Electro-Wire Products, Inc., *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Petitioner. Case 7-RC-14820

June 11, 1979

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

The Board has considered the objections[1] to an election held on June 2, 1978,[2] and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs[3] and hereby adopts the Hearing Officer's findings and recommendations,[4] but only to the extent consistent herewith.[5]

Petitioner's Objection 1 alleges, in substance, that the Employer was in violation of the *Peerless Plywood* rule[6] when, on the morning of the election, its president, Roland Catenacci, spoke to each eligible voter on the first shift, encouraging them to vote and suggesting that they vote no. The Hearing Officer recommended that this objection be sustained. We disagree.

The facts are as follows: The election was scheduled from 2:45 to 4:45 p.m. On the day of the election President Roland Catenacci spoke individually to each and every employee on the first shift (comprising at least half of the eligible voters), stating that he wanted them to vote at the election and that he would appreciate their voting no. The individual talks lasted only a few minutes at the work stations of the employees on company time and continued until just prior to the scheduled voting time. Two employees testified that immediately before and after being approached, they observed and overheard Catenacci delivering similar remarks to several other employees.

The Hearing Officer found that Catenacci's conduct violated the Board's *Peerless Plywood* doctrine prohibiting election speeches, by either employers or unions, to massed assemblies of employees on company time within the 24-hour period immediately preceding an election. She was of the opinion that Catenacci's remarks were "planned and systematic as well as timed and calculated to influence votes in favor of the Employer." Although it was found that the statements were noncoercive, the Hearing Officer concluded that it was not unlikely that a mass psychology was generated. The Employer contends that the Hearing Officer unrealistically extended the *Peerless Plywood* rule. We agree with the Employer.

In *Associated Milk Producers, Inc.*,[7] the Board found no violation of the *Peerless Plywood* rule where the plant manager, on the morning of the election, spoke to every eligible voter individually at his work station, stating that he did not feel the employees needed a union and that he hoped they would vote no. The Board found that the brief comments, made to the employees individually, could not be construed as a speech to a massed employee assembly and were, therefore, unlikely to create the mass psychology referred to in *Peerless Plywood.* Similarly, in the instant case, Catenacci did not call employees away from their work stations to speak to them singly or to address them as a group. The remarks were informal, individual, and of the same content as those in *Associated Milk Producers.* Therefore, it is concluded that the repetitious nature, reach, location, and timing of these individual conversations did not amount to a speech made to all the employees collectively. We therefore find that Catenacci's remarks to the first-shift employees on the day of the election were not objectionable within the meaning of the *Peerless Plywood* rule.

Based on the foregoing, we find that Petitioner's Objection 1 is without merit and that it should be, and it hereby is, overruled. Accordingly, we will certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and that said labor organization is not the exclusive representative of all the employees in the unit herein involved within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

CHAIRMAN FANNING, dissenting:

The employees addressed at the 11th hour of this campaign were at their work stations when addressed.

[1] The Petitioner had requested that its Objection 4 be withdrawn, and after due consideration the Regional Director approved the request.

[2] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 36 for, and 58 against, the Petitioner; there was 1 challenged ballot, an insufficient number to affect the results.

[3] The Employer and Petitioner have requested oral argument. This request is hereby denied, as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[4] In its exceptions, the Employer argued that the Hearing Officer erred in not granting its motion to dismiss. The motion was based on the Petitioner's alleged failure to comply with Sec. 102.111(b) of the Board's Rules and Regulations regarding service on the Employer's attorney of record. The record shows that the Employer was served and that its attorney of record had actual notice of the objections. Based on these facts and the fact that there was no evidence that the Employer was prejudiced by the Petitioner's alleged noncompliance, we are of the opinion that the Petitioner was in substantial compliance with the Board's Rules and Regulations, and, accordingly, the Hearing Officer was correct in denying the motion. *Alfred Nickles Bakery, Inc.*, 209 NLRB 1058, 1059 (1974); *Bratten Pontiac Corp.*, 163 NLRB 680, 683 (1967).

[5] In the absence of exceptions, we adopt, *pro forma*, the Hearing Officer's recommendation that Petitioner's Objections 2 and 3 be overruled.

[6] *Peerless Plywood Company*, 107 NLRB 427 (1953).

[7] 237 NLRB 879 (1978).

