

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

SUIZA DAIRY CORPORATION

Employer

and

CENTRAL GENERAL DE TRABAJADORES

Petitioner

Case 24-RC-090254

and

UNION INSULAR DE TRABAJADORES
INDUSTRIALES Y CONSTRUCCIONES
ELECTRICAS (UITICE)

Incumbent

**REPORT AND RECOMMENDATION ON OBJECTIONS
AND CHALLENGES AND NOTICE OF HEARING**

Pursuant to a Stipulated Election Agreement executed by the parties and approved by the undersigned Acting Regional Director on October 11, 2012, an election by secret ballot was conducted on October 30, 2012.¹ The tally of ballots made available and distributed to the parties on October 31, 2012², revealed the following:

Approximate number of eligible voters	161
Void ballots	0
Votes cast for Petitioner	81
Votes cast for Incumbent	79
Votes cast against participating labor organization	1
Valid votes counted	161
Challenged ballots	11
Valid votes counted plus challenged ballots	172

¹ The unit includes all production and maintenance employees, refrigeration department employees, employees that work in the refrigerator extension and the warehouse runner employed by the Employer at its facility in San Juan, but excluding all other employees, temporary employees, office clerical employees, quality control employees, guards and supervisors as defined in the Act, to determine whether or not said employees desired to be represented for the purpose of collective bargaining by Union Central de Trabajadores (Petitioner) or Union Insular de Trabajadores Industriales y Construcciones Eléctricas (Incumbent).

² The counting of the ballots took place in the Regional office on October 31, 2012.

The tally of ballots reflects that challenges are sufficient in number to affect the results of the election and that a majority of the valid votes counted plus challenged ballots have not been cast for either the Petitioner or the Incumbent.

Pursuant to the Stipulated Election Agreement, and in conformity with Section 102.69 of the Board's rules and Regulations, the undersigned Regional Director caused an investigation to be made of the issues raised by the challenged ballots and sets forth her findings and recommendations with respect thereto.

THE CHALLENGES

The following employees whose names were not on the voting list were all challenged by the Board Agent at the election: Eduardo Vazquez Echevarria, José J. Sáez Rosa, Francisco García Jimenez, Yadiel Torres Santiago, Jorge De Jesus, Xavier D. Berrios Rodriguez, Eliz Henriquez Quezada, Omar E. Osorio Santana, Ricardo J. Ortiz Davila³, Rafael Warner Correa, and Wilfredo Ortiz Alicea. Although requested to do so, only the Employer and the Incumbent submitted a written position on these challenged ballots. Upon being telephonically contacted by the Region, the Petitioner stated that its position was that all challenged ballots should be opened and counted.

As there appears⁴ to be no dispute that challenged voters Eduardo Vazquez Echevarria and Eliz Henriquez Quezada are indeed regular employees and that their votes should be counted, I recommend that the challenges to the ballots of Eduardo Vazquez Echevarria and Eliz Henriquez Quezada be overruled and these ballots be opened and counted on a date, place and time to be designated by the Regional Director.

³ The Employer claims that there is no employee named Ricardo J. Ortiz Davila that works for the Employer. Nevertheless, it does contend that an individual who is classified as a temporary employee named "Ricardo Freytes Davila".

⁴ Although requested to do so, the incumbent did not take any position with regard to these challenges. Nevertheless, it does not appear that they have any objection to opening and counting their votes.

The Employer and Incumbent agree that the challenged ballots of José J. Sáez Rosa, Francisco García Jimenez, Yadiel Torres Santiago, Jorge De Jesus, Xavier D. Berrios Rodriguez and Omar E. Osorio Santana are temporary employees and are not eligible to vote. With regard to Rafael Warner Correa the Employer's position is that he is also a temporary employee whereas the Incumbent did not express its position regarding this employee.

