re also referred to as crew chiefs”).

b) Costa is Treated as Management by The Employer

The record evidence unequivocally shows that PGV considers Costa part of its management team. (Tr. 308). Supporting the finding of Costa’s Section 2(11) supervisory status is attendance at management-only meetings—including management-only strategy meetings relating to the Union campaign—and offsite seminars, as well as receipt of management-only emails. (Tr. 91-92, 94-95, 272-73, 312); *Berkeley Marina Rest. Corp.*, 274 NLRB 1167, 1173-74 (1985) (bar manager was a statutory supervisor under Section 2(11), where, in addition to supervisory status indicia, bar manager also “regularly attended the weekly restaurant manager meetings, the importance of which should not be underestimated; for, at these meetings, personnel, financial, and other subjects not normally broached with employees were discussed”).

c) Costa is Substantially Paid More Than His Direct Reports

In addition, Costa is paid at least 10% more than the next highest paid employee in the maintenance department, and earns at least a 10% higher bonus than any other maintenance employee. (*See supra* Section II.B.11; Tr. 179-80). Costa's pay differential over his subordinates serves as further evidence of his supervisory status. *Illini Steel Fabricators, Inc.*, 197 NLRB 303, 303 (1972) (Board affirming supervisory status where employee, in addition to primary indicia of supervisory status, also received at least one dollar more than any other plant employee); *Penco Enters., Inc.*, 201 NLRB 29, 31 (1973) (holding that working plant foreman's pay that was \$30 per week higher than the next highest paid employee was evidence of his statutory supervisory status).

d) Costa is Routinely Delegated Mr. Wiebe's Authority in Mr. Wiebe's Absence

Moreover, PGV Maintenance Managers have routinely delegated their authority for the entire department to Costa in their absence. (*See supra* Section II.B.10; Employer's Ex. 7). Such delegation of responsibility is supportive indicia of supervisory status. *See Alois Box. Co., Inc.*, 326 NLRB 1177, 1179-81 (1998) (Board affirming finding that maintenance department employee (Miller) was a supervisor under the Act because he was delegated the authority of plant manager; indeed, the plant manager (Brasic) told employees to do whatever Miller told them to do; and employees testified that "[w]hen Brasic is not available, Miller is the man to see"); *Richardson Bros. Co.*, 228 NLRB 314, 314 (1977) (Board finding, contrary to hearing officer, that leadman in finishing department was a statutory supervisor where, *inter alia*, he substituted for the finishing department supervisor during his absence).

Accordingly, because the undisputed record evidence establishes that Costa possessed at least *one*, if not more, of the powers enumerated in Section 2(11), he is a supervisor under the

Act. *Arlington*, 339 NLRB at 818 (“An individual need possess *only one* of the enumerated indicia of authority in order to be encompassed by Section 2(11). . . .”) (emphasis added); *RCC Fabricators*, 352 NLRB at 701 (Board affirming ALJ’s finding that two foremen were statutory supervisors based only on their authority to assign work; “not pass[ing] on the judge’s further finding that they possessed the power to discipline . . . and his alternative finding that [one] foreman [] was the Respondent’s agent.”). The Hearing Officer’s contrary conclusion must be rejected.¹¹

In short, employees were coerced when a person with the ability to affect their terms and conditions of employment as often and thoroughly as Costa speaks up and creates the appearance of support for the Union. The Hearing Officer here was too focused on technicalities to support her result rather than looking at this case practically: of course employees see Costa as a “power” over them, because he can do all sorts of things to them. Why would the Hearing Officer ignore someone who is in a position to trigger discipline, provide substantive input on evaluations, or schedule work and shifts and whom the employees testify is their “boss”? She clearly decided there was only one way to rule after she rejected the parties’ stipulation and, unfortunately, this leaves the employees stuck with an improper and unfair result.¹²

