

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

Brooklyn Park Automotive, Inc.,

Case No. 18-RC-081708

Employer,

v.

Teamsters Local No. 974,

Petitioner

EMPLOYER'S BRIEF IN OPPOSITION TO PETITIONER'S EXCEPTIONS

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I. INTRODUCTION

The Teamsters Local 974 (“the Union”) filed objections (“Objections”) to an election held on June 28, 2012 involving certain employees of Brooklyn Park Automotive, Inc. (“the Employer”). Region 18 overruled the Objections. On exceptions to the National Labor Relations Board (“the Board”), the Union argues that its Objections should be sustained because it claims (1) the finding that the Employer did not engage in surveillance “is contrary to record evidence and well settled Board principles”; (2) the Region should have found that the Employer’s alleged conduct “otherwise interfered with the election”; (3) the Employer’s conduct violated the Peerless Plywood rule adopted at 107 NLRB 427 (1953); and (4) that the Employer’s alleged conduct “destroyed the secrecy of the ballot and interfered with the election.” (Union’s Exceptions at 1-2). As discussed in more detail below, the Union’s arguments in support of its Exceptions lack merit: (1) the Region’s conclusion that a management official’s “mere presence” in an office located on a different floor from the polling place “for a relatively brief period of time” does **not** constitute surveillance is supported by the facts and the law; (2) there is no basis to conclude that the Employer “otherwise interfered with the election” based on the evidence introduced at the hearing; (3) the Peerless Plywood rule does not prohibit a brief, post-vote conversation with management, initiated by employees; and (4) there is no factual or legal basis to claim that the secrecy of the balloting was compromised. The Board should adopt Region 18’s recommendation to overrule the Union’s Objections.

II. STATEMENT OF THE CASE

On May 24, 2012,¹ the Union filed a Petition to represent certain employees of the Employer. (Bd. Ex. 1(b) at 2). On June 1, the Regional Director approved the parties' Stipulated Election Agreement. (Id.). On June 28, the Board conducted a secret-ballot election at the Employer's place of business. (Id.). The Tally of Ballots stated that 20 votes were cast in favor of the Union, 21 against the Union, with one void ballot and three challenged ballots. (Id.).

Pursuant to the parties' Stipulation on Challenged Ballots on July 12, the parties stipulated that two of the challenged ballots should not be counted as they agreed those individuals "are not eligible to vote in the election." (Id. at 3). Based on this Stipulation, on July 16 the Regional Director issued an Order Approving the Stipulation on Challenged Ballots and issuing a revised tally of ballots showing that there were 20 votes cast for Petitioner and 21 votes cast against Petitioner. (Id. at 1).

On July 2, the Union filed Objections claiming that management employees of employer "stationed themselves" in an office at the base of one of two stairwells leading to the polling location and were "pulling employees inside [the office] to discuss voting." (Bd. Ex. 1(a)). The Union claimed further that "the bulk of the employees who were talked to" were "on their way to vote." (Id.).

On July 17, the Regional Director issued a Report on Objections to Conduct Effecting the Results of the Election, Order Directing Hearing and Notice of Hearing (the "Report and Order") concluding that:

Substantial and material issues of fact and law raised by Petitioner's Objections **are limited 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

¹ All subsequent dates are in 2012 unless otherwise indicated.

stairwell leading to the polling place **and/or by the alleged action of** pulling employees inside an office.

(Bd. Ex. 1(d) at 3 (emphasis added)).² The Report and Order specifically noted that the Objections “do not allege that whatever was said in the office is objectionable.” (Id.).

On July 26, a day-long hearing (“the Hearing”) was held for the purpose of receiving evidence to resolve the issues described in the Regional Director’s Report and Order. At the Hearing, the evidence showed that the Employer’s General Manager (Carter Doolittle) was in an office (“Office 110”) “for no more than 30 minutes during the polling time,” (R&R at 7 n.10), and that, while in Office 110, Doolittle “did see employees ascending and descending the stairs [to vote in an upstairs conference room] during the polling period.” (R&R at 6). The Union failed to introduce **any** evidence, however, in support of its claim that the Employer “pull[ed] employees inside an office.” (See R&R at 12: (“Petitioner [Union] presented **absolutely no evidence that** [the Employer] called people into the office or even that the conversation inside the office concerned the identities of voters.” (Emphasis added)). Accordingly, the Hearing Officer determined: “Thus, all that is left for me to consider is whether the managers’

² The Union, in its Brief in Support of Exceptions (“Union Brief”) suggests that the Hearing Officer erred by “limit[ing] the analysis of the record below to whether the employer engaged in surveillance ... 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).” (Union Brief at 2). The failure to quote the remainder of the sentence of the Report and Order, coupled with the absence of an ellipsis to indicate the remainder of the sentence has been omitted, is misleading. The Union’s selected quotation ignores the limitation of the Report and Order, emphasized above, which directed the Hearing Officer to consider only if the alleged actions of (1) “the Employer’s General Manager or Service Manager ... stationing themselves at the base of the stairwell leading to the polling place” and/or (2) “pulling employees inside an office” constituted “surveillance or otherwise interfered with the election.” (Bd. Ex. 1(d) at 3). The Hearing Officer’s R&R follows the Report and Order’s directive, and the Union’s suggestion that it was somehow incomplete is disingenuous.

undisputed presence in Office 110 constitutes surveillance requiring that the election be set aside.” (R&R at 12).