As noted, the Employer claims that an individual by the name of "Ricardo Freytes Davila" and not "Ricardo J. Ortiz Davila" is assigned by an unrelated entity known as "IKON Group", with whom the Employer contracts to supply labor at its facility. The Employer essentially makes the same contention as to an individual known as "Wilfredo Ortiz Alicea" who is purportedly an employee of another unrelated entity known as "Preferred Resources Solutions, Inc." that provides the employer with personnel to work at its facilities. The Employer asserts that the challenges to the votes of these individuals be sustained. Without providing any reasons therefore, the Incumbent argues that these two individuals are "temporary" employees and their votes not be counted whereas the Petitioner urges that their votes be counted.

As the issues herein raise substantial and material issues of fact and credibility which can best be resolved on the basis of record testimony, a hearing shall be directed to determine whether the votes cast by José J. Sáez Rosa, Francisco García Jimenez, Yadiel Torres Santiago, Jorge De Jesus, Xavier D. Berrios Rodriguez, Omar E. Osorio Santana, Ricardo Freytes Davila (or Ricardo J. Ortiz Davila), Rafael Warner Correa, and Wilfredo Ortiz Alicea shall be opened and counted or whether the challenge to their votes should be sustained.

THE OBJECTIONS

On November 7, 2012, the Incumbent submitted timely objections to the election consisting of seven numbered paragraphs which are discussed below.

Objection 1

This objection alleges that the Petitioner promised benefits and better working conditions to employees. In support of this objection the Incumbent submitted a copy of a leaflet that was allegedly distributed by the Petitioner promising employees that, if elected, it would allow them to retain their medical plan coverage but without having to pay the \$72.00 contribution presently required under the plan. Essentially, what the Incumbent claims is that this offer would be impossible to achieve because the medical plan was contracted by Incumbent and the medical plan carrier and that Petitioner could not possibly obtain better costs.

Under Board Law, union promises of benefits have customarily been considered part of the give and take of campaign propaganda and are not legally objectionable. See: *Midland National Life Insurance, Company*, 263 NLRB 127, 130 (1982). The Board has reasoned that an employer has it within its power to implement promises of benefits, whereas the union does not, and employees will be aware of such distinction. Employees are generally able to understand that a Union cannot obtain benefits automatically by winning an election; but must seek to win them through collective bargaining. Union promises are easily recognized by employees to be dependent on contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within its power to implement promises of benefits. *Smith Co.*, 192 NLRB 1098 (1971); *DLC Corp., d/b/a Fleet Boston Pavilion*, 333 NLRB 655 (2001). In *Lalique N.A., Inc.*, 339 NLRB 1119 (2003) the Board held that the union's promise of

medical benefits if it won the election was not objectionable. On this basis I recommend that the Incumbent's Objection No. 1 overruled.

Objection No. 2

With regards to objection No. 2, the Incumbent essentially refers to two incidents. In the first, an employee states that an unnamed individual purportedly associated to Petitioner sometime before the election "maintained an aggressive, intimidating and harassing" attitude towards him which incident prompted him to file a complaint with the Employer's office of Occupational Security. This same witness states that on the day of the election, he had to calm down and convince an eligible voter who was purportedly "intimidated" by someone associated with Petitioner.

As the purported testimony submitted in support of this objection is devoid of any facts that, if true, could establish that either agents and/or third parties associated with the Petitioner made coercive statements, threats, or otherwise engaged in any objectionable conduct. On this basis I recommend that Objection 2 be overruled.

Objections No. 3 and 4

Inasmuch as these objections are related, they will be discussed together.

As noted, Objection No. 3 essentially claims that Board agent Veronica Morales failed to maintain a peaceful and respectful environment during the election process by allowing Petitioner's representative Jose Budet to engage in verbal confrontations with the Employer's representatives. In support of this objection, the Incumbent offered the testimony of witnesses that essentially state that during the counting of the ballots Petitioner's representative, Jose Budet, was disrespectful towards the Employer's representatives and that Petitioner's representative Alejandro Lozada (a former employee) invited Incumbent's representative Máximo Vidal to fight. Objection No. 4 essentially claims that Petitioner's representative, Alejandro Lozada, was disrespectful towards Incumbent's

representative, Máximo Vidal, during the election process in the presence of other employees and instigated a “violent incident”. In support of these objections, the Incumbent offered the testimony of Vidal who purportedly was subjected to threats and intimidation by Alejandro Lozada, a former employee of the Employer, in the presence of other employees including receiving several threatening text messages. The Incumbent does not specify the alleged threats or intimidation, nor does it identify the employees who allegedly witnessed the incidents. Further, the Incumbent did not provide any evidence regarding the alleged text messages received by Vidal.

