

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

GOLDEN FARM BROOKLYN, INC. d/b/a
GOLDEN FARM GROCERY

Employer

and

Case No. 29-RC-77022

LOCAL 338, RETAIL WHOLESAL
AND DEPARTMENT STORE UNION,
UNITED FOOD AND COMMERCIAL
WORKERS

Petitioner

**HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS**

This report contains my findings and recommendations regarding: 1) the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election; and, 2) the Employer's Objection Nos. 1 and 2 concerning an alleged offer of financial reward by a third party. For the reasons described below, I recommend that the Employer's objections be overruled. I also recommend the approval of the Petitioner's request to withdraw its objection allegation. Accordingly, I recommend that a Certification of Representative be issued.

PROCEDURAL HISTORY:

On March 21, 2012,¹ Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers ("the Petitioner" or "the Union") filed a petition² in this matter seeking to represent certain employees employed by Golden Farm

¹ All dates hereinafter are in 2012 unless otherwise indicated.

² On March 7, the Petitioner filed an earlier petition for the same unit, which was withdrawn on March 21.

Brooklyn, Inc., d/b/a Golden Farm Grocery (“the Employer”). Pursuant to a Stipulated Election Agreement signed by the Petitioner and the Employer, and approved by the undersigned on March 21, an election by secret ballot was conducted on May 2 among the employees in the following unit:

All full-time and regular part-time employees, including cashiers, clerks, stock persons, drivers, and general merchandise handlers of groceries, meat, fish, and produce employed by the Employer at its facility located at 329 Church Avenue, Brooklyn, New York, but excluding all managers, buyers, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

The Corrected Tally of Ballots made available to the parties pursuant to the Board’s Rules and Regulations, showed the following results:

Approximate number of eligible voters	27
Number of void ballots	1
Number of ballots cast for the Petitioner	13
Number of votes cast against participating labor organizations	8
Number of valid votes counted	21
Number of challenged ballots	5
Number of valid votes counted plus challenged ballots	26

Challenges are sufficient in number to affect the results of the election.

The Petitioner challenged the ballots of Young Chung Chun, Jose Cuautle, and Sharon Kim on the ground that they are supervisors within the meaning of Section 2(11) of the Act. The Petitioner also challenged the ballot of Kim on the ground that she is a former owner of the Employer and enjoys certain benefits due to her status as a former owner. The Petitioner challenged the ballot of Seung Seup Lee on the ground that this individual is not employed by the Employer. The Board Agent conducting the election

challenged the vote of Maria Gomez because her name did not appear on the *Excelsior*³ list. Thereafter, the Petitioner and the Employer filed timely objections to conduct affecting the results of the election.

Pursuant to Section 102.60 of the Board's Rules and Regulations, the Regional Director of Region 29 caused an investigation concerning the above-mentioned objections and challenges to be conducted. On May 25, the Regional Director issued and served upon the parties a Report on Objections and Notice of Hearing, in which he directed that a hearing be held before a duly designated Hearing Officer concerning the Petitioner's challenges to the ballots of Young Chung Chun, Jose Cuautle, Sharon Kim, and Seung Seup Lee, the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election and the Employer's objections, in light of substantial and material issues, including issues of credibility. Further, the Regional Director directed that the ballot of Maria Gomez be opened and counted.⁴ Additionally, the Regional Director recommended overruling that portion of the Petitioner's first objection which alleged that the Employer pressured employees into voting for the Employer. Finally, the Regional Director approved the Petitioner's request to withdraw its second objection. The Employer filed Exceptions to the Regional Director's report within the time period provided.⁵ Thereafter, on June 5, the Regional Director issued a Supplemental Report on Objections upholding his original finding that the Employer did not establish that Lucas Sanchez is an agent of the Petitioner and that his conduct is

³ *Excelsior Underwear*, 156 NLRB 1236 (1966).

⁴ In order to safeguard the secrecy of Gomez's ballot, it was decided not to open and count the ballot until disposition of the remaining challenges or until at least one additional challenge was opened and counted.

