Ensign Sonoma LLC d/b/a Sonoma Health Care Center *and* Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO, Petitioner. Case 20–RC–17746

August 31, 2004

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

The National Labor Relations Board has considered objections to an election held May 24, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 38 for and 22 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.[1]

The Board unanimously agrees that the standard to be applied in deciding this case is set forth in *Athbro Precision Engineering Corp.*[2] A majority of the Board[3] interprets *Athbro* to require that an election be set aside when the conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. Confidence in the Board election process and standards can be undermined when Board agents fail to maintain strict neutrality in what they say while conducting Board elections. Their conduct may threaten the "indispensable perception of Board neutrality." *Hudson Aviation Services*, 288 NLRB 870 (1988). Under this standard, the majority concludes that statements of personal opinion by a Board agent may be sufficiently partisan to warrant setting aside an election even if made to a limited audience and even if unaccompanied by procedural irregularities or other "actions that reasonably create the appearance that the election procedures will not be fairly administered." A separate majority[4] finds that the specific statements of personal opinion made by the Board agent in this case, while intemperate and inappropriate, do not mandate setting aside this election under *Athbro.* Members Liebman and Walsh concur in the result, but read *Athbro* and subsequent decisions as holding that a Board agent's mere statement of personal feelings to a limited audience will not taint an election, absent actions that reasonably create the appearance that the election procedures will not be fairly administered.

The separate opinions, respectively, of Members Schaumber and Meisburg, Members Liebman and Walsh, and Chairman Battista, follow.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees in service and maintenance, including Certified Nursing Assistants, Restorative Nursing Assistants, Activities, Dietary, Laundry and Maintenance employees, employed by the Employer at its facility located at 1250 Broadway, Sonoma,
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> California; excluding all professional employees, RNs, LVNs, office clerical employees, guards and supervisors as defined in the Act.

MEMBERS SCHAUMBER and MEISBURG, concurring in the result.

1. Introduction

The issue before us is whether the hearing officer has correctly recommended overruling the Employer's Objection 1, alleging that the election process was impermissibly tainted by comments made by the Board agent who conducted the election. We concur with our colleagues that the standard to be applied in such cases is set forth in *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967). As discussed below, we believe that Chairman Battista's interpretation of the *Athbro* standard is the correct one, and decline to adopt the overly restrictive reading advocated by our concurring colleagues, Members Liebman and Walsh. Contrary to the Chairman, however, we nonetheless conclude that application of *Athbro* to the specific facts of this case does not mandate setting aside the election. We therefore join Members Liebman and Walsh in finding that a certification of representative should issue.

2. Facts

The relevant facts are few and largely undisputed. During a break in polling, union observer Juan Lopez asked the Board agent conducting the election why "companies" do not like unions. The Board agent re-

[1] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule the Employer's Objections 2–6.

[2] 166 NLRB 966 (1967), vacated sub nom. *Electrical Workers v. NLRB*, 67 LRRM 2361 (D.D.C. 1968), acquiesced in 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970).

[3] Chairman Battista and Members Schaumber and Meisburg.

[4] Members Liebman, Schaumber, Walsh, and Meisburg.

plied, "[C]ompanies don't like unions because they cannot fire or hire anyone, and they cannot take benefits from the staff." The record establishes that no one else except the Employer's observer, Yolanda Gonzalaz, heard (or heard about) this dialogue. Later, Lopez mentioned to the Board agent that the Employer had paid $60,000 to "the consultant," to which the Board agent responded "whoa, $60,000." There is no evidence that anyone else except Gonzalaz heard (or heard about) this dialogue. Still later, Gonzalaz asked the Board agent why he had answered Lopez' question that morning. The Board agent replied, "[W]ell, I can just give my opinion because I'm not going to vote." There is no evidence that anyone else heard (or heard about) this dialogue.

3. Discussion

We concur generally with Chairman Battista's discussion of the standard adopted by the Board in *Athbro*, a standard we reaffirm today. As the Chairman correctly observes, the test applied in *Athbro* was whether the conduct of the Board agent in conducting the election "tend[ed] to destroy confidence in the Board's election process, or . . . could reasonably be interpreted as impairing the election standards [the Board] seek[s] to maintain." 166 NLRB at 966. Board agents who fail to maintain strict neutrality in what they say while conducting the Board's business threaten the "indispensable perception of Board neutrality," which can undermine confidence in the Board's election process. *Hudson Aviation Services*, 288 NLRB 870 (1988). We also agree with the Chairman that the new standard articulated by Members Walsh and Liebman is inconsistent with and more restrictive than *Athbro,* and subsequent cases following it, and we decline to adopt it. In our view, like the Chairman's, a statement of personal opinion by a Board agent may be sufficiently partisan to warrant setting aside an election, even if made to a limited audience and even if unaccompanied by procedural irregularities or other "actions that reasonably create the appearance that the election procedures will not be fairly administered."

