

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

NY-FV, Inc., d/b/a)	
HASSEL VOLVO OF GLEN COVE,)	
)	
)	
Employer,)	
)	
and)	CASE NO.: 29-RC-102996
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE)	
WORKERS, DISTRICT LODGE 15,)	
)	
Petitioner.)	

**EMPLOYER’S EXCEPTIONS TO REGIONAL DIRECTOR’S
REPORT ON OBJECTIONS**

On June 19, 2013, Regional Director James G. Paulsen issued his “Report on Objections” (“Report”), recommending that the Objections to Conduct Affecting Results of Election filed by Employer NY-FV, Inc., d/b/a Hassel Volvo of Glen Cove (“Hassel Volvo,” or “the Employer”), be overruled. Pursuant to Section 102.69(c)(2) of the Board’s Rules and Regulations, as amended, Hassel Volvo files the following Exceptions (and Supporting Brief incorporated herein) to the Regional Director’s recommendation, and asks that the Board order a new election, or in the alternative, a hearing on the merits of the Employer’s Objections.

PRELIMINARY STATEMENT

The Petition in this proceeding was filed by International Association of Machinists and Aerospace Workers, District Lodge 15 (“the Union”) on April 17, 2013. Pursuant to the Stipulated Election Agreement, Region 29 conducted an election between 8:00 a.m. and 9:15

a.m. on the morning of Tuesday, May 29, 2013, within the Lunch Room of the Employer's facility located in Glen Cove, New York.

The polling place was constrained by extremely confined quarters, measuring approximately 8' x 12'.¹ The bargaining unit consisted of no more than 15 employees, as confirmed by the underlying *Norris Thermador* agreement. The tally of ballots reflected a vote in favor of representation by ten to five, suggesting the participation of all eligible employees.

Over the days leading up to the election, employees were overheard to remark that the Union and its supporters had imposed undue pressure in an effort to coerce them into voting in favor of representation. Within a few hours after the polls had closed, these reports were corroborated by an eligible voter who openly remarked that the Union and its supporters "would make life difficult for him" if he chose to vote against representation. Others heard him to proclaim that he "had no choice but to go along" for fear of retribution, and that he was otherwise pressured into voting for representation. All of these statements were supported by affidavits submitted to the Region in support of the underlying Objections (Exhibits 1-4).

Within its Objection 1, the Employer submitted that the Union (by and through its supporters and agents), intimidated and threatened unit employees with acts of retribution in the event that they chose to exercise their rights to vote against representation. In its Objection 3, the Employer asserted that the close confines of the designated polling area deprived employees of proper safeguards to protect their right to vote with sufficient confidentiality.

In support of the former Objection, the Employer provided the affidavits of employees Ed Schaefer and Erica Cangero, along with those of managers Ashley Cousins and Marie Falcone, all of which offered first-hand testimony of employee remarks suggesting undue coercion as set

¹ The volume within these dimensions was occupied largely by a table with sufficient chairs for the observers, and other furniture that included a refrigerator.

forth above. The Regional Director summarily overruled both² Objections without holding a hearing, resolving substantial and unanswered questions of fact by finding that the Employer had failed to provide sufficient supporting evidence. The Employer states the following Exceptions to the Regional Director's recommendation on those Objections:

EXCEPTION I

The Exceedingly Close Confines of the Polling Area Inherently Deprived Unit Employees of the Privacy Required for a Board-Administered Election.

As the Board held over 50 years ago, "if the integrity of the Board's election process is to be maintained it is manifestly essential that employees be balloted in a secret election, for the secret ballot is a requisite for a free election." *Royal Lumber*, 118 NLRB 1015, 1017 (1957). Doubts regarding the secrecy of an election require that the election be re-run. *Id.*; *Imperial Reed & Rattan*, 118 NLRB 911, 912 (1957).

In *Imperial Reed & Rattan*, the Board agent oversaw the creation of an improvised voting booth that included stacking chairs and cushions to obscure observers' view of voters' actions.

Id. The evidence in that case showed:

[T]hat the table at which the observers sat was located approximately 7 feet from the voting table and within their line of vision as they sat at the table. ...[T]he union observer stated that he could see some of the ballots as the employees placed them on the voting table although he could not see how they were marked.