¹¹ Although Costa may claim, as he did at the hearing, that he was somehow unclear as to his supervisory authority over a fraction of the employees in wellfield and instrumentation and control because of their desires, his testimony must be viewed in light of the Employer’s efforts to rectify this problem. It was a transitional issue born of these employees’ concerns about Costa’s abilities in their technical fields. Nonetheless, the Employer clarified Costa’s supervisory authority and his crew, the mechanics, never suffered from this issue. Costa’s subjective beliefs about his supervisory authority over a portion of his crew, therefore, are *not* determinative. Instead, “[t]he proper consideration is whether [his] *functions and authority* . . . meet the criteria defined in Section 2(11) of the Act”—they do. *Alois Box*, 326 NLRB at 1178 (emphasis added). Further, the Act does not require that he exercise his supervisory authority on a “regular or routine” basis; rather, it is the *possession* of this type of authority that mandates a finding of supervisory status. *Arlington*, 339 NLRB at 818; *RCC Fabricators*, 352 NLRB at 711. Overall, “[t]he *totality of the record* simply does not support [Costa’s] contention[,]” much less the Hearing Officer’s conclusion, that Costa was not a supervisor under the Act. *Alois Box*, 326 NLRB at 1181 (emphasis added).

¹² By the same token, even if Costa was not a statutory supervisor under the Act (he is), his functions and authority establish that he was nevertheless a managerial employee whose threatening and coercive conduct violated the

III. The Hearing Officer Erred In Concluding That Statutory Supervisor Abel Costa's Pro-Union Electioneering and Related Conduct Did Not Destroy The Laboratory Conditions Requisite For A Fair Election

The Hearing Officer's conclusion that the pro-union conduct of statutory supervisor Costa did not destroy the laboratory conditions requisite for a fair election is without legal and factual support, and must be rejected.

A. Applicable Board Standards

It is axiomatic that when examining whether pro-union conduct by a statutory supervisor upsets the requisite laboratory conditions for a fair election, so as to warrant setting aside the election, the Board considers two factors:

(1) Whether the supervisor's pronion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pronion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside Healthcare, Inc., 343 NLRB 906, 909 (2004).¹³

employees' Section 7 rights in the election. *See Kerite Co.*, 236 NLRB 1084, 1084, 1090 (1978) (Board affirming ALJ's ruling that company's "managerial staff's" conversations with employees "had such a restraining and coercive effect upon the voting predilections of the employees that they were thereby deprived of a free and untrammelled choice to elect a bargaining representative of their own choosing. I therefore recommend that Petitioner's objections to the election . . . be sustained, the election . . . be set aside, and a new election be directed.") (citing cases).

¹³ In this regard, the Hearing Officer's conclusion that PGV'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 PGV's objections, (Report at 17), is unsupported by law. *Harborside*, 343 NLRB at 909 n.11 ("We believe that the phrase "interfere with" is not synonymous with "coercion. . . [T]hey represent different ways of undermining Sec. 7 right to make an electoral choice in an untainted atmosphere.").

B. The Undisputed Record Evidence Demonstrates that Costa's Pro-Union Electioneering and Related Conduct Interfered with Employee Free Choice in the Election

Here, there is no question that Maintenance Supervisor Costa's pro-union conduct meets the Board's *Harborside* test. The undisputed evidence demonstrates that Costa, a statutory supervisor, acting both alone and in concert with his son and bargaining unit employee, Abraham, materially interfered with PGV employees' exercise of free choice in the May 14 election. Costa's pro-union campaign commenced on March 28 under the direct auspices of the Union itself – which failed to turn him away from their kick-off meeting -- and continued with his son acting as a conduit for his agenda until only minutes before closing of the polling booth. In a margin of victory by only two votes, Costa's pro-union conduct cannot be minimized.

