

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

SUIZA DAIRY CORPORATION^[1]

Employer

and

Case 24-RC-100527

CENTRAL GENERAL DE TRABAJADORES

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on April 3 and 9, 2013, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.^[2]

^[1] The Employer's name appears as amended by stipulation of the parties.

^[2] The parties filed their respective briefs, which have been duly considered. Upon the entire record in this proceeding, including the stipulations of the parties, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.
- c. The parties stipulated, and I find, that the Employer, Suiza Dairy Corporation, is a Puerto Rico corporation engaged in the distribution and production of juice, dairy products and its derivatives with its principal office and place of business in San Juan, Puerto Rico and warehouse and distribution facilities in Ponce, Hatillo, Aguadilla and Juncos. During the past 12 months, which period is representative of its annual operations described above generally, the Employer derived gross revenues valued in excess of \$500,000 and purchased and caused to be transported and delivered to its San Juan, Puerto Rico facilities, goods valued in excess of \$50,000 directly from points outside the Commonwealth of Puerto Rico.
- d. The parties stipulated, and based on the above I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.
- e. The parties stipulated, and I find, that the following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

INCLUDED: All regular full time and regular part time refrigeration warehouse employees, utilities and drivers employed by the Employer at its facility located in Juncos, Puerto Rico.

I. ISSUE:

Whether the Employer's purported closing of the refrigeration department in Juncos, Puerto Rico is imminent and if so, should the instant petition be dismissed.

II. OVERVIEW OF EMPLOYER'S OPERATIONS

As noted, the Employer is a Puerto Rico corporation engaged in the distribution and production of juice, dairy products and its derivatives with its principal office and place of business in San Juan, Puerto Rico. The Employer also owns and operates five other facilities used to refrigerate and distribute its products in San Juan, Ponce, Hatillo, Aguadilla, and Juncos. More particularly, each branch provides services to a different geographical area. The San Juan branch is the principal site and place of business and contains the employer's main offices and primary production and distribution center. Aguadilla is also dedicated to production and distribution, while the Hatillo and Ponce sites are solely distribution centers. A new branch, Toa Baja, is currently in the process of becoming an additional refrigerated storage facility.

The Employer's Juncos facility employs about 77 total employees. Besides 14 utility employees, the company employs 24 salesmen, 14 fleet employees, 21 merchandisers and 4 administrative employees. The utility employees load and unload the company's products from delivery trucks to a refrigerated warehouse. These utility employees also load the products on the Employer's trucks which are used to deliver these products to wholesalers, who in turn, sell them to consumers in the Juncos geographical area. Petitioner currently represents all but the employees covered by this petition that work in Juncos.

III. FACTS

The Issue Regarding Imminent Cessation of the Juncos Refrigeration Department

Human Resources Director Manuel Velázquez ("HR Director" or "Velázquez") testified that since October 2012, the Employer's management team began a series of changes to make its operation more profitable. About December 5, 2012, he received internal communication from his General Manager summarizing the Company's reorganization plans for 2013, which included the closing of the Juncos site in May 2013 and the transferring of the distribution routes to San Juan. Velázquez explained that when they referred to "closing out" the Juncos site, they meant eliminating the freezer area as it was costly to operate because of the high cost of electricity.

Velázquez testified that the Employer had started the restructuring process in Juncos about January and February 2013. Specifically, he stated that in January the Employer eliminated the routes that the salesmen worked on known as "the key

EXCLUDED: All other employees, guards and supervisors as defined in the Act.

There are 14 employees included in the stipulated unit.

accounts”.^[3] After that, on February 5, 2013, the Employer eliminated five utility positions in the refrigerator area. He further testified that on April 19, 2013 the Employer anticipated closing the refrigerated storage and afterwards the trucks would be loaded in San Juan, driven to and from Juncos to their respective customers. By loading the trucks in San Juan instead of Juncos, the 14 utility employees would no longer be needed. Velázquez testified that by May 2013, the closing of the refrigeration department would be complete.

Velázquez explained that as a result of the restructuring, all 14 utility employees were expected to be laid off without any reasonable expectancy of recall. More particularly, Velázquez stated that utility employees would be laid off on April 19th and that their duties would be performed by San Juan utility employees, who are currently represented by another labor organization.^[4] According to the Employer’s Director of Distribution and Fleet, Carlos Merced, the Employer’s plan to change the operations was intended to make the Juncos facility a specialized place for the mechanics that repair and maintain the company’s vehicles by the summer of 2013. According to Merced the Juncos operations would be limited to work performed by 18 direct sales distribution (DSD) routes, which are presently being loaded with the Company’s products in Juncos. However, after April 19, 2013 those 18 routes would be loaded in San Juan.

