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Fresenius USA Manufacturing, Inc. *and* International Brotherhood of Teamsters Local 445, Petitioner. Case 2–RC–23145

May 30, 2008

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The National Labor Relations Board has considered objections to an election held on November 3, 2006, and the attached administrative law judge's decision recommending disposition of them.[1] The election was held pursuant to a Stipulated Election Agreement. The tally of ballots for unit A shows 9 votes for and 7 against the Petitioner, with no challenged ballots. The tally of ballots for unit B shows 9 votes for and 7 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the judge's findings[2] and recommendations only to the extent consistent with this Decision and Direction of Second Election.

We find that the judge erred in overruling the Employer's Objections 1, 3, 4, and 5.[3] These objections allege, in pertinent part, that the Board agent in charge of the election improperly denied the Employer an opportunity to monitor the ballot count and, based on his confusion in differentiating between ballot colors, may have incorrectly distributed ballots to voters. For the reasons explained below, we find that the cumulative effect of the Board agent's conduct warrants setting aside the election.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The judge was sitting as a hearing officer in this representation proceeding. The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[3] We adopt the judge's recommendation to overrule the Employer's Objections 2 and 6.

I. FACTS

Two units of employees voted in this election: the Employer's drivers (unit A), and warehouse employees (unit B). At the preelection conference, the Board agent explained that unit A would vote with green ballots and unit B with yellow ballots. During this explanation, he pulled a yellow ballot from his shirt pocket and stated that it was green. After one of the representatives corrected this mistake, the Board agent announced that he was colorblind.

During the election, the Board agent kept blank ballots rolled together in his left shirt pocket, with green ballots encircling yellow ballots. Ballots were marked "UNIT A-GREEN" or "UNIT B-YELLOW." After the party observers verified a voter's eligibility and unit designation, the Board agent asked, "yellow or green?" The observers responded by calling out the color ballot a voter should receive. The Board agent then removed a ballot from his shirt pocket and handed it to each voter. He required that all voters mark ballots with a number two pencil.

After the first hour of the 3-hour election, employer observer Janet Buxbaum, unaware that the Board agent was colorblind, asked why she and the union observer needed to call out voters' ballot colors. The Board agent responded that he was colorblind and asked that the observers continue to call out ballot colors. Shortly after this disclosure, he handed a driver a yellow ballot instead of a green one.[4] After Buxbaum corrected the mistake, the Board agent handed the voter the appropriate green ballot.[5] He then stated that he needed the observers to call out ballot colors to prevent errors in distribution.

After the polls closed, the Board agent counted the ballots at a table in the polling area. The party observers sat at an adjacent table, four feet from him. The Board agent instructed the Employer's representatives to stand 6 to 8 feet away from him during the count. He first counted unit A ballots, calling out "yes" or "no" for each ballot. He placed "yes" ballots face up, in one pile, and "no" ballots face down, in a separate pile, but did not display their markings to those present for the count. He then counted the ballots in each pile and announced the results of unit A. He repeated the same process for unit B.

After the Board agent completed both counts, employer representative Kevin King requested a recount of unit B. During the recount, the Board agent did not reexamine or display ballot markings. Instead, he re-

[4] Although not stated by the judge, the record shows that the party observers called out "green" before the Board agent incorrectly handed the driver a yellow ballot.

[5] The judge inadvertently found that both party observers corrected the mistake. This inadvertent finding does not affect our decision.

counted the "yes" and "no" piles by paging through the ballots, with his hand placed over the markings on the top ballot in each pile. During the counts and recount, the Employer's representatives and observer Buxbaum could not see any ballot markings.

After the recount, King asked to examine all ballots. The Board agent denied this request, but stated that King could view the ballots at the Regional Office on Monday morning (the election was held on a Friday). The Board agent took the ballots home during the weekend and deposited them at the Regional Office the following Monday. There is no evidence that the Board agent secured the ballots in a way to assure against any tampering, mishandling, or damage. The Employer did not examine the ballots at the Regional Office.

II. JUDGE'S RECOMMENDED DECISION ON OBJECTIONS

The judge acknowledged that the Board agent's handling of the ballot count did not comport with Board guidelines. He nevertheless found that these irregularities were not objectionable absent evidence that they actually affected the election results. The judge emphasized that his close examination of ballots showed no questionable markings and revealed that the number of ballots cast for each unit matched the number of eligible voters in each unit. He also noted that the Employer's representatives failed to contemporaneously object to the Board agent's instruction to stand back from the counting table during the count or inform him at that time that they could not see ballot markings. In addition, the judge determined that any prejudice to the Employer was cured by the offer to inspect ballots at the Regional Office the next working day.

The judge rejected as speculative the possibility that employees may have voted with incorrect ballots. He found that the Board agent could have determined which ballot to distribute by reading them, and that the party observers likely would have noticed and corrected any errors. Under these circumstances, the judge found that the Board agent's conduct did not warrant setting aside the election.

III. ANALYSIS

When determining whether to set aside an election on the basis of Board agent conduct, "the Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election." *Jakel, Inc.*, 293 NLRB 615, 616 (1989) (citing *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970)).[6] There is not a "'per se rule that . . . elections must be set aside following any procedural irregularity.'" *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005) (quoting *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990)). Thus, the Board "requires more than mere speculative harm to overturn an election." *J. C. Brock Corp.*, 318 NLRB 403, 404 (1995) (citation omitted).[7] The Board will set aside an election, however, if the irregularity is sufficient to raise "a reasonable doubt as to the fairness and validity of the election." *Polymers*, 174 NLRB at 282.

The Board's "election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election, ballot count, and determinative challenge procedure." *Paprikas Fono*, 273 NLRB 1326, 1328 (1984). See also *Madera Enterprises*, 309 NLRB 774 (1992) (same).[8] In this case, the Board agent did not ensure that all parties had an opportunity to monitor the ballot count. As noted above, the Board agent did not display the ballots for inspection during the count.[9] Indeed, the Board agent denied the Employer's specific request to examine the ballots immediately after the count. By these actions, the Board agent prevented the Employer from verifying the accuracy of his count and interpretation of voter intent.

Nor was this irregularity cured by the Board agent's offer to allow the Employer to inspect the ballots at the Regional Office at a later date. As described, the Board agent did not secure the ballots against tampering or

[6] Contrary to the judge, the Board does not require proof that irregularities in the handling of ballots necessarily affected the election results before an election will be set aside.

[7] See, e.g., *Enloe Medical Center*, 345 NLRB 874, 891, 891 fn. 18 (2005) (Board agent's harmless error in handling of color-coordinated challenged ballots did not provide a basis for setting aside the election; error could not have affected the election results where challenged ballot procedure insured that all ballots were counted in the proper unit).

[8] The Board's Casehandling Manual (while not binding authority) states that ballots should be displayed during the count: "The Board agent(s) . . . removes the ballots from the box, opens them one by one, calling out and displaying the preference expressed and places them, face up, in piles according to the preferences expressed." NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11340.5. "[A] Board agent should [also] count aloud the different piles, displaying each ballot to the witnesses as it is counted." Id. The Board's Casehandling Manual also states that parties can, with good cause, challenge a Board agent's interpretation of voter intent. Sec. 11340.7(a).

[9] The Employer's timely request to inspect ballots, although not a formal objection, sufficiently brought to the Board agent's attention the Employer's concerns about his handling of the ballot count.

mishandling before taking them to his home over the weekend. In light of this unsupervised access to ballots that were marked—at the Board agent's direction—with an erasable pencil, we cannot say with confidence that ballots remained in the identical condition as during the count.[10] Thus, subsequent examination of ballots by the Employer—or by the judge—does not ameliorate this election irregularity.[11]

The Board agent's two mistakes in ballot identification cast additional doubt on the fairness and validity of the election. Although the judge found that the Board agent could have independently ensured proper distribution by reading the ballots, the Board agent incorrectly identified a ballot during the preelection conference and during the election. Even after the observers called out the correct ballot color, the Board agent nevertheless failed to correctly identify the ballot on at least one occasion. That error would have resulted in an employee voting with the wrong ballot absent observer Buxbaum's action to correct the mistake. These errors in ballot identification further contribute to doubt as to the election's fairness and validity.

We find it unnecessary to pass on whether the irregularities in this election, considered separately or in various combinations, would warrant setting aside the election. Rather, reviewing all the facts in this case, we find that the cumulative effect of these irregularities, particularly those during the ballot count, raises a reasonable doubt as to the fairness and validity of the election. This is especially so considering the closeness of the election, where even one mistake in the distribution or counting of the ballots could have altered the election outcome. Accordingly, we sustain the Employer's Objections 1, 3, 4, and 5, set aside the election, and direct a second election.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the units found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Brotherhood of Teamsters Local 445.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. May 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[10] We are not questioning the integrity or neutrality of the Board agent in this case or suggesting that the ballots were tampered with.

[11] In *Paprikas Fono*, supra, the Board agent failed to place determinative challenged ballots in a sealed and signed envelope in the presence of the parties. Id. Instead, the agent placed the ballots in an envelope the following day, outside the presence of the parties. Id. Subsequently, the Regional Office opened the envelope to inspect the condition of ballots, again, outside the presence of the parties. Id. In addition to depriving the parties of an opportunity to monitor the handling of ballots, the Board found that this conduct "did not permit the parties to assure themselves that the challenge envelopes were secure." Id.