⁵ To date, the Board has not ruled on said Exceptions.

properly analyzed as that of a third-party.⁶ No exceptions were filed to the Regional Director's Supplemental Report on Objections. Also on June 5, the parties entered into a stipulation wherein Local 338 withdrew its challenges to the ballots of Young Chung Chun, Jose Cuautle, and Seung Seup Lee. The parties agreed Chun, Cuautle and Lee were eligible to vote and that their ballots should be opened and counted. The parties further agreed that Sharon Kim is not eligible to vote and that Local 338's challenge to her ballot be sustained. Finally the parties agreed that Maria Gomez (whose name was not contained on the voter eligibility list and whose ballot the Regional Director recommended be opened and counted in his May 25 Report) is eligible to vote and that her ballot be opened and counted. Accordingly, the ballots of Young Chung Chun, Jose Cuautle, Seung Seup Lee and Maria Gomez were opened and counted and a revised Tally of Ballots was issued on June 5.

The Revised Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	27
Number of void ballots	1
Number of ballots cast for the Petitioner	13
Number of votes cast against participating labor organizations	12
Number of valid votes counted	25
Number of undetermined challenged ballots	0
Number of valid votes counted plus challenged ballots	25
Number of sustained challenges (voters ineligible)	1

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are not sufficient to affect the results of the election.

Accordingly, and pursuant to the Regional Director's Order and Notice of Hearing, a hearing was held before the undersigned Hearing Officer on June 5 concerning

⁶ Although not part of the record, I take administrative notice of the Supplemental Report on Objections dated June 5.

the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election and the Employer's Objection Nos. 1 and 2. At the hearing, all parties were represented by counsel and were afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues and present oral argument.

Upon the entire record of this case, consisting of the transcript of the testimony and exhibits,⁷ including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election and the Employer's objections.

THE PETITIONER'S OBJECTIONS

On June 5, the Petitioner requested to withdraw all of its objections in the instant case. As noted above, the Regional Director, in his May 25 Report on Objections, *inter alia*, directed that a hearing be held before a duly designated Hearing Officer concerning the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election. In view of the foregoing, I recommend that the request for withdrawal of the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election, which is the only Petitioner objection before me, be approved.

⁷ References to the Board's, Union's and Employer's exhibits will be cited as Board Ex. ___, Union Ex. ___ and Employer Ex. ___, respectively. References to the Transcript will be cited as Tr. ___.

THE EMPLOYER'S OBJECTIONS

The only issue remaining before me involves a third party's alleged offer of financial reward in exchange for supporting the Union, encompassed by the Employer's objections. The Petitioner contends that this objection has no merit. For the reasons noted herein, I recommend that this objection be overruled.

In support of the its objection, the Employer presented three employee witnesses, Jose Cuautle, Alberto Lozada and Francisco Gomez. The Union did not present any witnesses.

As noted above, the Regional Director, in his May 25 Report on Objections and his June 5 Supplemental Report, found that Lucas Sanchez is an employee for NY Communities for Change, a community organization, and that his conduct must be analyzed as that of a third party.

Documentary Evidence:

During a conversation more fully discussed below, Lucas Sanchez handed employee Alberto Lozada an 8½ inch by 11 inch size sheet of paper containing the letterhead, "NY Communities for Change," with Sanchez' name, phone number and his NY Communities for Change e-mail address on the bottom. (Tr. 70, 72, attachment to Union Ex. 1(a)) More specifically, the document indicates that, "The Kensington and Brooklyn community support workers from Golden Farm supermarket (329 Church Ave)," in connection with the workers "suing the owner, Mr. Sonny Kim, for back pay owed to them after having worked for many years earning well below the minimum wage." The above document states that, "New York Communities for Change is a coalition of working families in low and moderate income communities fighting for

social and economic justice throughout New York State. We are working to ensure that every family throughout New York has access to quality schools, affordable housing and good jobs. It is through the power-in-numbers approach that NY Communities is able to win REAL change for our towns and neighborhoods. For more information call: Lucas Sanchez...”⁸

The Employer’s witnesses:

Jose Cuautle:

Employee Jose Cuautle testified that he never had a conversation with an individual named Lucas Sanchez. (Tr. 15) In response to a question from the Employer’s attorney as to whether he had or witnessed a conversation with an individual named Lucas Sanchez, employee Jose Cuautle testified that he was leaving work and saw his comrade Alberto. “They” called to his co-worker Alberto. Alberto later told Cuautle that he had a brief conversation with Lucas Sanchez. Cuautle did not hear the conversation. (Tr. 15) Cuautle also testified that about a week before the May 2 election, he heard co-workers Francisco and Cecilio discussing the upcoming representation election in the front section of the Employer’s store. Cuautle testified that Cecilio said he would give his vote to whoever would pay the most. (Tr. 17-18, 20-21)