While agreeing with the Chairman's adherence to the *Athbro* standard, we ultimately agree with Members Liebman and Walsh that the Board agent's remarks here, while intemperate and inappropriate, do not mandate setting aside this election under *Athbro*. As our colleagues note, the agent's impulsive remarks, only one of which could be construed as partisan, were not as public as the conduct in question in *Athbro*, came in response to questions asked by the election observers, were heard by only two employees—the election observers chosen by the parties—in an election won by a large margin, and do not reflect such a level of bias or impropriety that they tend to destroy confidence in the Board's election process or truly impugn the election standards the Board seeks to maintain. Nor, when considered in context, do they taint the "indispensable perception of Board neutrality." *Hudson Aviation Services*, supra. In so concluding, we are mindful of the fact that the impact of Board agent misconduct on an election's outcome is not determinative under *Athbro*. Nevertheless, preservation of the free and uncoerced choice of employees is a relevant and compelling consideration, and we will not nullify that choice under the circumstances presented in this case.

The Board has unanimously addressed the Board agent's misconduct in this decision; further corrective action can be taken administratively.

MEMBERS LIEBMAN and WALSH, concurring in the result.

1. Overview

The election in this case was decided by a 62-to-36 percent margin. For the reasons that follow, we find that the Board agent's unguarded remarks, which were heard only by the two election observers, could not possibly have affected the outcome of the election, did not interfere with the election process, did not reasonably tend to destroy public confidence in the Board's election process, and could not reasonably be interpreted as impugning the integrity and neutrality of the Board's election procedures. Setting the election aside would thus be unwarranted under the circumstances in this case. And declining to set aside the election is consistent with at least 30 years of Board and court precedent. Accordingly, while our rationale differs from that of Members Schaumber and Meisburg, we agree that a certification of representative is appropriate.

2. Analysis and conclusion

a. Applicable principles

The applicable principles are summarized in *Safeway, Inc.*, 338 NLRB 525 (2002) (quotation marks and citations omitted):[1]

> Representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees. Accordingly, the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit.

An objecting party must show by specific evidence not only that the improper conduct occurred, but also that it inter-

[1] See also, e.g., *Lockheed Martin Corp.*, 331 NLRB 852, 854 (2000).

fered with the employees' exercise of free choice to such an extent that it materially affected the results of the election.[2]

When a Board agent is alleged to have engaged in objectionable conduct warranting the setting aside of the election, the Board also applies the standard in *Athbro Precision Engineering*.[3] In *Athbro*, the union narrowly won, 20 to 18, with one challenged ballot. Between the morning and afternoon voting sessions, an employee who had already voted saw the Board agent drinking beer with a union representative in a cafe about a mile from the plant. The Board set aside the election. Although the Board found that the Board agent's conduct did not affect the employees' votes, the Board found that this was not the only test to apply. The Board stated:

> The Board in conducting representation elections must maintain and protect the integrity and neutrality of *its procedures*. The commission of an act by a Board Agent conducting an election which *tends to destroy confidence in the Board's election process*, or which could reasonably be interpreted as *impugning the election standards* we seek to maintain, is a sufficient basis for setting aside that election. [166 NLRB at 966; emphasis added.]

The analytical focus of the *Athbro* line of cases is particularly well illustrated in *NLRB v. Dobbs Houses, Inc.*, 435 F.2d 704 (5th Cir. 1970). There, the Fifth Circuit Court of Appeals enforced the Board's order finding that a Board agent had not engaged in conduct that tainted the election when, near the end of balloting and in response to a question from the employer's observer, he stated to the employer and union observers that he felt that the union would win the election and that it would "do the people a lot of good." The court explained why *Athbro* was not controlling**,** as follows:

> The Board could reasonably distinguish this case. There was no procedural irregularity, nothing impinging on the sanctity of the ballot box. And the Agent's improper actions were not as public as those in *Athbro*. Additionally, it would be reasonable to distinguish between acts of fraternization and expressions of personal feelings to limited audiences. The former smacks much more of irregularity than the latter. Finally, the Board Agent's improper statements were not part of a proselytizing effort on his part or even a simple unprovoked indiscretion. [Footnote omitted.]