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RECOMMENDED DECISION ON OBJECTIONS

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. On September 5, 2006,[1] International Brotherhood of Teamsters Local 445 (the Union or the Petitioner) filed a Petition seeking to represent certain employees employed by Fresenius USA Manufacturing, Inc. (the Employer or Fresenius) at its facility located in Chester, New York. The parties entered into a Stipulated Election Agreement, approved on October 6, providing for an election to be conducted in two separate bargaining units, one consisting of drivers and the other warehouse employees. The election was conducted on November 3. The tally of ballots was identical for both units. In each unit there were 16 eligible voters, 9 votes for Petitioner, 7 votes against, and no challenges.

On November 13, the Employer filed timely objections to the election. On December 18, the Regional Director issued her report, recommending that all of the Employer's objections be overruled, and recommending that the Petitioner be certified.

On January 12, 2007, the Employer filed timely exceptions to the Regional Director's Report and Recommendations. On February 28, 2007, the Board issued an Order, in which it adopted the Regional Director's findings and recommendations to dismiss Objections 7 through 10 filed by the Employer, but concluded that Objections 1–6 regarding the Board agent's conduct raised "substantial and material factual issues warranting a hearing." On March 13, 2007, the Regional Director issued a Notice of Hearing on Objections, ordering a hearing before an administrative law judge for the purposes of receiving testimony with respect to the issues raised by Objections 1 through 6 in the Employers objections. The hearing was conducted before me on April 10, 2007, in New York, New York. Briefs have been filed by the Employer and the Petitioner and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE OBJECTIONS

Objections 1 through 6, filed by the Employer, alleges as follows:

Fresenius USA Manufacturing, Inc. (Fresenius) hereby objects, for the reasons set forth below, to the conduct of the representation election held on November 3, 2006, and to certain conduct affecting the results of the election.

[1] All dates hereafter are in 2006, unless otherwise noted.

II. BACKGROUND

A representation election was held at Fresenius's Chester, New York facility on November 3, 2006, from 1 to 4 p.m. Pursuant to a Stipulated Election Agreement, the election consisted of two separate voting units: (unit A) all full-time and regular part-time drivers employed by the Employer located at 68 Tetz Road, Chester, NY; and (unit B) all full-time and regular part-time warehouse workers, warehouse leads, administrative assistants and transportation routers employed by the Employer located at 68 Tetz Road, Chester, NY. Both proposed bargaining units voted at the same place during the same voting period, casting their ballots in the same box. Employees in unit A were supposed to have voted on green ballots and employees in unit B were supposed to have voted on yellow ballots. The Board agent in charge of the election was Howard Shapiro (the Board agent).

III. OBJECTIONS TO THE CONDUCT OF THE ELECTION

1. Fresenius objects to the confusion and potential miscast ballots caused by the Board agent's inability to differentiate between the colors of the ballots, and the failure of the Board agent to use two separate ballot boxes for the two separate voting units. During the election polling time, the Board agent stated to the party observers that he was colorblind, that he could not differentiate between yellow and green—the colors of the ballots for the two voting units, and that when he was diagnosed as colorblind around the age of 35 years old, he was unable to identify marks in colored boxes in a vision test. In addition, rather than adding a level of protection from miscast ballots, the Board agent used only one ballot box to collect the ballots from the separate voting units. During the election, the Board agent erroneously provided an incorrect colored ballot to one or more employees (i.e., he initially handed an employee a yellow ballot, when the employee should have received a green ballot and thereby required the assistance of the party observers to distribute the ballots). The confusion caused by the Board agent's inability to differentiate colors may have undermined an employee's ability to vote in the correct bargaining unit, or to exercise an uncoerced and reasoned choice in the election.

2. Fresenius objects to the reliance of the Board agent on the party observers to conduct the election. The Board agent ceded his authority to conduct the election to the party observers during the election time period by, in part, requiring the party observers to determine which colored ballot each employee received after they were identified as eligible voters. Furthermore, the Board agent required the party observers to assist or help the voters obtain their ballots indirect contravention of the Board's instructions to the party observers which stated, in part, "DO NOT give any help to any voter. Only a Board agent can assist a voter." Form NLRB-722. (Emphasis in original.) The Board has long held that it must maintain and protect the integrity and neutrality of its election procedures and the Board agent failed to do so in this election. See, e.g., *Alco Iron & Metal Co.,* 269 NLRB 590, 591 (1984); *Glacier Packing Co.,* 210 NLRB 571 (1974).

3. Fresenius objects to the Board agent's decision to prohibit employees from using any writing instrument except for an erasable pencil in marking their ballots. The use of an erasable

pencil permits the potential tampering with the markings on the ballots both before and after the election.

4. Fresenius objects to the Board agent's failure to permit the parties to see or review the marked ballots at any time after he removed them from the ballot box. The Board agent required the party observers and all other party officials to stand or sit a substantial distance from him as he reviewed and counted the ballots, such that Fresenius's representatives were unable to see clearly, if at all, the markings on all of the ballots. In addition, the Board agent turned the ballots face down and/or covered with his hand(s) the markings on any ballots that he placed on the table face up. Pursuant to Section 11340.5 and/or Section 11340.6 of the Casehandling Manual, the Board agent was required to "call [] out and display [] the preference expressed and place [] them, face up, in piles according to the preferences expressed." The Board agent, however, did not "display" or otherwise show Fresenius's representatives the markings on the ballots. In addition, pursuant to Section 11340.7(a) of the Casehandling Manual, the parties are entitled to object to the Board agent's interpretation of any marks made on the ballots. Fresenius, however, was precluded from considering the Board agent's interpretation of any marks on the ballots because the Board agent did not show the ballots to any Fresenius representatives.

5. Fresenius objects to the conduct of the election as set forth above to the extent that the abnormalities and significant deviations from Board-recommended procedures contained in the Casehandling Manual cast doubt on the fairness and impartiality of the process. Employees were required to write in erasable pencil, and the Board agent (who was the only person to actually see and interpret the markings made on the ballots and count the ballots) admitted to the party observers that he was colorblind, could not differentiate between yellow and green (the color of the ballots), and that he could not differentiate letters or numbers placed in a colored box in a vision test due to his colorblindness. "[T]he 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." *Alco Iron & Metal Co.,* 269 NLRB at 591.

6. Fresenius objects to the conduct of the election whereby the Board agent interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise an uncoerced and reasoned choice in the election.

WHEREFORE, Fresenius respectfully requests that the election conducted on November 3, 2006, be set aside, and a new election be scheduled by the Regional Director.

LV. FACTS

A. The Preelection Conference

The election was held on November 3, from 1 to 4 p.m. in the back of the Employer's warehouse. At 12:30 p.m., the Board agent, Howard Shapiro, met with representatives of the Employer and the Union. Present on behalf of the Employer was Kevin King (senior director of distribution operations), Mike Sereno (distribution center manager), Doug Maloney (east region manager for distribution), and Grant Dopheide (human resources director). Jerry Ebert (union organizer) was present on behalf of the Union.

Shapiro indicated that the area selected by the Employer to conduct the election was satisfactory, and he proceeded to set up the ballot booth and the ballot box. Shapiro showed the parties that the box was empty and taped and sealed the box. He explained that there would be one ballot box for both units and that the employees in unit A (drivers) would be given green ballots and that employees in unit B (warehouse employees) would be voting on yellow ballots. At about that time, Bob Bonds, a driver, entered the warehouse from the side entrance, and approached the conference, apparently thinking that the election had started and he could vote. Kevin King stepped away from the conference, and instructed Bonds that it was too early to vote, and asked Bands to go to the breakroom, until the election was ready to begin. King escorted Bonds out of the warehouse area.

While King was dealing with Bonds, the conference continued. Shapiro after discussing the different color ballots that would be used, pulled a yellow ballot out of his shirt pocket, and stated that it was green. One of the representatives corrected Shapiro, and told him that the ballot was yellow. Shapiro then informed everyone that he was colorblind. No one made any response to Shapiro's disclosure, nor made any objection to Shapiro conducting the election, in 20 view of his colorblindness.

At about 12:45 p.m., the two observers, Janet Buxbaum (the Employer) and Kevin Farrell (the Petitioner) joined the conference. Shapiro distributed written instructions to the observers, and discussed these instructions with them. He told them that they were to verify the identity of the voters and check off names on the *Excelsior* list.

The instructions to observers contain the following language:

> PRINCIPAL FUNCTIONS:
> - Monitor the election process
> - Help identify voters
> - Challenge voters and ballots
> - Assist Board agent in the conduct of the election

Shapiro did not mention to the observers that he was colorblind, nor did he tell them that he needed assistance from them in determining the color of the ballots.

Although several representatives of the Employer testified that they were shocked or surprised at the revelation that Shapiro was colorblind, none of them informed the Employer's observer of this fact, nor instruct her to make sure that the employees received the correct color ballots. Additionally, there was no discussion between the officials of the Employer, after the disclosure of Shapiro's colorblindness, until after the election was over, and the ballots counted.

B. The Polling Period

On two occasions during the voting, employees were told by Shapiro that they could not use a pen to mark their ballots, but they must use a pencil, provided by the Board agent. During the first hour of voting, an employee would come to vote, the observers would ask the employee his name. After the observ-

ers would agree as to the identity of the person, Shapiro asked "yellow or green," and the observers would respond which color ballot the employee should receive, depending on whether they were in unit A (drivers) or unit B (warehouse employees).[2]

After being so informed, Shapiro would remove a ballot from his shirt pocket, and hand the ballot to the voter.[3] The voter would then take his ballot to the booth, fill out the ballot, and then place it into the ballot box, which was situated next to Shapiro.