I credit the testimony of Cuautle that he did not have a conversation with Lucas Sanchez and that he did not hear the conversation between Sanchez and Alberto Lozada, which is not disputed by testimony given at the hearing by witness Alberto Lozada. With regard to Cuautle’s testimony concerning a conversation between employees Francisco and Cecilio, wherein Cecilio said that he would vote for whoever paid the most

⁸ The document described above, is part of the record, attached to Union Ex. 1(a).

money, Cuautle's testimony in this regard is essentially corroborated by Alberto Lozada. I note that the record is unclear as to whether the employee Francisco referred to by Cuautle is Employer witness Francisco Gomez who testified before me during the hearing. In this regard, I note that Francisco Gomez did not corroborate Cuautle's testimony about such a comment by employee Cecilio.⁹ Further, the specific context in which the alleged comment was made is undisclosed. Although Cuautle testified that he heard his co-workers discussing the election, his further testimony revealed that the only thing he heard was Cecilio "saying that he would give his vote to whoever would pay the most. Just that." In the circumstances of this case, I find it unnecessary to further address credibility related to the comment by employee Cecilio which is not probative evidence of either a promise of a financial reward or the dissemination of a promise of a financial reward by Lucas Sanchez.

Alberto Lozada:

Employee Alberto Lozada testified that shortly before the representation election he was approached by Lucas Sanchez at leaving time.¹⁰ Sanchez asked if "we" supported the Union. Lozada replied no. Sanchez said that if you support the Union you will get \$2,000. Lozada replied no, that he preferred working. (Tr. 23) Lozada never accepted money from Sanchez. (Tr. 24) Regarding this same conversation, Lozada later testified that Sanchez just walked up to him, told him if he supported the Union he would get

⁹ As noted below, Francisco Gomez testified that before the election, his co-workers, including Cecilio, said, "[S]upport us. Vote for the Union." (Tr. 81) Francisco Gomez' testimony does not reveal any such comment by Cecilio.

¹⁰ Lozada indicated in his testimony that this conversation occurred shortly before the representation election. When asked later in his testimony whether he knew the date of the conversation, he did not recall; when asked the month, he responded March. When asked whether it was the beginning, middle or end of March, he responded the middle. When asked if something happened that caused him to recall the middle of March, he responded that is when Sanchez was coming to the store. (Tr. 23, 65). In his previous affidavit provided by the Employer, Lozada testified that the timing of this conversation was about three weeks prior to the May 7 affidavit, which would indicate a date of about April 16.

\$2,000 and handed him the NY Communities for Change leaflet described above. (Tr. 65, 70, 72) The leaflet was written in English; it was the only paper that Sanchez gave him. (Tr. 65, 68) Lozada testified that Sanchez did not say anything when he handed Lozada the leaflet. (Tr. 68) No female was present during the conversation with Sanchez. (Tr. 69)

On cross-examination, Lozada testified that he was offered money for his vote only once; it was a Friday, when he was leaving work, around 8:10 p.m. about a block and a half away from the Employer's store.¹¹ (Tr. 32) Lozada was walking with his friend/co-worker, Jose Cuautle. Sanchez approached only Lozada. Lozada stopped walking to talk to Sanchez. Cuautle was about two or three meters¹² in front of him. (Tr. 33) No one else was present at the time and that was the only time that Sanchez approached Lozada.

On re-direct Lozada testified that Lucas Sanchez said hello to him and then spoke to him. Sanchez said, "If you help the Union to come into the store we'll give you \$2,000." Lozada had previously seen Sanchez giving out leaflets at the store before that night. (Tr. 43) When asked whether Sanchez offered only Lozada \$2,000 or was Cuautle included in the offer, Lozada testified that Cuautle was included in the offer.¹³ (Tr. 44) Lozada testified that Sanchez was not looking at both Cuautle and him at the time. (Tr. 44)

Lozada testified that he told one co-worker, his friend Jose Cuautle, that "they" had offered him money. Lozada told Cuautle that they should really think over what they

¹¹ Lozada testified that he punched out of work at 8:00 p.m.

