

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

BROOKLYN PARK AUTOMOTIVE, INC.

Employer

and

TEAMSTERS LOCAL 974

Petitioner

Case 18-RC-081708

**HEARING OFFICER'S REPORT
AND RECOMMENDATION TO THE BOARD ON OBJECTION
TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to a petition filed on May 24, 2012,¹ by Teamsters Local 974 (Petitioner) and a Stipulated Election Agreement executed by the parties and approved by the Regional Director on June 1, an election by secret ballot was conducted among certain employees² of Brooklyn Park Automotive, Inc. (the Employer) on June 28. The Tally of Ballots³ served on the parties after the election on June 28 included three challenged ballots – a number sufficient to affect the outcome

¹ Unless otherwise indicated, all dates are 2012.

² The collective bargaining unit contained in the Stipulated Election Agreement is as follows:

All full-time and regular part-time Technicians, Service Sales, Towermen, Parts Counters, Parts Drivers, Lubemen, Undercoaters, Detailers/Polishers, Janitors, Washers, Wholesale Parts, and Service Runners employed by the Employer at its Brooklyn Park facility; excluding New & Used Car Sales, Office Staff, and Guards and Supervisors as defined in the Act.

³ The Tally of Ballots shows:

Approximate number of eligible votes.....	45
Void ballots.....	1
Votes cast for Petitioner.....	20
Votes cast against participating labor organization.....	21
Number of valid votes counted.....	41
Number of challenged ballots.....	3
Number of valid votes counted plus challenged ballots.....	44

of the election. On July 12, the parties entered into a Stipulation on Challenged Ballots in which they agreed that two challenged ballots should not be opened for purposes of the June 28 election. The Regional Director approved the parties' Stipulation on Challenged Ballots and issued the Revised Tally of Ballots, which shows that the remaining challenged ballot is no longer determinative of the outcome of the election.⁴

On July 2, the Petitioner filed timely objections to conduct affecting the results of the election, a copy of which was served on the Employer. Thereafter, on July 17, the Regional Director for the Eighteenth Region issued a Report on Objections to Conduct Affecting the Results of the Election, Order Directing Hearing and Notice of Hearing, and ordered that a hearing be conducted for the purpose of receiving evidence to resolve the issues raised by the objections to the election. In his July 17 report and order, the Regional Director directed the hearing officer to prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues.

Accordingly, on July 26, a hearing was held pursuant to said notice in Minneapolis, Minnesota, before the undersigned hearing officer duly designated for the purposes of conducting such hearing. The Employer and Petitioner were represented at the hearing and had full opportunity to call, examine, and cross-examine witnesses, and to introduce evidence regarding the issues.

⁴ The Revised Tally of Ballots shows:

Approximate number of eligible votes.....	45
Void ballots.....	1
Votes cast for Petitioner.....	20
Votes cast against participating labor organization.....	21
Number of valid votes counted.....	41
Number of challenged ballots.....	1
Number of valid votes counted plus challenged ballots.....	42

Upon the entire record in this case,⁵ and from my careful observation of the demeanor of the witnesses while testifying under oath,⁶ I recommend overruling the objection in its entirety and issuing an appropriate Certification of Results of Election.

THE OBJECTION

In a letter dated July 2, Petitioner filed an objection to conduct affecting the results of the election.⁷ Pursuant to the objection, the Regional Director issued an order directing that a hearing be held with respect to “whether the Employer’s General Manager or Service Manager engaged in surveillance or otherwise interfered with the election by the alleged action of stationing themselves at the base of the stairwell leading to the polling place and/or by the alleged action of pulling employees inside an office.”

FINDINGS OF FACT

It is undisputed that the alleged misconduct in this case took place during the polling period. What is disputed is whether the general manager’s and service manager’s conduct was objectionable. To examine the objection, I will first describe the location of the office at the base

⁵ Permission was granted by the undersigned for the filing of briefs. The Employer and Petitioner subsequently filed briefs, which I have duly considered in formulating my recommendations.

⁶ In the resolution of all issues where credibility of oral testimony became a factor, I have carefully considered the demeanor and conduct of the witnesses, as well as their candor, their objectivity, their bias or lack thereof, and have carefully weighed the witnesses’ understanding of the matter to which they have testified, the plausibility, consistency and probability of their testimony, as well as whether parts of their testimony should be accepted when other parts are rejected.