1. Costa's Attendance at March 28 Meeting, Instruction to "Stick Together" and Sign Authorization Cards, and Threat that PGV "Will Retaliate"

It is undisputed that Costa attended the first organizing meeting on March 28, at which various employees, including several of his direct reports, heard him instruct employees to "stick together and not say nothing to nobody." (Tr. 19; *see also supra* Section III.A.1.a). By Costa's own admission, employees' reasonable take away from his statement was that Costa was supportive of the Union—an impression he never disavowed. (Tr. 271). Although Costa cannot remember saying anything else in particular at this Union meeting, Sumida credibly testified as to a conversation he had with Costa at the Union hall that night, during which Costa instructed him to sign an authorization card and keep the organizing quiet because PGV would retaliate. (Tr. 18). Sumida is a veteran, a solid worker, and has no reason to lie. No one contradicted him. The fact that Costa could not remember everything he said does not contradict Sumida and his better memory of the event.

a) Costa's Instruction to Sign Authorization Cards Constitutes Objectionable Card Solicitation

Costa's instruction to the bargaining unit employees to sign union authorization cards (Tr. 18), is tantamount to objectionable card solicitation, and the Hearing Officer erred in not so concluding. It is settled law that supervisory solicitation of authorization cards is inherently coercive and interferes with employees' freedom of choice. *Chinese Daily News*, 344 NLRB 1071, 1072 (2005); *Harborside*, 343 NLRB at 911. This is because the employee "will reasonably be concerned that the 'right' response will be viewed with favor, and a 'wrong' response with disfavor." *Harborside*, 343 NLRB at 911. The Board has found solicitation not only in cases of direct solicitation but also in cases where "employees had reason to believe that whether they signed a card would become known" to their pro-union supervisor. *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2007). Accordingly, Costa's solicitation of authorization cards from employees, including employees he supervised, directly and through the collection of cards by his son Abraham, was inherently coercive and interfered with PGM's employees' freedom of choice in the election. *Chinese Daily News*, 344 NLRB at 1072.

b) Costa's Threats of Termination and Retaliation Were Unlawful

Costa's foreshadowing of termination and instruction to employees to stick together is similar to the conduct found unlawful in *Millard Refrigerated Services, Inc.*, 345 NLRB 1143 (2005). In *Millard*, the Board held a pro-union supervisor's remark that "[I]f U does not get in, everybody will probably be fired," and "[E]ither vote for U or I'll make your life a living hell," to be objectionable conduct, even in the absence of card solicitation. *Id.* at 1146. In finding the remark to interfere with employee free choice, the Board reasoned that the supervisor's remark could reasonably make employees believe that they would be fired if they did not vote for Union. *Id.*

Here, as in *Millard*, PGV employees at the March 28 meeting, in particular Costa's direct reports, may have reasonably viewed Costa's instructions to stick together, keep the organizing quiet, and sign the cards as *orders* to support the Union. Further, his foreboding comment that "PGV will retaliate" could reasonably be understood as a threat of termination if they voted against the Union. As the Board noted in *Millard*, it is not dispositive that Costa did not say *he* would terminate the employees, because employees would reasonable fear to act contrary to his wishes due to his power to effectively recommended discipline. *Id.*

In this regard, the Hearing Officer's reliance on *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006) to find that Costa's actions did not interfere with PGV's employees' free choice and did not materially affect the results of the election, (Report at 31-33), is misplaced. *Northeast Iowa* is inapposite to the case at hand in several key respects. In *Northeast Iowa*, the putative supervisors attended union meetings, participated in discussions at those meetings, signed authorization cards in front of employees, and mentioned some of the issues the union could help resolve. *Id.* at 467. Unlike here, however, in *Northeast Iowa* the managers did *not solicit* authorization cards from other employees; the managers did not sign their own authorization cards in front of *employees under their supervision*; one of the managers had *never* disciplined technicians; and no retaliatory statements were made by the managers. *Id.* at 467-68.