¹² Lozada testified Cuautle was about two or three meters or about 6 or 9 feet away.

¹³ Lozada also testified that Sanchez said, "If you vote to bring in the Union, you'll get \$2,000." The interpreter indicated that Lozada used the plural form of you. Lozada testified that Sanchez spoke to him in Spanish.

were going to do. (Tr. 26, 28) More specifically, Lozada later testified that he spoke to co-worker Cuautle several times¹⁴ before the election about his conversation with Sanchez. The first time Cuautle and Lozada spoke about Lozada's encounter with Sanchez was the next day inside the Employer's store. (Tr. 45) Lozada testified that he said, "You know, yesterday I was talking to Sanchez and he offered me money. I said what do you think about that? Should we take it or keep working with our problems?" Cuautle responded that they would have to think it over. (Tr. 45-46) The next time Lozada and Cuautle spoke about this was about a week before the election in the store. Cuautle said that it was better to work and not have any problems. Lozada said okay. (Tr. 46) Lozada told only Cuautle about the \$2,000 statement; he did not tell any other employees. (Tr. 47, 69)

Lozada testified that he was present for the conversation between employees that witness Jose Cuautle testified about above, Lozada saw employees Cecilio, Silvestio and Francisco in the front of the grocery store. Lozada heard employee Cecilio say he would vote for whoever gave the most money. Lozada did not know whether anyone offered money to Cecilio, Silvestio or Francisco. (Tr. 24-25) Lozada did not tell any of those employees about the offer of money made to him. (Tr. 28)

Turning to credibility, after observing the demeanor and listening carefully to the testimony of Alberto Lozada, I specifically credit his testimony that in about mid-March, he had a conversation with Lucas Sanchez and that Sanchez contemporaneously handed him the NY Communities for Change document described above. However, I did not find Lozada to be forthcoming, he appeared hesitant to answer at times, and his testimony was internally inconsistent and inconsistent with his prior statement (taken by the

¹⁴ Also testified that spoke to Cuautle two times about his conversation with Sanchez. (Tr. 46, 47)

Employer's attorney). For example, Lozada was presented with the inconsistency between his testimony at the hearing that only Sanchez approached him on the night of their conversation and paragraph 4 of his sworn statement prepared by the Employer, wherein Lozada had reported that he was approached by Lozada and a female "Kelly." Lozada was asked at least three times for an explanation as to why he previously reported that two people approached him on this occasion. Lozada replied three times that only Sanchez came over to him without providing an explanation for the inconsistency. (Tr. 35-37) The last time Lozada was asked for an explanation as to the inconsistency between his testimony at hearing and his prior statement on the presence of Kelly, Lozada testified that Kelly "came over" when "they" were demonstrating, on a separate occasion. (Tr. 37-38, 41) Lozada testified that Kelly approached him at another time when "they" were doing a campaign or demonstration. (Tr. 39, 41) Lozada admitted that there was no campaigning going on the night of his conversation with Sanchez. (Tr. 41) While Lozada continued to testify that only Sanchez approached him on that night in question, he also continued to insist on the truth of paragraph 4 of his written statement, which states that he was approached by a Sanchez and a woman named Kelly on the night in question. (Tr. 39) Additionally, Lozada testified at the hearing that Sanchez approached just him that Sanchez just spoke to him, not coworker Jose Cuautle and that Cuautle was about three meters (or about nine feet) in front of him when Sanchez spoke. (Tr. 33, 38, 39) However, Lozada also repeatedly testified that paragraph 5 of his previous sworn statement, wherein he reported that Sanchez spoke to both Lozada and Cuautle as they stood on the sidewalk, was true. (Tr. 38) In this regard, at one point Lozada testified that Cuautle just listened because he was about three meters away. (Tr.