Buxbaum testified that she wasn't paying close attention for the first hour to the color of the ballot that Shapiro actually gave to the voters, so she did not notice whether Shapiro read or looked at the ballot before handing it to the voter. Buxbaum also testified that at times during this period, she could see some of the ballots being carried by the voter to and from the booth, as well as at times see the a ballot before or while the voter placed the ballot into the box. However, Buxbaum also testified that at times she did not see some ballots, because it was dark, the voters folded the ballot so she could not see it, or she was looking at the *Excelsior* list and not paying attention. Thus, Buxbaum contends that Shapiro could have given the incorrect color ballot to at least some voters, and she would not have noticed the error. Buxbaum also testified that there were "a lot" of people who came to vote at the beginning of the election. She did not testify as to how many employees voted during the first hour, but did indicate that several employees, i.e., more than four voted in the initial rush of voters, immediately after the polls opened.

At about 2 p.m., Buxbaum asked Shapiro why the observers had to continue to say green or yellow ballot. Shapiro responded that he was colorblind and that he has been since he was 35 years old. Buxbaum asked, "You're colorblind? How could you, like, distinguish between green and yellow?" Shapiro answered that he could see shades.[4] At that point, Farrell and Shapiro had a discussion about colorblindness and the Lchihara colorblind test.[5]

After that discussion was completed, Shapiro asked the observers to continue to call out the colors. At that point, Buxbaum began to more carefully watch the colors of the ballots that Shapiro gave to the voters. Shortly thereafter, Shapiro handed a yellow ballot to a driver who was supposed to receive a green ballot. Both Buxbaum and Farrell corrected Shapiro and told him that he had given a yellow ballot to a driver, instead of a green ballot. Shapiro corrected the error, gave the voter the appropriate green ballot, which the voter used. Shapiro then stated to the observers, "This is the reason why I need you to call out the colors. This way, I don't make a mistake."

After this incident, Buxbaum asserts that she began to watch more carefully what color ballots were actually given to the voter by Shapiro. She did not notice any other errors. Indeed, except for the one mistake that was corrected, Buxbaum testified that she was unaware of any other mistakes by Shapiro, and could not testify that any employee voted with an incorrect color ballot.

C. The Count

After the poll was closed, Shapiro counted the ballots. Present were King, Dopheide, Sereno, Frank Petliski (warehouse supervisor), Tom Engel (transportation supervisor), Ebert, Buxbaum, and Farrell. Shapiro sat at one of two circular tables in the area. Buxbaum and Farrell sat at the other table approximately 4 feet away from Shapiro. The Board agent directed Ebert and the Employer's representatives to stand back from the table, approximately 6 to 8 feet away from Shapiro.

Shapiro removed all the ballots from the box, and separated the ballots into green and yellow. Shapiro had no difficulty in determining which ballots were green and which were yellow, and was able to separate them without any assistance, and without making any errors. He then first counted the green ballots, by calling out "yes" or "no," and placing the "yes" ballots face up and the "no" ballots face down. Shapiro did not hold up or display the ballots for anyone to see. He then repeated the same process for the yellow ballots. Shapiro then counted the ballots in each pile and announced the count for each unit. As noted, the counts were nine "YES" and seven "NO" in each unit. None of the representatives present could see the markings on the ballots during the count, and no one asked to see them while Shapiro was separating and or counting.

After Shapiro announced the results, King requested a recount in the warehouse unit. Shapiro complied with this request, by placing his hand over the markings on the top ballot in each pile, and counting the piles by paging through the pile, touching only the upper corner of each. During the recount, Shapiro did not review the markings on any of the ballots to make sure that only the correct ballots were in the correct piles.

After the recount was completed, King asked if the Employer could see the ballots. Shapiro replied that the ballots could be seen at the Regional Office on Monday morning.[6] Buxbaum asked Shapiro what he was going to do with the ballots until Monday. Shapiro responded that he would be taking them home with him. Buxbaum asked where he lived? Shapiro replied, "New City, Spring Valley area."

Shapiro did not allow the Employer's representatives to view the ballots as requested on November 3. The Employer did not accept Shapiro's offer to view the ballots at the NLRB office on Monday morning.

The ballots have been introduced into evidence. I have carefully examined them, and conclude that the count was correct, and that each ballot was clearly marked in the "yes" or "no" box, with no identifying marks, or any other grounds for void-

[2] The ballots themselves stated on the right side of each ballot "(Unit B—Yellow)" and "(Unit A—Green)."

[3] The ballots were in Shapiro's shirt pocket, rolled together, with the green ballots encircling the yellow ballots.

[4] In that connection, Union Representative Ebert testified that he was "a little bit taken aback," when he found out at the preelection conference that Shapiro was colorblind. However, he became reassured during a conversation with his wife during lunch while the election was going on. According to Ebert, his wife informed him, "There's no problem. Colorblind doesn't mean you can't see colors, it means you just see shades of things."

[5] Farrell's parents were doctors.

[6] The election took place on a Friday.

ing any of the ballots. Further, the total number of ballots cast in each unit, exactly matches the number of eligible voters on the *Excelsior* list.

After the count, Buxbaum informed the Employer's representatives what had gone on during the election, particularly Shapiro making a mistake in handling one ballot, and that the observers were required to call out the colors. Buxbaum added that she was confused about the process, since when the Board agent counted the ballots, he never asked for help and was able to determine the colors. Buxbaum was "taken back by it." She also felt confused by the fact that Shapiro did not show the ballots to the Employer, so they could see the "Yes'" and "No's."

My factual findings above are based on a compilation of the credited portions of the testimony of Buxbaum, King, Dopheide, Sereno, Maloney, Petliski, Engel, and Ebert. While much of the facts detailed are undisputed, there are several significant areas of dispute. More specifically, Ebert testified that at the preelection conference, when Shapiro disclosed that he was colorblind, he also said that he had no problem distinguishing between yellow and green ballots. Ebert also contends that Shapiro asked if anyone had a problem with him conducting the election because of his condition, and that King replied, "As long as the count comes out right, no problem." Ebert adds that the other officials of the Employer nodded their head in approval of King's remark. Ebert also testified that at the count, he was standing behind Farrell about 5 feet away from the ballots, and he could see the markings on each ballot clearly as Shapiro was announcing whether it was "Yes" or "No." Ebert adds that Kevin King was standing in a counter position to Ebert, the same distance from the ballots. Ebert also denied that King or anyone else from the Employer asked to see the ballots, and did not recall the Board agent stating that he would be taking the ballots home with him over the weekend. I do not credit Ebert as to any of these areas, and credit the mutually corroborative, consistent, and believable testimony of the Employer's witness, as detailed in the above statement of facts. I did not find Ebert to be a particularly impressive witness. He was often vague, at times flip, inconsistent with his affidavit, and inconsistent between direct and cross-examination.

Most importantly, the Union failed to call Kevin Farrell, the Union's observer, who was present throughout the entire hearing, and could have corroborated Ebert in these areas of dispute between Ebert and the Employer's witnesses.[7]

Since Farrell was the lead organizer and observer for the Union, there is a presumption that his testimony would be favorable to the Union. I find it appropriate to draw an adverse inference from the Union's failure to call Farrell as a witness, and rely on same as additional support for my failure to credit Ebert as detailed above. *Teamsters Local 705(K-Mart),* 347 NLRB No. 42 ALJD slip op. at 6 (2006) ("Adverse inference drawn when employee who was predisposed towards the Union," did not testify about relevant incidents); *Battle Creek Health System,* 341 NLRB 882, 884 (2004) (Adverse Inference drawn against union, that union supporter threatened and intimidated decertification supporters when union failed to offer witness's testimony). *Dump Drivers Local 420,* 257 NLRB 1306, 1316 (1981) (Adverse inference drawn against union for failure to call witness [business agent] to corroborate testimony of union's secretary/treasurer); see also *Avery Heights,* 342 NLRB 1306, 1324 (2004) (vacated and remanded on other grounds). 448 F.3d 189 (2d Cir. 2006) (Adverse inference drawn against Employer for failure to call witness who was present for most of hearing).

In this regard, the Petitioner in its brief, made several references to the statement allegedly given by Farrell, and allegedly ("attached as tab 3 to Appendix of Record Evidence in Support of Local 445's Objections, part of Board Hearing Exhibit 1"), and relied on this alleged statement. Petitioner is incorrect, as the document referred to is not included in Board Exhibit 1, and Farrell's statement is not in the record. Moreover, even if the document had been in the record, I would not rely on Farrell's statement, inasmuch as he was available to testify, and should have been called by the Union as witness, and be subject to cross examination, if the Union wished to have Farrell's version of events be considered.