⁷ The Petitioner asked to amend its objections at the hearing and I denied the request. The objections period is a statutorily set period and had ended approximately three weeks prior to the hearing. The objection filed by the Petitioner states as follows:

On or about June 28, the General Manager and the Service Manager stationed themselves in an office at the base of a stairwell leading to the second floor of the facility, where the voting was held, and were pulling employees inside to discuss voting. The bulk of the employees who were talked to on their way to vote were Body Shop employees who the Union previously contested and originally were not petitioned for.

of the staircase and the alleged interactions with voting employees. Next, I will discuss the roles of the individuals involved and the alleged surveillance. Finally, I will analyze the case law and discuss reasons why the alleged misconduct is not sufficient to require that the election be set aside.

Summary of Record Evidence

According to the Stipulated Election Agreement, the Employer is a Minnesota corporation with a facility located in Brooklyn Park, where it is engaged in the business of automotive retail sales and services. The Brooklyn Park facility includes two separate buildings: the “Subaru side” and the “Nissan side.” The buildings sit approximately 150 feet apart, Nissan on the east and Subaru on the west, each with separate showrooms and service areas.

Approximately 109 people are employed at the Brooklyn Park facility and perform services ranging from car sales to auto repair. The June 28 election was held from 1:30 p.m. to 3:30 p.m. in the “Nissan Conference Room,” which is on the second floor at the east end of the Nissan building.

Petitioner’s objection centers on the undisputed fact that on the day of the election, during the polling time, General Manager Carter Doolittle, along with Service Manager Ron Johnson, occupied for a period of time an office (“Office 110”) at the bottom of the staircase that several employees passed by on their way to vote. Thus, a significant amount of time was spent at the hearing discussing the location of Office 110 and whether, how much, or how easily, someone could see into the office from the stairs and vice versa, via a window.

The building has an east staircase and a west staircase, and employees are permitted to use either one. The west staircase is geographically closer to the Subaru building than is the east staircase, and the voting location was at the top of the east staircase but could also be accessed

by ascending the west staircase and walking east, through open space on the second floor of the building. The service aisle, which essentially is an indoor driveway where customers drop off their cars for maintenance, is located along the south side of the building and has doors at the base of each of the two staircases, so that a person standing in the service aisle could see people enter or exit either door but not know whether they were continuing their way down the hall toward the showroom or going up either set of stairs. The body shop technicians work off-site and drive to the Brooklyn Park facility as need be.

Carter Doolittle has been the general manager of the Brooklyn Park facility since December 5, 2010. He has office space in each building; at Subaru he has a private office approximately six feet off the showroom floor, and at Nissan he shares desk space on the open showroom floor alongside three other managers.

The service manager is a man by the name of Ron Johnson. Johnson did not testify at the hearing, but witnesses' testimony puts him in the same office as Doolittle for approximately three minutes during the polling time.

Chimeng Xiong, who works in detailing, and Tou Yang, a runner, both work in the Subaru building and testified that when they went to the Nissan building to vote in the June 28 election, they used the western staircase because it was the first one they came to after entering the Nissan building from the Subaru building. Xiong said that he and "most of the employees"⁸ also used the western staircase for the captive audience meetings held prior to the election, but, although Petitioner did not mention it in its brief, the record shows that Xiong also said that there

⁸ Though Xiong did not specify, based on the record testimony, I conclude that he meant "most of the employees" *from the Subaru side*, not most employees *overall*, use the west staircase, because he went on to state that the east staircase would be more convenient for the Nissan service technicians. In any event, this fact is not material to my decision.

are more service technicians in the Nissan building than the Subaru building, and the eastern staircase would be most convenient for a number of them.