435 F.2d at 705–706. Thus, as decisions of the Board and the courts demonstrate, a Board agent's mere statement of personal feelings to a limited audience will not taint an election,[4] absent actions that reasonably create the appearance that the election procedures will not be fairly administered.[5]

b. Application of principles

The Board agent's remarks here, while ill advised, do not warrant setting aside this election under the principles set out above. Only Lopez and Gonzalaz heard the first two remarks, and only Gonzalaz heard the third. Thus, the Board agent's remarks were certainly not as public as the conduct in question in *Athbro*, where the Board agent was observed drinking beer with a union representative during a break in the polling. Fraternizing with a representative of one of the parties in the election contest was a public act inconsistent with the Board agent's required impartiality, and directly cast doubt on the integrity and neutrality of the election *procedures*. Here, the Board agent did nothing to suggest any procedural irregularity. None of the Board agent's remarks to Lopez and Gonzalaz—and certainly nothing else he said or did—could have reasonably caused these two election observers to suspect that the Board agent was actually *conducting* the election in a way that would advantage the Union. Also, the Board agent's remarks were made in response to questions asked by the election observers, and therefore were not **"**part of a proselytizing effort on

[2] *Tony Scott Trucking v. NLRB*, 821 F.2d 312, 316 (6th Cir. 1987), citing *NLRB v. Golden Age Beverage*, 415 F.2d 26, 30 (5th Cir. 1969).

[3] 166 NLRB 966 (1967), vacated sub nom. *Electrical Workers v. NLRB*, 67 LRRM 2361 (D.D.C. 1968), acquiescing in district court's order on remand as "the law of this case," 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970).

[4] See *NLRB v. Allen's I.G.A. Foodliner*, 652 F.2d 594 (6th Cir. 1980), enfg. 236 NLRB 1342 (1978) (Board agent's statements to two observers during balloting that in her opinion she would not be there holding an election if the employees had been treated right, did not warrant setting aside the election where no voters were present in the polling area, most of the voters had already voted, and there was no evidence that the Board agent's remark was relayed to any voter); *Rheem Mfg. Co.*, 309 NLRB 459 (1992) (Board agent's statements to three observers during a break in polling that it was so hot in the polling area that if he had to return to the plant in the future he might have to file his own petition did not warrant setting aside the election where no voters were present in the polling area, at least one of the two observers had already voted, and there was no evidence that the Board agent's remark was relayed to any other voter); *Shorewood Manor Nursing Home*, 217 NLRB 1106 (1975) (Board agent's statements to two observers during a lull in voting that he felt that he had gotten his job with the Board because he had been a union steward on his previous job did not warrant setting aside the election where no one else was present and there was no evidence that anyone else heard about the remark).

[5] Our dissenting colleague implies that when Board agent misconduct is alleged, the actual impact of that conduct on the election is not a primary consideration. While actual impact on the election is not *the only* consideration, it is not relegated to secondary status. To the contrary, in *Athbro* itself the Board reveals the order of analytical precedence: "Although the Board Agent's conduct did not affect the votes of employees, we do not agree that this is the only test to apply." 166 NLRB at 966.

his part" or an entirely "unprovoked indiscretion." *Dobbs Houses*, supra, 435 F.2d at 706. His remarks were also clearly expressions of his own personal opinion, and not representations as to the Board's policy. Finally, while the Board agent's response to Lopez' first question could be understood as putting employers as a group in a negative light, his spontaneous remark when being told how much the employer paid its election consultant—"Whoa, $60,000"—was not necessarily partisan. The agent's response to the third question, the question asked by Gonzalaz as to why the Board agent responded to Lopez' question in the manner he did, was not partisan. It neglected the need for Board agents to maintain professional distance from the parties while conducting official agency business, but it did not add to the partisan nature of his first remark or give further meaning to his second remark.