Analysis

Although the Employer has filed six separate objections, which were found by the Board to require a hearing, all the objections overlap and all rely on *Athbro Precision Engineering Corp.,* 166 NLRB 966 (1967), vacated *IUE v. NLRB*, 67 LRRM 2361 (D.D.C., 1968), acquiesced in, 171 NLRB 21, (1968), enf. 423 F.2d 573 (1st Cir. 1970), and its progeny.[8]

Therefore, I shall consider all the objections together. In *Athbro,* the Board agent in charge of the election was seen drinking beer with a union representative in a cafe by an employee who had already voted, in between polling periods. The Board observed as follows:

> The Employer does not claim any violation of the integrity of the ballot box, nor does it claim that the conduct of the Board agent had any effect upon the four employees who later voted. Rather, it objects that the behavior of the Board agent gave an appearance of irregularity to the conduct of the election, thus departing from the standards of integrity which the Board seeks to maintain.
>
> The Regional Director, while observing that a Board agent in charge of an election should not fraternize with a representative of one of the parties in the interim between two balloting periods, nevertheless did not recommend setting aside the election. 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.
>
> The Board in conducting representation elections must maintain and protect the integrity and neutrality of its pro-

[7] I note that Ebert testified, contrary to all of the Employer's witnesses, that when Shapiro disclosed that he was colorblind, King allegedly stated that the Employer had no problem with Shapiro conducting the election.

[8] *Sonoma Health Care Center,* 342 NLRB 933 (2004); *Renco Electronics,* 330 NLRB 368 (1999); *Hudson Aviation Services,* 288 NLRB 870, (1988); *Alco Iron Metal,* 269 NLRB 590 (1984); *Glacier Packing Co.,* 210 NLRB 571 (1974); *Skyline v. NLRB,* 613 F.2d 1328 (5th Cir. 1980).

cedures. 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.

In the circumstances of this case we hereby sustain the Employer's objections. Accordingly, we shall set aside the election and direct that a second election be held.

The Employer contends that the conduct of the Board agent here, in various respects, falls within the proscriptions detailed in *Athbro,* and requires that the election be set aside. My review of *Athbro,* as well as subsequent Board and court precedent interpreting and analyzing that case and its principles, leads me to conclude that the Employer has not met its burden of establishing that the election should be set aside.

I note initially that *Athbro*, as well as every other case cited by the Employer,[9] involve facts that attack the neutrality of the Board or the Board agent. Thus cases where the Board has set aside elections based on Board agent neutrality misconduct under an *Athbro* analysis include: *Renco,* supra (Board interpreter asked voter, while explaining the election procedure, "Do you know where to put your "Yes" vote?"); *Hudson Aviation,* supra (Board agent, in the presence of voters, had a loud argument with employer's supervisor, which "impermissibly put into a question the Board's neutrality in the election."); *Alco Iron,* supra (Board agent instructed union's observer to "translate the procedure of voting to employees." Board finds contrary to hearing officer, that the "atmosphere of impartiality in which the election should have been held was not present."); *Glacier Packing,* supra (Board agent in the presence of voters, ripped off cards pinned to lapels of Employer's and observers, which stated "vote neither," tore badges into pieces, and stated to observers, "Shame on you." Board agent also yelled at supervisor for distributing literature outside the building, and said, "get out of here, stop this. You have no business and no right to be here handing out anything." Employees were present, began clapping, made "cat calls," and pointed fingers at supervisor. Board finds that "Employees witnessing the two incidents involved could reasonably have interpreted Board agent's remarks and actions as indicative that the Board was opposed to the Employer's position in the election.").

See also several court cases, reversing Board decisions which had concluded that *Athbro* neutrality principles had not been violated. *North of Market Senior Services*, 163 LRRM 271 (D.C. Cir. 2000) (Board agent delegated to union officials the task of going through the plant, and telling employees what time they could vote. Union agents, wearing union insignia, told employees that they had been sent by the NLRB to tell employees when they could vote, and openly disagreed with management's view as to whether they had to vote on their lunch hour. Court finds that Board erred in not granting hearing to employer, concluding that Board agent gave impression that the "Board had ceded significant authority to the Union over the conduct of the election."), *NLRB v. State Plating & Finishing,* 738 F.2d 753, 742 (6th Cir. 1984), (court disagrees with Board, and concludes that statement made by Board agent to employees concerning raises that could or could not be granted by employer, "destroyed the Board's neutrality," and tainted the election); *Provincial House, Inc. v. NLRB,* 568 F.2d 8, 11 (6th Cir. 1978) (Ten days prior to election, while investigating ULP charges, Board agent was introduced by union official to employees at an organizing meeting at a hotel, as an NLRB agent. Court finds that when NLRB representative allowed himself to be introduced to the union organizational meeting, the appearance of NLRB neutrality was compromised, warranting setting aside the election.).

Athbro and its principles have been applied in numerous Board and court cases where the standards of Board neutrality were found not to have been violated, and the elections were not overturned. *Sonoma Health Care,* supra, cited by the Employer (Board agent answered questions of union observer why companies do not like unions, by stating "companies don't like unions because they cannot fire or hire anyone, and they cannot take benefits from the staff." Later observer said to Board agent that employer hired a consultant and paid $60,000. Board agent replied, "Whoa!, $60,000." Board majority concludes that the comments of the Board agent "while intemperate and inappropriate," "do not reflect such a level of bias or impropriety that they tend to destroy confidence in Board's election process."). *Indeck Energy Services,* 316 NLRB 300, 301 (1995) (Board finds fraternization between the Board agent and petitioner's observer, insufficient to reasonably cause a witness to question the Board neutrality, thereby distinguishing *Athbro* and *Hudson*); *Rheem Mfg. Co.,* 309 NLRB 459, 462 (1992) (Comments by Board agent to observers about his possible need to file a petition on his own, and complaints about heat in the plant, and his conduct in walking through the plant and taking and laughing with union observer, found by Board, contrary to hearing officer, insufficient to impugn Board's neutrality or give appearance of fraternization); *NLRB v. Duriron Co.,* 978 F.2d 254, 258 (6th Cir. 1992) (Court assessed conversations between Board agent and voters wearing union insignia, when agent inquired if voters were related to Gwen West, and Board agent telling voter that he had taken affidavit from Gwen West in another case. Court agrees with Board that conversationsfailed to compromise the integrity of the election, and distinguishing *Athbro,* as to the level of fraternization.). *San Francisco Sausage Co.,* 291 NLRB 384 (1988) (Board agent allowed petitioner in RD case to summon voters over the employer's intercom system. Board finds delegation of a minor task, did not impugn "atmosphere of impartiality," as contended by dissent); *Rochester Joint Board Clothing & Textile Workers v. NLRB,* 896 F.2d 24 (2d Cir. 1990) (Premature disclosure of Decision and Direction of Election by Region on phone to Union, while refusing to inform employer who also inquired by phone. Court affirms Board's conclusion that Board's neutrality was not sufficiently impugned by conduct to warrant setting aside election. *Athbro* and *Hudson* distinguished.); *S. Lichtenberg & Co.,* 296 NLRB 1302 (1989) (Comments made by Board attorney 5 days before election published in newspaper, commenting on unfair labor practice complaint issued by Region. Board concludes that statements

[9] See preceding footnote.

"cannot be found to constitute objectionable conduct destructive of Board neutrality under the *Athbro* standard."); *Sioux Products, Inc. v. NLRB,* 703 F.2d 1010, 1014, 1015 (7th Cir. 1983) (Court finds various acts of Board agent not to have sufficiently interfered with the impartiality of election. Acts included Board agent at preelection conference telling company observers to "shut up," when observer attempted to help interpreter translate Board agents remarks into Spanish, prohibiting company observer from any conversation with voters, and helping union observer in making a challenge.); *U.S. Ecology, Inc. v. NLRB,* 772 F.2d 1478 (9th Cir. 1985) (Allowing petitioner's observer to read poll opening announcement did not compromise the Board's appearance of neutrality.); *NLRB v. Osborn Transportation,* 589 F.2d 1275, 1279 (1979) (Same Board agent who conducted election, took affidavits from employees at motel room while investigating Unfair Labor Practice charges, 6 weeks before election. Court agrees with Board that above conduct did not compromise the integrity and neutrality of the Board's procedures.); *NLRB v. Fenway Cambridge Motor Hotel,* 601 F.2d 33, 36–37 (1st Cir. 1979) (Neutrality of Board's procedures not compromised by Board agent's conduct when handing ballot to voter, of pointing to "Yes" box and instructing voter to place mark there.); *Wabash Transformer Co.,* 509 F.2d 647, 648–649 (8th Cir. 1975) (Board agent in announcing the opening of the polls, stated "the polls are open and you may now go vote and elect a union representative." Court upholds Board's conclusion that the above conduct did not breach the neutrality of the election procedures and that the integrity of the election was not so impaired as to warrant the holding of a new election.); *Shorewood Manor Nursing Home,* 217 NLRB 1106, 1107–1108 (1975) (Board agent informed observers that he felt that he had gotten his job at the NLRB, because he had been a union steward at his previous job. Found not to compromise Board's *Athbro* standards.); *Wald Sound, Inc.,* 203 NLRB 366 fn. 1, 368 (1973) (Board agent, after count, stated to new Board agents who accompanied her at election, that they had gotten "a winner," where union appeared to have won. Board affirms hearing officer's conclusion (contrary to dissent who would have set aside election based on *Athbro*) that Board's neutrality was not compromised by remark, noting also that there is no way the remark could have affected the election results since the count was completed.); *NLRB v. Dobbs House, Inc.,* 435 F.2d 704, 705–706 (5th Cir. 1970) (Board agent in response to questions from the employer's observer, stated the union represented about 20 places and was trying to get more (that he felt the union would win at *Dobbs House* and that it would do the people a lot of good. Court found *Athbro* distinguishable, and sustained the Board's view that the election was not tainted by the above conduct).).

