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John W. Teeter Jr

St. Mary's University School of Law, jteeter@stmarytx.edu

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KEEPING THE FAITH: THE PROBLEM OF APPARENT BIAS IN LABOR REPRESENTATION ELECTIONS

John W. Teeter, Jr.*

I. INTRODUCTION

An essential purpose of the National Labor Relations Act (the "Act")¹ is to protect "the right of employees to organize and bargain collectively."² To fulfill this right, the Act grants workers the freedom to choose whether or not a labor organization shall represent them for purposes of collective bargaining. When an employer refuses voluntarily to recognize a union as its employees' chosen representative, those employees may file a petition stating their desire to be represented by that union with the National Labor Relations Board (the "Board"). If the Board "has reasonable cause to believe that a question of representation affecting commerce exists[,] . . . it shall direct an election by secret ballot and shall certify the results thereof."³

This ideal of labor democracy, however, can be corrupted by a variety of flaws in the election process. For example, employers can resort to intimidation or unlawful promises to forestall support for the union; unions can engage in illicit coercion; and agents of the Board itself can engage in misconduct that indicates bias for or against a particular side. Each of these occurrences undermines the workers' freedom of choice and constitutes grounds for setting aside the election and ordering a new one to be held.⁴ As the Board emphasized in *General Shoe Corp.*,⁵ it must undertake vigilant efforts to assure the sanctity of representation elections:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under

* Assistant Professor, Oklahoma City University School of Law. University of Illinois at Chicago Circle, A.B., 1982; Harvard Law School, J.D., 1985. The author would like to thank the Kerr Foundation for its generous research grant. The author also wishes to thank his students and colleagues for their encouragement and inspiration.

The author was one of the attorneys representing the employer in Hudson Aviation Services, 288 N.L.R.B. No. 94 (April 29, 1988), discussed *infra* at notes 223-26 and accompanying text, but no longer practices law on behalf of labor or management.

1. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

2. *Id.* at § 151.

3. *Id.* at § 159(c)(1)(B).

4. For a thorough discussion of representation elections, see R. WILLIAMS, NLRB REGULATION OF ELECTION CONDUCT (rev. ed. 1985).

5. 77 N.L.R.B. 124 (1948).

conditions as nearly ideal as possible, to determine the uninhibited desires of employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, *because of our fault* or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.⁶

In short, even if the employer, workers, and union all behave in a lawful and nondisruptive manner, the Board will set aside elections tainted by its own misconduct if the "laboratory conditions" are spoiled. One crucial manner in which the Board can pollute its laboratory is when its agents make statements or engage in acts that suggest a lack of impartiality in the election. Although section 151 of the Act declares the congressional policy of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing," the Board and courts have emphasized that the choice of unionizing or not unionizing is left entirely to the workers. As the late Justice Douglas once explained:

Any procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act employees have the right not only to "form, join, or assist" unions but also the right "to refrain from any or all of such activities."⁷

For that reason, Justice Douglas concluded that "[t]he Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a non-union shop or for a non-union shop and against a union."⁸ It therefore is plain that the Board's role in representation elections is to ascertain the employees' wishes concerning unionization, and not to influence that fundamental choice.⁹

6. *Id.* at 127 (emphasis added).

7. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973) (quoting 29 U.S.C. § 157 (1972)).

8. *Id.* at 280.

9. The legislative history of the Act reinforces the concept that the Board must behave as an objective fact finder rather than a partisan in representation elections. As Senator Robert F. Wagner explained, "[a]n election is nothing but an investigation, a factual determination of who are the representatives of employees." *The National Labor Relations Act: Hearings on S. 1958 before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. (1935), reprinted in 1 *NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT* 1426 (reprint ed. 1985). Similarly, Chairman Biddle of the Board stated: "An election is conducted by the Board for the sole purpose of ascertaining a

In practice, however, agents of the Board occasionally violate this requirement of neutrality through acts, communications, or procedures that suggest favoritism toward a party to the election. In this Article I explore how the Board and federal courts have sought to redress this problem of apparently biased conduct by Board agents during the course of representation elections. First, I will examine the Board's initial approach, which generally refused to invalidate elections unless it appeared that the Board agent's misconduct actually affected the election's outcome. Second, I will analyze *Athbro Precision Engineering Corp.*,¹⁰ which stated that elections could be set aside whenever a Board agent's misconduct tended to destroy confidence in the Board's election process or could reasonably be interpreted as impugning the Board's election standards regardless of whether such misconduct could have affected how employees voted. Third, I will discuss the fluctuating adherence the Board and federal courts have given to the *Athbro* standard. Finally, I will explain the need for the Board and courts to apply *Athbro* in a clear and consistent manner.

II. THE PRE-ATHBRO ERA

For many years the Board steadily certified representation election results despite charges that an agent conducting the election had demonstrated bias toward either the employer or the union. In essence, the Board's philosophy appeared to be that allegations of Board agent bias were immaterial unless the alleged partiality could have influenced the election's outcome by affecting the way workers voted. Perhaps the earliest explicit statement of this focus on outcome-determinism came in *Lane Cotton Mills Co.*,¹¹ where the Board refused to set aside a union's victory despite an allegation that two Board representatives had made a modest wager on the election's results. As the Board concluded, "[e]ven if it were proved that a wager was in fact made between the Board supervisor and the Board attorney, that fact *could in no way affect the results of the election.*"¹² That assertion may have been accurate, but the Board's reasoning left

single question of fact—what person or organization a majority of the employees in the plant wish to have as their representative for collective bargaining." *Id.* at 1473.

10. 166 N.L.R.B. 966 (1967), *vacated sub nom.* International Union of Elec., Radio & Mach. Workers v. NLRB, 67 L.R.R.M. (BNA) 2361 (D.D.C.), *acq. in result* 171 N.L.R.B. 21 (1968), *enforced*, 423 F.2d 573 (1st Cir. 1970).

11. 9 N.L.R.B. 952 (1938), *enforced*, 111 F.2d 814 (5th Cir.), *cert. dismissed*, 311 U.S. 723 (1940).

12. 9 N.L.R.B. at 956 (emphasis added). The Board also ruled that the employer had "offered no evidence in support of its allegation that the Board supervisor advised employees to vote for the [union]." *Id.* at 959.

much to be desired. In particular, one wishes the Board had at least discussed the possibility that the betting undermined faith in the fairness of the election process by raising questions concerning the Board's professional integrity and neutrality. The Board never even addressed this concern, however, and over the next three decades the Board proved highly reluctant to vacate elections when there were allegations of agent partisanship.

A. The Problem of Fraternization

One obvious manner in which the Board can appear biased arises when fraternization occurs between a Board agent and representatives of either the employer or the union. In the pre-*Athbro* era, however, the Board was very skeptical of such allegations. In *National Plastic Products Co.*,¹³ for example, the Board rejected an employer's argument that Board officials had contaminated election conditions by riding to the polling site in a car with the union's representative. Although such fraternization with a party representative might readily suggest favoritism, the Board accepted the trial examiner's conclusion that the conduct was "immaterial" in the absence of evidence that it was observed by any voting unit employee.¹⁴

Presumably, the Board reasoned that what the employees did not know could not have "hurt" them in the sense of influencing their votes. The potential flaw in such logic is that it ignored the effect the fraternization may have had on the employees' post-election perception of the Board's neutrality vis-à-vis the union. Although the employees did not know of the fraternization before they voted, they undoubtedly learned of it afterwards when the employer objected and may erroneously but understandably have concluded that the Board was in league with the union. That misperception conceivably could have weakened the resolve of employees who might have planned to have the union decertified¹⁵ or would consider fil-

13. 78 N.L.R.B. 699 (1948), *enforced*, 175 F.2d 755 (4th Cir. 1949).

14. 78 N.L.R.B. at 705.

15. As 29 U.S.C. § 159(e) provides:

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) [29 U.S.C. § 158(a)(3)], of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

ing charges against the union with the Board (such as for neglecting its duty of fair representation).¹⁶ In short, the Board's myopic focus on whether the fraternization had influenced the results of a particular election failed to encompass the equally grave concern that employees might view the Board as a union sponsor rather than as a neutral government agency committed to protecting their rights.¹⁷

The Board's order was enforced by the United States Court of Appeals for the Fourth Circuit, however, in an opinion marked by extreme judicial deference toward the Board's authority and expertise.¹⁸ Although the court observed that the Board itself had expressed disapproval of the fraternization,¹⁹ it concluded:

The determination of bargaining representatives under the act is a matter that Congress has entrusted to the Board, not to the courts; and when, as here, a certification is called in question in connection with a petition to enforce or review an order of the Board under section 10, 29 U.S.C.A. § 160, the certification must be sustained in so far as fact questions are concerned, if the fact findings of the Board made in connection therewith are based upon substantial evidence. In so far as the certification involves the exercise of discretion, that is a matter with which we are powerless to interfere so long as the Board acts within the limits of the law.²⁰

16. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967) (holding that union breaches its duty of fair representation when its conduct toward a member is arbitrary, discriminatory, or in bad faith).