After the parties submitted post-hearing briefs, the Hearing Officer issued a Report and Recommendation to the Board on Objection to Conduct Affecting the Results of the Election on August 13, 2012 (“R&R”), which recommended the Union’s Objections be overruled and that the Board issue an appropriate Certification of Results of Election.³ By letter dated August 27, 2012, the Union filed its Exceptions and its Brief in Support of Exceptions.

III. FACTUAL BACKGROUND

Employer, Brooklyn Park Automotive, Inc. conducts business under the name Morrie’s Nissan and Subaru of Brooklyn Park (“Employer”). The Employer’s physical facilities consist of a Nissan building (consisting of a show floor and a service facility), a Subaru building (consisting of a show floor and a service facility), and a body shop (consisting of two buildings located blocks away from the actual dealership). (Tr. 47, 159).

Eligible voters consisted of service employees located in the Subaru building, service employees located in the Nissan building and body shop technicians located in the body shop. (Bd. Ex. 1(d)). The voting took place in the second-floor conference room of the Nissan building. (202).⁴ (Tr. 81). The conference room is accessible through the lunch room (Room 201) which is, in turn, reachable by two separate stairwells, the east stairway (103) and the west

³ On August 14, 2012, the Hearing Officer issued an Erratum which included information regarding the right of the parties to appeal her decision, which had been inadvertently omitted.

⁴ Employer’s Exhibits 1 and 2 consist of floor plans of the first and second floors, respectively, of the Nissan building. During the course of the hearing, the hearing officer as well as witnesses utilized the Exhibits and numbers on the Exhibits to describe specific locations within the facility. (Tr. 63, 200). Locations beginning with the number 1 are locations on the first floor, Employer Exhibit 1, and locations beginning with the number 2 are located on the second floor, Employer Exhibit 2.

stairway (114).⁵ (Tr. 81) (Er. Exs. 1 and 2). The staircases, in turn, are accessible through either hallways to the sales floor (102 and 111) or by the service doors adjacent to the stairwells which lead to the Nissan service isle. Id.

The vote took place on June 28 from 1:30 p.m. to 3:30 p.m. (Tr. 17). Carter Doolittle serves as the General Manager of the entire dealership, and, therefore, maintains workspace in both the Subaru building and the Nissan building. (Tr. 43, 46, 48, 218). From April 2012 to the day of the election, Doolittle gradually spent an increasing amount of time at his desk located in the Nissan show room because the Nissan dealership did not have a new car sales manager. (Tr. 83, 218). By the time of the election, Doolittle was spending “99%” of his time in the Nissan show room.⁶ (Tr. 219). Doolittle’s desk at the Nissan show room is located at the sales desk, which consists of a wide open counter located within the sales floor (108). (Tr. 43, 48, 57). In addition to the sales desk (108), Doolittle also uses office 109 and Office 110 if the business managers located in those offices are not scheduled to be there in the event that an employee wants to hold a private conversation. He testified, “I used both finance offices on Exhibit 1. I use 109 and office 110 if the Business Manager in that office isn’t scheduled to be there that day, if someone wants to have a private conversation, whichever office is available.” (Tr. 83).

During the course of the election, Doolittle sat at his desk (108) except for a 10-15 minute time period⁷ at approximately 2:00 when he met first briefly with sales person Joe Cobb

⁵ The top of Er. Ex. 1 and 2 represents south rather than north. (Tr. 178).

⁶ The R&R noted: “No testimony was offered to rebut this assertion” regarding the time Doolittle spends in the Nissan building. (R&R at 8).

⁷ The R&R noted: “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

in a finance office (Office 110) and then with three body shop technicians, Steve Johnson, Dan Morrison and Rick Servaty. (Tr. 222, 225).

Doolittle, Cobb, Johnson, Morrison, and Servaty all testified consistently why they were in Office 110 during the polling time. At approximately 2:00 p.m. on June 28, Cobb, who sits at work station 10 (WS 10) (Er. Ex. 1) approached Doolittle at the service desk (108) and requested a private meeting to discuss a time-off request. (Tr. 55, 129). Cobb was closing on the sale of a home and wanted to request vacation time from June 29 to July 5 off to move. (Tr. 126, 131, 141). This was a particularly sensitive request, given that the month end was approaching as was the July 4th holiday, both important times within the automobile sales industry. (Tr. 55, 139-141, 223-224).

Doolittle and Cobb, with Cobb leading the way, approached the only four private offices on the first floor. (Tr. 57). Room 112 was occupied and housed the lot keys. (Tr. 130, 222). Cobb then led Doolittle to Room 113, which was occupied, Room 109, which was occupied, and finally, to the only unoccupied private office on the first floor, Office 110 – a finance office. (Tr. 28, 132, 146-148, 223, 234). Cobb opened Office 110 using the security code. (Tr. 132). Cobb and Doolittle testified that Office 110 was the best place to have a private conversation at the time. (Tr. 151, 234).