39) Then Lozada testified that he thought Sanchez was speaking to both himself and Cuautle but since Cuautle had to take the train, Cuautle kept on walking and was three meters or about nine feet in front of Lozada and Sanchez. (Tr. 39, 41) When the remainder of paragraph 5 was read to Lozada, i.e., that “He told us that we each could get \$2,000 a piece in exchange for their support for the Union,” Lozada admitted that Sanchez did not shout this offer to Cuautle who was 3 meters or 9 feet ahead of them. And when the first sentence of paragraph 5 of Lozada’s statement was read again, i.e., that “ [Sanchez] did all the talking to [Cuautle] and me as we stood on the sidewalk,” Lozada admitted that Cuautle was not “standing” on the sidewalk, that he continued to walk (towards the train) and was moving. (Tr. 41-42) Further, Lozada testified that the day after his conversation with Sanchez, he told employee Cuautle, “You know, yesterday I was talking to Sanchez and he offered *me* money...” [emphasis provided] (Tr. 45) Such a statement to Cuautle would not be logical if Sanchez spoke to both men together the day before and offered both of them money during the conversation. Finally, with regard to questions related to the circumstances of his providing the Employer prepared statement, the Lozada appeared nervous, was hesitant, and provided shifting testimony. For example, Lozada initially testified that owner Sonny Kim wrote his statement which focused on his conversation with Sanchez. (Tr. 50) Thereafter, Lozada testified that he did not tell Kim about his conversation with Sanchez. (Tr. 54) However, when asked by the Employer’s attorney whether he told Kim about his conversation with Sanchez, he responded affirmatively. (Tr. 59) Thereafter, Lozada shifted back again and testified that he did not tell Kim about his conversation with Sanchez. (Tr. 61-62)¹⁵

¹⁵ I note that Kim was present during witness testimony at the hearing.

In light of the foregoing, and considering that Sanchez contemporaneously gave Lozada the NY Communities for Change leaflet referring to a lawsuit filed by employees to receive back pay for years of earning below the minimum wage, I am not confident that Lozada's testimony related to this conversation with Sanchez was complete and/or accurately described. I also note that the testimony of employee witness Francisco Gomez below indicates employee awareness that Sanchez's discussion of money was related to not being paid the right amount for his wages, i.e., the back pay issue.¹⁶ I credit Lozada's testimony that when Sanchez mentioned the money, Lozada told Sanchez no, that he preferred working, that Lozada never accepted money from Sanchez and did not talk to him again. Similarly, I credit Lozada's testimony that after he told employee Jose Cuautle about his conversation with Sanchez, Cuautle was uninterested.

Francisco Gomez:

Employee Francisco Gomez testified that "a long while ago," Lucas Sanchez came to his house.¹⁷ Sanchez told Gomez about a lawsuit and employees at Master Food. Sanchez told Gomez that the employees at Master Food "won already." Sanchez offered to bring Gomez a representative from Master Food but Gomez said that would not be necessary. (Tr. 88-89) Sanchez handed Gomez a printed document when Sanchez came to his house. Gomez testified that Sanchez said "what are you waiting for? Come on in, support us with the -- support the Union," and he gave Gomez the document. (Tr. 76-77)

¹⁶ While Lozada described a conversation with co-worker Cuautle as to whether they should take the money or keep working with their problems, this testimony about the conversation does not reveal the problems referenced. (Tr. 46)

¹⁷ Tr. 89. While Gomez did not provide a specific date of the home visit, he testified that "They've been trying to get in for about a year."

Gomez also testified that Sanchez gave him two pieces of paper, one an 8½” by 11” sheet of paper¹⁸ and another piece of note paper, smaller with typed print.¹⁹ (Tr. 84-85).

Gomez testified that thereafter, he spoke to Lucas Sanchez on March 4 or 5, when he went out to pay his cell phone bill at about 6:30. (Tr. 76, 85, 98) Sanchez greeted Gomez about a block from the Employer’s facility; Gomez told Sanchez to wait because he had to pay his phone bill. Sanchez waited for Gomez outside a pizzeria next to the Metro PCS phone store. (Tr. 86-87) When Gomez came out of the phone store, Sanchez asked what was happening; he told Gomez to support the union. Sanchez said that “The money is already on the table.” (Tr. 76, 86) Gomez testified that this statement was made by Sanchez in connection with Master Food. (Tr. 97) In this regard, during the conversation, Sanchez told Gomez that “at a store called Master Food we already won; it’ll be like that here.” Sanchez asked Gomez what he thought and Gomez told him to let him think about it. (Tr. 76, 86) Gomez also testified that he told Gomez that he was not interested in the money. (Tr. 95) Later, in response to a question on cross-examination about whether an amount of money was mentioned, Gomez testified, “I asked him how much is it. He said you’ve been here a while. He said from \$8,000 down.” Gomez testified that he “supposed” this was because he wasn’t paid the right amount for his wages. Gomez noted at this point in his testimony that he does not understand Spanish very well and Sanchez speaks “fancy Spanish;” Sanchez speaks fast and is difficult to understand. (Tr. 96-97) Gomez never spoke to Sanchez again. (Tr. 76) This was the only conversation Gomez had with Sanchez where money was discussed. (Tr. 92)