17. Furthermore, as one commentator has emphasized:

Because the Board remains responsible for administering all possible future allegations concerning violations of the [Act], or for supervising subsequent elections[,] misconduct or suggestions of partiality by the Board agents conducting an election could tend to impair future cooperation among the parties and the Board, and possibly between the parties themselves.

WILLIAMS, *supra* note 4, at 400.

18. *NLRB v. National Plastic Prods. Co.*, 175 F.2d 755 (4th Cir. 1949).

In general, the Board's certification of election results may not be reviewed directly in federal court. When a union is certified as the employees' bargaining representative, however, the employer can seek judicial review in the following manner. First, it can refuse to recognize the union as its employees' bargaining representative, which usually prompts the union to file an unfair labor practice charge alleging that the employer has violated 29 U.S.C. § 158(a)(5) (commonly known as § 8(a)(5) of the Act). Then, if the Board finds the employer guilty, the employer may seek review of that finding in federal circuit court under 29 U.S.C. § 160(f). Alternatively, the employer may simply ignore the Board's bargaining order because such orders are not self-executing. The Board must then petition the court of appeals for enforcement of its bargaining order pursuant to 29 U.S.C. § 160(e). Under either approach, the employer can obtain judicial review of the Board's certification of the union's electoral victory. For a more in-depth discussion of the review process, see WILLIAMS, *supra* note 4, at 20-23.

19. 175 F.2d at 758.

20. *Id.* (footnote omitted).

The Fourth Circuit's conclusion, like the Board's order it enforced, may have been correct on the facts but it is marred by a lack of reasoning to support it. First, neither the Board nor the court gave a principled reason for refusing to consider the fraternization a fatal defect in the election process. Instead, they impliedly accepted the trial examiner's bald conclusion that the misconduct was immaterial because it was not witnessed by employees before casting their ballots. That failure to justify this conclusion is particularly troublesome because it was not reached in conformity with any background of statutory guidance, regulations, or prior Board or judicial decisions explaining when such fraternization would or would not necessitate the holding of a second election. The Board and the Fourth Circuit were operating in a doctrinal vacuum, yet neither tribunal attempted to fill the void with a reasoned elaboration of new standards. Second, the court's deference to the Board seems ill-suited to a case where the Board has passed on the possible consequences of misconduct by its own agents. Although the Board must resolve such issues in the first instance and its determinations are entitled to substantial respect,²¹ the court's plea that it was "powerless to interfere so long as the Board acts within the limits of the law" is both circular and hollow in light of its failure to define those limits. In sum, neither the Board nor the court offered any meaningful guidance on how the problem of fraternization should be addressed in subsequent cases.

In light of *National Plastic Products*, it is not surprising that most objections concerning fraternization fell on deaf ears during the pre-*Athbro* era.²² *NLRB v. Fresh 'nd-Aire Co.*,²³ however, marks a partial break both from the Board's apparent lack of concern over fraternization and from the deference demonstrated by the court in *National Plastic Products*. As the United States Court of Appeals for

21. As the Supreme Court later clarified in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the federal courts of appeals are to affirm the Board's findings of fact if they are supported by substantial evidence on the record taken as a whole.

22. See, e.g., *Calcor Corp.*, 106 N.L.R.B. 539, 541 (1953) ("No inference of Board support of the [union] would be likely to be drawn by employees merely because the Board agent courteously accompanied a union representative to inspect the polling place before the election began."); *West Tex. Utils. Co.*, 100 N.L.R.B. 1012, 1014 (1952) (overruling employer's objection "that a close personal relation existed between the Board agents and [a union] organizer" on the grounds that "[p]ersonal acquaintance of a Board agent with a union representative is not, in itself, sufficient basis for setting aside an election"); *S.H. Kress & Co.*, 23 L.R.R.M. (BNA) 1645 (1949) (original decision unpublished) (holding there was no impropriety in Board agent's presence in employer's store with union representatives). See also *Griffin-Goodner Grocery Co.*, 73 N.L.R.B. 1332, 1336 (1947) (finding that there was no collusion between Board agent and union representatives).

23. 226 F.2d 737 (7th Cir.), denying enforcement to 111 N.L.R.B. 158 (1955).

the Seventh Circuit explained, the Board²⁴ initially vacated a union victory because one of its field examiners investigating an unfair labor practice charge against the employer attended two union organizational meetings to obtain information and played piano at the union's party for the workers shortly before the election.²⁵ The prophylactic value of the Board's ruling was undermined, however, by its direction that the new election be held within thirty days, which the employer argued did not permit sufficient time for any prejudicial effect of the fraternization to dissipate. Moreover, employees apparently believed that the Board nullified the first election because of misconduct by the employer and the Board refused to notify them of the true cause of the vacatur or assure them that the Board was neutral on the representation issue. Finally, the Board certified the union's subsequent victory in the second election over these objections.²⁶

The Seventh Circuit refused to enforce the Board's bargaining order, however, on the grounds that the Board had not gone far enough to redress the potential prejudice stemming from the fraternization. The court first explained:

The conduct of the field examiner in attending both organizational meetings of the Union was indefensible. It is obvious that the presence of a representative of the Board in the midst of organizational activities of the petitioning Union gave an apparent authority to the efforts of the petitioning Union which violated the Board's duty of neutrality.²⁷

The court then reasoned:

Respondent [the employer] brought to the Board's attention, prior to the holding of the second election, the claim that the Union was carrying on a campaign of misrepresentation in stating that the second election was caused by some illegal or improper action on the part of respondent. In view of the fact that it was the actions of the Board's own representative which caused the setting aside of the first election, it was the duty of the Board to lean over backwards to be certain that the taint of such conduct was not present when the second election was held. In view of the alleged misrepresentation being then made by the Union, we conceive it to have been the duty of the Board to have acquainted the employees of respondent with

24. 106 N.L.R.B. No. 115 (1953), *published in* 32 L.R.R.M. (BNA) 1529 (1953).

25. 226 F.2d at 739.

26. 111 N.L.R.B. 158 (1955).

27. 226 F.2d at 741.

the true situation, and that failing to do so, the election was unfair to respondent.²⁸

Based on this reasoning, the court concluded that "in fairness to everyone, . . . another election should be held under conditions that would demonstrate the impartiality of the Board as to the outcome of that election."²⁹ That result seems eminently fair and reasonable. Given that the Board's field examiner had contaminated the laboratory, equity demanded that the Board move vigorously to restore proper election conditions and to remove any remaining prejudice to the employer. Furthermore, the union could not reasonably complain that its two victories were vacated when it was a partner in the field examiner's misguided fraternization and had distorted the reasoning behind the Board's call for a second election. In fact, the only disturbing aspect of *Fresh 'nd-Aire* is that the Board was reluctant to assume full responsibility for its agent's sins.

B. *The Problem of Allegedly Partisan Statements or Actions*

In addition to fraternizing with a party representative, a Board agent can undermine the Board's aura of neutrality through statements or actions that suggest bias in favor of a particular electoral outcome. As with fraternization, however, the Board was quite reluctant to credit such objections during the pre-*Athbro* period.

Perhaps the most important case reflecting this reluctance was *Botany Worsted Mills*.³⁰ In *Botany*, the employer apparently violated the Act and a circuit court decree by distributing bonuses on the eve of the election and using the company newsletter and public address system to direct employees to vote against the union.³¹ On the day preceding the election the Board's regional director responded by issuing a press release indicating his intent to recommend that the Board find such actions unlawful and move to have the employer held in contempt.³² After the union was victorious, the employer objected to the election on the grounds that "the issuance of the press release constituted an improper and illegal interference with the freedom of choice guaranteed by the Act to the employees, and was calculated to influence a vote favorable to the Union."³³

This objection failed to move the Board. First, the Board emphasized that the issue was *sui generis*, stating:

28. *Id.*

29. *Id.* at 742.

30. 56 N.L.R.B. 370 (1944).

31. *Id.* at 371 n.4.

32. *Id.*

33. *Id.* at 371-72.

The Act and the Rules and Regulations nowhere prescribe a standard by which the conduct of a Board agent designated to conduct or supervise the conducting of an election shall be measured. Nor do the few cases which involve objections to a Board agent's conduct in this respect delineate a zone of propriety within which a Board agent must operate.³⁴

Having identified this indeterminacy, the Board should have seized the opportunity to draw clear standards for guidance in subsequent cases. Instead, the Board simply chose to resolve the case on its facts, concluding:

Confronted by the Company's continuing and increasing disregard of its obligation to remain neutral and by the consequently diminishing possibility of holding a free election, the Regional Director here resorted to use of the press in an effort to dissipate in some measure the effects of the Company's interference and thus restore the appropriate atmosphere for an election. We consider that the imminence of the balloting and the need to reach the employees upon as nearly similar a scale as that upon which the Company had improperly influenced them provide a sufficiently reasonable basis for the Regional Director's action.³⁵

In other words, the regional director could fight fire with fire. This rationale is disturbing for at least three reasons. First, condoning the regional director's media campaign undermines the Board's normative role in assuring free elections by making the Board's sanctity a relative matter: how prejudicial was the regional director's conduct in comparison with the employer's illicit tactics that it sought to counterbalance? This approach seems at odds with the fundamental requirement that the Board maintain its neutrality in the electoral process regardless of an employer's or union's unlawful practices. By excusing the regional director's media retaliation on the grounds that it was necessary to overcome the effects of the employer's misconduct, the Board sent the perverse message that its actions could mirror prejudicial election tactics in order to negate them.

