

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

Case No. 18-RC-081708

Brooklyn Park Automotive, Inc.,

Employer,

v.

Teamsters Local No. 974,

Petitioner.

**BRIEF OF PETITIONER
TEAMSTERS LOCAL NO. 974
IN SUPPORT OF
OBJECTIONS TO ELECTION**

Petitioner Teamsters Local No. 974 submits the following in support of Union's objections to conduct of the Brooklyn Park Automotive, Inc. affecting the results of the election.

INTRODUCTION

On June 28, 2012, the Board conducted an election on the premises of the employer at its location in Brooklyn Park, Minnesota, in a unit consisting of 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. Following the election, the Tally of Ballots served on the parties showed that of the approximately 45 eligible voters, 20 were cast for petitioner; 21 were cast against petitioner; and 3 ballots were challenged (Board Exh. 1(b)). A subsequent stipulation was entered into by the parties, and approved by the Regional Director, in which it was agreed that two of the challenges would be sustained.

Following the election, Petitioner Union filed timely objections to the election (Board Exh. 1(a)), and on July 26, 2012, the Region conducted an evidentiary hearing on the Union's objections.

STATEMENT OF FACTS

The record shows that Brooklyn Park Automotive, Inc. consists of separate Subaru and Nissan new and used car and service dealerships located in adjoining buildings in Brooklyn Park, Minnesota.

The two separate Subaru and Nissan new car showroom and service bay facilities are separated by about 150 feet (T47)¹. Carter Doolittle, general manager of both the Subaru and Nissan sides of the business, testified that he maintains an executive office along with other managers in or near each new car showroom (T49-51). He keeps an office on the Subaru side with a door that can be closed for the sake of privacy should he require it (T83). On the Nissan side, he testified that since April or May 2012 he would generally use an office in area "108" as illustrated on Employer Exhibit 1, which is quite a distance away from office "110" (T83). As will be shown, the record shows that general manager Doolittle had ample space all over the two facilities to carry on a brief and private conversation with car salesmen such as Joseph Cobb.

Two schematics or diagrams purporting to illustrate the layout of the first and second floors of the Nissan side of the employer's facility were received into evidence (Employer Exhs. 1, 2). The employer offered them into evidence to illustrate the second floor area where the voting took place, the two stairwells accessing the polling area, and the location of the finance office (i.e., "110") which was a physical focus of the Union's objections. The diagram apparently was prepared by an entity known as "Intereum,"

¹ "T" refers to the official transcript of July 26, 2012, and page numbers.

which supplied the employer with its furniture (T63). It is important to note that the drawings are not to scale (T249).

On the day of the election, June 28, 2012, the polls were open from 1:30 PM to 3:30 PM, and the voting took place in an upstairs (i.e., second floor) conference room on the Nissan side depicted as area “201” on Employer Exhibit 2. Apparently the only stairwells accessing that area for Nissan and Subaru bargaining unit members coming to vote were to the east and west of the area. The Union’s objections to the election focused on the presence and activities of general manager Carter Doolittle and service manager Ronald Johnson during the polling period at the base of what is known to be the most frequently used stairwell accessing the polling place and a critical location for any employee exercising his right to vote.

The facts are not in dispute. For bargaining unit members on their way to vote, they had to use one of two stairwells on the first floor underneath the second floor conference room where the voting was conducted. According to employees Chimeng Xiong and Tou Yang, two Subaru side employees (T17, 114), who went to vote at about 2:00 PM, they entered the Nissan side and approached the west stairwell preparing to ascend the stairwell. The west stairwell is the stairwell on the right side of Employer Exhibits 1 and 2, and the east stairwell is on the left side of the exhibits (T178, 205-206). They used the west stairwell because it represented the shortest route to the polling area. It also was the closest from the point where they entered the Nissan side from the Subaru side (T21-25, 116). Xiong added that “most” of the employees would use that stairwell because it was “much closer” (T25).

As they approached, they noticed general manager Doolittle in an office immediately in front of the first step in office “110” described as a “finance office” (T66) and engaged in a conversation with three bargaining unit body shop employees (T28-31). According to Xiong, the office has a large window four feet by a “waste high” and “over your head” window (T26-27). Doolittle was sitting at a desk and facing the window. He looked at Doolittle and Doolittle looked at him, and they waved. On their way down after they had voted, both again saw Doolittle. Xiong knew it was not the general manager’s usual office, and he became so concerned he waited a while and then returned to the polling area and complained to the Board agent conducting the election (T35-36).