¹⁸ Gomez testified that this 8 ½” by 11” size sheet of paper, “said the Union on it.”

¹⁹ Gomez lost a piece of paper with Sanchez’ phone number on it. (Tr. 83-84)

Gomez testified that he heard a conversation between co-workers Sebastian, Cecilio and Martin, who were talking in Spanish as Gomez walked by. (78-79, 82) Gomez again testified that he does not speak Spanish very well (Tr. 80); that his native language is Q'eqchi, a native language in Central America.²⁰ Gomez testified that he does understand some Spanish but not very well. (79 -80) His co-workers Sebastian, Cecilio and Martin said, “[S]upport us. Vote for the Union.” (Tr. 81, 80-82) Gomez also testified that before the election his co-workers kept asking him to support them, to help them out. (Tr. 83) After the election, other employees made fun of him. They said that he was not a real man because he did not vote for the Union. (Tr. 82-83)

Owner Sonny Kim asked Gomez to sign an affidavit prepared by the Employer’s attorney. (Tr. 100) Gomez signed it even though he did not understand what it said. No one read him the affidavit.²¹ (Tr. 101-102). When asked why he signed the affidavit, Gomez admitted that he likes his job and that he “did not want to get involved with problems.” (Tr. 103-104) Gomez testified that owner Sonny Kim arranged for him to speak to the Employer’s attorney and Kim told him what to say to the Employer’s attorney. (Tr. 105) However he also testified that he told the Employer’s attorney the truth about his conversation with Sanchez. (Tr. 106)

Turning to credibility, after observing the demeanor and listening carefully to the testimony of Francisco Gomez, I credit his testimony that on about March 4 or 5, he had a conversation with Sanchez, that Sanchez spoke about Master Food and that Sanchez discussed money which Gomez believed was related to him not being paid the right amount for his wages, i.e., back pay owed. I note that there are inconsistencies between

²⁰ Gomez testified that he is from Guatemala. (Tr. 83)

²¹ Gomez testified that he did not want his boss to be mad at him and that he liked his job. (Tr. 103)

Gomez' affidavit and his testimony at hearing; he explained that he did not read the statement and he signed it because he did not want any problems. Indeed, Gomez indicated loyalty to his Employer, who gave him a job despite the fact that he did not know English. (Tr. 102) I also note that Gomez credibly indicated that although he understands some Spanish, Sanchez is difficult to understand. Thus, his testimony does not inspire complete confidence.

Further, while Gomez responded affirmatively to a question about whether he heard a conversation between his co-workers regarding money and the representation election, when asked what he heard specifically, there was no mention of money in the conversation. Instead, Gomez testified that his co-workers told him, "support us. Vote for the Union." (Tr. 81) Accordingly, I do not credit his testimony that would indicate he heard a conversation between his co-workers regarding money and the representation election.

DISCUSSION:

In third party cases involving threats, the Board will not overturn election results unless the third party's conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803. In third-party cases not involving threats, the Board has rephrased the standard, to evaluate 'whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside.' See e.g., *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004) (where electioneering by nonparties was evaluated). The Board has noted that this heightened standard for

objections based on third-party conduct reflects a recognition of the unfairness of saddling parties with the consequences of conduct over which they had no control. See *Independence Residences*, 355 NLRB No. 153 (2010).