Second, the Board approved of the regional director's tactics even though he could have relied upon less prejudicial alternatives to safeguard the workers' freedom of choice. As the Board itself recognized, even if the employer's unfair ploys had succeeded the Board could have nullified and condemned them by vacating the result of the balloting, ordering a new election, and charging the em-

34. *Id.* at 372 n.5.

35. *Id.* at 383.

ployer with unfair labor practices.³⁶ In that manner the Board could have denounced prejudicial election tactics, censured the employer, deterred others from similar misconduct, and protected the workers' freedom without jeopardizing its own claim of neutrality and calling into question the legitimacy of its methods. Instead, the Board permitted the regional director to escalate the war of words in a manner that could well have increased the employees' confusion regarding the role of the Board in representation elections.

Third, and perhaps most regrettable, the Board squandered the opportunity to lay down clear and practical guidelines for determining when the misconduct of Board representatives would necessitate vacating elections. The Board presumably recognized that in some instances new elections must be ordered to offset its representatives' suggestions of bias. But when? Whenever such possible bias has undermined the Board's standards of integrity and impartiality? Or, only when the appearance of bias actually may have affected the results of the balloting? Unfortunately, the *Botany* Board failed to discuss, much less resolve, the competing considerations it would need to assess in future cases.

Perhaps the Board by-passed this opportunity because it simply did not believe that isolated allegations of bias posed a serious threat to its legitimacy. In fact, the pre-*Athbro* decisions demonstrate the Board's lack of concern over statements by its agents that employees could have construed or reasonably misconstrued as indicating that the Board favored one particular side in representation elections. In *United States Gypsum Co.*,³⁷ for example, the Board's agent allegedly stated that the union representative had made a "good objection" when the representative protested a certain vote during the tallying of ballots. Although the employer objected to that statement (presumably on the grounds that the agent had prejudged a matter the Board would need to resolve), the Board tersely concluded that "[t]he Board agent's expression of opinion is immaterial and in no way establishes the existence of a valid objection."³⁸ While the Board's conclusion may be defensible, its lack of reasoning is not. Was the Board implying that an agent's "expression of opinion" is always "immaterial"? Or are such statements material only if they occurred before balloting was completed and possibly could have influenced the employees' votes? Or was the

36. *Id.* at 382-83. In addition, the circuit court presumably could have held the employer in contempt for defying its earlier order.

37. 92 N.L.R.B. 1661, 1662-63 (1951).

38. *Id.* at 1663.

statement of opinion in this case simply de minimis under the circumstances? Once again, the Board left these issues unresolved.

*H.E. Fletcher Co.*³⁹ also demonstrated the Board's lack of concern and reasoned analysis. In *Fletcher*, the employer argued that a Board agent gave force to union propaganda that the employer was unlawfully padding the list of eligible voters with pro-management personnel by sardonically stating that one challenged voter resembled the "[p]resident of the First National Bank."⁴⁰ The Board, however, affirmed the regional director's conclusion that the agent's sarcasm had not "interfered with the free choice of the voters at the election or . . . lent credence to the purported 'Padding' propaganda of the union, particularly since it occurred after the polls were closed."⁴¹ While this explanation suggests that the criterion for evaluating alleged statements of bias was whether they could have influenced the election's outcome, neither the regional director nor the Board chose to clarify this matter.

If anything, the *Fletcher* opinion indicated that the Board would not thoroughly review the possible ramifications of its agents' remarks. This obtuseness has plagued the Board's opinions since, at least, its decision in *Craddock-Terry Shoe Corp.*⁴² in 1948. In *Craddock-Terry*, the United Shoe Workers of America was elected by the employees, but the employer objected based, in part, on the contemptuous attitude of the Board agents supervising the election. In the first alleged incident, a Board agent stated, to a woman questioning why her right to vote had been challenged, "Shut up. If you were a lady you would act like one."⁴³ Such language plainly demeans voters (especially women) and could undermine the freedom and dignity the Act was intended to protect. Nevertheless, the (exclusively male) Board dismissed this challenge, concluding: "While we disapprove of the use of language of this character by a Board agent, we do not think that it could have restrained or influenced a prospective voter in the casting of his [or her?] vote."⁴⁴

The second alleged incident arose when the employer's vice president protested that a worker should not be permitted to vote because he was intoxicated on the job, a violation of company rules. One of the Board's agents disagreed, however, and led the worker

39. 121 N.L.R.B. 826 (1958).

40. *Id.* at 828. In other words, the Board agent allegedly was remarking that the challenged voter obviously was not a blue-collar voting unit employee.

41. *Id.* at 830.

42. 80 N.L.R.B. 1239 (1948).

43. *Id.* at 1240. For a discussion of the voter challenging process see *infra* note 244 and accompanying text.

44. 80 N.L.R.B. at 1240.

to the polls. Furthermore, two Board agents allegedly ridiculed the vice president for raising this challenge and their disparagement may have been overheard by certain employees.⁴⁵ If true, this clearly could have instilled doubts among the voters concerning the Board's lack of respect for the employer and its supposed neutrality in the election. The Board, however, overruled this objection claiming that "neither seeing [the employee accused of drunkenness] conducted by a Board agent nor overhearing the allegedly derogatory remarks would tend to restrain or influence the vote of any employee."⁴⁶

Such reasoning is inadequate because the Board did not seriously consider whether the offensive statements to the female voter or the ridicule of the vice president could have raised doubts regarding the depth and sincerity of the Board's self-professed concern for worker dignity and impartial elections. As dissenting Board members Herzog and Gray asserted, these unprofessional acts by the Board's agents, combined with the employer's allegations of misconduct by the union, raised sufficient questions concerning the integrity of the balloting process to require a Board hearing on the employer's objections.⁴⁷ "As the integrity of the Board's own process is in-

45. *Id.* at 1241-42.

46. *Id.* at 1242.

47. *Id.* at 1245. It is important to note that parties challenging an election are not automatically entitled to a hearing on their objections. As the Board has explained:

Section 102.69 of the Board's Rules and Regulations sets forth election procedures, including the handling of objections. It provides for the holding of a hearing when it appears to the Board that exceptions to the report of a Regional Director on objections raise substantial and material factual issues. In accordance therewith, the Board has held that unless substantial and material issues of fact are raised a request for a hearing will be denied. The Board has rejected the contention that a Respondent is entitled as a matter of right to a hearing on objections to an election. In order to prevent delay in election procedure the Board has uniformly refused to direct a hearing on objections unless the party supplies specific evidence of conduct which *prima facie* would warrant setting aside the election.

O.K. Van & Storage, Inc., 127 N.L.R.B. 1537, 1539 (1960) (footnotes omitted), *enforced*, 297 F.2d 74 (5th Cir. 1961).

This reluctance to grant hearings has been the subject of perceptive criticism. As one scholar argues:

By granting the party which has alleged that the election has been unfairly conducted an opportunity to subpoena witnesses, cross-examine the agent involved, and generally air the facts surrounding the claim of impropriety, the Board would do much to overcome the notion that it actually is partial in election matters. Such hearings would also dispel any suspicions that the Board is more concerned with concealing the mistakes of its own staff members than with fairly effectuating the election procedures of the Act. At the same time, it may be assumed that most allegations of partiality and election tampering would prove unfounded if

volved," they reasoned, it was advisable to "apply a stricter standard to this case than our colleagues seem to think necessary."⁴⁸

In sum, during the pre-*Athbro* era the Board displayed extreme skepticism toward allegations that its representatives had engaged in biased behavior.⁴⁹ Furthermore, as *Bullard Co. v. NLRB*⁵⁰ reveals, even when the Board took an idealistic step toward preserving the integrity of its election procedures, that effort was promptly nullified in federal court. In *Bullard*, the Board set aside an employer's victory based on allegations that a Board agent mishandled ballots, constantly wandered from the polling area, and gave the appearance of bias by eating lunch with the employer's representatives and protesting whenever the union challenged ballots.⁵¹ As the Board explained:

The objections relate to alleged irregularities by the Board agent conducting the election. Although, as the Regional Director concluded, *the Board agent did not in fact engage in any irregularities, there is a possibility that some of his conduct may erroneously have given such an appearance.* The mere appearance of irregularity in a Board agent's conduct of an election departs from the standards the Board seeks to maintain in assuring the integrity and secrecy of its elections and constitutes a basis for setting aside the election.⁵²

tested through the hearing process. Hence, the election results could be certified in most cases without the greater delay and uncertainty of rerun elections.

WILLIAMS, *supra* note 4, at 427. Williams' proposal would certainly be a step in the right direction, but I would caution that the ordering of a second election might still prove necessary in many cases to remove the appearance of Board partiality.