At approximately the same time Cobb and Doolittle started the brief meeting, Morrison, Servaty, and Johnson entered the Nissan building at entrance 101, having carpooled over from the body shop to vote in the Union election. (Tr. 160, 199). The three body technicians entered through entrance 101, walked through hallway 102 and climbed stairwell 103 (the east stairwell, which **cannot** be seen from Office 110) to the lunch room where they waited to enter the

minutes; and Doolittle and Johnson testified that Doolittle left Office 110 with the body shop technicians.” (R&R at 7 n.10).

conference room to vote. (Tr. 160-161, 200-201). After Morrison, Servaty and Johnson voted, they descended the west steps because they intended to go to the Subaru building where Johnson believed Doolittle officed. (Tr. 161-162, 202). At the bottom of the west stairwell, Johnson realized that Doolittle was in fact sitting in Office 110 with Cobb. (Tr. 162, 202). Johnson then approached Office 110, knocked on the door and asked whether he could enter the office with Morrison and Servaty. (Tr. 53, 163, 181-82, 202, 225).

Cobb and Doolittle had been in Office 110 for approximately five minutes (during which Doolittle approved Cobb's time-off request) before Johnson's knock. (Tr. 136). After the three body technicians entered the finance office, Cobb excused himself, leaving only Doolittle and the three body shop technicians in the finance office. (Tr. 29, 137, 163, 203).

The Report and Order explicitly stated that:

[The Union]'s submission and support of its objections does not include any evidence regarding what was said once employees were (allegedly) pulled into the office. Moreover, the objections do not allege that whatever was said in the office is objectionable.

(Bd. Ex. 1(d) at 3).

Nonetheless, the Hearing Officer allowed testimony related to what Doolittle and the three body technicians discussed "to the extent that the testimony [the Union's counsel was] eliciting could give insight as to whether or not surveillance was occurring." (Tr. 183-184). According to the three body technicians, they requested that Doolittle telephone the body shop with the result of the election following the election. (Tr. 162). In addition, they indicated that they discussed whether an employee who formerly worked in the body shop (Brandon) should be trained as a service technician. (Tr. 185, 216, 226). The body shop technicians uniformly testified that **no** other discussion occurred relating to the Union vote in which they had **already voted** occurred in Office 110. (Tr. 184-186, 190, 214-215).

IV. THE UNION'S OBJECTIONS

The Union identified three allegedly objectionable actions. (Bd. Ex. 1(a)). First, the Union alleged that the Employer was conducting surveillance. Second, the Union alleged that Employer management personnel “stationed” themselves in an office to interfere with the election. Third, the Union accused Employer’s management personnel of “pulling” employees inside an office. These allegations will be discussed in turn, in light of the evidence introduced at the Hearing.

A. Surveillance.

As for the Union’s surveillance allegation, Doolittle admittedly spent approximately 10-15 minutes in Office 110, located at the base of one of two stairwells that lead to the lunchroom which, in turn, leads to the conference room in which the vote took place. (Tr. 77). No witness testified as to the precise number of employees who used the west stairwell (viewable from Office 110) rather than the east stairwell (which **cannot** be seen from Office 110) to go to and/or from the polling place. (Tr.109, 120, 122-123, 177, 187, 233). The body shop technicians entered through the east stairwell because they drove from the body shop to the Nissan building. (Tr.160-161, 200-201). There were more service technicians in the Nissan service department than the Subaru service department and that the door from the Nissan service department was closer to the east stairwell than the west stairwell. (Tr. 40, 123, 205-206, 226). In addition, the door to the conference room in which voting took place is closer to the east stairwell (103) than the west stairwell (114). (Tr. 39). It appears that the Subaru employees likely entered primarily through the west stairwell because the Subaru building is west of the Nissan building. (Tr. 24-25, 40, 89-90, 116).

Other than the 10-15 minutes of the two-hour voting period during which Doolittle met with Cobb and the three body technicians in finance office (110), Doolittle spent the entire voting period sitting at the sales desk (108) from which neither stairwell can be seen. (Tr. 221). Even during the 10-15 minutes during which Doolittle met with Cobb and the three body technicians in the finance office (110) he was only able to see the west stairwell (114), but could not see the east stairwell (103). (Tr. 41, 206). If Doolittle intended to conduct surveillance of individuals entering both stairwells, he could have stood at the service isle from which **both** the east stairway and the west stairway are visible, but he did not do so. (Tr. 109, 112, 207, 228). Instead, Doolittle chose to spend the vast majority of the voting period sitting at a desk from which neither stairwell was visible. (Tr. 43, 221).