This is not to suggest at all that the Board agent's response to the question why companies don't like unions was appropriate. It was not. Nevertheless, when an election is won by a wide margin and setting it aside will result in thwarting the will of the employees who voted in it, we must take this countervailing concern into consideration, as well as whether other alternatives can best address the Board agent's actions. Given the Act's overriding purposes, we should not mechanically set aside the election whenever a Board agent makes an inappropriate remark. Clearly, then, and contrary to our dissenting colleague's assertion, we are not upholding this election "as if nothing happened." We are upholding it because what *did* happen does not warrant setting it aside.

Our dissenting colleague argues that the Board agent's remarks undermine *Board* neutrality. We respectfully differ. The observer clearly did not seek an official Board position on why employers supposedly do not like unions, and, in response, the Board agent obviously volunteered his own personal opinion. In fact, he expressly said as much to Gonzalaz later on when he explained that the reason he answered Lopez' question was that "I can just give my opinion." Nor did the Board agent express any Board position on the money spent by the Employer on a consultant. Rather, the Board agent simply responded to Lopez' statement about how much *he* thought the Employer had spent. Our dissenting colleague asserts that the Board agent's reply—"Whoa, $60,000!"—constituted a message that employers are willing to spend lavishly to defeat a union. That interpretation reads far too much into this spontaneous exclamation and limited exchange.[6]

In short, we cannot say that the Board agent said or did anything that had a reasonable tendency to destroy the observers' confidence in the election process itself. In arguing for a different result, our dissenting colleague relies heavily on *Athbro,* supra, and says we are trying to "get around" that case. There is, however, no need for us to circumvent *Athbro.* As the court found in *Dobbs Houses*, supra, *Athbro* is distinguishable from cases like this one, which involve Board agent expressions of personal feelings to limited audiences rather than Board agent fraternization with a representative of a party to the election during the course of the election. The court found the latter conduct much more likely than the former to raise a reasonable question about procedural irregularity.

c. Conclusion

The message for Board agents in all of this should be clear: stick to the business at hand, and do not express personal opinions. After a thorough review of the circumstances of this case—the wide margin of the result, the nature of the Board agent's remarks (only one of which was even arguably objectionable), the initiation of the remarks by the observers, the very limited audience, and the agent's clear communication that his remarks were his own personal opinion—we find insufficient reason to set aside the election. To set the election aside under these circumstances would serve only to frustrate the free choice of the employees, whose votes would be rendered a nullity even though the employees had nothing to do with the Board agent's misconduct and were not even aware of it.

CHAIRMAN BATTISTA, dissenting from the result.

The Board's election process is rightly called the "crown jewel" of the Board's endeavors. The election is the place where the ultimate Section 7 choice is made,

[6] The cases cited by our colleague are readily distinguishable from the instant case. In *NLRB v. State Plating & Finishing Co.*, 738 F.2d 733, 740 (6th Cir. 1984), the Board's neutrality was destroyed by a Board agent's broadly disseminated statement that misled many of the employees to believe that the employer had lied to them about not being permitted to grant certain raises. In *Renco Electronics*, 330 NLRB 368, 368 (1999), a Board agent gave voting instructions that could reasonably cause employees to believe that the Board agent was speaking for the Board and that the Board wanted the employees to vote "Yes." In *Hudson Aviation Services*, 288 NLRB 870, 870 (1988), the Board agent got into a heated argument with the employer's assistant manager in the polling area and communicated the impression that the Board was displeased with and was criticizing the assistant manager. Finally, in *Glacier Packing*, 210 NLRB 571, 573 (1974), the Board agent yanked a "Vote Neither" pin off the lapel of an employer election observer during polling, shouted "shame on you" at her in front of voters, shouted at the employer's personnel director in front of the employees, and then followed him for approximately 70 yards while employees clapped, laughed, made catcalls, and pointed their fingers at him. Here, the Board agent engaged in no conduct even remotely similar to the conduct of the Board agents in these cases.

and the Board goes to extraordinary lengths to see to it that the election is conducted in a fair and impartial manner.

Today, the crown jewel has been tarnished. Worse, it has been tarnished by the actions of the Board's own agent. And, worse still, the Board puts its imprimatur on the result. I would preserve the crown jewel. I therefore dissent.

The facts are not in dispute. On election day, during the first polling period, the Employer's observer, Yolanda Gonzalaz, overheard the Union's observer, Juan Lopez, ask the Board agent why companies do not like unions. The Board agent responded: "[C]ompanies don't like unions because they cannot fire or hire anyone, and they cannot take benefits from the staff." Gonzalaz also heard Lopez tell the Board agent that the Employer paid $60,000 to campaign consultants. The Board agent replied, "[W]hoa, $60,000." Finally, later that day, just prior to the second voting period, Gonzalaz asked the Board agent why he answered Lopez' question that morning. The Board agent stated, "I can just give my opinion because I'm not going to vote."