As can be seen from my description of the above precedent dealing with *Athbro* issues, the primary thrust of these cases was an examination of whether the Board's neutrality was compromised sufficient to destroy confidence in the Board's election process. Here, there is no contention by the Employer that any of the various alleged transgressions of the Board agent had any affect on the Board's neutrality. Thus, neither Shapiro's colorblindness and its potential affect on the election, nor his alleged problems in conducting the count, nor his decision to require pencils to be used, impacted the neutrality of the Board, since he treated both sides equally in these areas. Thus, the primary rationale for *Athbro* is not present here.

In this regard, the Employer alleges as a separate objection, that the Board agent ceded his authority to conduct the election to the observers, by requesting that they assist him in determining which color ballots to be given to the voters. *Alco Iron & Metal,* supra. I disagree. The crucial factor in *Alco* that warranted a finding of objectionable conduct was the fact that the Board agent ceded his authority to the *union* observer (emphasis supplied) to translate voting instructions. The Board emphasized the fact that the employer's observer has complained about the conduct, and the Board agent continued to have the union observer repeat instructions in Spanish. The Board concluded that "under these circumstances, we find the atmosphere of impartiality in which the election should have been held was not present. The delegation of an important part of the election process to the Petitioner's observer conveyed the impression that the Petitioner, and not the Board, was responsible for running the election." 269 NLRB at 591–592. Here, the Board agent requested the assistance of both observers in helping him insure the correct colored ballots, so there can be no finding, as in *Alco* that the impartiality of the election was not present.

The Employer also argues that the Board agent's conduct violates the instructions given to observers which states, "Do Not . . . give any help to any voter." I again, do not agree. Indeed, the same list of instructions to observers, states as among the principal functions of the observer as "help identify voters," and "assist Board agent in the conduct of election." In my view, the observers were in fact "assisting the Board agent in the conduct of the election", by helping him to insure the voter receives the proper ballot, as well as helping to identify voters. It is clear that the observers were using the color of the ballot, as a shorthand way of determining the proper placement of the voter into either unit A or unit B. I find nothing even remotely objectionable for the observers to assist the Board agent in these minor tasks, particularly as detailed above, both observers participated in these functions. *NLRB v. Michigan Rubber Products,* 738 F.2d 111, 114–115 (6th Cir. 1984) (Following morning polling session, Board agent allowed union representative to carry metal voting booth to her car. Court finds, in agreement with the Board, that while Board's agent conduct may have been imprudent, it did not give appearance of fraternization, sufficient to warrant setting aside election.); *San Francisco Sausage Co.,* 291 NLRB 384 (1988) (Board agent allowing petitioner's observer to use the intercom system to announce that employees could vote, was the delegation of a minor task, insufficient to require a new election.); *U.S. Ecology v. NLRB,* 772 F.2d 1428, 1482–1484 (9th Cir 1985) (Board agent allowed union observers to read the poll opening announcement, over the objection of employer. Choice of union observer was made after a coin toss. Board agent also allowed the union observer to signal the first voter to come into vote. Court concludes in agreement with Board, that these delegations of minor tasks to union observer did not compromise the Board's appearance of neutrality.).

Based upon the above analysis and precedent, I recommend that Objection 2, be dismissed.

While the remaining objections, as I have detailed above, do not raise any issue of lack of neutrality, which substantially detracts from the Employer's reliance on *Athbro* and its progeny,[10] this finding does not fully dispose of the Employer's objections.

Thus, there is another line of cases, which analyzes Board agent conduct, under a slightly modified version of the second sentence of *Athbro*. These cases generally involve conduct which deal with the sanctity of the ballots and or the ballot box, and the appropriate standard is set forth in *Polymers, Inc.,* 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 346 U.S. 1010 (1970). The question to be answered is whether the conduct of the Board agent raises a reasonable doubt as to the fairness and validity of the election. This standard appears to me to be a slight modification of the *Athbro* standard of evaluating whether the conduct could reasonably be interpreted as impugning the election standards the Board seeks to maintain. In any event, subsequent precedent makes clear that the *Polymers* standard should be applied to situations, as here, where the Board agent's conduct although not necessarily violative of neutrality principles, could be construed as a sufficiently serious departure from Board election standards, to warrant setting aside the election.

In this regard, elections have been set aside, based on violations of the *Polymers* standards, in a number of cases. Board agent failed to keep a list of challenged voters, placed all ballots both challenged and unchallenged into an envelope, and sealed the envelope. When the employer asked for a list of challenged voters, Regional personnel broke the seal, and opened the ballots, removed the challenged ballots envelopes, and a prepared of challenged voters, and returned the challenged ballots to the envelope, which still contained the unchallenged ballots. Board concludes that the Board agent's conduct in breaking the seal, and opening the envelope outside presence of the parties, constituted conduct which reasonably would destroy confidence in the election process. *Madera Enterprises,* 309 NLRB 774, 775 (1992). In *Jakel Inc.,* 293 NLRB 615, 616 (1989), as a voter was putting her ballot into the box, the union observer told the Board agent that it was to be a challenged ballot. Board agent opened ballot bag, removed a ballot, showed it to voter and asked if it was her ballot. Voter identified ballot as hers. Board agent tore up ballot and placed pieces into challenged envelope and marked it "spoiled." Board agent gave a new ballot to the voter, who voted and had the ballot placed in challenge envelope. Board affirms Regional Director who concluded that the conduct of Board agent raised a reasonable doubt as to the fairness and validity of the election. Regional Director concluded that it cannot be determined with reasonable accuracy whose ballot was extracted from the bag. *Paprikas Fono,* 273 NLRB 1326, 1328–1329 (1984), involved a Board agent who failed to place challenged ballots in an envelope sealed with tape. Regional personnel subsequently opened the envelope to inspect the condition of the challenged ballots, outside the presence of the parties. Board concludes that conduct denied parties the opportunity to monitor challenge and assure themselves that challenges were secure. This conduct created a "reasonable doubt" as to the fairness and validity of the election. Finally elections were set aside in *Kerona Plastics,* 196 NLRB 1120 (1972), where the polls were closed 20 minutes early, in the presence of employees waiting to vote, and in *Austill Waxed Paper,* 169 NLRB 1169, 1110 (1968), where the ballot box was left unattended, for from 2–5 minutes, due to an altercation outside the polling place.

On the other hand there are numerous Board and court decisions, applying the *Polymers* standard, and finding that the conduct did not raise a reasonable doubt as to the fairness and validity of the election. *Enloe Medical Center,* 345 NLRB 874, 891 (2005), enfd. 219 Fed. Appx. 6 (D.C. Cir. 2007) (Board agent, in election involving multicolor ballots and several units, gave all challenged voters white ballots, even though some of them should have received green or pink ballots. However, since the name and job of voter was on the envelope, when challenges were resolved, the ballots were placed in the correct unit. Thus, the ALJ found, supported by the Board and the court, that the error of Board agent could have had no effect on the results.); *St. Vincent's Hospital, LLC,* 344 NLRB 586, 587 (2005) (Two voters were allowed to enter the voting booth at the same time.); *Cedars-Sinai Medical Center,* 342 NLRB 396, 608–609 (2004) (Blank ballots left unattended, and observers did not initial seal in ballot box.); *Robert Orr-Sysco Food Services,* 338 NLRB 614, 623 (2002) (Board agent failed to detail reasons for the challenge, contrary to Casehandling Manual.); *J. C. Brock Co.,* 318 NLRB 403, 404 (1995) (Region's error in using separate language ballots, requiring Board agent to ask if voter needed Vietnamese ballot.); *T. K. Harvin & Sons,* 316 NLRB 510, 537 (1995) (Two ballots taken from ballot box, one inside the other.); *Rheem Mfg.,* supra, 309 NLRB at 459–461) (Board agent allowed three employees to vote while polls were closed between sessions. Board agent put ballots in shirt pocket, and told observers that he would deposit ballots in box when polls reopened. When other Board agent returned, he put ballots in briefcase, and when polls reopened, explained to parties what had occurred. The employer challenged ballots, which were never counted. Board, reversing hearing officer, finds that although proper procedures were not followed, facts did not cause reasonable doubt as to validity of election.); *Dunham's Athleisure Corp.,* 315 NLRB 689 (1994) (Observers could not see the ballot box for substantial periods of time during election.); *Allied Acoustics,* 300 NLRB 1181 (1996) (Board agent miscounted ballots. An hour after tally was served, employer notified Region that he believed 24 employees had voted. [tally showed 23]. Board agent recounted the ballots in private, and recount disclosed an additional vote for union, and 24 votes cast. He prepared a corrected tally of ballots.); *Newport News Ship Building,* 239 NLRB 82, 90 (1978) (Ballot box not sealed, union representative carried ballot box from one to another polling place, and company representative was denied permission to inspect ballot boxes.); *Kirsch Drapery,* 299 NLRB 363, 364 (1990) (Board agent opened polls a half hour late, allowed parties to assemble voting equipment, placed chal-

[10] As I observed infra, all of the cases cited by the Employer which followed or analyzed *Athbro* itself, including *Athbro* itself, involved conduct which compromised the Board's neutrality. *Renco,* supra; *Alco,* supra; *Hudson,* supra; *Sonoma Health Case,* supra; *Glacier Packing,* supra.