48. 80 N.L.R.B. at 1245 (dissenting opinion). Curiously, neither the majority opinion nor the dissent discussed *General Shoe's* emphasis on the need to maintain laboratory conditions even though that opinion was penned less than eight months prior to *Craddock-Terry*.

49. In addition to the decisions discussed above, see *e.g.*, *Neuhoff Bros., Packers, Inc.*, 154 N.L.R.B. 438 (1965) (holding that Board agent did not spoil laboratory conditions by refusing to permit thirteen supposed supervisors to cast challenged ballots), *enforced*, 362 F.2d 611 (5th Cir. 1966), *cert. denied*, 386 U.S. 956 (1967); *Hammond-Hohman Corp.*, 111 N.L.R.B. 1094, 1096 (1955) (concluding that "the Employer's contention that the questions of the General Counsel's representative in her pretrial interview of witnesses could reasonably have led to an inference that the Board was . . . biased against the Employer, is not supported by the record"); *Morris Harris*, 72 N.L.R.B. 494, 496 (1947) (holding that Board agent's remarks to employees were not "sufficient to warrant the setting aside of the election"); *Paragon Rubber Co.*, 8 N.L.R.B. 690 (1938) (overruling union's objection that it had been prejudiced by the manner in which a Board representative had questioned challenged voters).

50. 253 F. Supp. 391 (D.D.C. 1966).

51. *Id.* at 391-92.

52. *Id.* at 392 (emphasis added by the court in its quotation of the Board's unpublished opinion).

This idealistic approach (which was to be resurrected in *Athbro*) was short-lived, however, for the employer successfully petitioned the federal district court to order certification of its electoral victory and to enjoin the Board from requiring a second election. As Judge Gasch declared:

The decision and order of the Board recites that the Board agent did not, in fact, engage in any irregularities. Thus, the "possibility that some of his conduct may erroneously have given such an appearance," in no way affects the validity of the election. The Court finds that the efforts of the Board to maintain the highest standards in the conduct of its elections to be a commendable goal. But when the pursuit of this goal results in the setting aside of an admittedly valid election and the refusal to certify the results thereof, contrary to statutory duty, the Court is of the opinion that it has a duty to enjoin the Board from subjecting an employer to a second election.⁵³

In one paragraph, therefore, a federal court curtailed the Board's idealistic endeavor to protect the integrity of its election procedures from even the appearance of bias and irregularity. This result foreshadowed a similar development in *Athbro* itself, which will be discussed at length in Part III of this Article. For present purposes, it suffices to emphasize that even when the Board finally began a vigorous defense of its perceived integrity and impartiality, a federal court condemned rather than nurtured that process.

The Board's aborted *Bullard* decision, however, was an exception rather than the rule during the pre-*Athbro* era. In general, the Board might admonish its agents for misconduct but would not invalidate elections for that reason alone. And perhaps the Board was right in certifying at least some of these tainted elections. The problem is not so much with the Board's conclusions as with its inability or refusal to support them in a principled fashion. The Board obviously reached results, but it did so without delineating and resolving the competing policy concerns that administrators and judges would need to address in the years ahead.

53. *Id.* at 395. Judge Gasch also emphasized that the Board had not found that the appearance of irregularity "had in any way affected the outcome of the election" and suggested in dicta that ordering a new election in these circumstances could conceivably deprive the employer of its due process rights. *Id.*

III. THE *ATHBRO* DECISION: NEW DAWN OR FALSE LIGHT?

In *Athbro Precision Engineering Corp.*,⁵⁴ the Board resurrected the spirit of its *Bullard* opinion by showing pronounced sensitivity toward the problem of apparent favoritism and by focusing on whether the Board's aura of neutrality had been tarnished. In *Athbro*, an employee who already had voted observed the Board agent in charge of the election drinking beer with a union representative during a recess in the polling. This fraternization occurred approximately one mile away from the employer's plant, was not observed by any other employees, and the employer did not allege that it had affected the votes of the workers. The employer still argued, however, that the union's victory should be invalidated because "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."⁵⁵

This argument seemed doomed in light of the decisions discussed in Part II of this Article. In a unanimous opinion by members Fanning, Jenkins, and Zagoria, however, the Board reasoned that whether a Board agent's conduct affects the votes of employees is not "the only test to apply."⁵⁶ To the contrary, the Board declared:

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.⁵⁷

With this language the Board appeared to override decades of doctrine concerning the problem of possible bias. Since, at least, *Lane Cotton Mills Co.*,⁵⁸ the Board typically had refused to invalidate elections unless the Board's perceived bias could have altered the results of the election "experiment." Now, however, the Board moved to protect the perceived sanctity of the voting process and the good name of its administrative laboratory. No longer would an aggrieved employer or union need to demonstrate that Board bias had

54. 166 N.L.R.B. 966 (1967), *vacated sub nom.* International Union of Elec., Radio & Mach. Workers v. NLRB, 67 L.R.R.M. (BNA) 2361 (D.D.C.), *acq. in result*, 171 N.L.R.B. 21 (1968), *enforced*, 423 F.2d 573 (1st Cir. 1970).

55. 166 N.L.R.B. at 966.

56. *Id.*

57. *Id.*

58. 9 N.L.R.B. 952 (1938) *enforced*, 111 F.2d 814 (5th Cir.) *cert. dismissed*, 311 U.S. 723 (1940). For a discussion of *Lane Cotton Mills* see *supra* notes 11-12 and accompanying text.

tipped the scales; it would suffice to show that the misconduct was of the sort "which tends to destroy confidence" in the election process or "which could reasonably be interpreted as impugning the [Board's] election standards."⁵⁹

Athbro's effect, however, was weakened by several factors. First, the opinion was uncommonly brief and failed to explain its departure from *Lane Cotton Mills* and its progeny. Although *Athbro* appeared to signal a crucial turning point in the jurisprudence of representation elections, the decision was merely a one-page statement which failed to cite the Board's opinion in *Bullard* or any other administrative, judicial, or scholarly authority for its conclusion. Furthermore, the Board did not reinforce its admirable idealism with any meaningful elaboration of how its new standard should be applied.⁶⁰ The *Athbro* Board may have purported to bring forth a new day regarding the problem of perceived bias, but it left its standard vulnerable to manipulation and misapplication in the years ahead.

Athbro's vitality was further jeopardized by its subsequent procedural history. After the Board rendered its decision, the union sought an injunction in federal district court to compel the Board to certify its electoral triumph. This injunction was granted in *International Union of Electrical, Radio & Machine Workers v. NLRB*,⁶¹ where Judge Sirica emphasized practical costs at the expense of the Board's idealism. Judge Sirica emphasized that no one had suggested that the Board agent's fraternization had affected the employees' votes. Furthermore, if the court vacated the election it would effectively impose two costs upon the union. First, the union's "right" to represent the employees would "be irretrievably denied as to the time it would take to conduct a new election." Second, "[t]he process of preparing for and participating in a second election would be expensive and burdensome."⁶²

Judge Sirica then argued that "[t]he Board's finding that there was no possible effect upon the election resulting from the conduct of its agent is tantamount to recognition that the election was valid."⁶³ Without supporting that assertion with any reasoning or

59. *Athbro*, 166 N.L.R.B. at 966.

60. As one observer has argued, "The problem with the *Athbro* standard is that the Board has not given any clear guidance about what constitutes interference Moreover, if the *Athbro* test is used, there is room for disagreement regarding what is 'reasonably . . . interpreted as impugning the election standards.'" WILLIAMS, *supra* note 4, at 402.

61. 67 L.R.R.M. (BNA) 2361 (D.D.C. 1968).

62. *Id.* at 2363.

63. *Id.*

case law,⁶⁴ Judge Sirica concluded that the Board's decision was arbitrary and capricious, denied both the union and employees their rights under the Act, and violated "the plain and mandatory provisions of Section 9(c)(1) of the Act [29 U.S.C. § 159(c)(1)], which directs the Board to certify the results of such representation elections."⁶⁵

The Board could have maintained its position, appealed the injunction, and attacked Judge Sirica's reasoning on numerous grounds. First, the Board could have argued that the Judge's emphasis on the costs of rerunning the election ignored the far greater, more costly risk of undermining the Board's legitimacy in the eyes of workers, management, unions, and the public. Furthermore, there would be nothing unfair about requiring the union to bear the costs of a second election given that it was a union representative's misconduct—fraternizing with the Board agent on election day—that undermined the Board's appearance of impartiality. If anything, it would have seemed equitable to require the union to pay the employer's reasonable campaign expenses, given that its hands had been clean in the initial election.

Judge Sirica's statutory interpretation was equally suspect. Although section 9(c)(1) of the Act requires the Board to "certify the results" of elections, that statutory directive is predicated on the assumption that the election is valid. The Board enjoys substantial discretion in determining this threshold issue of validity,⁶⁶ and nothing in the Act or its legislative history⁶⁷ supports Judge Sirica's fundamental premise that an election is valid per se if a Board agent's misconduct does not affect the votes of employees.