Even after complaining to the Board agent (and calling the Union), which was about fifteen minutes later, and in the process of descending the stairs a second time, he saw Doolittle still talking to the three body shop employees (T44).

While Carter Doolittle attempted to minimize the size of the window and the nature of his conversations with the body shop employees, a third employee, Jason Gross, testified that the window is quite large, eight or nine feet tall and perhaps ten feet wide (T91). Another employee testified that 75% of the wall of the finance office is glass (T133). According to a witness called by the employer, visibility is so good, one could see Doolittle halfway down the stairs through the large glass window (T181). Gross is another Subaru side employee who testified that the west stairwell opposite the office where Doolittle had positioned himself was the most direct route for anyone to take from the Subaru side in order to access the voting area (T88-89).

As he went up the stairs to vote, Gross saw Doolittle in the office by himself (T92). He passed the three body shop employees as they were on their way down (T92-

93). After he voted and in descending the same stairwell, he saw Doolittle in the office conversing with the employees (T96-97). Doolittle was seated at the desk and facing the window. Along with Xiong, he expressed concern over Doolittle's presence at that location at that time (T103-104).

Testimony of the body shop employees shows not only that Doolittle and the body shop employees discussed the NLRB election (T172, 185, 211), but that Doolittle allowed them to air grievances or concerns about other employees and how to generate more work (and earnings) for themselves (T184-185, 189, 214-215).

According to the testimony of body shop employees, Steve Johnson knocked on the glass and Doolittle waved all of them into the office (T163, 202). According to Doolittle, he was in that office for the purpose of having a private conversation with new car salesman Joseph Cobb (T222-223). After Cobb left, the conversation became extended and went much longer than one would ordinarily take to request that management inform body shop employees about the outcome of the election, which is the alleged explanation for the meeting between Doolittle and the three body shop employees (T161-162).

During that meeting, service manager Ronald Johnson entered the room and carried on a conversation with the others present (T164), and in plain view of anyone else using the west stairwell on their way to the polling area.

Body shop employee Steve Johnson testified that as he and the other two body shop employees were on their way to the west stairwell after having voted, they passed a "couple people" (T179). While in the office talking to Doolittle, he saw ". . . people go up the stairs and come down them" (T187). When asked how many, he testified that it was

between six and ten additional employees who chose to use the west stairwell (T187). Counting the “couple” or two he saw earlier, along with the six to ten, as well as Xiong, Yang and Gross, that would mean between eleven and fifteen bargaining unit employees used the west stairwell in plain sight of Carter Doolittle (and with Doolittle in their plain sight) at the same time Doolittle was occupying the office at the base of the stairwell.

ARGUMENT

Under well established Board principles, the Union’s objections have merit for the following reasons:

1. The Employer’s conduct during the election interfered with employee free choice.
2. The employer’s conduct in meeting with employees during the election violated the *Peerless Plywood* Rule.
3. The employer’s conduct would reasonably convey to employees that they were being watched and interfered with employee free choice.

I. THE EMPLOYER’S CONDUCT DURING THE ELECTION INTERFERED WITH EMPLOYEE FREE CHOICE

The facts show that at about the same time the polls opened on June 28, 2012, or shortly thereafter, the employer’s general manager chose to position himself at a critical location a short distance away from the polling area 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.

Considering that the election was a close one, and that the record shows that a minimum of between eleven and fifteen employees had to pass by Carter Doolittle on

their way to vote during the time that Doolittle occupied the finance office, there can be no doubt that the employer's conduct interfered with the employee's freedom of choice and likely affected the outcome of the election. In a close election, the Board should be careful to scrutinize any conduct that might be objectionable. Modern Hard Chrome Service Co., 187 NLRB 82 (1970).

The record shows not only that Doolittle was present at a location that is not a part of the executive offices of the two dealerships but it was far removed from his Subaru side office and an appreciable distance away from the office he claimed to normally occupy on the Nissan side. It also should be noted that for part of the time he occupied the office in question where he could plainly see who chose to vote (and who chose not to vote if they never showed up), and where employees could plainly see him, he was joined for a portion of the time by service manager Ronald Johnson whose presence at that particular time and location was never explained.