As a matter of fact, pro-union supervisory conduct similar to the one at issue here was ruled objectionable and invalidated an election in *Harborside*. In *Harborside*, the supervisor in question initiated discipline, assigned schedules, gave principal input on evaluations, and effectively recommended discipline (up to termination). 343 NLRB at 910. At least one employee testified in *Harborside* (as here) that the supervisor "could write you up and make you lose your job." *Id.*; *see supra* Section II.B.2. Armed with such broad authority over the

employees' daily work conditions, "including the ability to both reward and retaliate against them," the supervisor in *Harborside*, like Costa here, repeatedly told employees they could lose their jobs if the union lost the election and solicited authorization cards from employees. *Id.* at 910-11. It is well-established law that "[t]hreats of job loss are highly coercive and one of the most serious forms of election misconduct." *Id.* at 913. Thus, Costa's pro-union conduct reasonably tended to coerce or interfere with employees' exercise of free choice in the election. *Id.* at 910, 913.

2. Costa's Coercion Was Magnified and Reinforced by Abraham's Role in the Union Campaign

Costa's conduct cannot be viewed in isolation from the actions of his son, and effective conduit, Abraham. Along with his father, Abraham was a primary Union proponent at PGV: arranging union meetings, gathering authorization cards, relaying information between the union and employees, hosting union meetings at his house, and electioneering for the union on the day of the vote. (Tr. 28, 30, 37, 200-01, 208-09, 471-72). This father and son team was seen as a united force in favor of union representation by PGV employees. (Tr. 206). Every action undertaken by Abraham in support of the Union, was reasonably attributed by bargaining unit employees to his supervisor father Costa and the Union. *Id.* To bargaining unit employees, Costa's actions were indistinguishable from Abraham's actions.

3. Costa Supervises Nearly 50% of the Bargaining Unit and the Union's Margin of Victory was Only Two Votes

The Union won by only *two* votes. Extant Board law requires careful scrutiny of objections in close elections such as here. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). But in examining the materiality of Costa's pro-union conduct, the Hearing Officer utterly failed to carefully scrutinize the fact that Costa supervises nine employees in a proposed bargaining unit of 20 employees—that is nearly 50% of the bargaining unit. Even assuming, *arguendo*, that

Costa is found only to supervise the three mechanics, his objectionable pro-union conduct still materially impacted the election because the election was won by a slim margin of two votes. *Harborside*, 343 NLRB at 913 (supervisor’s pro-union conduct materially affected the election outcome where the union’s margin victory was 11 and the supervisor’s conduct directly affected at least four employees).

4. Costa’s Conduct Had a Lingering Effect on the Bargaining Unit Employees

Costa’s pro-union conduct commenced on March 28 and continued up until moments before the election. Costa’s pro-union activities constituted an unbroken chain of objectionable actions: He attended the initial Union meeting where he instructed at least one employee to sign an authorization card; repeatedly told employees to “stick together” and keep the union organizing quiet; stood side-by-side with his son during an all hands meeting voicing complaints about management; and provided information obtained about bargaining unit employees in his role as a supervisor to his son so that his son could electioneer for the Union on the day of election.

At least two employees (Sumida and Maeda) credibly testified that they were surprised by Costa’s pro-union conduct given his supervisory status. (Tr. 24, 202). Employees continued to talk about Costa’s presence at the March 28th meeting well into the critical period. Sumida credibly testified that Craig Dubczak, direct report of Costa, reiterated to him “just remember what Abel said to just stick together and not say anything and, you know, just make sure we stick together.” (Tr. 19, 24). Employees were also actively seeking Costa’s input on the union. About two weeks prior to the election, Costa continued to instruct bargaining unit employees to “stick together.” (Tr. 25, 29). The day after the election, DuVoisin attributed the Union’s victory to *one* person Costa. (Tr. 58). More recently, an anonymous employee wrote a letter to PGV

expressing extreme displeasure with both Costa's and Abraham's pro-union actions. (Employer's Ex. 10).