Office 110 has a desk with one chair behind it facing out toward the staircase, visible through a large window, and two chairs facing the desk with their backs to the window and stairwell. As Petitioner states in its brief, Doolittle initially testified that the window only covers a portion of the door, and a person sitting behind the desk cannot necessarily see people approaching and ascending the stairs. However, all other witnesses testified to the contrary, Employer Exhibit 3 depicts the window as covering the entirety of the door and an additional portion of the wall, and Doolittle eventually admitted that he did see employees ascending and descending the stairs during the polling period. Thus, based on the sum of the evidence, and particularly Doolittle's ultimate admission, I conclude that there is no factual dispute that someone using the east staircase can see into the office and can be seen from the office, albeit not on every single step.

Lube Technician Jason Gross testified that when he went up the west stairs to vote, he saw Doolittle sitting alone⁹ at the desk in Office 110; and as he ascended the stairs, he passed three body shop employees, identifiable because of their uniforms, on their way down the stairs. When he returned from voting, he saw these three employees in Office 110 with Doolittle; Doolittle was sitting at the desk facing the stairs and the three body shop employees were facing Doolittle with their backs to the window. Employees Xiong and Yang testified that when they went upstairs to vote, they saw Doolittle and three body shop employees in Office 110; and Xiong testified that he looked at Doolittle and Doolittle looked back at him. As they went up the

⁹ Gross's testimony conflicts with that of Cobb and Doolittle, who testified that Doolittle was never alone in Office 110. However, because the additional facts show that Doolittle was not engaging in surveillance, I find it unnecessary to resolve this conflict.

stairs, Yang testified, Gross was heading down.¹⁰ After Xiong and Yang voted, approximately five minutes after walking by Office 110 on their way upstairs, they walked back down the west staircase and again saw Doolittle and the same three body shop employees in Office 110. Xiong waved and Doolittle waved back, and Xiong and Yang walked back to the Subaru building. Thus, there is no factual dispute that Doolittle was in Office 110 with three body shop technicians during the polling period. By way of background, I will discuss Doolittle's reason for being in Office 110 and what he was doing while he was there. However, the legal issue is whether this undisputed conduct constitutes surveillance requiring that the election be set aside.

Sales Consultant Joe Cobb and Doolittle offered the following explanation: Cobb was closing on a new house on June 29 and needed to talk to Doolittle on the 28th so he could ask for time off without going through the standard request procedure. Cobb says that because he is usually the top salesman in the store and it was the close of the month, and because the objective is to close out the month strong, it would take a special commitment from Doolittle to permit his request and it needed to be discussed in private. Cobb approached Doolittle and asked if he could "borrow his attention" and without knowing the subject of the conversation, Doolittle followed Cobb toward the private offices. The two looked for somewhere to sit down and, not seeing a good place to sit in the open area, headed toward the finance hallway. Doolittle had

¹⁰ The transcript reflects inconsistencies between the witnesses' recollection of the time of day they voted and saw each other on the stairs. Although corroboration on the timing would help define *when* Doolittle was in Office 110, there is enough corroboration to know *how long* Doolittle was in Office 110. The evidence shows that Doolittle was in Office 110 for no more than 30 minutes during the polling time. Cobb and Doolittle testified that they went to Office 110 together and their conversation lasted 5-10 minutes; Cobb, Doolittle, and Johnson testified that Johnson and the other two body shop technicians entered Office 110 while Cobb was still in there; Doolittle and the body shop technicians testified that their conversation lasted 10-20 minutes; and Doolittle and Johnson testified that Doolittle left Office 110 with the body shop technicians. Petitioner stated in its brief that Xiong saw Doolittle and the three body shop technicians in Office 110 when he descended the west staircase a second time after returning to the polling place to notify the Board agent that Doolittle was in Office 110, approximately 15 minutes after voting. However, there is no record evidence to support this.

already attended the pre-election conference; while he was unable to testify as to what time Cobb approached him, it is obvious that he knew it was during the polling time.

Doolittle testified that there was no private area to talk on the showroom floor: the sales areas were too open and it would be inappropriate to have a private conversation in a display car. Cobb testified that there are only four closed offices on the first floor of the Nissan building (Offices 109, 110, 112, and 113) and that the Employer keeps each of these four offices locked. He testified that he and Doolittle walked down the hall and tried a couple of offices but none was available, so he used the code he knew to unlock Office 110 and they used the office to talk. Doolittle testified that they went toward Office 112, but they decided not to use that room (which did not have a view of the staircase) because it is where the lot attendants use a key track machine for all of the new Nissans. Office 113 (which also does not have a view of the staircase) was occupied, as is usual, according to Doolittle. Office 109 (which has a more limited view of the staircase than does Office 110) was being used by a finance manager, and 110 was therefore the “only professional area” where he “could sit and conduct a professional conversation” with Cobb.