With respect to notice to the 14 utility employees about their possible layoffs, Velázquez initially testified that the utility employees had been notified that they would be laid off on February 5th, 2013. However, he later acknowledged that he did not notify the utility employees at that time because he did not have a specific date of the closing and considered that the information was too sensitive to disseminate to employees. While Velázquez also testified that the notification occurred in a meeting with the supervisor and all of the remaining employees, and that the layoff letters were given to the five employees that were affected, he clarified that he had not been present at said meeting where this had occurred. Additionally, while he stated that the Director of Distribution and Fleet, Carlos Merced, (“Merced”) would testify about such matters, Merced subsequently denied his attendance in that meeting or any other meeting in which utility employees were notified that they were going to be laid off. Merced, in turn, admitted that Human Resources Manager Yarimar Delgado (“HR Manager Delgado”) and Distribution Supervisor Hector Lozada (“Lozada”) met individually with the five utility employees that were laid off but did not meet with the remaining 14 utility employees included in this petition.

Merced further testified that after the five utility employees were laid-off “the rest of the employees” started asking questions about the layoffs. However, because the Employer had no fixed date to give them they were merely apprised that “in the future Juncos was not going to exist because they were going to be transferred to San Juan”. Lozada testified that he had no recollection of any meeting with utility employees prior to March 8, 2013 and denied that on such meeting, he informed the utility employees of any date that contemplated the closing of the Juncos refrigeration department. Lozada further

^[3] Key account employees are responsible for distribution of items to large businesses or retail chain stores. Conversely, Direct Sales Distribution stores (DSD) are “mini-markets”, gas stations and corner grocery stores.

^[4] The record reflects that these employees are represented by Unión Insular de Trabajadores Industriales y Construcciones Electricas, Inc. (UITICE).

added that prior to that meeting of March 8, 2013, employees had been making comments about the closing of the freezer, but clarified that he understood that the same came about as a result of a meeting held with the sales department personnel, a meeting that Lozada did not attend.^[5]

Likewise, HR Manager Yarimar Delgado testified that she met individually with the employees that were being laid off, but she categorically denied having met with other utility employees.^[6] Additionally, HR Director Velázquez testified that the reason why the Employer had not notified the utility employees in Juncos -that they would be laid off on April 19th, 2013- was that the Employer was planning to do so during the week before the hearing. However, he claimed that because he was on vacation outside of Puerto Rico he wrongly assumed that it would be done, but that, in fact, no one took the time to notify the employees. In this regard, Velázquez also explained that they did not want to “create even more attention within the proceedings”.^[7]

Upon being questioned specifically if the Employer had already prepared the termination letters of the utility employees, HR Director Velázquez testified that they had not been prepared but that they could be prepared upon short notice. Similarly, he stated that the Employer had not notified the Union that represented the utility employees in San Juan that after the utility employees in Juncos were laid off, that the trucks would now be loaded by the San Juan utility employees. In this regard, Velázquez stated that the Employer did not notify the Union because in his opinion, it did not affect the working conditions of the utility employees in San Juan. He further testified that the Employer still had to decide how the change of loading the trucks in San Juan would be implemented because they were still considering several options. Velázquez also testified that the Employer was anticipating that the process of restructuring the company would be completed in May 2013, and that the financial results would be received by the middle to the end of May.

On the second day of the hearing, HR Director Velázquez, who was recalled as a witness for the Employer testified that his management team had met (apparently between the first and second day of the hearing) and decided the night before the start of the second day of hearing (April 9, 2013) that it made more sense to start closing the Juncos refrigerator on April 19th and to slowly move routes towards San Juan. That is, the loading of the trucks would be in San Juan, but salesmen would still deliver the Employer’s products from Juncos. Velázquez explained that he anticipated that in a month, or a month and a half, he anticipated that the Juncos refrigeration unit would be closed by June 2013. Velázquez specifically declined providing any specific details, but testified that they would be transferring the routes “little by little” from Juncos to San Juan. More particularly, he testified that as soon as enough accounts are transferred to San Juan to be loaded, they would eliminate

^[5] As noted, the Petitioner called as witness Orlando Medina, one of the utility employees that was laid off on March 8, 2013. He testified that before being laid off on March 8, 2013 he heard rumors that the refrigeration department in Juncos was going to close, but was never notified about it.