Interestingly, fully aware that PGV employees viewed him in favor of union organizing, at no time between the March 28 meeting and the election of May 14, did Costa take *any* step to correct any employee's impression that he was in favor of union organizing or disavow his pro-union statements. (Tr. 200, 271). *See, SNE Enterprises, Inc.*, 348 NLRB 1041 (2006) (finding no "disavowal" since employer never addressed, much less disavowed, supervisor's coercive conduct). Costa's pro-union campaign and its interference with employee exercise of free choice fits squarely within the parameters of conduct prohibited by the Board. *Harborside*, 343 NLRB at 914 (The effect of supervisor's pro-union campaigning "into the critical period, up to the election . . . would not dissipate, but . . . linger.").

Campaigns similar to the one at issue here have been found objectionable by the Board. In addition to *Harborside*, discussed above, the conduct of lead persons in soliciting authorization cards prior to Union election constituted objectionable behavior even though leads stopped campaigning one month before election in *SNE Enterprises, Inc.*, 348 NLRB 1041, 1043 (2006). The Board reasoned that the fact that solicitation of cards ceased at time petition was filed does not negate coerciveness, since employees who signed cards may feel obliged to continue with their stated intent, and number of cards may paint false portrait of support. *Id.* Here, perhaps more egregiously than in *SNE Enterprises*, bargaining unit employees were subjected to six weeks of Costa's pro-union conduct without reprieve before the election. Understandably, PGV employees could have felt (and did feel) obligated to adhere to Costa's pro-union agenda and the authorization cards and election results do not portray an accurate portrait of support for the Union.

In all, the record clearly evidences that there is a substantial basis for finding that the laboratory conditions were tainted by Costa's pro-union conduct.¹⁴

IV. The Hearing Officer Erred In Concluding That The Pro-Union Electioneering And Related Conduct Of Abraham Did Not Destroy The Laboratory Conditions Requisite For A Fair Election

The Hearing Officer also erred in concluding that Abraham's pro-union misconduct was not objectionable. (Report at 11-15). Because this conclusion is neither supported by fact nor law, it must be reversed.

A. Abraham's Pro-Union Electioneering and Related Conduct Warranted Setting Aside the Election

"It is the province of the Board to safeguard its elections from conduct which inhibits the free choice of voters." *Claussen Baking Co.*, 134 NLRB 111, 112 (1961). "In furtherance of this responsibility the Board prohibits electioneering at or near the polls." *Id.* This is because:

the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a *strict rule* against such conduct, without inquiry into the nature of such conversations. The final minutes before an employee casts his vote should be his own, as free from interference as possible.

Milchem, Inc., 170 NLRB 362, 362 (1968) (emphasis added). In *Tyson Fresh Meats, Inc.*, 343 NLRB 1335 (2004), the Board, contrary to the hearing officer, sustained the employer's objections and set aside an election based upon evidence that union stewards had 5-to-10-minute conversations with employees waiting to vote under *Milchem's* strict "prolonged" conversations prohibition. 343 NLRB at 1338; *see also Parsec, Inc.*, 353 NLRB No. 96 n.3 (2009) (Intervenor Union steward engaging in prolonged conversations with voters at the polling place,

¹⁴ Contrary to the Hearing Officer's conclusion, the question of union agency is irrelevant to both the statutory supervisor determination and whether a supervisor's pro-union conduct destroys the laboratory conditions requisite for a fair election. (Report at 11-15); *see* 29 U.S.C. § 152(11) (enumerating statutory supervisor factors); *Harborside*, 343 NLRB at 906, 909 (reaffirming long-standing two-part test for determining whether pro-union supervisory conduct coerces or interferes with the employees' exercise of free choice in an election; with neither prong requiring or even considering whether the supervisor is an union agent).

objectionable, as it constituted impermissible electioneering and violated Board's strict rule against such conduct).