The Board, however, declined to pursue these points. Instead, it rejected the employer's urges to appeal, accepted Judge Sirica's opinion as the law of the case, and ordered the employer to bargain with the union.⁶⁸ Such reticence seems curious and cannot help but raise questions regarding the strength of the Board's commitment toward preserving faith in its election standards. Indeed, the United States Court of Appeals for the First Circuit chastised the Board for

64. Notwithstanding the clear ideological symmetry between his opinion and Judge Gasch's reasoning in *Bullard*, Judge Sirica did not cite that opinion. See *supra* notes 50-53 and accompanying text.

65. 67 L.R.R.M. at 2363.

66. See, e.g., *NLRB v. National Plastic Prods. Co.*, 175 F.2d 755, 758 (4th Cir. 1949), enforcing 78 N.L.R.B. 699 (1948). For a discussion of *National Plastics* see *supra* notes 13-21 and accompanying text.

67. See NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935 (reprint ed. 1985).

68. *Athbro Precision Eng'g Corp.*, 171 N.L.R.B. 21, 21 & n.3 (1968).

lacking the courage of its convictions in *NLRB v. Athbro Precision Engineering Corp.*⁶⁹ This case reached the First Circuit when the employer refused to comply with the bargaining order that the Board issued when it acquiesced in Judge Sirica's opinion. The court emphasized the extent of its disagreement with Judge Sirica's analysis:

The Board's role in overseeing elections is not limited to mere ballot-counting. It has broad discretion in the establishment of procedures and safeguards to insure fairness. We cannot think that the Board, any less than a court, is uninterested in maintaining, as well as fairness, the appearance of fairness. The Board's public image provides the basis for its existence. The re-running of an occasional election is a small price to pay for the preservation of public respect. The union was peculiarly in no position to complain, since its representative participated in the improper conduct.⁷⁰

For these reasons, the First Circuit concluded that the Board "had made the correct decision" in its original *Athbro* holding.⁷¹ The court enforced the Board's acquiescent bargaining order, however, because neither the Board nor the employer had appealed from Judge Sirica's injunction. As the court concluded, "[w]e would have more sympathy with this if the Board had appealed, and lost. Any present embarrassment is of its own making."⁷²

The court's admonition was well taken, as the Board boldly had announced a new standard of idealism yet failed to follow through by defending it in the appellate arena. Indeed, as demonstrated below, the Board's ambivalence toward the *Athbro* standard has continued over the past two decades. At times, the Board vigorously has enforced the philosophy that elections must be set aside whenever an agent's actions suggest favoritism toward one of the competing parties. At other times, however, the Board has certified elections in the face of possible bias on the grounds that any misconduct could not have affected the balloting. The result of this wavering commitment to idealism has been to engender confusion, to provoke burdensome litigation, and to undermine the normative message *Athbro* originally was intended to impart.

IV. THE PQST-ATHBRO ERA: TENSIONS AND CONTRADICTIONS

Although the Board occasionally has resuscitated the *Athbro* standard of idealism, its application of that principle has been highly

69. 423 F.2d 573 (1st Cir. 1970).

70. *Id.* at 575 (citations omitted).

71. *Id.*

72. *Id.*

selective and *Athbro* has been “honored” in the breach more often than in practice. The circuit courts also have mirrored this confusion: some appellate decisions have rigorously held a reluctant Board to the *Athbro* standard while others have ignored its principle or applied it in a grudging fashion. This inconsistent application—and the uncertainty it begets—can be demonstrated by analyzing cases involving fraternization, the delegation of Board agent duties to private parties, allegations of partisan statements or actions, and allegations of other breaches in administrative professionalism.

A. *The Problem of Fraternization*

Given that *Athbro* itself involved a charge of improper association between a Board agent and a party representative, it is useful to begin this analysis of the post-*Athbro* era by focusing on the problem of fraternization. As explained below, despite *Athbro* the Board has been markedly reluctant to invalidate elections despite highly questionable associations between its agents and parties to representation elections.

First, the Board consistently has refused to set aside election results simply because its agents investigated charges of unfair labor practices during a representation campaign. This refusal has a questionable foundation, especially to the accused, because it conceivably could convey the impression that the Board views the investigated party as a “wrongdoer” and that the employees consequently should support its opponent. In fact, in *Amax Aluminum Extrusion Products*,⁷³ the Board cautioned:

[I]n most circumstances, it would be better practice for the Board agent conducting an election to refrain from investigating unfair labor practice charges between shifts of the election. It has long been Board policy that elections be conducted in as “laboratory” an atmosphere as possible, and, where feasible, this could best be accomplished if the conduct of the election were kept separate from the investigation of unfair labor practice charges, which charges, of course, may eventually prove baseless.⁷⁴

Nevertheless, the Board overruled the employer’s objection because “[o]nly three employees were interviewed, all off the Employer’s premises, and there is no evidence other employees saw the interviewing, or became aware of it. We find the evidence insuffi-

73. 172 N.L.R.B. 1401 (1968).

74. *Id.* at 1401 n.1.

cient to establish that the conduct of the Board agent affected the results of the election."⁷⁵

Amax demonstrates how far and how fast the Board retreated from the idealism expressed in *Athbro*. Although the same Board members authored each opinion—Fanning, Jenkins, and Zagoria—in *Amax* the Board withdrew from its foothold of idealism and meekly applied the outcome-determinative test of Judge Sirica. The Board adhered to *Amax* two years later in *Kimco Auto Products of Mississippi*,⁷⁶ where less than a month before the election the supervising Board agent served as a trial attorney for the Board in an unfair labor practice case against the employer. Although the Board reiterated that "wherever practical, the Board's Regional Offices should, and normally do, keep the conduct of elections completely separate from the investigation or trial of contemporaneous unfair labor practice charges involving the same parties,"⁷⁷ it accepted the regional director's rationale that only two rank-and-file employees had attended the trial and that even if their votes had been swayed by the proceedings the union still would have won the election.⁷⁸

*Tri-City Linen Supply*⁷⁹ was to similar effect. The *Tri-City* Board simply ruled that upon the request of the charging party, a regional director may proceed with an election despite charges of unfair labor practices.⁸⁰ This conclusion was approved by the Court of Appeals for the Ninth Circuit, which expressly rejected "any suggestion that scheduling an election contemporaneously with an unfair labor practice investigation constitutes an abuse of discretion *per se*."⁸¹

Tri-City is noteworthy because the employer sought to demonstrate that the Board agent's questioning of an employee actually had affected his vote. Allegedly, the employee was so confused by

75. *Id.* (citing *International Union of Elec., Radio & Mach. Workers v. NLRB*, 67 L.R.R.M. (BNA) 2361 (D.D.C. 1968), discussed *supra* in notes 61-67 and accompanying text).

76. 184 N.L.R.B. 599 (1970).

77. *Id.* at 599 n.1.

78. *Id.* at 600. Of course, more than two votes may have been affected if the employees related their observations to their coworkers. The regional director belittled that possibility, however, on the grounds that the hearing occurred more than two weeks before the election and took place "a substantial distance" from the employer's plant. *Id.* More importantly, neither the regional director nor the Board showed any remembrance of *Athbro's* focus on preserving the Board's appearance of integrity and impartiality.

79. 223 N.L.R.B. 21, *summary judgment granted in related proceedings*, 226 N.L.R.B. 669 (1976), *enforced*, 579 F.2d 51 (9th Cir. 1978).

80. 223 N.L.R.B. at 21 n.1.

81. 579 F.2d at 57 n.14.

the investigation that he abandoned his intention to vote against the union and instead cast a blank ballot. The administrative law judge barred such evidence, however, on the grounds that it had "no probative value in view of the subjective nature of the proffered testimony."⁸² The Ninth Circuit upheld that determination, explaining that "[s]ubjective declarations of intent are not admissible to show how an employee would have voted."⁸³

This trio of cases demonstrates how it is virtually impossible for a party to overturn election results simply because it was being investigated on unfair labor practice charges during or shortly before the balloting. The Board has refused to hold that such investigations are necessarily objectionable, especially when there is no proof that they have affected an election's results. Moreover, the Board has placed the additional hurdle of barring parties from proving outcome-determinism by introducing testimony regarding an employee's voting intentions. On balance, this may be the lesser of two evils; one would not want an employer or union to be able to postpone elections indefinitely by bringing, or deliberately incurring, a succession of unfair labor practice charges. The downside, however, is that parties may strategically file such charges in the hope that employees will presume the charged party is guilty and vote in accordance with that possibly erroneous conclusion.

A different issue arises, however, when the Board agent's investigation becomes so indiscreet that it suggests favoritism toward one of the parties. As in *Fresh'nd-Aire*, both Board members⁸⁴ and judges⁸⁵ have recognized that an agent could impermissibly taint an election if his investigation took on a social flavor that could create the appearance of bias. The Board and courts have not been successful, however, in consistently differentiating what separates an impartial investigation from an objectionable form of fraternization. For example, in *Isaacson-Carrico Manufacturing Co.*⁸⁶ the Board certified an election even though the employer introduced testimony that on election day an agent ate lunch at the union hall, shot pool with union advocates, and was "laughing and acting silly." As one worker testified, "[i]t just seemed odd because I mean the Labor Board was supposed to be neutral . . . I mean it just didn't seem

82. 223 N.L.R.B. at 27.