Id. at 912-13. In those circumstances – even where the testimony was that the observer *could not see how the ballots were marked* – the Board found that the:

[V]oting arrangements were entirely too open and too subject to observation to insure secrecy of the ballot and freedom of choice by the employees in the selection of a bargaining representative. A secret ballot is essential to a free election. In the interest of preserving the integrity of our election processes, we shall set aside the election and direct that a new election be held.

² A third Objection (Employer Objection 2), alleging that the union offered unlawful inducements, was also overruled.

Id. at 913. Similarly, in *Royal Lumber*, a non-voter who approached a make-shift voting booth stated that he *could not* see voters making markings on ballots, but the Regional Director found that “voters could have believed that he saw their vote.” 118 NLRB at 1017. The Board there found that “the employees voted under circumstances which at least raise doubts concerning the integrity and secrecy of the election,” and ordered a second election. *Id.*

Like the Board in *Royal Lumber*, the Board here should order a re-run election based upon the close proximity of the observers to the voters themselves, which would have offered them the ability to view voter arm movements, thereby depriving them of sufficient secrecy in the voting process.³

The Board’s Casehandling Manual (“CHM”) also envisions an entirely private polling space. Section 11304.3 of the CHM states that, “[w]hat is required is a compartment or cubicle that not only provides privacy but that also demonstrates the appearance of providing privacy, while maintaining a level of dignity appropriate to the election process.” An eight by twelve foot room cannot sufficiently occupy such a compartment, nor can it offer the level of privacy and dignity contemplated by Board procedures.

In his Report, the Regional Director fails to squarely address the contentions within Objection 3, choosing instead to dismiss them outright by suggesting that, “the Employer has not produced any evidence showing that the Petitioner engaged in the conduct alleged therein.” (Report at p. 4). In doing so, he erroneously assumes that the Employer takes issue with Petitioner’s conduct, when in fact it takes issue with the sufficiency of the process.

³ The Regional Director’s reliance on the stipulated election agreement as set forth within Footnote 3 of the Report is misplaced, as the Board has made clear that the notion of estoppel as applied to Objections proceedings is confined to circumstances in which a party relies on *its own misconduct* as objectionable. *B. J. Titan Service Co.*, 296 NLRB 668 (1989), and *Republic Electronics*, 266 NLRB 852 (1983).

Given the extremely close confines of the room in which the vote was conducted, it should not have been incumbent upon the Employer to produce supporting evidence beyond reference to the cramped confines of the polling area itself. Indeed, the Board has traditionally characterized its role in the conduct of elections as one that “must not be open to question.” *New York Telephone Co.*, 109 NLRB 788, 790 (1954). Consequently, it has set aside elections where, for example, improvised voting arrangements were in its opinion “entirely too open and too subject to observation to secure secrecy of the ballot.” *Imperial Reed Furniture Co.*, 118 NLRB 911, 913 (1957). *See also Columbine Cable Co.*, 351 NLRB 1087 (2007).

The Employer submits that under the unique circumstances of this case, its preliminary showing should at least be deemed sufficient for purposes of directing an evidentiary hearing. To prove a *prima facie* case, the Employer need only adduce evidence to show “that the employees voted under circumstances which at least raise doubts concerning the integrity and secrecy of the election.” *Royal Lumber*, 118 NLRB at 1017; *see also Imperial Reed & Rattan*, 118 NLRB at 912 (“the voting arrangements were such that there is doubt as to the complete secrecy of the ballot as required in Board conducted elections”). As set forth above, the evidence already available is sufficient to raise sufficient *doubt* – which is all that is required – as to the secrecy of the election that should cause the Board to invalidate the results and require a re-run election. At the very least, this doubt required the Regional Director to hold a hearing.

EXCEPTION II

The Employer Presented *Prima Facie* Evidence Supporting its Contention that the Union, Through its Agents, Engaged in Acts of Intimidation That Had a Tendency to Coerce Employees in Their Exercise of Free Choice.