In my view, the Board agent's remarks were wholly inappropriate. The Board agent stated his view that employers do not like unions because employers wish to be unrestrained in their ability to fire employees and take away benefits. Similarly, by responding, "[W]hoa, $60,000," the Board agent sent a message that employers are willing to spend lavishly to defeat a union. Finally, the Board agent's last comment was that he could give his opinion because he was not going to vote. He thereby indicated that he was entitled to express his partisan opinions. Of course, he was entirely wrong in this respect, as were the expressions themselves.

In sum, the Board agent did not observe the quintessential element of strict neutrality. The remarks cast doubt on the impartiality of the agent, the agent's principal (the Board) and the election being conducted under Board auspices. Such conduct cannot be tolerated. Members Liebman and Walsh concede that the first remark was "inappropriate" and "ill advised." They further concede that the remark showed a "lack of appreciation of the need for Board agents to maintain professional distance from the parties while conducting official agency business." Members Schaumber and Meisburg conclude that the Board agent's remarks were "intemperate," and "inappropriate," and they further concede that one remark was "partisan." Despite all of this, all four of my colleagues uphold the election as if nothing happened.

The *Athbro* case,[1] cited by my colleagues, is the guidepost. Between voting sessions in that case, the Board agent went to a bar and drank a beer with a union representative. The only employee who saw this had already voted, and he did not report it to any other employee during the election. The union won the election. The Board set the election aside. The Board said:

> The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. [Id.]

The Board said that in cases involving Board agent conduct the test is whether the Board agent's conduct "tends to destroy confidence in the Board's election process or . . . could reasonably be interpreted as impugning the [Board's] election standards."[2] Moreover, "[t]he appearance of a compromise of Board neutrality will warrant setting aside an election even if the Board in fact remains neutral."[3] In short, the "Board's role in conducting elections must not be open to question."[4]

Members Liebman and Walsh, in an effort to get around *Athbro*, note that the election margin was slim in that case. That is true, but that fact had nothing whatever to do with the rationale for the Board's decision. Indeed, inasmuch as only one employee was involved, and he had already voted, the election result was not affected by the Board agent's conduct. To the contrary, the Board conceded that "the Board Agent's conduct did not affect the votes of employees." In essence, the Board held that it is the insult to the process, not the particular election result, that matters.[5]

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[1] *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967).

[2] Id. at 966; accord: *Glacier Packing Co.*, 210 NLRB 571, 573 (1974).

[3] *NLRB v. State Plating & Finishing Co.*, 738 F.2d 733, 740 (6th Cir. 1984); see *Hudson Aviation Services*, 288 NLRB 870, 870 (1988) (setting aside election where conduct of Board agent "undermined the indispensable perception of Board neutrality in the election").

[4] *Renco Electronics*, 330 NLRB 368, 368 (1999); *Glacier Packing*, 210 NLRB at 273.

[5] Members Schaumber and Meisburg "concur generally" with my discussion of the standard in *Athbro* and join with me to "reaffirm" that standard today. Inexplicably, however, they do not set aside the election, noting the margin of victory and the value of the free and uncoerced choice of employees. I, too, believe that the results of an election should not be set aside lightly. However, as to the margin of victory, *Athbro* itself makes plain, and my colleagues recognize that "the impact of Board agent misconduct on an election's outcome is not determinative under *Athbro*. As to the value of a free and uncoerced choice of employees, I endorse that value. But another value of equal or greater weight is the value of the Board's reputation for neutrality. Indeed, that is precisely the value recognized in *Athbro* where the election was set aside even though it was found that no employee was affected by the Board agent's conduct. Presumably, my colleagues believe that the margin of an election victory can be a make-weight for any injury the

If anything, the instant conduct is worse than that in *Athbro*. The conduct there was not at the polling site, and the Board's agent did not speak favorably for one side or the other. Having a beer with a person does not connote agreement with that person's view. By contrast, the conduct here was at the polling place itself, and the Board agent expressed views against one of the parties.[6]

Members Liebman and Walsh rely on the general standards of *Safeway, Inc.*, 338 NLRB 525 (2002), for determining whether an election should be set aside. Where the case involves a party's alleged misconduct, or that of a private third party, the Board applies *Safeway* standards. However, where, as here, the case involves Board agent misconduct, a different standard applies. For, in those cases, it is the integrity of the Board that is in issue. And, as discussed above, the Board must be satisfied that its own integrity is above reproach. That special standard is set forth in *Athbro*, and that is the standard to be applied here.