As stated above, Doolittle has offices, or work space, in each of the two buildings, and neither of his offices is Office 110. He testified that he does use Office 110 (and Office 109) if the business manager in the office is not scheduled to be there and someone wants to have a private conversation. Doolittle does have a private office in the Subaru building but testified that, since April or May 2012, he has officed primarily in the Nissan building and currently spends 99 percent of his time at his desk in the Nissan building. No testimony was offered to rebut this assertion.

Doolittle sat behind the desk and Cobb sat facing him, with his back to the window. Cobb testified that he was in Office 110 with Doolittle for approximately five minutes.¹¹ There is conflicting evidence concerning whether Cobb and Doolittle walked together to Office 110, how Doolittle ended up in that office, whether the door was open or shut during the conversation between Cobb and Doolittle, and whether Body Shop Technician Steve Johnson knocked on the door before entering. Regardless, because the additional facts show that Doolittle was not engaging in surveillance, I find it unnecessary to resolve these conflicts.

Steve Johnson says that he drove Rick Servaty and Dan Morrison to the Nissan building from the body shop to vote in the June 28 election. Johnson parked his car close to the front door¹² of the building, and the three walked in the front door, straight across the showroom floor to the east staircase, and up the stairs. Johnson testified that he saw a couple of people going down the east stairs as he was going up. Morrison testified that when he was upstairs he could see voters arriving from both staircases.

Johnson voted first, and then waited outside the voting area for the other two. Servaty and Morrison started toward the east stairs to go back down, and Johnson said he wanted to go down the west staircase. He testified that he wanted to see if he could find Doolittle and ask him to call the body shop when the vote was over so the technicians there would know the result of the election, and he chose the west staircase because he knew Doolittle's office to be in the Subaru building. He said that he did not have a personal meeting with Doolittle ahead of that time, and there is no evidence that he had been asked to report to Doolittle on whatever he saw when he voted.

¹¹ Witnesses consistently testified that Doolittle and Cobb were in Office 110 together for 5-10 minutes.

¹² The front door of the building is located at the building's northeast corner.

When the body shop technicians got about halfway down (after turning the corner to the second half of the flight of stairs), Johnson saw Doolittle in Office 110, straight ahead of the stairs, with Cobb. Johnson testified that he knocked on the door¹³ and asked if they could come in; Cobb might have turned around, and Doolittle might have motioned them in with his hand. This testimony is corroborated in detail by Dan Morrison, though I note that Morrison testified that Johnson did not explain why he wanted to use the west stairs—he just told them he wanted to go that way. Doolittle testified that Cobb unlocked the door and let the body shop technicians into Office 110.

Johnson and the other body shop technicians closed the door and stayed in Office 110 with Doolittle for 15-20 minutes. Johnson asked Doolittle to call the body shop when the voting was over, and then they started discussing an employee named Brandon and a marketing idea for introducing customers to the body shop. Doolittle corroborated this testimony. The only other person who came into Office 110 was Ron Johnson, the service manager.¹⁴ Again, the testimony about Ron Johnson's entrance—whether he walked in on his own or was waived in by Doolittle—is inconclusive. However, all witnesses consistently testified that Ron Johnson was only in Office 110 for about three minutes and then left the vicinity of the office and stairwell.¹⁵ Steve Johnson does not know why Ron Johnson came in, but while he was there they brought up Brandon again because Brandon works for Ron. Doolittle testified that Ron Johnson came in

¹³ As stated above, there is inconsistent testimony regarding whether Johnson knocked on the door to Office 110. However, because none of the testimony is that Doolittle called him in, how Johnson entered the room does not impact my decision in this case.

¹⁴ Steve Johnson testified that a different employee, Jeremy Smida, is his supervisor. Ron Johnson is a supervisor, but does not supervise the body shop technicians who were in Office 110 during the polling time.