lenged ballot in box, rather than instructing voter to place it in box, and violated Casehandling guidelines in resolving challenge. Board reverses hearing officer, and finds separately or collectively, their misconduct do not raise a reasonable doubt as to fairness and validity of election.); *Trico Products,* 238 NLRB 380, 381 (1978) (Board agent left envelope with blank ballots unattended for 5 minutes while erecting voting booth. When Board agent retrieved ballots, she noticed a small tear in envelope.); *Niagara Wires,* 237 NLRB 1347 (1978) (Portion of initials of company representative was under the tape rather than over it.); *Keystone Metal Moulding,* 236 NLRB 697 (1978) (Board agent did not request that observers inspect the seal, before opening the box, and observers could not see or confirm that box had not been tampered with. Further, Board agent failed to have observers sign certification of conduct at end of first voting session.*); Pride Made Products,* 233 NLRB 182 (1970) (Voter left polling area with marked ballot, spoke to some employees who had voted, and returned to voting area to cast her vote. Board agent challenged her ballot.); *Benavent & Fourmier,* 208 NLRB 636 (1974) (Board agent left voting area for 2–5 minutes, and left ballots on table and box unsealed.); *People's Drug Stores,* 202 NLRB 1145 (1973) (In multistore election, ballot boxes were left in trunk of escort vehicles [driven by employees], and Board agent took the trunk key for the day.); *Polymers,* supra (Ballot box was left unguarded in locked car of Board agent between sessions. Box not sealed properly, since easily removable masking tape was used.); *Nabisco Inc. v. NLRB,* 738 F.2d 955, 958 (1984) (Union observers failed to give identification badges, as required in Casehandling Manual.*); Skyline Corp. v. NLRB,* 613 F.2d 1328, 1332–1333 (5th Cir. 1980) (Envelopes containing ballots were not sealed with tape, no label with name of person who sealed envelope, and no memo in file stating where challenged ballots were stored, all in violation of Casehandling Manual.); *Bell Foundary Co. v. NLRB,* 827 F.2d 1340,1346–1347 (9th Cir. 1987) (Board agent left ballot box unattended for 5 minutes before start of afternoon session.); *NLRB v. Capitan Drilling Co.,* 408 F.2d 676, 677 (5th Cir. 1968) (One seam on ballot box was not sealed with tape.).

It is therefore appropriate and necessary to evaluate the conduct of the Board agent here, under the analysis of *Polymers,* and determine if it creates a "reasonable doubt as to the fairness and the validity of the election."[11] *Polymers,* supra, 174 NLRB at 282; *Enloe Medical Center,* supra, 345 NLRB at 891; *Sawyer Lumber Co.,* 326 NLRB 1331, 1332 (1998); *Keystone Metal,* supra, 236 NLRB at 697; *Rheem Mfg,* supra, 309 NLRB at 460.

In Objection 1, the Employer asserts that the Board agent's colorblindness rendered him unable to differentiate between the colors of the ballots for the two separate units, and the failure to use a separate ballot box for each unit, caused confusion and potential for miscast ballots.

Taking the Employer's latter contention first, I find nothing inappropriate or confusing in using a single ballot box for both units. Indeed this is the normal procedure in Board elections, and nothing in the Casehandling Manual indicates or requires separate boxes. In my view, the use of different color ballots and voting lists ensured that each ballot was recorded, and counted accurately. Further, the Employer introduced no evidence of confusion amongst eligible voters as a result of using one, rather than two boxes. I therefore conclude that the use of one ballot box did not create a reasonable doubt as to the fairness and validity of the election. *Polymers,* supra.

The Employer's contentions with respect to the Board agent's colorblindness is more troublesome. The Employer argues that his admitted colorblindness caused him to confuse the color of the ballots twice, once at the preelection conference, and once during the election. While conceding that neither of these errors caused a wrong ballot to be voted,[12] the Employer asserts that since the Employer's observer could not be certain that the correct color ballots were distributed to all voters, since she was not paying close attention for the first hour of the election, that "no one will ever know how many other wrong colored ballots were distributed by the Board agent, or how many voters cast ballots with the wrong colored ballots. It is for this reason that there cannot be confidence in the results of this election."

However, it is well settled that the Board will not set aside elections based upon speculation that its election standards have been impugned or violated. "It requires more than mere speculation to overturn an election." *J. C. Brock,* supra, 318 NLRB at 404, *Sawyer Lumber,* supra at 1332 ("Speculation about the possibility of irregularity . . . does not raise a reasonable doubt as to the fairness and validity of the election.); *Newport News,* supra, 239 NLRB at 86 ("The speculation of the Employer concerning the accuracy or legitimacy of the ballots is no substitute for specific evidence relating to actual conduct or events which raises material issues that the Board's election standard have been impugned.). *Pride Motor Products,* 233 NLRB 182 (1977) (The Board "does not set aside an election based on mere speculation that election standards have been impugned."); *Bell Foundry v. NLRB,* supra, 827 F.2d at 1346 ("The mere possibility of irregularity of representation election does not preclude certification."), *NLRB v. Capitan Drilling,* 408 F.2d at 677 (Uncorroborated speculation that ballot box could have been tampered with, insufficient to necessitate an evidentiary hearing or the setting aside of the election.). *Trico Produces,* supra, 238 NLRB at 381 ("It is not every conceivable possibility of irregularity which requires setting an election aside but only reasonable possibilities."). Further, the Board in *Polymers,* supra, supported by the court, enlarged upon the definition of reasonable . The Board held:

> We do not think, however that the word "possibility" could ever be construed in this context to have the connotation of 'conceivable'. The concept of reasonableness of the possibil-

[11] I note again my conclusion detailed above, that this standard represents a clarification, and perhaps a slight modification of the language in *Athbro* that the conduct can be objectionable, if it "could reasonably be interpreted as impairing the election standards the Board seeks to maintain."

[12] The first mistake occurred in the preelection conference, before any ballots were distributed, and the second error was caught by the observers, and the mistake rectified by giving the voter the appropriate color ballot.

ity must be imported into this text in order for it to have meaning. [174 NLRB at 282 fn. 6.]

The circuit court specifically affirmed the Board's analysis in this regard. "A *per se* rule of possibility would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained." 414 F.2d at 1004.

Here, the Employer's contentions with respect to the Board agent's conduct, comes down to no more than "speculation" that it is possible that the Board agent my have given wrong color ballots to one or more voter, during the first hour of voting, when Buxbaum asserts that she was not paying close attention, and could not be certain that all voters received a correct ballot.

I do not find this speculative and uncorroborated testimony to be sufficient to warrant the conclusion that reasonable doubt as to the fairness or validity of the election has been demonstrated.

The Employer relies on Buxbaum's testimony, as well as the fact that Shapiro made two mistakes with respect to the color of the ballots. However, other evidence in the record tends to show that notwithstanding the Board agent's colorblindness, he was able to determine the appropriate ballot. The ballots in addition to being different colors, specifically stated "Unit A" or "Unit B" on each ballot. There is no evidence in the record that the Board agent had any difficulty in reading. Buxbaum in her testimony conceded that she did not know if Shapiro read the ballots before he handed them to the voter during the first hour, because she was not paying close attention. Therefore, he could have read the ballots and determined the appropriate ballot to be distributed. I also found Buxbaum's testimony vague and unconvincing concerning the first hour of voting. While she admits that at times during this period of time, she did see the voter with the ballot and or place it into the box, she insists that she could not be sure that she saw all of the voters' ballots, since she was often focused on checking off names on the *Excelsior* list. I find this testimony dubious, since it does not take very long to check off a name on the list, leaving her ample time to see what color ballot the voter had received, before they placed it in the ballot box. Therefore, I find it likely that Buxbaum was able to see most if not all of the ballots, before they were deposited in the box. I further find it highly likely, that even if Buxbaum did not see the ballots of some voters, that the Union's observer would have seen the error and corrected it, as was done, when the Board agent made a mistake with one ballot.

Furthermore, I note the undisputed evidence that Shapiro was able to separate all the ballots, into green and yellow piles, without any assistance or difficulty, while conducting the count, thereby demonstrating that despite his disability, that he was able to determine the difference between the ballots for unit A and unit B.

Accordingly, based on the foregoing, I find the possibility that the Board agent gave a wrong colored ballot to any other voter to be extremely remote, and that the Employer has fallen short of its burden of establishing reasonable doubt as to the fairness and the validity of the election. *Polymers,* supra.

As further support for this conclusion, I also note that the number of ballots cast (16 in each unit) equals the number of eligible voters in each unit, which is at least an indication that no errors were made in the distribution of ballots. *T. K. Harvin,* 316 NLRB 510, 537 (1995); *Queen Kapiolani Hotel,* 316 NLRB 655 (1994).[13]

Finally, I also rely on the fact that while the Employer became aware of the Board agent's colorblindness during the preelection conference, it made no objection to Shapiro conducting the election. While I do not find that the employer waived any rights to object to the Board's agent's conducting the election, I note that by failing to object, the Board agent was given no opportunity to rectify the alleged deficiency of the election. *Polymers v. NLRB,* supra, 414 F.2d at 1002; *Avante At Boca Raton,* 323 NLRB 555, 558 (1997); *Sioux Products v. NLRB,* supra, 703 F. 2d at 1015; *Wabash v. NLRB,* supra, 504 F. 2d at 647. While the Board agent was by himself at the time, it is conceivable, had the employer objected to Shapiro conducting the election, that he might have been able to call the Region, and arrange for someone else to be assigned to at least assist in the election. I also note that although several of the Employer's representatives testified that they had some concerns about Shapiro's ability to conduct the election, due to his colorblindness, they nonetheless failed to instruct the Employer's observer to make sure and look out for the possibility of wrong color ballots being distributed to voters by the Board agent. Indeed, none of the Employer's representatives even notified its observer that the Board agent was colorblind, even though he had disclosed this information during the preelection conference.