In an objections investigation, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election. To balance the interests of insuring that employees have a fair chance to express their choice with the requirement that elections have at least a reasonable degree of finality, the Board has explicated a set of standards by which to judge whether conduct will be sufficient to set aside an election. In *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001), the Board stated:

[T]he proper test for evaluating conduct of a party is an objective one- whether it has “tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). In determining whether a party’s misconduct has the tendency to interfere with employees’ freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the

degree to which the misconduct can be attributed to the party. See e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

In the instant case, the Incumbent has failed to meet this burden as the evidence submitted did not establish that the alleged Board agent conduct or the alleged threats and intimidation suffered by Vidal affected the results of the election and/or that employees were disenfranchised. Furthermore, it must be noted that the conduct attributed to the Board agent admittedly took place after the election was held. Accordingly, it is recommended that Objections No. 3 and 4 be overruled.

Objection No. 5

As noted, objection No. 5 essentially claims that the Petitioner engaged in a campaign of threats and intimidation where employees were told “be careful on what you plan to do, you could get into trouble; remember we are in election time”. In support of this allegation the Incumbent proposed the testimony of two witnesses who purportedly received threatening text messages during the election process and that Petitioner’s representative Lozada intimidated a witness by gesticulating violently in front of other employees. The Incumbent submitted copies of the alleged messages with regard to one of the witnesses; however, the purported objectionable communication does not identify who is the sender or the receiver of these messages. Further, the messages were received on September 21, 2012, and the petition in this case was not filed until September 28, 2012. With regard to the other alleged message received, the Incumbent did not submit any evidence to support this incident. As to the alleged intimidation of a witness by Lozada, the proposed testimony offered by the Incumbent refers to pre and post election conduct. The proposed testimony does not specify or describe with any particularity the alleged threats or intimidation purportedly made. Further, it does not identify the employees that were present during the alleged incidents.

The party seeking to set aside the election results must submit a *prima facie* evidence "of a kind which would be admissible into evidence at a hearing and subjected to evaluation as to its weight and probative force." *Grants Furniture Plaza, Inc.* 213 NLRB 410 (1974). Thus, the burden placed on the objecting party is a heavy one because specific evidence is required. *NLRB v. Claxton Mfg. Co.*, 613 F2d 1364, 1366 (5th Cir. 1980). Furthermore, in an objections investigation, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F2d 191, 195 (7th Cir. 1988); *Progress Industries, supra*. Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election. Accordingly, it is recommended that Objection No. 5 be overruled.

Objection No. 6

As noted, objection No. 6 essentially claims that the *Excelsior* list was notified to the Incumbent on October 25, 2012. In support of this objection the Incumbent submitted a letter sent by the Region dated October 23, 2012. The letter contains a receipt that includes a date signed by an unidentified representative of the Incumbent reflecting therein that the same was received on October 25, 2012. The Regional file shows that the *Excelsior* list was received from the Employer by email on October 22, 2012. On October 23, 2012, the list was sent to Incumbent by facsimile. A receipt of confirmation shows that the fax was received by the Incumbent on October 23, 2012. According to *Excelsior Underwear*, 156 NLRB 1236 (1966), to be timely, the *Excelsior* list should have been received by the Incumbent on or before October 19, 2012. Extant Board law establishes that untimely receipt of the *Excelsior* list constitutes grounds for setting aside an election. Accordingly, as the Employer did not submit the *Excelsior* list on a timely basis and the Petitioner did not

have the required 10 days to communicate with employees, I recommend that the election be set aside and a new election be conducted.