Although the Hearing Officer allowed inquiry into the discussion which occurred between the three body technicians and Doolittle in Office 100, for the limited purpose of determining whether surveillance occurred, none of the three who testified (Doolittle, Johnson or Morrison) testified that **any** discussion occurred relating to surveillance. (Tr. 184-186, 190, 214-215). According to Johnson:

When we walked in, like I've told you probably – this will be the fourth time – I asked him when it was over with if he could call over there [the body shop] and let us know. He said, “yeah” . . . end of conversation. Nothing more about the Union, nothing about voting.

(Tr. 190).

According to Johnson, Doolittle would not have even been able to see employees ascending or descending stairwell 104 unless Doolittle “could see through Rick [Servaty].” (Tr. 187). The most damning evidence the Union could muster during the day-long hearing relating to surveillance is that Doolittle gave a friendly wave to one of the service technicians on his way to **vote after the service technician first waved at Doolittle**. (Tr. 33, 42). One of the Union’s

witnesses, Jason Gross, testified that when he passed the finance office (110), “I saw [Doolittle] but I don’t know if he saw me.” (Tr. 92). When asked, “did he look at you or look in your direction?” Gross responded, “I cannot recall that.” Id.

Doolittle vehemently denies engaging in any surveillance and denies that he utilized finance office 110 for the purpose of conducting surveillance. (Tr. 222).

B. Stationing.

According to Doolittle, he was never instructed by the National Labor Relations Board agent or the Union to avoid sitting in Office 110. Doolittle testified:

My understanding was, is what I’m not supposed to – I’m not allowed to be in 202 [the polling place], I’m not allowed to position myself outside the door of 202. And that’s what I understood the extent of it was.

(Tr. 221; see also Tr. 237-238).

Doolittle vehemently denied that his presence in the Office 110 had anything to do with the voting process and vehemently denied purposely stationing himself to watch over voters attending the election. (Tr. 228-229).

C. “Pulling Employees Inside an Office.”

Despite offering testimony by three service technicians who testified on behalf of the Union as well as two of the body shop technicians who were allegedly pulled into an office, the Union presented absolutely no evidence that Doolittle pulled any employee into any office. (Tr. 42, 102-103, 121-122, 164-165, 203-204, 222, 229). Indeed, no evidence exists that he even waived an employee into the office until after an employee (Johnson) had knocked to request permission to enter. (Tr. 42, 102-103, 121-122, 164-165, 203-204, 222, 229).

V. HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On August 13, the Hearing Officer issued her R&R. After making Findings of Fact, the Hearing Officer framed the legal issue as follows:

[The Union] 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' undisputed presence in Office 110 constitutes surveillance requiring that the election be set aside.

(R&R at 12 (footnote omitted)).

Guided by Performance Measurements Co., 148 NLRB 1657 (1964), the R&R considered (1) the duration of Doolittle's presence; (2) the layout of the facility; (3) whether Doolittle knew any passing employees must be on their way to vote; and (4) Doolittle's conduct while in Office 110. (R&R at 12-16). First, regarding the duration, because "Doolittle was in Office 110 for approximately 30 minutes of the 2-hour polling time," the R&R found the Union "has not established that Doolittle had a 'continued presence.'" (R&R at 13). Second, regarding the layout, the R&R concluded that voters did **not** have to pass Office 110 to vote because "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." (R&R at 14). Third, the R&R found Doolittle "had neither a direct view of the polling place nor knew if employees were ascending the stairs for the purpose of voting." (R&R at 13). Fourth, the R&R found "[t]here 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." (R&R at 14).

Accordingly, the R&R stated:

I conclude that [the Union] has failed to meet its burden of proof. [The Union] did not present sufficient evidence to demonstrate that Doolittle was in Office 110 for the purpose of engaging in surveillance: he did not pull employees in to talk with him or engage employees in lengthy conversations 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.

(R&R at 16-17).

Last, the R&R rejected the Union's Peerless Plywood argument, finding: "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 that assertion." (R&R at 17 n.19).

VI. ARGUMENT

As an initial matter, the Union, as the objecting party, has the burden of proving interference with the election, which involves establishing that the challenged conduct "has the tendency to interfere with the employees' freedom of choice." See, e.g., Hollingsworth Management Serv., 342 NLRB 556, 556 (2004); see also Park Chevrolet-Geo, 308 NLRB 1010, 1010 n.1 (1992) (noting that the evidence introduced by the objecting party must establish a *prima facie* case in support of its objections). Moreover: "It is well settled that representation elections are not lightly set aside," and "[t]here is a strong presumption that ballots cast ... reflect the true desires of employees," meaning that "the burden of proof on parties seeking to have a Board-supervised election set aside is a **heavy one**." Suburban Journals of Greater St. Louis, LLC, 343 NLRB 157, 159 (2004) (internal citations and quotations omitted; emphasis added).

The Union ignores its burden and instead invites the Board to engage in rank speculation to overturn the election.