83. 579 F.2d at 58 n.16 (citing *T & G Mfg. Co.*, 173 N.L.R.B. 1503 (1969)).

84. 106 N.L.R.B. No. 115 (1953), published in 32 L.R.R.M. (BNA) 1529 (1953).

85. *NLRB v. Fresh'nd-Aire*, 226 F.2d 737 (7th Cir.), denying enforcement to 111 N.L.R.B. 158 (1955). For a discussion of *Fresh'nd-Aire*, see *supra* notes 23-29 and accompanying text.

86. 200 N.L.R.B. 788, 800-02 (1972).

right to me at that time."⁸⁷ The trial examiner, however, discredited this testimony because of conflicting statements by other witnesses and concluded that the alleged fraternization had not created "a general atmosphere of fear and reprisal" and "was not such as to have destroyed the employees' freedom of choice."⁸⁸ This decision was accepted by the Board with virtually no discussion.⁸⁹

The Board showed similar insensitivity toward investigation *cum* fraternization in *Provincial House, Inc.*⁹⁰ In *Provincial House*, the employer objected to the union's victory because an agent took affidavits for an unfair labor practice case against the employer at a restaurant where the union was concurrently holding a campaign meeting and was introduced to the audience of voting unit employees.⁹¹ Although the hearing officer purported to apply the principles expressed by the Board in *Athbro*, he overruled the objection based on his reading of *Amax* and *Isaacson-Carrico* and concluded that the fraternization "was not such so as to undermine the Board's processes or any confidence herein" and "did not have an impact upon the election . . . which the [union] won by a large margin."⁹² This decision was adopted by the Board over the dissent of Chairman Murphy, who argued that "the foregoing conduct could have given the impression to the employees who attended the meeting that the Board was not truly impartial in this election campaign and instead favored the Union."⁹³

The United States Court of Appeals for the Sixth Circuit, however, wisely refused to enforce the Board's bargaining order. Stat-

87. *Id.* at 802.

88. *Id.* Ironically, the trial examiner quoted *Athbro* in his decision, but made no effort either to distinguish that decision or to apply its reasoning to the facts of the case before him. *Id.* at 800.

89. *Id.* at 788. See also *Queen City Foundry*, 73 L.R.R.M. (BNA) 1345, 1346-48 (1970) (holding that friendly conversation between Board agent and union representative was a harmless "exchange of amenities between two persons who had had previous contact in connection with their jobs").

90. 221 N.L.R.B. 5 (1975), *summary judgment granted in related proceedings*, 222 N.L.R.B. 1300 (1976), *enforcement denied*, 568 F.2d 8 (6th Cir. 1977).

91. 221 N.L.R.B. at 6-7.

92. *Id.* at 7-8.

93. *Id.* at 6 (Murphy, dissenting). The difference between the treatment given to *Athbro* by the hearing officer and Chairman Murphy is both ironic and informative. Whereas the former viewed the Board's original opinion in *Athbro* as stating a still-valid principle but apparently believed it had not been violated in this case, the latter noted that the *Athbro* Board had acquiesced in Judge Sirica's opinion but concluded that the fraternization in this case was distinguishably more serious. *Id.* at 5-6 (Murphy, dissenting). This disparate treatment of *Athbro* demonstrates the Board's uncertainty both as to the meaning of the *Athbro* principle and to the question of whether it was still a valid Board precedent. The Board's majority opinion did not even bother to cite *Athbro*, much less discuss its vitality and application. *Id.* at 5.

ing that it would apply "the Board's own rule" to this case, the court concluded:

[I]t should be possible for any NLRB representative to keep from becoming a part of a union organizing meeting. And when such a representative (voluntarily or involuntarily) becomes a part of such a meeting (absent extraordinary circumstances), we think that NLRB neutrality, in either fact or appearance, has been so compromised as to warrant setting aside the election and holding a new one.

While we agree with the Board that the size of the union majority in this case [52-17] was such as to make it quite unlikely that the NLRB representative's appearance at the meeting had any decisive effect on the result, we do not think that is the issue in this case. What we deal with here is an act by a Board Agent which tends to destroy "the neutrality of the Board's procedures."⁹⁴

The Board also issued a bargaining order that a circuit court refused to enforce in *Delta Drilling Co.*,⁹⁵ where the Board refused to consider an employer's objections on the grounds that they could have been raised in an earlier representation proceeding. The Board explained:

It is established Board policy, in the absence of newly discovered or previously unavailable evidence, not to permit litigation before a Trial Examiner in a complaint case of issues which were or could have been litigated in a prior related representation proceeding. This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and material issues are raised; and that there are not such issues here has been effectively decided by the Board.⁹⁶

The United States Court of Appeals for the Fifth Circuit refused to enforce this decision in an opinion⁹⁷ which relied heavily upon the Board's own reasoning in *Athbro*. In *Delta Drilling Co.*, the employer objected that on election day the Board agent who was conducting the polling entered a union representative's motel room to "freshen up."⁹⁸ Even though this fraternization was witnessed only

94. *Provincial House, Inc. v. NLRB*, 568 F.2d 8, 10-11 (6th Cir. 1977) (citing *Athbro Precision Eng'g Corp.*, 166 N.L.R.B. 966 (1967)). The Board acquiesced in the court's opinion in *Provincial House, Inc.*, 236 N.L.R.B. 926 (1978).

95. 169 N.L.R.B. 617 (1968), *enforcement denied*, 406 F.2d 109 (5th Cir. 1969).

96. 169 N.L.R.B. at 618 (footnotes omitted).

97. *Delta Drilling Co. v. NLRB*, 406 F.2d 109 (5th Cir. 1969).

98. *Id.* at 110.

by a company supervisor, who was not an eligible voter,⁹⁹ the court concluded that the election was fatally flawed:

[T]he undisputed fact [is] that a Board Agent, while an election was in process, and while he had the ballot box in his physical possession, was seen by a company supervisor going to, remaining in, and coming out of the room of a motel where presumably if he needed space there was plenty available without closeting himself with a Union representative. There are no witnesses to what went on in the room but the two participants, neither of whom had any business participating in such activity, under such circumstances, while an election was in progress. . . .

We hold that an employer who enters into a consent agreement, relying upon the unflinching preservation of Board policy, is entitled to the benefit of that reliance, especially when the questionable activity of a Board Agent occurs without his knowledge or participation. Additionally, if the benefits and advantages of consent elections are to be maintained, preserved, and utilized, the employer is entitled to that same degree of confidence in the election process as counsel concedes the employee is entitled to have. Of course, the Board recognized this in *Athbro* when it sustained the employer's objections.¹⁰⁰

Delta Drilling and *Provincial House* demonstrate how far the Board had drifted from the ideological moorings of *Athbro*. In each of these cases the Board chose to ignore or minimize the importance of fraternization that could have raised doubts concerning the Board's neutrality, and in each it was left to a circuit court to breathe new life into *Athbro*. This reluctance of the Board to practice what it had earlier preached could only undermine *Athbro's* original normative power and breed uncertainty as to what standards the Board would apply in future cases.

The Board continued its myopic approach in *Osborn Transportation, Inc.*,¹⁰¹ where the employer objected that the same agent who conducted the election had earlier investigated an unfair labor practice charge against it in a motel room rented by a union representative. According to a witness, several employees and two union representatives were in the room with the Board agent and consumed alcohol and addressed her by her first name while she interviewed them.¹⁰²

99. *Id.* at 113.

100. *Id.* at 113-14.

101. 226 N.L.R.B. 1370 (1976), *summary judgment granted in related proceedings*, 232 N.L.R.B. 821 (1977), *enforced*, 589 F.2d 1275 (5th Cir. 1979).

102. 226 N.L.R.B. at 1371.

The acting regional director overruled this objection on the grounds that "the taking of statements under the circumstances described, while not to be condoned, does not in any manner identify the Board sufficiently with [the union] so as to influence employee votes in an election to be held six weeks later."¹⁰³ This report was adopted by the Board majority¹⁰⁴ without any discussion of *Athbro*, *Delta Drilling*, or *Provincial House*.