They were, therefore, "captive," as *Peerless Plywood* uses the word. All the employees who could have been addressed were, in fact, addressed and, moreover, were aware of the fact that all employees on the shift were being addressed. The mass psychology to which *Peerless* alludes seems to me, in such circumstances, to be fully operative. Finally, these employees were addressed, personally, by their employer. There can be no more apt "locus of employer authority." An appreciation for the substance of *Peerless*, not merely its form, requires, in my judgment, that we not permit employers to accomplish indirectly precisely that which *Peerless* directly proscribes, and, for that reason, I would adopt the Hearing Officer's recommendation and set this election aside.[8]

MEMBER TRUESDALE, dissenting:

Unlike my colleagues, I would find, in agreement with the Hearing Officer, that the Employer's conduct immediately before the election violated the rule adopted in *Peerless Plywood Company*, 107 NLRB 427 (1953), and that the election must therefore be set aside.

The facts are essentially undisputed, but bear repeating here. A Board-conducted election was scheduled to take place on June 2, 1978, from 2:45 to 4:45 p.m. On the day of the election—indeed in the last hour before the start of the voting—the Employer's president, Catenacci, walked through the plant and engaged each and every employee on the first shift in conversation at the employee's work station. The first shift represented about one-half of all eligible voters. Catenacci approached each employee individually and expressed to them, first, that he wanted them to vote in the election and, second, that he would appreciate their voting no to union representation. The record also shows, as the Hearing Officer found, that, immediately before and after Catenacci addressed them individually, the employees observed and overheard him delivering similar remarks to several other employees in their respective departments. Thus, each of the employee-witnesses who testified at the hearing stated that she saw and heard Catenacci deliver similar remarks to anywhere from one to seven other workers at their work stations during working time.

In concluding that Catenacci's remarks violated the *Peerless Plywood* rule, the Hearing Officer relied on the fact that Catenacci's remarks, though in themselves noncoercive, were delivered on company time and premises to a captive audience within 24 hours of the election. She also relied on her finding that these campaign statements were not casual off-chance remarks to a few isolated employees, but rather were planned and systematic, as well as timed and calculated to influence votes in favor of the Employer. Finally, the Hearing Officer concluded that, even though the Employer did not literally deliver its 11th-hour campaign pitch in a formal speech to the employees assembled en masse, the impact of its conduct was the same as it would have been had Catenacci addressed his remarks only once to the employees assembled in a meeting. I fully agree with the Hearing Officer's rationale.

The rule in *Peerless Plywood* is a simple one. It states that "employers 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. Violation of this rule will cause the election to be set aside whenever valid objections are filed." The Employer concedes that Catenacci's remarks were made on company time and within 24 hours before the election. It also cannot be seriously disputed, as the Hearing Officer found, that Catenacci's remarks were in the nature of traditional campaign speeches—albeit milder than some—in that they pertained directly and exclusively to the upcoming election and solicited the employees to vote against the Petitioner. Were these remarks addressed to the employees assembled at a meeting, there is no doubt that my colleagues would find such conduct violative of the *Peerless Plywood* proscription. My colleagues find no violation apparently only because they find that Catenacci's remarks were not addressed to a massed assembly of the employees. Here the Employer has sought—successfully, with the help of my colleagues—to avoid the consequences of the *Peerless Plywood* proscription by making the campaign remarks to all of the employees—on company time—individually at their work stations. To find no violation in this conduct seems to me to put undue emphasis on form rather than substance. The same improper end—specifically eschewed by *Peerless Plywood*—was achieved by Catenacci's planned and systematic remarks to individual employees as would have been obtained had the employer called a meeting on company time to address these remarks to them en masse. For, as the Board said in *Peerless Plywood*, "the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time. . . . Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or

[8] I find this case distinguishable from *Honeywell Incorporated, Precision Meter Division*, 162 NLRB 323 (1966), in which Member Jenkins and I dissented. In *Honeywell*, a supervisor engaged in conversation concerning the union with only 6 employees out of 266 eligible voters before the polls opened. Member Jenkins and I found that such action could not have engendered the "mass psychology" condemned by *Peerless*. In this case, the planned and systematic speech to more than half of the eligible voters creates quite a different situation. See fn. 5 of the dissent in *Honeywell, supra*

I did not participate in *Associated Milk Producers*, 237 NLRB 879, and do not subscribe to the holding in that case.