First, the Union bases much of its argument on the incorrect premise that the voters “*had to pass* by Doolittle while he was at the particular location [(Office 110)].” (Union Brief at 4 (emphasis added)). This is a gross misrepresentation of the undisputed facts. As noted in the R&R, because there were **two** available staircases that would permit the employees to access the polling place, “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.” (R&R at 14). The Union’s argument on Exceptions also ignores its own Objections: “The lunchroom [polling place] has **two stairwells** leading from the service area. **One**, which is closest to the other service building, has an office located near the base” (Office 110). (Bd. Ex. 1(a) (emphasis added)). Further, as noted in the R&R, “there are more service technicians in the Nissan building than the Subaru building, and the east staircase [which is **not** visible from Office 110] would be most convenient for a number of them.” (R&R at 14). The Union is simply wrong to suggest to the Board that all voters “had to” pass by Office 110 to vote.

In a somewhat related argument, the Union claims, without any citation to the record, that “Doolittle *would* know that anyone ascending the stairs would be on his way to vote.” (Union Brief at 5). However, as found in the R&R, “Doolittle had neither a direct view of the polling place nor knew if employees were ascending the stairs for the purpose of voting.” (R&R at 15). The Union cannot point to any evidence to support its assertion.

Second, as reflected in its briefing, the Union introduces numerous theories, which, as reflected by the emphasis added, have absolutely no support in the record: (1) “*at least one* employee complained to the Board Agent conducting the election” (Union Brief at 3); (2) “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 reason⁸ (Union Brief at 3); (3) there “*could have been* many more” employees who passed Office 110 on their way to vote when Doolittle was inside (Union Brief at 4); (4) “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 [these unknown individuals] from voting⁹ (Union Brief at 4); (5) “it appears that Doolittle *might* purposely have chosen to position himself where Nissan-side employees would access the polling area” (Union Brief at 5); and (6) “it is *not known* where the employees who were not accounted for voted” (Union Brief at 5). The Union had its opportunity, at the Hearing, to introduce such evidence, if it exists, in support of its Objections. It simply failed to do so.

Ultimately, the Union has failed to carry its burden; its Objections fail as a matter of law in several respects.

A. Surveillance.

First, it is well-established that holding an election at the Employer’s place of business or near a place of management responsibility does not require that an election be invalidated. See Cupples-Hesse Corp., 119 NLRB 1288, 1288-89 (1958) (rejecting objection based on the fact that the election was conducted “near certain company offices”). Accordingly, the mere fact that management was present in the facility during the election period—and continued “business as usual”—is not objectionable conduct.

⁸ The Union attempted, unsuccessfully, to introduce evidence on this point at the Hearing. (See Tr. 231:24-232:1 (Q [Counsel for the Union] ... Are you [(Doolittle)] aware that *maybe* a few people even called the NLRB office complaining about your presence? A [Doolittle]: Absolutely not).

⁹ Further, this assertion is directly rebutted by the fact of the 45 eligible voters, there were 45 votes (20 for the Union, 21 against the Union, 1 void, and 3 challenged). (See Bd. Ex. 1(b) at 5, Revised Tally of Ballots).

Second, the conduct “proved” at the hearing falls far short of constituting objectionable surveillance based on well-established Board law discussed infra.

In McIndustries, Inc., 244 NLRB 1298 (1976), the Union objected to the election as follows: “Employer agents, manager, and/or supervisors remained impermissibly close to the polling place during the conduct of the election.” Id. at 1303. Specifically: “The Union contends there was extensive surveillance by [the Employer’s] supervisors during the election and also a prolonged conversation initiated by [a supervisor] with an employee standing in line to vote.” Id. The evidence in support of the objection was deemed insufficient because the “[s]upervisory witnesses testified, without contradiction, that the nature of their duties occasionally required movement from one area of the plant to another,” a supervisor testified “that on at least one occasion it was necessary for her to pass near the vicinity of the voting line in order to carry out her normal duties and responsibilities,” and the conversation did not involve the election or “anything about the Union.” Id. at 1303-04. Moreover, “[i]n order to fairly assess the question of surveillance it is necessary to consider the physical layout of the plant and the area of the plant where the voting took place. The balloting took place in a ‘breezeway’ between two large open sections of the plant and within a few feet of the main office. Therefore employees standing in line to vote were sometimes clearly visible to other employees and supervisors from their work stations.” Id. at 1303. In conclusion: “The composite testimony of all the witnesses who testified in this proceeding revealed that the polling area was visible.... The supervisors, allegedly involved in the surveillance, acknowledged it was occasionally necessary to pass in the vicinity of the polling place but denied any conduct which could be viewed as surveillance. The testimony of the Union’s witnesses does not establish any acts of surveillance.” Id. at 1304.

In Patrick Industries, Inc., 318 NLRB 245 (1995), the Union objected to the election, alleging that “employees were forced to walk through a gauntlet of management persons (plant manager, supervisor and other members of management) as they were entering the polling area during voting times.” Id. at 255. The objections were overruled because

the evidence shows that [the management persons] were there for reasons unrelated to the voting.... Plainly it was insensitive of the three supervisors to spend so much time next to the route the ... 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.... But supervisory sensitivity about the election process is not the test for whether conduct is objectionable.... [T]he supervisors were [there] for work-related reasons, they did not converse with the employees, they were a reasonable distance from the breakroom [where the voting took place], and nothing about their behavior was intimidating.

