UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Brooklyn Park Automotive, Inc., Case No. 18-RC-081708

Employer,

v.

PETITIONER TEAMSTERS LOCAL NO. 974'S BRIEF IN SUPPORT OF EXCEPTIONS

Teamsters Local No. 974,

Petitioner.

Petitioner Teamsters Local No. 974 submits the following in support of its exceptions to the Hearing Officer's Report And Recommendations To The Board On Objection To Conduct Affecting The Results Of The Election of August 13, 2012, and the Erratum of August 14, 2012.

Petitioner's exceptions relate to a Board - conducted election held on June 28, 2012, at the employer's adjoining Subaru and Nissan new car and automotive service facilities in Brooklyn Park, Minnesota. As shown by the Hearing Officer's Report and Recommendation, the revised tally shows that 20 votes were cast for Petitioner and 21 votes were cast against union representation.

Following the election, Petitioner filed objections, and on July 26, 2012, the Region's Hearing Officer conducted an evidentiary hearing. In its post-hearing brief, Petitioner contended that its objections should be sustained and a new election should be conducted because (1) the employer's conduct during the election would reasonably convey to employees that they were being watched and which interfered with employees' free choice; (2) that the employer's conduct during the election interfered with employee free choice because the employer’s agents chose to station themselves at a critical

location where they could observe who voted, thereby destroying the secrecy of the ballot; and (3) the employer's conduct in meeting with employees during the election violated the Peerless Plywood rule (Brief of Petitioner Teamsters Local No. 974 In Support of Objections to Election, pp.6-9).[1]

However, the Hearing Officer's Report and Recommendation limits the analysis of the record below to whether the employer engaged in surveillance (Hearing Officer's Report, etc., p.3; 17) even though the Regional Director's order directing a hearing indicated that the issues which should be addressed include whether the employer "engaged in surveillance or otherwise interfered with the election" (emphasis added).

STATEMENT OF FACTS

While Petitioner relies on a more detailed and complete statement of facts set forth in its brief to the Hearing Officer, the essential facts are not in dispute. On the day of the election and moments after attending the pre-election conference on behalf of the employer, Carter Doolittle, the general manager of both the Subaru and Nissan dealerships, chose to strategically position himself in an office on or near the path of many bargaining unit members on their way to vote. The polling place was located in a second story conference area, and any employee wishing to vote had to access that area by one of two stairwells leading to that area, the west stairwell or the east stairwell (T178, 205-208; Employer Exhs. 1, 2).

The office occupied by Doolittle, "110," was opposite the west stairwell,[2] and had a large window covering almost all of the outside wall, allowing Doolittle and any person

[1] Petitioner wishes to rely on the "Statement of Facts" it recounted in its post-hearing brief to avoid needless duplication in this brief and therefore has attached a copy of that document to this brief.

[2] The Hearing Officer's Report, etc., at time confuses the east and west stairwells (Report, p. 6, line 12; p. 14, line 7). Office 110 was opposite the west stairwell.

passing by to fully observe each other. For example, employee Chimeng Xiong, who testified that "most" of the employees would use that stairwell because it was the closest and shortest route to take for many of the voters, testified that he saw Doolittle inside the office on his way to the polls and on his way back from the polls, and that Doolittle even gestured to him (T21-27). Visibility for both Doolittle looking outward and for employees looking inward on their way to the polls or on their way back was so good that they could observe each other at the base of the stairwell and at the halfway level (T133, 181).

At least two of the employees who testified expressed a concern over Doolittle's presence at that particular location and at that particular time of day when the polls were open (T35-36, 103-104). One employee was so intimidated that he went back to the polling area and complained to the Board Agent.

While the Hearing Officer appears to downplay the time spent by Carter Doolittle in office 110, the period of time he was joined by service manager Ronald Johnson, and the number of employees who uses the west stairwell, the record shows that at least eleven to fifteen employees used the west stairwell when Doolittle was occupying office 110 (Petitioner's Brief in Support of Objections, pp. 5-6). As it is known that at least one employee complained to the Board Agent conducting the election, and that an unknown number of employees might have called the Region to complain about Doolittle's presence, Doolittle might have learned about those complaints and decided to cut short his presence there for that reason.

As to service manager Ronald Johnson's presence after Doolittle admitted the three body shop employees to office 110, the reason for his presence and the timing of it was never fully explained by the employer.

It is important to note that the Hearing officer agreed that the employer failed to show that Doolittle had to be in office 110 at that particular time, or that office 110 was the only place where he could engage in a private conversation with salesman Joe Cobb (Hearing Officer's Report, etc., p.15).