union, who in this manner obtains the last most telling word."[9]

The Board has repeatedly held that the *Peerless Plywood* ban is not limited to "a formal speech in the usual sense," but rather is designed to bar "absolutely" during the 24-hour preelection period the use of company time for "campaign speeches of any form." *Montgomery Ward & Co., Incorporated*, 124 NLRB 343, 344 (1959); *Honeywell, Incorporated Precision Meter Division*, 162 NLRB 323, 325-326 (1966) (then-Member Fanning and Member Jenkins dissenting). The Board has also held that the term "massed assemblies," as used in *Peerless Plywood*, is not to be construed as "limited to all or most of the unit employees, or to any certain proportion of them, or to an assemblage of such employees whose votes would [be sufficient in number to] affect the outcome of the election." *The Great Atlantic & Pacific Tea Company*, 111 NLRB 626, 626 (1955); *Honeywell, Incorporated, supra*.

Catenacci is the highest ranking official of the Employer. He is not generally at the plant all of the time, and, indeed, his office is located at another of the Employer's facilities. His conduct in coming to the plant shortly before the election was to begin and then engaging in the massive and systematic last-minute campaign described above was highly unusual and, in my judgment, certainly tended "to create a mass psychology" among the employees who observed and listened to him. Clearly Catenacci's conduct resulted in an "unfair advantage" to the Employer, "who obtained the last most telling word." *Peerless Plywood, supra*. Although the employees were not a "massed assembly" in the traditional sense of that phrase, they were gathered at their work stations on company time for the purpose of hearing Catenacci's remarks. The Board has held that a planned assembly of employees is not an indispensable ingredient for a proscribed captive-audience speech. Thus, in *United States Gypsum Company*, 115 NLRB 734, 735 (1956), the Board set aside an election where, less than 24 hours before the election, the union stationed a sound truck outside the plant and blasted campaign speeches at the employees who were working within. The Board there stated:

> However, the critical factor in this regard is not the location of the speaker but whether the employees are exposed to his remarks. Thus, here the speeches could be clearly heard during working hours at locations in the plant where a number of employees were stationed. Furthermore, although the employees were not a massed assembly in the sense that they were gathered for the purpose of hearing the speeches, the employees who heard or could have heard the speeches were not isolated, but were working with or near each other, and the Petitioner in a planned and systematic fashion directed its campaign speeches at the employees during the entire day before the election. Accordingly, as the considerations operative in establishing the *Peerless Plywood* rule are here present in substance, albeit not in form, we are persuaded to reach the same result here.

As in *Gypsum, supra*, all of the relevant factors establishing the *Peerless Plywood* violation are here present in substance, albeit not in form. The Employer addressed campaign speeches to each and every one of its employees on company time during the last hours before the election. The employees were not free to come and go as they pleased. Rather, they were compelled to remain at their work stations and to listen to these speeches by Catenacci. The speeches, although each was of relatively short duration, were made over a period of more than 1-1/2 hours in the presence of other employees who had an opportunity to hear and witness them. In all of these circumstances, I am persuaded that the speeches constitute improper conduct within the meaning of the *Peerless Plywood* rule, and I would, therefore, set this election aside.

I am, of course, fully aware that the majority relies upon the Board's recent decision in *Associated Milk Producers, Inc.*, 237 NLRB 879 (1978), in which I participated. The facts in that case are virtually indistinguishable from those here. In *Associated Milk* the Board found, contrary to the Regional Director, that the employer's systematic planned individual remarks, made 24 hours before the election, to each and every one of its employees on company time and at the employee's work station, did not run afoul of the *Peerless Plywood* doctrine. I have reconsidered that case, in light of this case, and have concluded that the Regional Director correctly decided *Associated Milk* and that he was improvidently reversed by the Board. Accordingly, I disassociate myself from the case and no longer adhere to its holding. Thus, when agents of either the employer or the union systematically importune all or a substantial number of the employees at their work stations within 24 hours of the election, the mass psychology which *Peerless Plywood* sought to avoid is set in motion, and one party thereby achieves an unfair advantage through "the last most telling word." Inasmuch as here the Employer's conduct immediately before the election was, in my view, a violation of the *Peerless Plywood* rule, I would set aside the election. Accordingly, I dissent from my colleagues' refusal to do so.

[9] 107 NLRB at 429.