Objection No. 7

As noted, objection No. 7 claims that there were about 50 or more people that signed the petition who were not employed by the Employer. On October 15, 2012 the Incumbent submitted its evidence in support of an allegation that the showing of interest submitted by the Petitioner was fraudulent or tainted. The allegations of fraud were investigated by the Region and on October 26, 2012, the parties were advised that upon the conclusion of the investigation, the Region was satisfied with the showing of interest submitted by the Petitioner. Extant Board law establishes that the adequacy of the Petitioner's showing of interest is not a subject of litigation. *O.D. Jennings & Co.*, 68 NLRB 516 (1946). Accordingly, it is recommended that Objection No. 7 be overruled.

RECOMMENDATION

It is hereby recommended that the challenges to the ballots of Eduardo Vazquez Echevarria and Eliz Henriquez Quezada be overruled and that these ballots be opened and counted on a date and time to be designated by the undersigned Regional Director. Further, it is hereby recommended that the challenges to the ballots of José J. Sáez Rosa, Francisco García Jimenez, Yadiel Torres Santiago, Jorge De Jesus, Xavier D. Berrios Rodriguez, Omar E. Osorio Santana, Ricardo J. Ortiz Davila, Rafael Warner Correa, and Wilfredo Ortiz Alicea, be set for hearing to determine the issues raised by these challenges. It is also recommended that the Incumbent's objections Nos. 1, 2, 3, 4, 5, and 7 be overruled in their entirety. Finally, having found merit to Incumbent's objection No. 6, it is recommended that the election be set aside and a new election be conducted at a time and

place to be designated by the undersigned Regional Director only if, after the resolution and counting of the challenged ballots, a majority of the valid votes counted are not counted in favor of the Incumbent.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on December 18, 2012 at 9:30 a.m. and continuing on consecutive days thereafter until concluded, at the NLRB Hearing Room, La Torre de Plaza, Plaza Las Américas Mall, Suite 1002, 525 F.D. Roosevelt Ave., San Juan, Puerto Rico, a hearing will be conducted before a duly designated Hearing Officer of the National Labor Relations Board, at which time and place the parties will have the right to appear in person, or otherwise, and give testimony with respect to the challenges to the ballots of José J. Sáez Rosa, Francisco García Jimenez, Yadiel Torres Santiago, Jorge De Jesus, Xavier D. Berrios Rodriguez, Omar E. Osorio Santana, Ricardo J. Ortiz Davila, Rafael Warner Correa, and Wilfredo Ortiz Alicea.

APPEAL PROCEDURE

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the

Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on December 14, 2012, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than December 14, 2012, 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁵ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. *Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated on November 30, 2012, at San Juan, Puerto Rico.



A handwritten signature in cursive script that reads "Marta M. Figueroa".

Marta M. Figueroa
Regional Director, Region 24
National Labor Relations Board
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San Juan, Puerto Rico 00918-1002
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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case: 24-RC-090254
Suiza Dairy Corporation

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in **detail**;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; **and**

(5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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INDUSTRIALES Y CONSTRUCCION
ELECTRICAS (UITICE)**

Union

AFFIDAVIT OF SERVICE OF: Report and Recommendation on Objections and Challenges and Notice of Hearing, dated November 30, 2012.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 30, 2012, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

MANUEL VELAZQUEZ , DIRECTOR SUIZA DAIRY CORPORATION PO BOX 363207 SAN JUAN, PR 00936-3207	PEDRO RIVERA PEREZ, ESQ. UNION INSULAR DE TRABAJADORES INDUSTRIALES Y CONSTRUCCION ELECTRICAS (UITICE) P.O. BOX 2038 GUAYNABO, PR 00970-2038
ANGEL MUNOZ-NOYA , ESQ. SANCHEZ BETANCES - SIFRE - MUÑOZ- NOYA & RIVERA, C.S.P. PO BOX 364428 SAN JUAN, PR 00936-4428	SCOTT BARBES , Union Representative CENTRAL GENERAL DE TRABAJADORES PO BOX 192901 SAN JUAN, PR 00919-2901

November 30, 2012

Date

Teresita Sanabria,
Designated Agent of NLRB
Name



Signature