In his Report, the Regional Director states that “an investigation of the objections has been conducted,” but he did not hold a hearing. The Regional Director should not have made his

determinations before hearing witness testimony beyond the scope of the affidavits offered by the Employer, which themselves make out a *prima facie* case of restraint and coercion.

Pursuant to Section 102.69(a) of the Board's Rules and Regulations, as amended, the Employer submitted the affidavits of four separate individuals as "the evidence available to it to support the objections." (See Exhibits 1-4). The Employer's provision of affidavits exceeded its obligation under Section 102.69(a), as the Board does not require their submission. Rather, the objecting party may submit a summary of the evidence and the names of witnesses who can provide such testimony. *The Daily Grind*, 337 NLRB 655, 656 (2002). To support the underlying objections, the evidence need only establish a *prima facie* case. *Id.*

The Board has made clear that violence or threats of violence constitute coercion and restraint within the meaning of Section 8(b)(1)(A), and may otherwise constitute objectionable misconduct under the Act. See, e.g., *Operating Eng's Local 450*, 267 NLRB 775 (1983); *Chemical Workers Local 738*, 156 NLRB 872 (1966). Even non-violent physical force constitutes restraint and coercion when used to prevent employees from exercising their Section 7 rights. *Longshoremen Local 6*, 79 NLRB 1487 (1948). Moreover, conduct creating an atmosphere that renders free choice improbable may warrant invalidating an election, despite the fact that the underlying conduct may not constitute an unfair labor practice. *General Shoe Corp.*, 77 NLRB 124 (1948).

The affidavits provided by the Employer herein established a *prima facie* case that at least ten percent of those ballots cast in favor of union representation were unduly influenced by acts of Union coercion that precluded the exercise of free choice. These affidavits show that within hours after the election, at least one employee was already openly proclaiming that he had

been subject to verbal intimidation and threatened with acts of retribution had he chosen to vote against union representation.

Specifically, manager Ashley Cousins stated that the day after the election, he was engaged in direct dialogue with a unit employee who volunteered that, “he did not want to go that way” (i.e. vote in favor of union representation), but that the union or its supporters “would make life difficult” for him had he failed to do so. *See* Exhibit 1. The implications of that statement could not have been more clear.

That same day, the same employee was overheard by two other individuals (Erica Cangero and Marie Falcone) proclaiming that he “had no choice” but to go along with those who were voting in favor of union representation. *See* Exhibits 2 and 3, respectively. A fourth employee (Ed Schaefer) also stated that during the week of the election, this same individual made clear that he was being pressured to vote in favor of union representation. *See* Exhibit 4.

Much could have been gleaned by directing a hearing to allow for elaboration from these and other witnesses who could shed additional light upon the full scope of coercion referred to above, and its impact on employee free choice. Yet in his Report, the Regional Director offers little more than a blanket dismissal of Objection 1, on the basis that, “the Employer failed to present sufficient evidence to support its first objection.” (Report at p. 3). Elaborating on that contention, the Regional Director dismissed the affidavits as “hearsay statements” containing “conclusory statements” that failed to attribute the conduct in question to Petitioner. (Report at pp. 3-4).

The Employer concedes that the affiants offered testimony pertaining to the remarks of a co-worker rather than themselves, but that alone does not render their testimony inadmissible or untrustworthy. Moreover, a review of the affidavits themselves paints a different picture. For

example, there is nothing “conclusory” in the affidavit of Ashley Cousins, who quotes a unit employee verbatim as to the threats directed at him, and goes on to attribute these statements to “the union and/or its supporters.” (Exhibit 1). Exhibits 2 and 3 also offer direct quotes, rather than conclusory statements. At a minimum, these affidavits called for further investigation in the form of an evidentiary hearing.

EXCEPTION III

The Regional Director Abused His Discretion by Failing to Order a Hearing on Employer Objections 1 and 3.