¹⁵ Ron Johnson did not testify at the hearing. I recognize that the objection referred to the general manager and service manager as having engaged in the objectionable behavior, but the service manager was only in Office 110 for three minutes. I have considered that perhaps the objection was meant to include Joe Cobb, who was in Office 110 with Doolittle for a longer time, but the evidence is clear that he is neither a supervisor nor manager.

because the body technicians were talking about Brandon and wanted Ron to hear about it firsthand. Despite this discrepancy between Doolittle's and Johnson's testimony, there is no evidence that Ron Johnson was present for the purpose of engaging in surveillance, nor is there evidence that any other employees saw him in Office 110 on their way to or from the election.

Steve Johnson testified that while he was in Office 110 with Doolittle, Doolittle did not try to pull in, wave in, point at, motion, or signal toward any service techs or body techs or anyone else who was voting. This testimony is corroborated by Dan Morrison. During the conversation, Johnson was standing at the side of the desk, with the window on his right, and he could see people going up and down the stairs. He estimates that he saw 6-10 people going up and down, and that anybody who walked by would have seen the four of them in the office. Doolittle sat in the chair facing the window, and the three body shop technicians stood or squatted around the desk. It is undisputed that some employees passed by while Doolittle was in Office 110.

After Johnson and the body shop technicians finished their conversation with Doolittle, they walked to the showroom floor, diagonally across it, and out the front door to their car. Taken as a whole, the witnesses' testimony is that Doolittle spent up to 30 minutes in Office 110. Doolittle also states that, during the polling time, he spent 80 or 90 percent of his time at his desk area in the Nissan showroom, from where he could not see either the east or west staircase.

Factual and Legal Analysis

“Representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). However, it is the Board's usual

policy to direct a new election whenever an unfair labor practice occurs during the polling period because conduct which violates Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free choice in an election. *Bon Appetit Management Co.*, 334 NLRB 1042 (2001). The Board's standard for evaluating objectionable conduct is whether such conduct reasonably tends to interfere with the employees' exercise of their free choice; the test is objective. *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). The burden is on the objecting party to establish evidence in support of its objection. *Waste Management of Northwest Louisiana, Inc.*, 326 NLRB 1389 (1998).

There are two components of Petitioner's objection: 1) that Doolittle and the service manager pulled employees inside an office to discuss voting during the polling time; and 2) that Doolittle and the service manager were in an office at the base of a stairwell leading to the second floor of the facility, where the voting was held. As made clear by the evidence described above, Petitioner presented absolutely no evidence that Doolittle or the service manager called people into the office or even that the conversation inside the office concerned the identities of voters. Thus, all that is left for me to consider is whether the managers'¹⁶ undisputed presence in Office 110 constitutes surveillance requiring that the election be set aside.

In determining whether a party's conduct is objectionable surveillance, case law considers the duration of a party's presence, the location of the party agent, and the conduct of the party. First, I consider the duration of time for which Doolittle was in Office 110. In *Performance Measurements Co.*, 148 NLRB 1657, 1659 (1964), the Board held that brief visits to the election area might not interfere with voters' free choice, but a manager's "continued

¹⁶ From here on out, I will only discuss the conduct of General Manager Doolittle. As discussed above, Service Manager Ron Johnson was only in Office 110 for approximately three minutes, and Petitioner offered no evidence that he engaged in any surveillance separate from Doolittle. Thus, by discussing Doolittle's alleged misconduct and concluding that he did not engage in surveillance necessitating that the election be set aside, I also address and dismiss the objection insofar as it alleges that Johnson also engaged in misconduct.

presence” at a location where employees are required to pass on their way to vote might constitute improper conduct. As explained above, the testimony establishes that Doolittle was in Office 110 for approximately 30 minutes of the 2-hour polling time. Thus, I find that Petitioner has not established that Doolittle had a “continued presence” that would interfere with the employees’ free choice. See *Patrick Industries*, 318 NLRB 245 (1995) (three supervisors’ presence in a location 72 feet from the voting booth for 20 minutes during the polling time was not sufficient evidence to find that their conduct was objectionable); and *Mountaineer Park, Inc.*, 343 NLRB 1473, 1484 (2004) (without evidence that the employer was stationed for an “extensive period of time,” the Board could not find that there was a “continued presence,” or that employees were required to pass by the employer in order to vote); c.f. *ITT Automotive*, 324 NLRB 609, 623-625 (1997) (all employees were required to pass by a “massed throng of supervisors” which was in place during the entire 3-hour polling period, and the Board found that the “continued presence” of managers standing in a circle in an area where employees had to pass through to vote and where the managers observed employees waiting in line to vote interfered with the election) enfd. in part 188 F.3d 375 (6th Cir. 1999).