Id. at 256. Similarly, here, Mr. Doolittle was in Room 110 to discuss a time-off request with Mr. Cobb, a legitimate business purpose completely unrelated to surveilling the election.¹⁰

In J. P. Mascaro & Sons, 345 NLRB 637 (2005), the Board held “the judge erred in sustaining the Petitioner’s Objection 1, which alleged that the Employer’s agents stood outside the voting area, within 15 feet of the polls, and intimidated voters as they entered to vote,” overruling the objection. Id. at 637. The Employer’s President stood in front of the facility for most of the day, standing between 30 and 54 feet from the door. Id. at 637. First, the Board noted “the evidence does not show that the Employer engaged in objectionable electioneering.” Id. at 638. Second, the Board found, that the President’s “presence did not constitute objectionable surveillance. Here there is insufficient evidence to establish that employees had to pass by [him] in order to vote.... In addition, [he] had no direct view of the vending/snack room

¹⁰ To the extent the Union argues that the content of the conversation Doolittle had with Cobb and the three body technicians is irrelevant under the rule set forth in Milchem, Inc., 170 NLRB 362 (1968), the Union is incorrect. Milchem only prohibits conversations between a party and voters while the voters are in a voting area waiting to vote. No evidence exists that Doolittle was in the voting area (202) or spoke to any voters while they were waiting to vote.

area [where the vote took place]. Although he could see who entered the facility he had no way of knowing who was entering to vote and who was entering to perform job-related duties or to eat and drink in the vending/snack room.” Id. at 639. Accordingly, the Board certified the results of the election.

To constitute objectionable surveillance the Union must show that management positioned itself in an area that cannot be explained by ordinary business reasons. See McIndustries, Inc., 224 NLRB at 1303-04; Am. Nuclear Resources, Inc., 300 NLRB 567, 567 (1990) (finding employer following its “normal security procedure” during election “did not reasonably tend to coerce the employees and therefore it was not objectionable conduct”). The uniform description of what happened on the day of the election comes nowhere close to satisfying that standard. This is evident in the fact that the Union’s attempts to suggest that Doolittle could have met with Cobb in someplace other than the finance office reached the point of ridiculousness:

Q [Counsel for the Union]: And how many cars are out there on display most of the time?

A [Carter Doolittle]: Three.

Q: Three, okay.

And nothing would prevent you from stepping into one of those cars, shutting the door after you and having a private conversation, would there be?

A: I have never sat in a car on the showroom floor to engage in a private conversation with an employee. That’s not the way that I would having [sic] a meeting with an employee.

Q: Okay. What about the area like 104, 105, 106 – that area?

A: [Joe Cobb] 104. Oh. Those are latrines.

Q: Okay. Well, I mean, if this is a 3-minute conversation, you could use that, couldn't you.

A: I prefer to sit down at a[n] office and use that . . . instead of a latrine.

(Tr. 58, 148, 149). Although the R&R found that “Office 110 was not the only place at the facility that would have offered a private meeting space for Doolittle and Cobb,” (R&R at 15), it remains undisputed that Doolittle and Cobb were in Office 110 for a legitimate business purpose, unrelated to the Union election. See Patrick Industries, 318 NLRB at 256 (overruling objections even though the supervisors “could readily have held their conversation in a nearby office” because “supervisory sensitivity about the election process is not the test for whether conduct is objectionable” and “the supervisors were [there] for work-related reasons”).

1. The Union's Arguments Are Unpersuasive

The Union (a) cites to various (inapposite) cases to claim the Employer's actions constituted objectionable surveillance; (b) claims that the secrecy of the election process has been compromised; and (c) overreaches to argue that the Peerless Plywood rule is implicated. As discussed below, none of these arguments have merit.

a. The Cases the Union Relies Upon are Inapposite

The Union has failed to cite a single apposite case in support of its surveillance argument. The Union cites Electric Hose and Rubber Co., 262 NLRB 186, 216 (1982), Ravenswood Electronics Corp., 232 NLRB 609 (1977), Shrewsbury Nursing Home, Inc., 227 NLRB 47 (1976), and Woodland Molded Plastics Corp., 250 NLRB 169 (1980), and claims these represent “fact situations similar to the instant case.” (Union Brief at 5). These cases are not on point. First, in Electric Hose, it was undisputed that a supervisor “‘stationed’ [himself] within 10 to 15

feet of the entrance to the voting area.” 262 NLRB at 216, 216 n.129. Significantly, and highly distinguishable from the facts at issue here, this supervisor “**did not testify** to explain his presence near the polling site during the voting.” Id. at 216 (emphasis added). Therefore, “[w]ithout any explanation for a supervisor to be ‘stationed’ outside the voting area, it can only be concluded that his purpose in observing the even [sic] was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched.” Id. (emphasis added). The ALJ deemed this purpose “destroyed the laboratory conditions necessary for the conduct of a free and fair election,” citing the Ravenswood Electronics, Shrewsbury Nursing Home, and Woodland Molded Plastics Corp. cases relied upon by the Union here. These cases relied upon by the ALJ in Electric Hose and the Union here are highly **dissimilar** to the instant case.