A hearing should be held whenever there are substantial and material issues of fact. *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 706-07 (2d Cir. 1978) (remanding case for hearing on employer's election objection where employer averred that certain union payments to company employees raised substantial and material facts regarding the purpose and effect of those payments); *Home Town Foods, Inc. v. NLRB*, 379 F.2d 241, 244 (5th Cir. 1967) (holding that, if there are substantial and material issues of fact, employer must be given opportunity for hearing to establish its charges; court said that employer's objections and evidence must be considered cumulatively because “[i]t is not the effect of any one of the objectionable acts standing alone,...but the combined effect of all of them, which must be considered”). *See also Kerr-McGee Chemical Corp.*, 311 NLRB 447 (1993) (divided Board directed a hearing to “aid us in determining which side of the line drawn by our case law this case falls”).

The Employer’s Objections in this case clearly raised substantial and material factual issues warranting a hearing. A hearing was clearly necessary in this case, and if the Board does

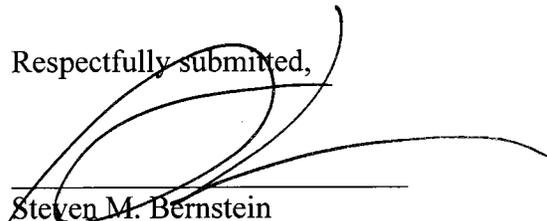
not itself order the election re-run, it should remand the Employer's Objections so that a proper one may be conducted.⁴

CONCLUSION

The Employer submitted *prima facie* evidence that the Union engaged in election interference that had a tendency to coerce employees in their exercise of free choice, and that the ensuing election was not held under conditions that afforded sufficient voter privacy. On the basis of the record as it currently stands, the Employer respectfully requests that the Board invalidate the results of the first election and order that a second election be run. In the alternative, the Employer asks that the Board order the Regional Director to hold a hearing on this matter, to issue a decision consistent with the well-settled precedent of *Imperial Reed & Rattan* and *Royal Lumber*, and to establish a full record as to the influence of the union's conduct and the polling area itself on the exercise of free choice.

Date: July 2, 2013

Respectfully submitted,



Steven M. Bernstein
For Fisher & Phillips LLP
Counsel for the Employer
401 E. Jackson St.
Tampa, Florida 33602
(813) 769-7500
sbernstein@laborlawyers.com

⁴ It cannot be denied that the Regional Director perceived gaps in the affidavit testimony offered by the Employer. The proper way to fill those gaps would be to call the affiants (and/or others) to the witness stand and have them testify under oath, rather than to fill them with the Regional Director's speculation. Even if the affiants themselves did not testify, the questions raised should have at least been resolved by the testimony of others, including those whose cooperation the Employer could not voluntarily procure. Because the Regional Director denied a hearing, however, the Employer had no opportunity to take advantage of Section 102.66(c) of the Board's Rules and Regulations, as amended, which allows a party to obtain a subpoena issued by the Board that would have compelled the attendance of witnesses. Such subpoenas are *only* available if and when a hearing is actually held.

Exhibit 1

COUNTY OF MONMOUTH
STATE OF NEW JERSEY

STATEMENT OF ASHLEY COUSINS

I, Ashley Cousins, have given this Statement voluntarily, without coercion or duress or promise of benefit.

1.

My name is Ashley Cousins, and I am employed by Group One Automotive as a Regional Fixed Operations Director. I am over the age of majority and suffer from no legal disabilities. I am giving this statement based upon my own personal knowledge.

2.

I understand that Hassel Volvo of Glen Cove (“Hassel Volvo”) has filed Objections with the National Labor Relations Board alleging that conduct by the union, through its supporters, agents or associates, occurred and interfered with the free choice of employees to such a degree that it materially affected the results of the representation election that was conducted at the Dealership on Wednesday, May 29, 2013.

3.

My personal knowledge on those allegations is as follows.

4.

While working on site at Hassel Volvo on May 30, 2013, I encountered a service technician named Mike Ebrimian, who would have been eligible to participate in the representation election that took place the day before.

5.

During this encounter, a conversation ensued, in which I expressed surprise over the results of the recent election. In response, Mr. Ebrimian volunteered, "I didn't want to go that way, but I knew they would make life difficult if I didn't." It was clear to me that his reference to "they" within the context of this statement was intended to refer to the union and/or its supporters.

This concludes my testimony. I have read the preceding statement consisting of five paragraphs, and swear that it is true and correct to the best of knowledge.

Executed this 13th day of June, 2013.