My colleagues also say that an overturning of the election will render the employees' votes a nullity, even though the employees had nothing to do with the Board agent's misconduct. Of course, under *Athbro*, that is true of every case involving Board agent misconduct. In essence, the Board makes a judgment that its own integrity requires that the employees vote again, this time in an election that is free from taint.

Members Liebman and Walsh state that the election will be valid absent actions that would reasonably create the appearance that procedural irregularities will occur. I disagree with that test, as do Members Schaumber and Meisburg. In my view, the Board's obligation, and that of its representative, is to be completely impartial and to refrain from giving the appearance of partiality. The objecting party need not show that the Board agent would actually tamper with the election itself, or that employees would fear that he would do so. *Athbro* requires no such showing. That is, there was no showing there that the Board agent would tamper with the election itself or that employees feared that he would do so. Rather, the sole vice was that the Board agent engaged in conduct "which tended to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards [the Board] seeks to maintain." The Board held that "that conduct was itself a sufficient basis for setting aside that election." [166 NLRB at 966.]

Thus, even if there are no procedural irregularities in the election itself, or fear of same, the election will be set aside if the conduct "could reasonably be interpreted as impairing the election standards [the Board] seeks to maintain." Clearly, neutrality and impartiality are the very hallmarks of the Board standards that the Board seeks to maintain.

My colleagues then seek to minimize the significance of the Board agent's remarks. Of course, they concede, as they must, that the agent's first remark was improper. That remark itself undermined the standard of neutrality. My colleagues' effort to interpret the other two remarks is of no avail. The obligation of the Board agent is to refrain from comments that give "the *appearance* of a compromise of Board neutrality." (Emphasis added.) See fn. 2, supra. Thus, even if the remarks could be interpreted in a benign way, that is not sufficient to privilege them.

In *NLRB v. Dobbs Houses, Inc.*, 435 F.2d 704 (5th Cir. 1970), cited by Members Liebman and Walsh, is clearly distinguishable. In that case, the Board agent offered the prediction that the union would win the election, and would be successful as a representative. That is a far cry from the comments of the Board agent here who voiced opinions favoring one side over the other.

The other cases cited by Members Liebman and Walsh are also inapposite. In *NLRB v. Allen's I.G.A. Foodliner*, 652 F.2d 594 (6th Cir. 1980), the Board agent's comment was that both the company and the union were just putting on a show for the employees and that if the employees had been treated right, she (the Board agent) would not be there holding an election. Based on these remarks, it was impossible to tell whether the Board agent was favoring one side over the other. In *Rheem Mfg. Co.*, 309 NLRB 459 (1992), the Board agent was simply complaining about the heat in the polling area; he was not taking sides in the election. In *Shorewood Manor Nursing Home*, 217 NLRB 1106 (1975), the Board agent simply speculated about how to get his job with the Board; he was not taking sides in the election.

Finally, it is no answer to say that the opinion was personal to the Board agent. The Board acts through its agents. They are the ones with whom the public deals. The Board agent was the Board's only representative on the scene. He alone was the "the Board" conducting the election. In law and in fact, the agent is the Board. It is therefore the duty of the Board agent to keep his personal opinions to himself. Where, as here, that person expresses a view favoring one party over the other, there is,

Board's agent's conduct might have on the appearance of Board neutrality. I would respectfully disagree.

[6] Members Schaumber and Meisburg say that the conduct here was "not as public" as the conduct in *Athbro*. In my view, it is at least as bad, if not worse, for a Board agent to engage in the conduct at the election site (where employees are present) than for an agent to do so at a bar (where employees are not present).

at the very least, a reasonable tendency to undermine confidence in the election process.

Conclusion

As noted at the outset, the Board's crown jewel has been tarnished. I would restore the luster by setting aside the election. In that way, a new election, held with unquestionable fairness and integrity, can be held. In short, I would uphold the time honored Board tradition of unquestioned neutrality in Board election proceedings.