Ravenswood Electronics and Shrewsbury Nursing Home did not even involve an election. Rather, in Ravenswood Electronics, the Employer was found to have engaged in surveillance because a supervisor watched the Union passing out authorization cards to employees and, when asked by an employee for an explanation for her (the supervisor’s) presence, the supervisor told the employee “‘they’ told her to do so,” which was interpreted to mean the Employer’s “higher management officials.” 232 NLRB at 614-15. In Shrewsbury Nursing Home, the Employer hired an armed security guard the day after the Union started distributing literature to employees. 227 NLRB at 50. The security guard testified that the Employer told him to report “when union representatives arrived to distribute literature.” Id. Therefore, the ALJ found that the Employer’s purpose in hiring the security guard “was to effectively survey the union activities of his employees and to be sure they [(the employees)] knew they were being watched.” Id.

In Woodland Molded Plastics, an upper-level management official watched the Union, on two separate days, “hand out literature to employees and engage them in conversation.” 250 NLRB at 169. The Union was positioned on public property outside of the Employer’s premises. Id. The official claimed that he was simply “investigat[ing] reports that the union organizers were on company property.” Id. However, because that rationale did not explain why he remained observing these Union activities for “an extended period of time” after he determined the organizers were **not** on the company’s property, the Board found “we can only conclude that [the official’s] purpose in continuing to observe the events ... was to effectively survey the union activities of the employees and to convey to said employees the impression that they were being watched.” Id.

Next, the Union claims that ITT Automotive, 324 NLRB 609 (1997), is “strikingly similar to the instant case.” (Union Brief at 6). Not so. In ITT Automotive, during several polling sessions, employees “were **required to go by** [five or six] managers standing in a circle” as they went to vote. 324 NLRB at 623-24. Moreover, the managers “could watch [the employees] as they were standing in line to vote” from a “balcony outside the door to the polling place.” Id. at 623-25. This observation continued for the entirety of the polling period. Id. Here, again, the employees simply were **not required** to pass Office 110 when going to vote. Further, the ALJ found that “the Company presented evidence that I find was deliberately misleading.” Id. at 623. Specifically, the Employer submitted photographs of the balcony that attempted to obscure (via tricky camera angles) the fact that the managers **could** observe the employees. Id. The ALJ found, therefore, “the misleading evidence in support of this argument amounts to a deliberate attempt at deception. I discredit [the Employer’s] other denials and

reject this defense.” Id. at 625. This “deception” at issue in ITT Automotive destroys any persuasive value here.¹¹

Last, the Union claims “a similar result was reached” in Nathan Katz Realty v. NLRB, 251 F.3d 981, 991 (D.C. Cir. 2001). (Union Brief at 6). Again, Katz is highly distinguishable as it involved conduct (sitting in a car and motioning, gesturing, and honking at employees as they passed to vote) which “occurred in a no-electioneering zone” and the Union agents’ “presence and actions were contrary to the instructions of the Board Agent.” 251 F.3d at 991. There is no similar indiscretion here. Moreover, the Union ignores the procedural posture of Katz: the Board overruled the objections to the election, and the D.C. Circuit vacated the Board’s Order on petition for review. Id. at 991-993. Even the D.C. Circuit’s reasoning, however, is not helpful to the Union’s case here, as it interpreted Board caselaw “to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is **continually present** in a place where employees **have to pass in order to vote.**” Again, Doolittle’s presence in Office 110 was no more than thirty minutes, not continuous, and employees simply did not **have to** pass Office 110 to access the polling place.

b. The Union Has No Basis to Claim that the “Secrecy of the Ballot” Was Compromised

Next, the Union claims that Doolittle’s brief presence in Office 110 “destroy[ed] the secrecy of the ballot for a large component of those who voted.” (Union Brief at 6). Again, while in Office 110, Doolittle “had neither a direct view of the polling place nor knew if employees were ascending the stairs for the purpose of voting.” (R&R at 13). The Union can point to no contrary evidence. Instead, the Union cites to three inapposite cases: Imperial Reed

¹¹ Here, the Employer introduced detailed floor plans and a photograph of Office 110. (See Er. Exs. 1, 2, 3). There is **no** claim here that these Exhibits are misleading in any respect.