Ashley Cousins

Exhibit 2

COUNTY OF NASSAU)
STATE OF NEW YORK)

STATEMENT OF ERICA CANGERO

I, Erica Cangero, have given this Statement voluntarily, without coercion or duress or promise of benefit.

1.

My name is Erica Cangero, and I am employed by Hassel Volvo of Glen Cove (“Hassel Volvo”) as a DMV Administrator. I am over the age of majority and suffer from no legal disabilities. I am giving this statement based upon my own personal knowledge.

2.

I understand that Hassel Volvo has filed Objections with the National Labor Relations Board alleging that conduct by the union, through its supporters, agents or associates, occurred and interfered with the free choice of employees to such a degree that it materially affected the results of the recent representation election.

3.

My personal knowledge on those allegations is as follows.

4.

While working on site at Hassel Volvo on May 29, 2013, I overheard a service technician named Mike Ebrimian, who was complaining about the recent election results. Specifically, he loudly proclaimed that he “had no choice but to go along with the guys in the shop” or they would “give him a hard time.”

This concludes my testimony. I have read the preceding statement consisting of four paragraphs, and swear that it is true and correct to the best of knowledge.

Executed this 13th day of June, 2013.

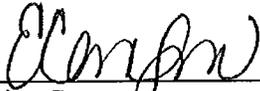

Erica Canger

Exhibit 3

COUNTY OF NASSAU)
STATE OF NEW YORK)

STATEMENT OF MARIE FALCONE

I, Marie Falcone, have given this Statement voluntarily, without coercion or duress or promise of benefit.

1.

My name is Marie Falcone, and I am employed by Hassel Volvo of Glen Cove (“Hassel Volvo”) as an Accounting Supervisor. I am over the age of majority and suffer from no legal disabilities. I am giving this statement based upon my own personal knowledge.

2.

I understand that Hassel Volvo has filed Objections with the National Labor Relations Board alleging that conduct by the union, through its supporters, agents or associates, occurred and interfered with the free choice of employees to such a degree that it materially affected the results of the recent representation election.

3.

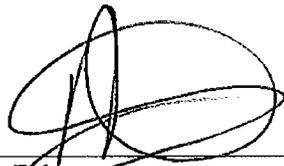
My personal knowledge on those allegations is as follows.

4.

While working on site at Hassel Volvo on May 29, 2013, I overheard a service technician named Mike Ebrimian, who was complaining about the recent election results. Specifically, he loudly proclaimed that he “had no choice but to go along with the guys in the shop” or they would “give him a hard time.”

This concludes my testimony. I have read the preceding statement consisting of four paragraphs, and swear that it is true and correct to the best of knowledge.

Executed this 13th day of June, 2013.



Marie Falcone

Exhibit 4

COUNTY OF NASSAU)
STATE OF NEW YORK)

STATEMENT OF ED SCHAEFER

I, Ed Schaefer, have given this Statement voluntarily, without coercion or duress or promise of benefit.

1.

My name is Ed Schaefer, and I am employed by Hassel Volvo of Glen Cove (“Hassel Volvo”) as a Parts Retail Counterperson. I am over the age of majority and suffer from no legal disabilities. I am giving this statement based upon my own personal knowledge.

2.

I understand that Hassel Volvo has filed Objections with the National Labor Relations Board alleging that conduct by the union, through its supporters, agents or associates, occurred and interfered with the free choice of employees to such a degree that it materially affected the results of the recent representation election.

3.

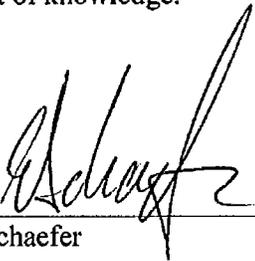
My personal knowledge on those allegations is as follows.

4.

While working on site at Hassel Volvo during the week of May 27, 2013, I overheard a service technician named Mike Ebrimian volunteering that he felt pressured by his co-workers into voting in favor of union representation.

This concludes my testimony. I have read the preceding statement consisting of four paragraphs, and swear that it is true and correct to the best of knowledge.

Executed this 13th day of June, 2013.



Ed Schaefer