Here, the final minutes before maintenance employee Maeda cast his vote were neither peaceful nor "his own," but filled with undue pressure and veiled threats. Abraham, known Union agitator and son of supervisor Costa, *twice* approached Maeda in Maeda's direct path to the polls, in plain sight of the *entire* bargaining unit. (Employer's Ex. 9; Tr. 203-06, 210-11). Abraham tried everything within his power to secure Maeda's vote for the Union, including direct confrontation and coercion. Maeda was particularly disturbed by Abraham's comment, "I heard you're frustrated because now you're talking on new responsibilities since Kellet Park got fired," because he had made this comment to Costa—and *only* Costa—just two days before the election (Tr. 204-06). Maeda knew this comment could mean only thing—Maeda's supervisor Costa and his son Abraham were launching a coordinated effort to get him to vote for the Union. (Tr. 206). Therefore, as in *Milchem* and the cases cited herein, Abraham's electioneering, constituted objectionable behavior that warrants setting aside the election.

Even if, as the Hearing Officer erroneously concluded, PGV did not establish that Abraham was a Union agent (Report at 12-15; *see* discussion *infra*), the Hearing Officer's conclusion still fails because Abraham's conduct constitutes objectionable third party electioneering that warrants setting aside the election. *Hollingsworth Mgmt. Serv.*, 342 NLRB 556, 557, 558 (2004) (setting aside election where hearing officer erred in overruling employer's electioneering objection on grounds that the employees engaged in electioneering were not union agents).

In evaluating electioneering by nonparties at or near the polls, the Board considers "whether the conduct at issue so substantially impaired the employees' exercise of free choice as

to require that the election be set aside’’ *Id.* at 558. In *Hollingsworth*, the Board found this standard was met, reversing the hearing officer and setting aside the election, because in the line of waiting voters the in-house Volunteer Organizing Committee manhandled two employees, one of them in front of as many as 30 voters, and had prolonged conversations with voters about the union and how they intended to vote. *Id.* Similarly, in *Claussen*, the Board set aside an election, finding that, contrary to the Regional Director, a nonsupervisory employee’s electioneering at or near the polls, during the voting period, involving several voters, “could have affected the election results if it swayed but one voter.” 134 NLRB at 112.

In this case, the record evidence and reasonable inferences to be drawn therefrom demonstrate that Maeda was *twice* subjected to extreme pressure by Abraham—chief Union proponent and son of his supervisor—while he was making his way to the polls, and that this occurred in front of the *entire* bargaining unit. (Tr. 203-06, 210-11). As in *Hollingsworth* and *Claussen*, such bullying and intimidation substantially impaired Maeda’s ability to exercise free choice in the Union election, as to require that the election be set aside.

Moreover, irrespective of whether he was a Union agent or a third party, Abraham’s pro-union misconduct is even more problematic because of his familial relationship with Costa, a supervisor under the Act who also exerted improper pro-union influence on PGV employees. *Cf. Automotive, Petroleum and Allied Industries Employees Union, Local 618*, 324 NLRB 865, 865 (1997) (concluding that “the daughter of the union’s chief executive officer had at least apparent authority to speak for the union”). If anything, when properly viewed, Abraham served as a conduit of Costa’s supervisory pro-union misconduct and, vice versa, Abraham’s unlawful acts could be suitably impugned to supervisor Costa. Maeda’s testimony was an act of courage: he is very credible, testifying in a way that both his supervisor and a co-worker could find contrary to

their interests. Maeda's humble tone and personage were completely different from the Union's swashbuckling witnesses like Brittain, Abraham Costa, and Culnan. The Hearing Office ignored this act of bravery to provide her the truth and instead once again minimized the coercion on this employee who has no reason to testify other than completely in accord with the truth. Abraham's misconduct—particularly when in the light of this father's conduct—tainted the election and requires that the election be set aside. The Hearing Officer's contrary conclusion is in error and, again, is stretched to reach a pre-determined conclusion.