^[6] As noted, HR Manager Delgado testified that she is the person who was responsible for the Juncos, Ponce, and San Juan facilities and she was in charge of the process of informing utility employees about their layoffs and delivering their termination letters in February 28 and March 8, 2013. She also testified that prior to February 27th, when she was informed that she would be performing the layoffs, she had no knowledge about the terminations of the Juncos utility employees as a result of a closing on April 19, 2013.

^[7] Velázquez did not specify which proceedings he was referring to.

personnel from the Juncos refrigerator area. Nonetheless, he stated that they would be planning the transfer of routes “next week”, but that they do not have a timeline.

Velázquez also testified that the decision to delay the closing of the Juncos refrigerated storage was due to the fact that the Employer failed to timely secure a contract for the refrigerators at the Toa Baja site. Since they were focused on establishing the Toa Baja site as the Employer’s biggest refrigerated storage facility, closing the Juncos refrigerator sporadically instead of “all at once”, would allow them to focus on Toa Baja by performing repair work, securing permits, and ensuring that the refrigerators cooled to the appropriate temperature.

Finally, Velázquez stated that it is possible that between now and June 2013, there would be less employees working in the Juncos refrigeration area than there are presently because by June, they should be down to their last few employees at Juncos. However, Velázquez testified that he could not provide specific dates on which the utility employees would be discharged, neither provide an “exact decision” but that they will determine the date based on the prevailing circumstances. His testimony contradicted his earlier statement that the facility would close by June but that he could not specify what would happen and on which date it would occur.

Velázquez went on to explain that they decided that it made more sense to continue the restructuring plan during April and May instead of only in April, because they noticed that the Company had no control over the process of establishing the refrigerator unit in Toa Baja as it was owned by a third party. In that regard, Velázquez testified that the Employer knows that Juncos location would be closed down, but it appears to be contingent on the Toa Baja site, upon which the Employer admits, it has no control over such operation.

IV. LEGAL ANALYSIS

There is no definitive evidence of imminent cessation

In the Board’s seminal decision on cases involving expanding or contracting units, *Douglas Motors Corp.*, 128 NLRB 307, 308 (1960), it was held that when there is definitive evidence of an expanding or contracting unit, in order for an immediate election to be warranted, “the present work complement must be substantial and representative of the ultimate complement as projected both as to the number of employees and the number and kind of classifications.” Generally, an existing work complement of employees is substantial and representative when approximately 30 percent or more of the eventual complement is employed in 50 percent or more of the anticipated job classifications. *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1256 (2001); *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000), citing *Custom Deliveries*, 315 NLRB 1018, 1019 fn. 8 (1994).

Furthermore, a mere reduction in the number of employees is insufficient to warrant dismissal of the petition; the Board will also consider whether the reduction is a consequence of a “fundamental change in the nature of the Employer’s business operations.” *MJM Studios*, 336 NLRB at 1256, citing *Douglas Motors*, 128 NLRB at 308. A fundamental change in the Employer’s business operations is evidenced by the Employer shifting to a different type of business or eliminating aspects of its current business. *MJM Studios*, 336 NLRB at 1256.

The present work complement of employees is determined by the number of employees in the proposed bargaining unit on the date of the hearing. See, e.g., *Douglas Motors*, 128 NLRB at 308 (present complement determined as of the date of the hearing in contracting unit case); *Celotex Corp.*, 180 NLRB 62, 63 (1969) (same); *Plum Creek Lumber, Inc.*, 214 NLRB 619 (1974) (same).

“There have been numerous Board decisions establishing that where an employer’s operations are scheduled to terminate within three to four months that no useful purpose is served by directing an election.” *Davey McKee Corporation*, 308 NLRB 839, 840 (1992), citing *M. B. Kahn Construction Co., Inc.*, 210 NLRB 1050 (1974); *General Motors Corporation*, 88 NLRB 119 (1950); *Todd-Galveston Dry Docks, Inc.*, 54 NLRB 625 (1944); *Fraser-Brace Engineering Company, Inc.*, 38 NLRB 1263 (1942), and *Fruco Construction Company*, 38 NLRB 991 (1942). It is significant to note however, that petitions have been dismissed only in cases when a permanent layoff is both imminent and certain. *Hughes Aircraft Company*, 308 NLRB 82, 83 (1992). It is important that both factors be present. *Id.*, citing *Larson Plywood Company*, 223 NLRB 1161 (1976). In that regard, “mere speculation as to the uncertainty of future operations is not sufficient warrant for dismissing the petition”. See *Canterberry of Puerto Rico, Inc.*, 225 NLRB 309 (1976), and *Gibson Electric*, 226 NLRB 1063 (1976).