The credited evidence presented at hearing shows that on March 4 or 5, Lucas Sanchez, had a conversation with employee Francisco Gomez wherein Sanchez spoke about Master Food. Sanchez also discussed money which Gomez believed was related to him not being paid the right amount for his wages, i.e., back pay. Since the evidence does not clearly show that this conversation took place after March 7 (the filing date of the earlier petition), the conversation took place outside the critical period. Accordingly, inasmuch as the evidence does not clearly establish that the aforementioned conversation took place during the critical period, it is not objectionable. *Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961). Additionally, the credited evidence presented at hearing shows that in about mid-March, Lucas Sanchez had a conversation with employee Alberto Lozada. Contemporaneously, Sanchez gave Lozada an 8½ inch by 11 inch size sheet of paper containing the letterhead, “NY Communities for Change,” with Sanchez’ name, phone number and his NY Communities for Change e-mail address on the bottom. More specifically, the document indicates that, “The Kensington and Brooklyn community support workers from Golden Farm supermarket (329 Church Ave),” in connection with the workers “suing the owner, Mr. Sonny Kim, for back pay owed to them after having worked for many years earning well below the minimum wage.” The above document states that, “New York Communities for Change is a coalition of working families in low and moderate income communities fighting for social and economic justice throughout New York State. We are working to ensure that

every family throughout New York has access to quality schools, affordable housing and good jobs. It is through the power-in-numbers approach that NY Communities is able to win REAL change for our towns and neighborhoods. For more information call: Lucas Sanchez...” The leaflet was in English; it was the only document Sanchez gave Lozada. As noted above, I do not credit Lozada’s testimony that Sanchez offered him \$2,000 for supporting or voting for the Union, as a reliable complete accounting of the facts. In the circumstances of this case, where Sanchez handed the NY Communities for Change leaflet to employee Lozada at the time of their conversation, it would be reasonable to conclude that Sanchez discussed money in connection with the lawsuit and back pay referred to in the leaflet. This is also consistent with employee Gomez’ testimony that indicated he believed the money Sanchez referred to in their March 4th or 5th conversation was related to him not being paid the right amount for his wages, i.e., back pay owed. In this regard, I note that the Board has recently held in *Stericycle, Inc.*, 357 NLRB No. 61 (2011), that a union engages in objectionable conduct warranting a second election by financing a lawsuit *filed during the critical period* which states claims under Federal or State wage and hour laws or other similar employment law claims on behalf of employees in the unit. Here, there is no evidence that the lawsuit referred to in the leaflet was filed by the Union or a third party during the critical period.²² Moreover, even assuming Sanchez, a third party, promised to file a lawsuit on behalf of Lozada, in the circumstances of this case, I do not find such a promise would be objectionable. In this regard, a promise to assist an employee concerning his rights under labor laws or to improve his terms and conditions of employment is clearly distinguishable from objectionable union conduct which bears no connection to the employer-employee

²² The Employer would be in a position to know who filed a lawsuit against it and when it was filed.

relationship. Further, Lozada testified that when Sanchez mentioned the \$2,000 to him, he declined and stated that he preferred working. Lozada also testified that Jose Cuautle, the only other employee that knew about his conversation with Sanchez, also indicated no interest in Sanchez' offer. Accordingly, there does not appear to be evidence that such a promise substantially impaired the exercise of free choice.²³ Compare *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004)

SUMMARY AND RECOMMENDATIONS

Based upon the findings of fact, credibility resolutions, and discussion of the applicable legal principles, it is recommended that Employer Objection Nos. 1 and 2 be overruled. I further recommend that the request for withdrawal of the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election, be approved. As the Tally of Ballots shows that a majority of the valid votes counted has been cast for the Petitioner, it is recommended that a Certification of Representative be issued.

RIGHT TO FILE EXCEPTIONS

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party, within fourteen (14) days from the date of the issuance of this Report, may file with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C., 20570-0001, an original and eight (8) copies of exceptions to such Report, with supporting brief if desired. A copy of such exceptions together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Board. Within seven (7) days from

²³ Although the conversation between Sanchez and employee Gomez took place outside the critical period, I note that Gomez also testified that he told Sanchez that he was not interested in the money. (Tr. 95)

the last date on which exceptions may be filed, a party opposing the exceptions may file an original and eight (8) copies of an answering brief with the Board. If no exceptions are filed to such Report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. Exceptions must be received by the Board in Washington D.C. before August 10, 2012.

Dated at Brooklyn, New York, this 27th day of July, 2012.



Tracy Belfiore
Hearing Officer
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