Second, I consider the layout of the facility. In *Performance Measurements Co.*, supra, the employer’s president stood by the door to the election area so that it was necessary for each employee who voted to pass within two feet of him to gain access to the polls. See also *Electric Hose and Rubber Co.*, 262 NLRB 186, 216 (1952) (the Board found it objectionable that one of the supervisors was stationed within 10 to 15 feet of the entrance to the voting area and that employees who were on their way to vote had to pass an area where one of two other supervisors was standing); c.f. *J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005) (the Board found that the employer’s president’s presence did not constitute objectionable surveillance because there was

insufficient evidence to establish that employees had to pass by him in order to vote.) At the Employer's facility there are two staircases—east and west—that lead from the first floor to the second floor, and voters were free to use either staircase on June 28. In its brief, Petitioner states that Doolittle positioned himself in a place “where he could observe each individual who chose to vote as he approached the polling area, and where each employee would see that he was being observed by a high management representative on his way to vote.” However, this is a misstatement of the evidence. Office 110 sits across from the base of the east staircase and has no view of the west staircase.¹⁷

As discussed above, Petitioner witnesses Xiong, Yang, and Gross used the west staircase because they came from the Subaru building, which sits to the west of the Nissan building, and those stairs were closer. However, Xiong also testified that there are more service technicians in the Nissan building than the Subaru building, and the east staircase would be most convenient for a number of them. Additionally, witnesses testified that they saw voters approach the polling place from both staircases, and the body shop technicians' testimony is that they used the east staircase to go to the second floor and the west staircase to go back down. I recognize that employees might not have known Doolittle was in Office 110 until they got to the stairs, and thus had no choice but to pass him as they continued on their way to the polling place, but there is no evidence that Doolittle was in a place where voters *had* to pass him on their way to the polling place or that he could see all voters going to and from the polling place. Nor is there evidence that he was engaged with voters in the polling area or waiting to vote. Compare *Milchem, Inc.*,

¹⁷ The Employer contends that the fact that Doolittle chose Office 110 (instead of the service aisle) is evidence that he did not intend to engage in surveillance because he lacked a view of both staircases. However, this argument is flawed because the service aisle doors lead to the Nissan building as a whole, and there is no evidence that Doolittle would have been able to know who was going inside to vote or take care of other business. Thus, I reject the argument raised by the Employer in its brief and find that Doolittle's choice of Office 110 is *not* evidence of a lack of desire to see the voters.

170 NLRB 362 (1968), where the Board was guided by the principle that “the final minutes before an employee casts his vote should be his own, as free from interference as possible” and made a rule against “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.” *Id.* at 362. In its decision, the Board explained that “conversations between a party and voters while the latter are in a polling area waiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election.” *Id.* at 363. Subsequent cases have applied the *Milchem* rule only to conversations between a party agent and voters that took place in the polling area or with voters actually waiting in line to cast their votes.

Another factor some cases consider is whether the party agent knows that eligible voters who pass him must be on their way to vote. For example, in *J.P. Mascaro & Sons*, *supra*, the employer’s president had no way of knowing who was entering to vote or who was entering for job-related or other activities. See also *Blazes Broiler*, 274 NLRB 1031, 1032 (1985) (although the agent could see who entered the hallway leading to the banquet room, he had no way of knowing who was entering the hallway to vote). Doolittle had neither a direct view of the polling place nor knew if employees were ascending the stairs for the purpose of voting.