In contrast to its stance in *Delta Drilling*, the United States Court of Appeals for the Fifth Circuit decided to enforce the Board's bargaining order.¹⁰⁵ The court first sought to distinguish *Athbro* and *Delta Drilling*, stating:

[T]he Board could reasonably decide that the Board agent's conduct in this case did not violate the *Athbro* neutrality rule. In both *Athbro* and *Delta Drilling* the Board agent was observed fraternizing with a union representative on the day of the election and in neither case was the agent engaged in pursuing an official function when he associated with the union representative. In this case, however, the Board agent went to the union representative's motel room for the express purpose of conducting an official investigation of unfair labor practice charges filed by the union against the company. There is no evidence that the agent in this case engaged in the kind of public fraternization with one of the parties to the election condemned in *Athbro* and *Delta Drilling*. . . . We hold that the Board could reasonably conclude that its agent's conduct in taking affidavits in a union-supplied room six weeks before the election did not compromise the integrity and neutrality of the Board's procedures.¹⁰⁶

The distinction the court drew between *Athbro* and *Delta Drilling* on the one hand and *Osborn Transportation* on the other has some merit: there is a clear difference between a Board agent's investigation of charges and a Board agent's quaffing beer with a union representative or using a representative's motel room to "freshen up." One wonders, however, about the circumstances surrounding the Board agent's interviews. Was it proper for the interviews to take place in the room of a union representative? While both voting unit

103. *Id.*

104. *Id.* at 1370. Board Chairman Murphy dissented, citing her earlier dissent in *Provincial House, Inc.*, 221 N.L.R.B. 5, 5 (1976), because she disagreed with the majority's conclusion that the event "could not have given employees . . . the impression that the Board was not truly impartial in this campaign." *Id.* at 1370 n.3.

105. NLRB v. *Osborn Transp., Inc.*, 589 F.2d 1275 (5th Cir. 1979). Note, however, that the circuit panels in *Delta Drilling* and *Osborn Transportation* were composed of different judges.

106. *Id.* at 1280-81 (footnote and citations omitted).

employees and union representatives were present? While alcohol was being consumed and the interviewees were referring to the Board agent on a first-name basis? Or, did these circumstances intentionally or unintentionally convey an impression of partisanship, as in *Provincial House*? In both cases, the Board's agent took affidavits in a room reserved by the union, where alcohol was served, and where the Board agent was introduced to voting unit employees. Indeed, the *Osborn Transportation* court acknowledged that *Provincial House* might not be distinguishable on its facts,¹⁰⁷ but nevertheless concluded that "the agent's conduct in this case did not violate the neutrality rule announced in *Athbro* and did not require the Board to set aside the election."¹⁰⁸

Of *Provincial House* and *Osborn Transportation*, the former decision was clearly the better reasoned. Fraternalization does not occur in a vacuum; it can take place during a purely "social" exchange or during the investigation of unfair labor practice charges. The *Osborn Transportation* court erred by implying that fraternization may be acceptable as long as it takes place within the framework of an "official investigation." In fact, such fraternization may be even more damaging to the Board's aura of neutrality because it involves social intimacy that is closely intertwined with the Board's official business.

Furthermore, the discrepancy between the Sixth Circuit's stand in *Provincial House* and the Fifth Circuit's approach in *Osborn Transportation* is regrettable on both normative and practical grounds. As a normative matter, one would hope that the Board and circuit courts could agree on a consistent, principled basis for assessing a Board agent's conduct. Otherwise, employees, employers, unions, and the public are confronted with a garbled and contradictory message concerning the ethical standards to be applied in representation elections.¹⁰⁹ And as a practical matter, this conflict among the cir-

107. The court stated:

Although in *Provincial House* the Board agent conducted his investigation only ten days before the election and in the context of a union organizational meeting, we are not certain that the differences in time and place presented in our case would lead the *Provincial House* court to a different result.

Id. at 1281.

108. *Id.*

109. As Charles Nesson has emphasized, "the projection and affirmation of norms embodied in substantive law are central functions of the judicial process . . ." Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1390 (1985). The same holds true, of course, for the Board's administrative adjudicatory process. The competing and conflicting messages transmitted by the courts and Board preclude these tribunals from projecting a coherent normative vision with regard to assuring the integrity of representation elections.

cuits could lead to forum shopping in which parties direct their appeals toward whatever circuit seems to favor their particular position.¹¹⁰ Moreover, the conflicting resolutions reached by appellate courts leave the Board with little guidance on how to address similar issues in subsequent cases. It is common to criticize the Board for its repeated nonacquiescence toward appellate court rulings,¹¹¹ but to which court should the Board defer when the circuits are riddled with conflict?¹¹² These inconsistencies among the Board's own opinions, among the Board and the courts, and among various circuits create grave uncertainties over the applicable standards, dilute the normative impact of decisions, encourage forum shopping, and aggravate the problem of Board nonacquiescence.

In sum, the entire problem of fraternization has been treated by the Board and the courts in an inconsistent manner. *Athbro* notwithstanding, the Board has been loath to invalidate elections based on fraternization despite the appearance of partiality it may have conveyed to the parties, the employees, and the public. Ironically, it frequently has been left to the circuit courts to uphold the Board's earlier concern for maintaining the integrity of the Board's election standards. Even the appellate court opinions, however, are marked both by intra-circuit divisions (as in the Fifth Circuit's different approaches in *Delta Drilling* and *Osborn Transportation*) and inter-circuit conflict (as between *Osborn Transportation* and the Sixth Circuit's resolution of *Provincial House*).

B. The Problem of Delegation

In addition to fraternizing with a party to a representation election, Board agents may impermissibly convey the appearance of favoritism by delegating certain official tasks to a representative of either the employer or the union. As explained below, the inconsistencies that plague Board members and judges concerning fraterni-

110. See Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 705-12 (1989), and the sources cited therein for a discussion of the broad venue provisions of 29 U.S.C. § 160(f) (1982). As Estreicher and Revesz explain, "[w]hen an N.L.R.B. order renders both the union (or employee) and the employer 'aggrieved,' it is possible for petitions to be filed in three different circuits—setting in motion a 'race to the courthouse' that is only partially mitigated by recent legislation." Estreicher & Revesz, *supra*, at 706 (footnote omitted).

111. See, e.g., Estreicher & Revesz, *supra* note 110 (discussing such criticism); Kafker, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 LAB. LAW. 137 (1987); Mattson, *The United States Circuit Courts and the NLRB: "Stare Decisis" Only Applies if the Agency Wins*, 53 OKLA. B.J. 2561 (1982), for detailed criticism of the Board's recurring nonacquiescence in circuit court opinions.

112. See Estreicher & Revesz, *supra* note 110, at 709-10 for a concise discussion of this predicament.

zation are mirrored in the difficulties they have encountered in deciding whether the delegation in a particular case has tarnished the Board's election standards. These difficulties have led to seemingly inconsistent opinions and raise additional questions concerning the standards the Board and courts will apply to preserve both actual and apparent Board neutrality.

In *Hotel Equities*,¹¹³ for example, the Board overruled an employer's objection that the agent conducting the balloting had wrongfully permitted a union observer to translate voting instructions for Spanish-speaking employees. As the trial examiner explained, the employer argued "forcefully" that "the first admonition in the Board's 'Instructions to Election Observers' is that an observer should not 'give help to any voter. Only an agent of the Board can assist the voter.'"¹¹⁴ Nevertheless, the trial examiner overruled this objection, stating:

[T]he record is not clear as to whether the Board agent was sufficiently conversant in Spanish to have explained the ballot. Had she been, it would seem clearly improper for her to have allowed an observer for one of the parties to have assisted the voter in this manner, in the absence of an interpreter for the other party. On the other hand, if she was not sufficiently conversant the disallowance of observer assistance would effectively result in the loss of an employee's right to vote.¹¹⁵

The trial examiner then decided that the Board agent should be given the benefit of the doubt:

In the absence of evidence to the contrary, I believe the presumption of regularity prevails here, and that the Board agent would not have delegated the authority to instruct the voter had she been able to effectively do it herself. Since the instruction does not appear to be improper, I cannot agree that the Board agent's conduct on this occasion warrants setting the election aside.¹¹⁶

This determination was then approved by the Board on the grounds that "[t]here was no proof of electioneering,"¹¹⁷ but one can question whether this conclusion is convincing. It is true, as the trial examiner emphasized, that the union observer who acted as translator specifically denied having urged the employee to vote for the union.¹¹⁸ Nevertheless, one is left with a nagging sense of un-

113. 180 N.L.R.B. 489 (1969).

114. *Id.* at 498 (footnote omitted).

115. *Id.*

116. *Id.*

117. *Id.* at 490.

118. *Id.* at 498.

certainty as to the propriety of this translation. The Board agent had told the translator, "I speak a little Spanish so go ahead and explain [how to vote],"¹¹⁹ which suggests that she could monitor the translation to assure that no electioneering occurred. On the other hand, if she was not sufficiently fluent to give the instructions herself, how can we be confident that she was capable of closely following the translation? These doubts are aggravated by her failure to testify at the hearing and her apparent rudeness and emotional state throughout the election process.¹²⁰ Furthermore, why wasn't the Board apprised of the possibility that not all employees would understand English? Then, the Board could have provided a bilingual agent or at least assured that both the employer and the union had observers present to translate. These concerns were not addressed by the Board and one leaves the *Hotel Equities* decision with doubts whether the Board adequately maintained its appearance of integrity and impartiality.¹²¹

A translation controversy arose again in *Alco Iron & Metal Co.*,¹²² but this time with diametrically opposite results. In *Alco*, the Board agent relied upon a Spanish-speaking union observer to give voting instructions to the predominantly Hispanic workforce because neither the agent nor the employer's observer was bilingual. Although the employer objected, the hearing officer ruled that such translation was necessary and proper and that there was no indication that the translator had done more than explain voting procedures.¹²³ The Board overruled his decision, however, emphasizing that "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."¹²⁴ The Board then explained:

119. *Id.*

120. *Id.* at 499-500 & n.51.