In this case, these factors are not met because the Employer is currently still in operation, employing a full complement of employees and the evidence on the record indicates that the plan and the process of closing the Juncos refrigerator is not imminent and certain. In this respect, it is relevant that at the conclusion of the hearing, Velázquez testified that the Employer did not have specific dates in which the utility employees would be laid off. In this regard, Velázquez admitted that, although by June there would assertedly be fewer employees working at the Juncos refrigeration area, he could not provide the dates of their termination. He added that the decision to close would depend on the circumstances. Additionally, based on the objective evidence on the record, it is clear that the remaining 14 employees scheduled to be laid off have not been notified about the closing of the Juncos refrigeration department. In this regard, it should be pointed out that Supervisor Hector Lozada, who was the person identified by the Employer as the one who notified the rest of the employees that they would be eventually laid off, speculated that the employees started to feel discomfort about a possible closing of the refrigeration department due to rumors from other departments and not as a direct result of Lozada informing them. Ultimately, Velázquez admitted that as of the date of the hearing, the utility employees had not been notified about the closing of the refrigerator in Juncos. Velázquez testified that this oversight was due to the fact that he had gone on vacation and thought that someone else would have notified the employees in his absence. However, to his dismay, the employees had not been notified. It therefore appears that, although the Employer may have had a restructuring plan in progress, the overall circumstances as well as the uncertainty of fundamental aspects of the plan, suggests that the closing of the Juncos operations is not imminent.

Likewise, it is also relevant that the Employer shifted dates regarding the closing of the refrigeration department from April 19th to June 2013. Similarly, the record showed that the process of transferring the routes to San Juan would be done sporadically, nevertheless the same lacked planning. In this regard, although Velázquez stated that the General Manager planned to close the Juncos refrigeration department by June 2013, Velázquez admitted that he could not state specifically

what would happen and in which date it would happen mainly because it seemed to be contingent upon the availability of the new refrigerated storage in Toa Baja, which the Employer has no control of because it belongs to a third person.

Based on the overall record, the evidence tends to show that the future of the refrigeration department at the Juncos site is still uncertain, and the likelihood of an imminent closing speculative. It is clear under Board law precedent that mere speculation as to the uncertainty of future operations is insufficient to warrant the dismissal of a petition. See *Canterberry of Puerto Rico, Inc.*, 225 NLRB 309 (1976), and *Gibson Electric*, 226 NLRB 1063 (1976). The record revealed that it cannot be said with any degree of certainty that the Employer will cease operations in the refrigeration department at the Juncos site in June 2013. Therefore, because it is not both imminent and certain that the Employer will cease operations at in the refrigeration department at the Juncos site, the motion to dismiss the petition is denied. I also find that from the overall record evidence that there is a substantial complement of employees in the petitioned unit at the time of the hearing.

For the reasons set forth above, I conclude that it would be consistent with the provisions and policies of the Act to direct an immediate election.

V. THE UNIT

The following unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All regular full time and regular part time refrigeration warehouse employees, utilities and drivers employed by the Employer at its facility located in Juncos, Puerto Rico.

EXCLUDED: All other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.⁸ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible

⁸ As provided for in Section 103.20 of the Board's Rules and Regulations, the Employer is required to post copies of the Board's Official Notice of Election in conspicuous places at least 3 full working days (excluding the day of the election, Saturdays, Sundays, and holidays) prior to the date of the election; said notices are to remain posted until the end of the election. Failure to post the election notices as required by the Board's Rules and Regulations shall be grounds for setting aside the election whenever proper and timely objections are filed. An employer shall be conclusively deemed to have received copies of the election notices unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of said notices.

are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Central General de Trabajadores.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); North Macon Health Care Facility, 315 NLRB 359 (1994); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters in the unit found appropriate herein, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, La Torre de Plaza Suite 1002, 525 F.D. Roosevelt Ave., San Juan, Puerto Rico 00918-1002, on **May 9, 2013**. The list may be submitted by facsimile transmission or electronically as notified at the time of the filing of the petition. No extension of time to file the list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 - 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **May 16, 2013**, at 5:00 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 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 a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within

which to file.⁹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review 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 NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was offline or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated: **May 2, 2013.**¹⁰



/s/

Luis F. Padilla
Acting Regional Director, Region 24
National Labor Relations Board
La Torre de Plaza, Suite 1002
525 F.D. Roosevelt Avenue
San Juan, Puerto Rico 00918-1002

⁹ 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.

¹⁰ In accordance with section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlr.gov.