Finally, I note that Doolittle’s conduct in Office 110 does not suggest surveillance. I recognize and give weight to Petitioner’s argument that there was really no reason Doolittle *had* to be in Office 110. The Employer’s witnesses offered explanations, but the simple fact is that Office 110 was not the only place at the facility that would have offered a private meeting space for Doolittle and Cobb. Several witnesses, including Doolittle himself, testified that Doolittle

has a private office in the Subaru building, which is only 150 feet to the west of the Nissan building. No testimony was offered to explain why he could not use that office—his own office—for a private meeting.¹⁸ Further, one could speculate whether the two even needed a private meeting space. However, such speculation is neither here nor there. There is no evidence that, when he was in Office 110, Doolittle actually engaged in any kind of surveillance, and the fact of the matter is that he was only in the room for a limited time during the polling. See *Patrick Industries, Inc.*, supra, where the Board found that it was “insensitive of the three supervisors to spend so much time next to the route the plant 8 employees took to the polling area. The supervisors knew that the voting was occurring. And they could readily have held their conversation in a nearby office in plant 8. But supervisory sensitivity about the election process is not the test for whether conduct is objectionable.” *Id.* at 22. There, the Board went on to say that had the supervisors engaged employees in lengthy conversations as they went toward the polling area, or if their purpose was to convey to the employees that they were being watched, or if they had been standing right next to the door to the polling place, the outcome might have been different. Here, the analysis is the same.

I do recognize that the Tally of Ballots is close: the votes cast for and against Petitioner are only different by one. However, it is Petitioner’s burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election, and “if the evidence is insufficient, then the [Petitioner] has failed to meet its burden” and “the closeness of the election does not alter [the] burden of proof.” *Consumers Energy Co.*, 337 NLRB 752 (2002).

I conclude that Petitioner has failed to meet its burden of proof. Petitioner did not present sufficient evidence to demonstrate that Doolittle was in Office 110 for the purpose of engaging

¹⁸ That Doolittle was at a site other than his own office is not determinative. See *J.P. Mascaro & Sons*, supra, where the employer’s president did not even have an office at the facility where voting was taking place, but his presence and conduct were still not considered objectionable.

in surveillance: he did not pull employees in to talk with him or engage employees in lengthy conversations¹⁹ as they went toward the polling place, the employees were not *in* the polling place or in line to vote when he was talking to them, he did not have a view of the polling place, employees did not have to pass him on their way to vote, and he was only in Office 110 for 30 minutes. Doolittle's conduct does not constitute surveillance and his mere presence for a relatively brief period of time is insufficient to warrant setting aside the election.

CONCLUSIONS AND RECOMMENDATION

In view of the foregoing findings of fact, and after carefully considering all of the evidence in the record and assessing the credibility of each of the witnesses who testified, I conclude that Petitioner's objection is without merit and I therefore recommend that it be overruled in its entirety. I further recommend that the Board issue an appropriate Certification of Results of Election.

Signed at Minneapolis, Minnesota this 13th day of August, 2012.


Abby E. Schneider
Hearing Officer
National Labor Relations Board, Region 18
330 South Second Avenue, Suite 790
Minneapolis, Minnesota 55401

¹⁹ I reject the argument raised in Petitioner's brief that the body shop technicians' time in Office 110 with Doolittle constitutes a captive audience meeting in violation of *Peerless Plywood Co.*, 107 NLRB 427 (1953). The evidence is that Steve Johnson, one of the body shop technicians, decided to find Doolittle to ask if he could let him know the results of the election, and then their conversation shifted to topics having nothing to do with the June 28 election. No testimony was offered that rebutted this assertion.

Additionally, in its post-hearing brief, Petitioner requested that I take administrative notice of additional information relating to complaints from employees about the Employer's conduct. I reject this request, as my report must be based on the evidence presented at the hearing and not on evidence that is not part of the record.

CERTIFICATE OF SERVICE

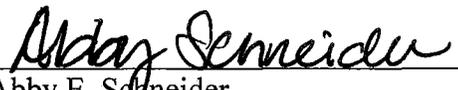
I hereby certify that a copy of the Hearing Officer's Report and Recommendation on Objection to Conduct Affecting the Results of the Election was e-filed on August 13, 2012, and served upon all parties, via electronic mail to their legal counsel, on the same date. Courtesy copies were also sent by regular U.S. Mail to Mr. Doolittle and Mr. McCullen on the same date.

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