Accordingly, based on the foregoing analysis and authorities, I conclude that the colorblindness of the Board agent did not raise a reasonable doubt as to the fairness and validity of the election. *Polymers,* supra; *Enloe Medical Center,* supra; (Board finds no reasonable doubt as to fairness and validity of election, even where Board agent had admittedly given wrong color ballots to challenged voters. The court affirmed this finding, concluding that the employer failed to show "that the Board agent's alleged misconduct would create a reasonable possibility of an incorrect outcome in the election, and the allegations were not of the sort that would create presumption of such taint." 181 LRRM at 2698).

I shall therefore recommend that Objection 1 be dismissed.

Objection 3 alleges that the Board agent required voters to use an erasable pencil, and on several occasions refused to allow voters to use a pen, and directed them to use a pencil, provided by the Board agent. The Employer argues that the "use of an erasable pencil permits the possible tampering with the markings on the ballots before and after the election, and the

[13] I recognize in this regard, that it is mathematically possible for the Board agent to have distributed two incorrect ballots, one in each unit, and there would still be a correct number of total ballots in each unit. However, as explained above, I find it highly unlikely and in fact remote, that he gave out any wrong color ballots, and the fact that it would be necessary for him to have distributed precisely, two or four ballots incorrectly, and in each unit, is a further remote possibility.

requirement that all employees only use such eraseable pencil opens a question in the fairness of the election process." I note initially that the record does not establish whether or not the Board agent required the voters to use an "eraseable" pencil as the Employer's observer testified only that the Board agent insisted that employees use a pencil, without specifying whether or not it had an eraser on it. However, even assuming that the finding can be made the pencils contained erasers, the evidence falls far short of establishing that the Board agent's conduct in requiring the use of such pencils, created a reasonable doubt as to the fairness and validity of the election. While the Employer argues, as related above, that the use eraseable pencils "permits the possible tampering with the ballots," this contention again represents speculation, which as I have detailed above, is insufficient to set aside an election. *Sawyer Lumber,* supra; *J. C. Brock,* supra; *Bell Foundary,* supra. No evidence was presented that any voters were disenfranchised by the use of pencils, nor any evidence that any ballots were erased, tampered with or changed. Although two voters attempted to vote by using a pen, and the Board agent required that they use a pencil, the voters in fact voted with a pencil and did not object to this requirement. In this circumstance, this objection is clearly nonmeritorious and must be dismissed. I so recommend. *Elizabeth Town Gas Co. v. NLRB,* 212 F.3d 257, 263 (4th Cir. 2000) (Board agent requiring that voters use a pencil, not objectionable, even where one employee had initially objected to using a pencil because voter felt that someone could change her vote.).

Objection 4 alleges that the Board agent required the observers and other officials of the Employer to stand back or sit a substantial distance from him, as he reviewed and counted the ballots. It cites Section's 11340.5 and .6 of the Casehandling Manual, which requires that the Board agent "display the ballots and place them face up in piles according to the preferences expressed." The Employer argues that the Board agent failed to comply with these requirements, since he did not "display" the ballots when he was counting, and that he did not place all of the ballots face up. (He placed the "yes" ballots face up and the "no" ballots face down.)

As a result of the Board agent's failure to comply with the Manual, the Employer asserts that its representatives could not see the markings on the ballots, and were deprived of the opportunity to make challenges to the Board agent's interpretation of the markings on the ballots. The Employer also asserts that this error was compounded by the Board agent's failure to accede to the Employer's request to examine the ballots, after they had been counted.

However, it is well established by both Board and court precedent, that the provisions of the Casehandling Manual are not binding procedure rules. These provisions are merely intended to provide optional guidance in the handling of representation cases. *Robert Orr-Sysco Food Services,* supra, 338 NLRB at 623. (Board agent failed to detail reasons for challenge); *Topside Construction,* 329 NLRB 886, 900 (1999) (Voters permitted to vote prior to opening of polls, contrary to Manual); *Sawyer Lumber,* supra, 326 NLRB at 1333 (Board agent failed to tape ballot box closed, and dismantled voting booth before agreed upon closing time); *Avante At Boca Raton,* supra, 323 NLRB at 557–558 (Violation of Casehandling Manual requirement that observers should remain at least 3 feet away from ballot box); *Queen Kapiolani Hotel,* supra, 316 NLRB at 655 (failure to securely seal ballot box); *Kelly & Hueber,* 308 NLRB 578, 579 (1992) (Allowing former supervisor employee of employer to act as observer for petitioner.); *Correctional Health Solutions,* 303 NLRB 835 (1991) (Allowing petitioner to use former employee as observer in violation of Manual.); *Kirsch Drapery,* supra, 299 NLRB at 364 (Board agent deposited challenged ballot in box, rather than directing voter to do so, and disposed of challenged ballot *after* the count, and failed to either secure withdrawal of challenge or memorialize the disposition of the challenge.); *Schwartz Bros.,* 194 NLRB 158 (1971) (Board agent made challenges on behalf of union, who did not have observer present.); *Polymers,* supra, 174 NLRB at 282 (Failure to seal ballot box properly.); *L. C. Cassidy & Sons v. NLRB,* 745 F.2d 1059, 1063 (7th Cir. 1984), (Poll closed early and observers did not remove badge while taking a break.); *Elizabethtown Gas v. NLRB,* supra, 212 F.3d at 267-268 (Board agent did not seal ballot box when taking breaks); *Nabisco v. NLRB,* supra, 738 F.2d at 958 (Union observers failed to wear identification badges, as required in Manual.); *Skyline v. NLRB,* supra, 613 F.2d. 1322 (Envelopes containing ballots were not sealed with tape, no label with name of person who sealed envelope, and no memo in file, stating where challenged ballots were stored, all in violation of manual.); *NLRB v. Fenway Cambridge,* supra, 602 F.2d at 38 (Board agent stood as she explained mechanics of voting, contrary to Board Manual and request of employer's observer.).

This as can be seen from the above precedent, the fact that the Board agent violated the Manual's provisions is not determinative. Rather, the issue is whether these violations, create a reasonable doubt as to the validity and fairness of the election.

Here, I agree with the Employer that the Board agent did in fact violate the Manual's provisions by failing to display the ballots and not placing them all face up. I further agree that he compounded these errors, by refusing to permit the Employer to inspect the ballots, although the Employer had so requested. However, while I do not condone the Board agent's conduct here, I conclude that it did not raise a reasonable doubt as to the fairness and validity of the election, and thus was not sufficient to warrant setting aside the election. *Rheem Mfg.,* supra at 962; *Polymers,* supra.

Initially, I note that although the Employer's witness could not see the marking on the ballots while the Board agent was counting, due in part as to the Board agent's instructions as to where to stand, they made no objection to these instructions, nor did they inform the Board agent that they could not see the markings. *Sioux Products,* supra, 703 F.2d at 1015 (Although Board agent ordered both union and employer representatives "back from the table" when counting ballots, employer representatives did not complain at the time that they could not see the ballots.); *T. K. Harvin,* supra, 316 NLRB at 537 (Employer's observer did not object to the location of the ballot box.); *Wabash Transformer,* supra, 509 F.2d at 647 (Employer representative made no objection to announcement made by Board agent over loud speaker, which allegedly compromised Board neutrality.).

The Employer did in fact request to see the ballots, after the count was completed, which request was denied by the Board agent. However, the Board agent did inform the Employer that the ballots would be available for viewing at the Board's office on Monday morning, which was the next working day. The Employer chose not to take advantage of this opportunity to view the ballots. Thus, any prejudice to the Employer by the failure of the Board agent to allow inspection of the ballots on the day of the election, was cured by giving the Employer the chance to do so, on the next working day. Thus, had the Employer taken advantage of this offer, it would have been able to see all the ballots, and to determine for itself whether there were any questionable markings on any of them.

Most importantly of all, these ballots have been introduced into the record herein. I have examined them closely, and I conclude that none of them contain any identifying marks or any other grounds for voiding any of the ballots. Indeed, the Employer has not so claimed. Further the total number of ballots case exactly matches the number of eligible voters in each unit. *T. K. Harvin,* supra at 537; *Queens Kapiolani Hotel,* supra at 655. *Dunham's Athleisure,* supra, 315 NLRB at 689.

In these circumstances, I conclude not only that this conduct of the Board agent does not raise a reasonable doubt as to the validity and fairness of the election, but that it could not have affected the results of the election. *Enloe Medical Center,* supra, 345 NLRB at 891 fn. 18, affirmed by circuit court's conclusion that employer "failed to provide evidence that would create a reasonable possibility of an incorrect outcome in the election, and the allegations were not of the sort that would create a presumption of such taint." 181 LRMM at 2698, see also *Allied Acoustics,* supra, 300 NLRB at 1181 (Error in counting by Board agent, plus recount made in private, insufficient to set aside election, since no evidence of tampering, loss of ballots or any factual issue concerning the accuracy or integrity of Board agent's recount.); *Dunham's Athleisure,* supra, 315 at 689 (Although observer unable to see ballot box at all times during election, no evidence of tampering, loss of ballots or that box was "stuffed" when observers could not see box.). As Board stated therein, quoting *Polymers v. NLRB,* supra, 414 F.2d 49 "A *per se* rule of [Setting an election aside if there is a possibility] [of irregularity] would impose an overwhelming burden on a representation case. If speculation on conceivable irregularities were unfettered, few elections results would be certified, since ideal standards cannot always be attained." See also *Wald Sound,* supra (Alleged improper conduct of Board agent could not have affected election results, since they occurred after ballots were cast.).