ARGUMENT

I. SURVEILLANCE

In finding that the employer's conduct did not amount to surveillance, the Hearing officer evaluated the facts in light of three considerations: (1) the duration of the party's presence; (2) the location of the party's agent; and (3) the conduct of the party's agent. Citing Performance Measurements Co., 148 NLRB 1657 (1964), the Hearing Officer found that because Doolittle was in office 110 for "approximately 30 minutes of the 2-hour polling time," there was no "continued presence" sufficient to interfere with the election. However, the Hearing Officer failed to acknowledge that a minimum of eleven to fifteen voters had to pass by Doolittle while he was at that particular location. As no one kept count, it could have been many more. If most voters decided to vote early, and used the west stairwell, they were more or less compelled to walk by Doolittle and be in his line of sight for at least half the time it took to ascend the stairwell.

Considering that only 41 employees voted, eleven to fifteen known employees who had to pass Doolittle on the way to vote, and back again, is not an insignificant number and represents a "presence" sufficient to cause interference with an election. It also is not known to what extent early voters who had to pass by Doolittle on their way to vote communicated to others who had not voted that they had to contend with Doolittle's presence on their way to vote, which might have deterred them from voting.

As to the location of the party's agent, it appears that Doolittle might purposely have chosen to position himself where Nissan-side employees would access the polling area, as opposed to a location near the east stairwell. Though it is not known where the employees who were not accounted for voted, Doolittle chose to station himself at one of two strategic locations or chokepoints where anyone wishing to exercise his right to vote would find himself in irreversible proximity to the employer's general manager and, for a time, in proximity to the service manager.

The Hearing Officer makes the observation that "some cases consider. . . whether the party knows that eligible voters who pass him must be on their way to vote," and that Doolittle would not know if anyone he saw would be on their way to vote. However, the record shows that the second floor conference room was not used in any regular fashion by bargaining unit employees. Their only experience with that area came when the employer conducted campaign sessions after the organizing activity had commenced. According to Doolittle, the second story area is used by "accounting office people," "salespeople," and "managers" (T220). In that light, and particularly because he had attended the pre-election conference only moments before occupying 110, Doolittle would know that anyone ascending the stairs would be on his way to vote.

Subsequent to the Board's decision in Performance Measurements, the Board approved the setting aside of elections in fact situations similar to the instant case. In Electric Hose and Rubber Co., 262 NLRB 186, 216 (1982), the Board set aside an election where a supervisor stationed himself at a key location in relation to the voting area. Citing Ravenswood Electronics Corp., 232 NLRB 609 (1977); Shrewsbury Nursing Home, Inc., 227 NLRB 47 (1976); and Woodland Molded Plastics Corp., 250 NLRB 169 (1980), the Board held that such conduct "destroyed the laboratory conditions necessary

for the conduct of a free and fair election." Even though no conversation took place, the conduct was nonetheless found to be objectionable. In 1997, in ITT Automotive, Div. of ITT Corp., 324 NLRB 609, in another case strikingly similar to the instant case, the Board again set aside the election.

A similar result was reached in Nathan Katz Realty v. NLRB, 251 F.3d 981, 991 (D.C. Cir. 2001). There the Court of Appeals noted that, "in previous cases, the Board has stated that a party's mere presence maybe sufficient to set aside an election." The party's presence in that situation is "coercive" and would convey to (the voting) employees the impression that they were being watched. The same result should apply in the instant case.

II. SECRECY OF THE BALLOT

A related objection of Petitioner is that by having general manager Carter Doolittle station himself in a location where he could observe, and did in fact observe, employees on their way to vote, the employer interfered with the employees' freedom of choice by destroying the secrecy of the ballot for a large component of those who voted. Whenever voting arrangements are "entirely too open and too subject to observation to secure secrecy of the ballot," an election should be set aside. Imperial Reed Furniture Co., 118 NLRB 911, 913 (1957). See also Sewell Plastics, 241 NLRB 887 (1979), and Standard-Coosa-Thatcher Co., 115 NLRB 1790 (1956), where the Board discussed the need to protect secrecy of the ballot.

III. *PEERLESS PLYWOOD*

As more fully discussed in Petitioner's Brief in Support of Objections, petitioner contends that the employer's conduct in meeting with body shop employees during the election and in an open and conspicuous location where every bargaining unit employee

on his way to vote using the west stairwell would see that a meeting was taking place, violated the Peerless Plywood Co. rule, 107 NLRB 427 (1953).

The employer's claim that the meeting took place because certain body shop employees wanted to ask Carter Doolittle to apprise them of the election outcome is disingenuous because the evidence indicates that the meeting lasted for at least twenty minutes, which is much longer than it would take to make such a request. The evidence also indicates that Doolittle took it upon himself to summon service manager Ronald Johnson to participate in the meeting, and that the meeting appears to have resulted in the adjustment of matters of concern or grievances put forth by body shop members.

IV. CONCLUSION

For the foregoing reasons, the recommendation of the Hearing Officer should not be adopted. The Board should sustain the Petitioner's objections and issue an order directing another election.

Dated: August 27, 2012

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