B. Board Law Does Not Require That Abraham Be a Union Agent In Order For His Pro-Union Conduct to Warrant Setting the Election Aside

In concluding that Abraham's pro-union related conduct was not objectionable, the Hearing Officer found that PGV failed to present evidence demonstrating that Abraham possessed either actual or apparent authority to represent the Union. (Report at 12). However, the record evidence amply demonstrates that, contrary to the Hearing Officer's conclusion, the Union had in fact "cloaked" Abraham "with sufficient authority to create a perception" among bargaining unit employees that he was acting on behalf of the Union. *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1337 (2004). It is well established that "the determinative factor in establishing agency status is not authorization or ratification of the agent's acts by the principal, but rather the nature of the agency." *Bio-Med. Applications of P.R., Inc.*, 269 NLRB 827, 828 (1984). Thus,

A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent, even if the principal did not authorize the particular act. In other words, *it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.*

Id. (emphasis added).

As detailed above, the evidence shows that Abraham was a primary Union proponent at PGV: arranging union meetings, gathering authorization cards, relaying information between the union and employees, hosting union meetings at his house, and electioneering for the union on the day of the vote. (Tr. 28, 30, 37, 200-01, 208-09, 471-72). Though the Union may contend otherwise, the evidence credibly exhibits that Union agent Brittain relied and called upon Abraham to help lead the union organizing efforts. For example, knowing that Abraham was running the in-house organizing committee, Brittain called Abraham the week prior to the election to inform Abraham that he was available in Hilo to answer employee questions and that the Union hall was available for meetings. (Tr. 391-92, 395). Two days before the scheduled NLRB election, Brittain also attended a pro-Union barbeque hosted by Abraham at his house, at which at least 5 PGV employees were in attendance. (Tr. 393, 472). Accordingly, Abraham's unlawful conduct on behalf of the Union warrants that the election be set aside.

Brittain's testimony denying Abraham Costa's status is not reliable. First, Brittain is biased for the Union as one of its paid agents. Second, Brittain had no idea that his behavior could be perceived by employees as empowering one of their number. This is the same Union Business Agent who let Abel Costa into a meeting and never disavowed Costa's conduct. Brittain spent hours of testimony stating what he "would do" in theory and his on his "approach," but he never contradicted the facts about his contacts and connections with Abraham. The Hearing Officer allowed this kind of testimony about the Union Business Agent's self-importance to clutter the record over objection, because she was hoping something credible would come out. It never, however, contradicted Maeda or the others.

V. The Hearing Officer Erred In Concluding That The Union Did Not Engage In Any Misconduct, Wrongdoing Or Other Action That Improperly Influenced And/OR Invalidated The Election.

Committing further error, the Hearing Officer concluded that the Union did not engage in any misconduct that warranted invalidating the election. But such conclusion does not hold water under established legal authority and record evidence in this case.

Under established Board precedent, promising increased or additional benefits during the critical period, as Brittain did here, is objectionable conduct that necessitates a new election. *Ameraglass Co.*, 323 NLRB 701, 701 (1997). The irrefutable evidence demonstrates that Brittain contacted PGV operators during work hours on the *eve* of the election in a last minute effort to obtain their votes. (Tr. 20-21, 354-55). They discussed the key issues of DUIs and job security, and at least one employee, Sumida, credibly testified that he understood from the conversation with Brittain that if the Union were elected, the Union would protect the jobs of PGV employees with DUIs. (Tr. 21, 26, 38). Thus, Brittain's promises of Union benefits requires invalidating the election in this case.

CONCLUSION

For the reasons set forth in its Exceptions and herein, PGV respectfully requests that the Hearing Officer's Report on Objections be rejected in its entirety, PGV's exceptions to the Report on Objections be sustained, the election be set aside, and a new election be ordered.

Date: September 24, 2012

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 BRIEF IN SUPPORT OF ITS EXCEPTIONS TO 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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