& Rattan Furniture Co., 118 NLRB 911 (1957), Sewell Plastics, 241 NLRB 887 (1979), and Standard-Coosa-Thatcher Co., 115 NLRB 1790 (1956). In Imperial Reed, the polling place was set up so that the observers could actually see the ballots as the employees placed them on the voting table to vote. Id. at 912-13. Therefore, the Board found the “voting arrangements were entirely too open and too subject to observation to insure secrecy of the ballot,” which required a new election. Id. at 913. Similarly, in Sewell Plastics, several observers “testified that during the election they could see how a substantial number of ballots were marked.” 241 NLRB at 887. However, because “the voters were unaware that observers could see how ballots were marked,” the Board found “we see no reason to set aside the election. Any possible impairment of the secrecy of the ballot could not have affected the outcome of the election or intimidated the voters...” Id. Last, Standard-Coosa-Thatcher involved whether irregularly marked ballots should be voided, not a claim that the secrecy of the election had been compromised. 115 NLRB at 1790-92. There is no basis to claim here that Doolittle’s brief presence in Office 110 in any way compromised the secrecy of the voting process as he did not know whether any employees he observed on the stairwell were on their way to vote or not, much less *how* they voted.

c. Peerless Plywood Is Inapplicable

Last, the Union claims: “the [E]mployer’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, [in violation of] the Peerless Plywood ... rule.” (Union Brief at 6-7 (emphasis added)). The Union’s argument first ignores the limited time period during which Doolittle was in Office 110. More significantly, the Union misstates the Peerless Plywood rule, which is as follows: “[E]mployers and unions alike will be prohibited from making election speeches on company

time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election.” 107 NLRB at 429. However, the Board clarified that “the rule does not prohibit employers or unions from making campaign speeches on or off company premises during the 24-hour period if employee attendance is voluntary and on the employees’ own time.” Id. at 430. First, this conversation was not a “campaign speech.” The Union argues it is “disingenuous” that the meeting only touched on the election briefly “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 [for Doolittle to call them with the election results].” (Union Brief at 7). The Union’s argument is unpersuasive as it ignores the undisputed evidence that the employees spent the majority of this time with Doolittle discussing whether they thought another employee should be promoted to technician. However, even if this conversation can be somehow considered a “campaign speech” (which it was not),¹² because it is undisputed that **the employees** initiated the conversation with Doolittle in Office 110 – and not the other way around – the voluntariness precludes a finding that the Peerless Plywood rule has been violated here.

B. Stationing.

As discussed supra in Section IV.B, the Union failed to introduce any actual evidence which supported its “stationing” theory. Thus, the Union’s claim of objectionable conduct based on “stationing” similarly misses the mark. While in some circumstances objectionable conduct has been found, where during polling, supervisors stationed themselves so that employees **had to** pass by them on their way to vote, see, e.g., ITT Automotive, 324 NLRB at 623-625, the facts

¹² Further, the Report and Order specifically noted that the Objections “do not allege that whatever was said in the office is objectionable.” (Bd. Ex. 1(d) at 3). Therefore, the Hearing Officer only allowed inquiry into the discussion which occurred between the three body technicians and Doolittle in Office 110, for the limited purpose of determining whether surveillance occurred. (Tr. 183-84).

here do not come close to establishing such a conclusion. Indeed, the floor plans received into evidence indicate that the more natural stairway for the Nissan employees and the body shop employees (who constituted a majority of the eligible voters) to use coming to and from the election is the east stairwell, which is on the **opposite** side and not visible from the office (room 110) where Dootlittle briefly met with Cobb and the three body shop technicians. There simply was no **need** for employees to use the staircase near the finance office to access the polling place. See J.P. Mascaro, 345 NLRB at 639 (finding management’s “presence did not constitute objectionable surveillance. Here there was insufficient evidence to establish that employees **had to** pass by [management] in order to vote” (emphasis added)).

Moreover, it is undisputed that management **never** stood at the service aisle, where both stairwells could be viewed.¹³ The Union’s Objections based on “stationing” should be overruled.

C. “Pulling Employees Inside an Office.”

As was the case for stationing, as discussed supra in Section IV.C., there simply is no evidence to support the Union’s bald assertion that employees were “pulled” inside an office. Rather, as explained by the employees themselves, they knocked on a closed door and they (the employees) asked permission to enter. The Union’s Objections based on this unsupported theory should be overruled.

¹³ The Union does not even make this allegation.

VII. CONCLUSION

The Union's Exceptions in support of its Objections misstate the facts, the law, or both. Accordingly, the R&R should be adopted, the Union's Objections overruled, and the Employer respectfully requests that the Board issue an appropriate Certification of Results of Election.

Dated: September 4, 2012

FELHABER, LARSON, FENLON & VOGT, P.A.

By: **s/Daniel R. Kelly**

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BROOKLYN PARK AUTOMOTIVE, INC

STATEMENT OF SERVICE

I hereby certify that on September 4, 2012, I caused the following:

EMPLOYER’S BRIEF IN OPPOSITION TO PETITIONER’S EXCEPTIONS

to be electronically filed with the National Labor Relations Board E-Filing System, and that I electronically mailed the same to the following:

<p>James T. Hansing IBT/974 331 Second Avenue South, Suite 840 Minneapolis, MN 55401 Email: jthanatt@yahoo.com</p>	<p>Paul McCullen Vice President Teamsters Local 974 3001 University Avenue SE, Suite 301 Minneapolis, MN 55414 Email: paultu974@yahoo.com</p>
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Dated: September 4, 2012.

s/Daniel R. Kelly
Daniel R. Kelly, #247674 (MN)