Accordingly, based on the foregoing analysis and authorities, I recommend that Objection 4 be dismissed.

In Objection 5, the Employer in effect repeats all of the previous allegations, and contends that "the abnormalities and significant deviations from Board recommended procedures contained in the Casehandling Manual cast doubt on the fairness and impartiality of the process." It argues further that "individually, or in the aggregate, the abnormalities and significant deviations in the conduct of the election could reasonably lead employees to question the secrecy of the election, the impartially of the ballot process and or the accuracy of the election results reported by the Board agent." *Renco,* supra; *Alco,* supra.

However, I have already considered the Employer's assertions in connection with my discussions above concerning its other objections. I do not find that considering the Employer's objection in the aggregate, results in any change in my conclusion, that none of the specific allegations of misconduct of the Board agent, singly or collectively, created a reasonable doubt as to the fairness and validity of the election. *Polymer,* supra; *Enloe Medical Center,* supra; *Kirsch Drapery,* supra at 364 (Deviations from guidelines in Manual, "considered separately or collectively, do not raise a reasonable doubt as to the fairness and validity of the election.")[14]

The Employer's reliance on *Renco,* supra; *Alco,* supra, and *Athbro,* supra, is misplaced. As I have detailed above, the basis and rationale for these cases, as well as other cases cited by the Employer, all involve conduct by Board representatives that was found to compromise the Board's neutrality in the election process, and which suggested that "the Board favored the Petitioner." *Renco,* supra at 368. Here, as I have concluded, there is not a scintilla of evidence of any conduct of the Board agent that can be said to have compromised the Board's neutrality or suggested that the Board favored the Petitioner. Thus, the Employer's precedent is inapposite, and instead I have evaluated the Board agent's conduct under the *Polymers* standard, which as I also have observed is similar to the second sentence of *Athbro.* However, the cases following and interpreting *Polymers,* do in assessing whether a reasonable doubt exists as to the validity and fairness of the election consider the possible or probable impact of the conduct on the election results. Indeed, I note that even in *Renco,* supra, which analyzed the conduct of the Board, under *Athbro* standards, concluded that since the improper comments that were made by the Board representative was heard by voters waiting in line, "there was sufficient evidence of dissemination, given the closeness of the election, to establish that the conduct may have affected the outcome of the election." Id. at 368.

Here, as I have discussed above, I find that none of the Board agent's conduct, considered singly or collectively, raises a reasonable doubt as to the fairness of the election. I found that the possibility that the Board agent's colorblindness affected the election results to be remote. *Polymers,* supra; and that the other conduct, i.e., use of one ballot box, pencils, and the Board agent's conduct in conducting the count, had no affect on the election results. *Enloe Medical Center,* supra.

The Employer emphasizes in this regard, the closeness of the election, noting that a change of one vote in either unit, could have affected the results. *Renco,* supra. See also *Jakel,* supra, 293 NLRB at 616. However, while "elections decided by narrow margins are closely scrutinized, there is, however, simply no presumption against the validity of a closely contested election. cf. *NLRB v. Browning Ferris-Indus. of Louisville,* 803

[14] The cumulative impact argument may not be used to turn a number of insubstantial objections to an election into a serious challenge. *NLRB v. Browning & Ferris Industries,* 803 F.2d 345, 349 (7th Cir. 1986); *Amalgamated Clothing Workers v. NLRB,* 736 F.2d 1559, 1569 (D.C. Cir 1984).

F.2d 345, 349 (7th Cir. 1986) (While . . . the closeness of the vote may be (a) relevant consideration [] in determining whether free choice was interfered with . . . [this] fact is [not] sufficient to raise a presumption that the complained of conduct had an impact on the election results.). *Elizabethtown Gas v. NLRB,* supra, 212 F.3d at 268–269. Therefore, the closeness of the election is insufficient to meet the Employer's burden of establishing that the conduct of the Board agent raised a reasonable doubt as to the validity and fairness of the election, or otherwise impugned the Board's election process.

I also note particularly the Board's recent decision in *Ensign Sonoma,* supra, reaffirming *Athbro* standards, but finding no violation of same in that particular case. The Employer relies heavily on the portion of the opinion that reaffirms *Athbro,* as well as the dissenting opinion of Chairman Battista and his reference to the Board's election process as the "crown jewel" of the Board's endeavors. However, the Employer conveniently ignores other portions of the majority, as well as the concurring opinion therein, which clarify, if not modify the *Athbro* analysis. Thus, in assessing whether the conduct of the Board agent therein, destroyed confidence in Board's election procedures or truly impugned the election standards the Board seeks to maintain, the Board considered the potential impact on the election. It relied on facts that the statements were heard by only two employees, and the election was won by a large margin, and concluded that its election standards were not impugned and do not taint the perception of Board neutrality. The Board also observed, "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 choice of employees is a relevant and compelling consideration, and we will not nullify that choice under the circumstances presented in this case." 342 NLRB at 934. Further as pointed out correctly in the concurring opinion (342 NLRB at 435) "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 procedure. '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.

Therefore, I reject the Employer's contention that the Petitioner's argument that no evidence was shown that any ballots were inaccurate is without merit. *Sonoma Health* makes clear, that even in using an *Athbro* analysis, impact on the election is a relevant consideration. Here, as I have described in detail below, the Employer has failed to demonstrate the reasonable possibility that any or all of the conduct of the Board agent had any impact on the election results. In such circumstances, its objections must be dismissed. *Polymers,* supra, *Enloe Medical Center,* supra; *Allied Acoustics,* supra; *Bell Foundary v. NLRB,* supra; *People's Drug Stores,* supra; *Kirsch Drapery,* supra; *Trico Products,* supra.[15]

As the Board's concurring opinion in *Sonoma Health,* aptly observed, "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." I would also add that the Petitioner and its representatives engaged in no misconduct here, unlike *Athbro,* supra, where the union did participate in the misconduct of the Board agent, by drinking beer with the Board agent at a café after the first polling closed, but before the second polling had begun.

Accordingly, I also recommend that Objection 5 be dismissed.

The Employer's final objection asserts that the Board agent interfered with, coerced, and restrained employees in the exercise of their Section 7 rights and interfered with their ability to exercise an uncoerced and reasoned choice in the election. The Employer relied on no additional facts with respect to this objection, relying on the various acts of alleged misconduct by the Board agent, set forth in Objections 1 though 5, which I have already discussed and dismissed.

I initially note that whether or not the Board agent's conduct warrants the election being set aside, it does not constitute coercion or restraint of Section 7 rights of employees, since that

[15] I have considered the cases that I cited above, such as *Madera,* supra; *Jakel,* supra; *Paprikas Fono,* supra; *Kerona Plastics,* supra; and *Austill Waxed Paper,* supra, where the Board set aside elections based on Board agent misconduct. All of these cases involve situations where the misconduct of the Board agent was far more serious and egregious than that of the Board agent here, and where the Board concluded that conduct created reasonable doubt concerning the fairness and validity of election, principally in view of the significant uncertainty created as to the sanctity of some of the ballots by the conduct of the Board agent. Moreover, as I have detailed above, far more serious and egregious misconduct by Board agents has been found by the Board and or the courts not to have created a reasonable doubt as to the validity and fairness of elections. See for example, *Enloe Medical Center,* supra (Board agent gave wrong colored ballots to three voters); *St. Vincent's Hospital,* supra (Two voters allowed into voting booth at the same time.); *Cedars-Sinai,* supra (Blank ballots left unattended, and observers did not initial seal in ballot box.); *Rheem Mfg.,* supra (Allowing voters to vote while polls not opened.); *Allied Acoustics,* supra (Board agent miscounted ballots, and made recount in private.); *Kirsch Drapery,* supra (Board agent opened polls late, placed challenged ballot in box, rather than instructing voter to do so, and resolved challenge *after* count, contrary to Manual.); *Trico Products,* supra (Board agent left blank ballots unattended and tear noticed in envelope containing ballots, when Board agent retrieved ballots.); *Bell Foundry v. NLRB,* supra (Board agent left ballot box unattended for five minutes before start of afternoon session.).

section of the Act covers only conduct by employers or unions, but not Board agents.

To the extent that the Employer argues that the Board agent's conduct placed the fairness of the election in question, I have rejected that contention, in the above analysis where I recommended dismissal of Objections 1–5. Therefore, I recommend that Objection 6 be dismissed as well.

Conclusion

I recommend that all of the Employer's objections be dismissed and that an appropriate certification issue.[16]

Dated, Washington, D.C. May 25, 2007.

[16] Pursuant to the provisions of Sec. 102.69 of the Board's Rules and Regulations, within 14 days from the date of issuance of this recommended Decision, either party may file with the Board in Washington, D.C., an original and eight copies of the exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this recommended Decision.