In ITT Automotive, a Division of ITT Corp., 324 NLRB 609, 623 (1997), citing Performance Measurements Co., 148 NLRB 1657 (1964), the Board set aside an election in circumstances similar to the instant case. In the latter case, the Board held that,

The continued presence of the [employer's] president at a location where the employees were required to pass in order to enter the polling place was improper conduct and that by this conduct the [employer] interfered with employees' freedom of choice in the election. 148 NLRB 1657, 1659.

In ITT Automotive, which also is similar to the instant case, the Board held that upper management personnel's presence,

. . .at a location where the employees were required to pass in order to enter the polling area, as well as from where they observed the employees while waiting at the top of the

stairs and on the balcony outside the door to the polling place, did interfere with the employees' freedom of choice in the election.

While Doolittle contended that he had to use that office to speak to Joseph Cobb in privacy, the testimony shows at one point that he was in the finance office by himself (T92) and not able to use that excuse. Surely, Doolittle knew when and where the election took place because he was present at the pre-election conference (T56). Moreover, once Cobb left, and body shop employees knocked on the glass and asked to be admitted, Doolittle consciously chose to stay and wave them in. He also chose to wave at employees on their way to vote.

When Doolittle disingenuously claimed that that particular office was the only office available to carry on a private conversation with Cobb, it is not a credible claim that there were no other places inside or outside two new large dealerships where the top executive officer could not find a place to have a private conversation without placing himself at a critical access route for those wishing to exercise their right to vote.

II. THE EMPLOYER'S CONDUCT IN MEETING WITH EMPLOYEES DURING THE ELECTION VIOLATED THE PEERLESS PLYWOOD RULE

In Peerless Plywood Co., 107 NLRB 427 (1953), the Board held that "massed assemblies" or "captive audience" meetings that are conducted within 24 hours of an election are grounds to set aside the election whenever objections are filed. See also P.E. Guerin, Inc., 309 NLRB 666 (1992). That the subject of any speech did not involve any electioneering or that its electioneering was not effective is irrelevant NLRB v. DIT-MCO, Inc., 428 F.2d 775, 778 (8th Cir. 1970). Even if the employees involved in the captive audience meeting represent only a component of the bargaining unit, the rule

applies nonetheless. Honeywell, Inc., 162 NLRB 323 (1967); Great Atlantic Pacific Tea Co., 111 NLRB 623, 625-626 (1955).

In the instant case, it is undisputed that management representatives Carter Doolittle and Ronald Johnson elected to meet with body shop employees during the election on June 28 in violation of the Peerless Plywood rule.

Contrary to the claims of the employer, the record indicates that the subject of the meeting included topics of concern in the workplace for those who participated from the body shop, and that from the employer's standpoint the conduct involved campaigning and electioneering subject matter that the body shop employees were likely to take back to the body shop and to employees who had not yet voted. In the context of a Board-conducted election, the meeting which Doolittle allowed to take place was not innocuous or mere happenstance.

III. THE EMPLOYER'S CONDUCT WOULD REASONABLY CONVEY TO EMPLOYEES THAT THEY WERE BEING WATCHED AND INTERFERED WITH EMPLOYEES FREE CHOICE

The decision of general manager Carter Doolittle to meet with salesman Joseph Cobb in office "110" on June 28 beginning between 1:30 and 2:00 PM was not limited to the time it took for him to grant Cobb time off, as he alleged in his testimony. The time he was there extended to a meeting or meetings with service manager Ronald Johnson and the three body shop employees, and the meeting(s) lasted much longer than it would take for the body shop employees to request to be notified about the outcome of the election, as the employer likely will contend.

Doolittle had attended the pre-election conference a short time before his decision to station himself where he would observe employees on their way to vote, and where

they could plainly see him, and his conduct in that respect was purposely or recklessly indifferent to what should have been the employees' free and unfettered right to vote without any interference from the employer. In the circumstances, his sustained and highly visible presence in an area where a large number of voters would be sure to pass on their way to vote would reasonably convey to employees that they were being watched and would interfere with their free choice. Smithfield Packing Co., 344 NLRB 1 (2004).

According to the record, one employee, Chimeng Xiong, became so alarmed over Doolittle's presence that he contacted the Board agent shortly after he voted, which necessitated returning to the polling area sometime after he voted. Another employee, Jason Gross, also testified that he became concerned over Doolittle's presence at that time and place.

On information and belief, the Union believes that an unknown number of unidentified employees called the Region offices during the election and expressed a concern over what was taking place during the election. The Board should take administrative notice in this proceeding of any internal files or records relating to complaints it received from employees about the employer's conduct during the election.

Dated: August 9, 2012

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