121. See also *Sioux Prods. v. NLRB*, 703 F.2d 1010 (7th Cir. 1983), *denying enforcement on other grounds* to 258 N.L.R.B. 287 (1981), where the court affirmed the Board's conclusion that an agent did not impermissibly prejudice the election by allowing union representatives to help her translate instructions into Spanish, by rudely telling an employer representative to "shut up" when he interrupted that translation to add clarification, by bungling an attempt to translate instructions into Italian, and allegedly engaging in other acts of misconduct. The court denied enforcement of the Board's order, however, because it concluded that the Board had improperly invalidated a ballot.

122. 269 N.L.R.B. 590 (1984).

123. *Id.* at 591.

124. *Id.* (citing *Glacier Packing Co.*, 210 N.L.R.B. 571 (1974), discussed *infra* text accompanying notes 186-192). Interestingly, the Board did not cite *Athbro* despite its essentially identical language.

[W]hen the first Spanish-speaking employee came to vote, the Board agent merely instructed the Union's observer, Diaz, to "translate the procedure of voting to these employees." The Board agent provided no additional instruction or guidance, and did not participate further in the conduct of the election, except for handing ballots to employees, until the Employer's observer complained. Even after this complaint, the Board agent merely instructed the union observer to repeat the instructions in Spanish. 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 [union's] observer conveyed the impression that the [union], and not the Board, was responsible for running the election. Such conduct is incompatible with our responsibility for assuring properly conducted elections and, accordingly, we hereby sustain the Employer's objections, and direct that a second election be conducted.¹²⁵

This reasoning seems directly at odds with the rationale of *Hotel Equities*, for how can the delegation of voting instruction duties be acceptable pragmatism in one case and yet a fatal flaw in the next? Moreover, the *Alco* Board's attempt to distinguish *Hotel Equities* is far from convincing. The Board argued that its earlier decision was distinguishable because in that case the employer's observer had not objected to the delegation, there was no proof of *sub rosa* electioneering, and the translation "involved only one employee and could not have affected the outcome of the election."¹²⁶ These distinctions, however, pale upon further scrutiny. First, the employer's observer in *Alco* did not object to the delegation per se; instead, he complained only when he felt that the conversations in Spanish were too lengthy.¹²⁷ Second, there was no proof in either case that the union observer engaged in electioneering under the guise of translating.¹²⁸ Finally, the *Alco* Board's retreat into outcome-determinism—that the translating in *Hotel Equities* could not have affected the election's results—ran afoul of its own declaration that Board agent misconduct "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

125. *Id.* at 591-92 (footnotes omitted).

126. *Id.* at 591 n.2.

127. *Id.* at 591.

128. *Id.* As the *Alco* Board itself acknowledged, the hearing officer concluded that "even if [the union observer's] explanations may have been lengthy and too verbose, there was no indication that he did anything more than explain voting procedures to employees who might not otherwise have been able to exercise their rights." *Id.*

basis for setting aside that election."¹²⁹ The Board, therefore, failed to offer a single compelling reason to justify the deep inconsistency between its two decisions.¹³⁰

A different kind of delegation problem arose in *NLRB v. Michigan Rubber Products*,¹³¹ where the employer objected that the Board agent appeared to give the union control of the balloting by stationing a union observer at the entrance to the polling area and instructing him to admit employees into the area one at a time. The Board overruled this objection, however, and the Sixth Circuit agreed:

There is evidence that it was necessary to have someone control the flow of traffic in order to avoid congestion, because there was only one door in and out of the [polling area]. At the same time, a company observer stationed himself by the ballot box, which negated any suggestion of partiality towards the union. The Board was justified in concluding that the placement of these observers had no impact on the votes cast in the election.¹³²

The employer also argued that this case involved the type of fraternization forbidden by *Athbro* and *Provincial House* because a union representative assisted the female Board agent by carrying the metal voting booth back to her car after the morning polling session. The court rejected that analogy, however, stating:

[W]hile it may have been imprudent of the Board agent to allow the union representative to assist her, this action could not have had any effect on the outcome of the election. A Board agent having a beer with a union representative presents an entirely different situation than that of a female Board agent

129. See *supra* text accompanying note 124.

130. Furthermore, as Board member Hunter noted in his concurring opinion in *Alco*, the Board failed to provide guidance on how representation elections should be conducted when language difficulties arise. For that reason, Hunter proposed:

[W]here a Regional Office is on notice that a substantial percentage of the electorate do not speak English, the Board must attempt to fulfill its responsibility to protect the integrity of the election process by supplying a Board agent or Regional Office authorized or otherwise approved interpreter, capable of speaking the language of those employees so far as the particular circumstances permit.

Id. at 592 (concurring opinion).

Indeed, this was not the first time that the Board received criticism for its inattention toward language barriers in elections. In *Marriott In-Flite Servs. Div. of Marriott Corp. v. NLRB*, 417 F.2d 563 (5th Cir. 1969), *denying enforcement to* 171 N.L.R.B. 742 (1968), for example, the court applied *Athbro* and set aside a Board order because the Board had failed to follow its policy of providing foreign language ballots where a substantial number of voting employees did not understand English.

131. 738 F.2d 111 (6th Cir. 1984) (per curiam), *enforcing* 251 N.L.R.B. 74 (1980).

132. 738 F.2d at 114.

allowing a male union representative to help her by carrying a polling booth. The first situation would certainly imply to the observer that there was some social or business bond between the participants, while the latter situation could be based entirely on practical, physical logistics.¹³³

As *Michigan Rubber* demonstrates, the Board and courts are reluctant to invalidate elections simply because an agent delegated minor tasks to a representative of management or labor. In *US Ecology, Inc. v. NLRB*,¹³⁴ for example, the Board and the Ninth Circuit overruled the employer's objections that the agent permitted a union observer to read the poll opening announcement and to help usher employees into the voting area. The Ninth Circuit explained:

[T]he Board agent's request for assistance in ushering employees into the room constituted delegation of a minor task based on objective considerations (the Union observer was closest to the door), and therefore did not impair her appearance of neutrality. Similarly, the Union observer's request that each voter state his name as he entered the voting area was proper and did not represent an abrogation of the Board agent's control over the election. Finally, the Board agent's choice of the Union observer to read the poll opening announcement was made after a neutral coin toss, the company observer stood by the Union observer's side as he read the announcement, and the content of the announcement had been agreed on by all the parties. This neutral method of delegating a minor task also did not impair the Board's appearance of neutrality.¹³⁵

In support of its reasoning, the court relied on *NLRB v. ARA Services, Inc.*¹³⁶ In *ARA*, the Third Circuit enforced the Board's bargaining order on the grounds that it was not unreasonable for the Board agent to allow a union observer to ask the names of employees as they came to vote. As the court explained, "it is proper, and even necessary, for observers not personally acquainted with every member of the bargaining unit to require identification."¹³⁷ Furthermore, the *US Ecology* court correctly relied upon 29 C.F.R.

133. *Id.* at 115. The court also concluded that "[t]he Board agent's allowing the union representative to carry the polling booth hardly rises to the same level as the situation in *Provincial House*." *Id.* See also *Queen City Foundry*, 73 L.R.R.M. (BNA) 1345, 1348 (1970) (holding that union representative's friendly offer to help Board agent erect voting booth did not prejudice the election).

134. 772 F.2d 1478 (9th Cir.), enforcing 274 N.L.R.B. No. 58 (1985) (unpublished opinion).

135. 772 F.2d at 1483 (citation omitted).

136. 717 F.2d 57 (3d Cir. 1983) (en banc), enforcing 251 N.L.R.B. 55 (1980).

137. 717 F.2d at 68.

§ 101.19(a)(2), which provides that “[a]ppropriate representatives of each party may assist [the Board agents] and observe the election.”¹³⁸ Certainly elections should not be set aside whenever an agent delegates minor tasks to facilitate the voting, as long as he “take[s] care not to turn over control of the election to an observer” and assures that the election is “conducted in a manner which inspires confidence in the impartiality of the Board and its agents.”¹³⁹

Nonetheless, there is one troublesome aspect to *US Ecology*, namely that the employer’s attorney objected to an observer for either party reading the voting announcement and agreed to the coin toss only because the Board agent would not read it herself.¹⁴⁰ The attorney reasonably might have believed that prejudice could arise unless the Board agent personally read the announcement and agreed to flip a coin only because the agent failed to recognize this. A similar problem arose recently in *San Francisco Sausage Co.*,¹⁴¹ where a divided Board upheld an election over the union’s objection that the agent improperly permitted the employer to summon voters over its intercom system. Relying on *US Ecology*, the Board majority ruled that this was a harmless “delegation of a minor task.”¹⁴² In contrast, Board member Johansen argued:

The parties clearly and specifically agreed prior to the election that the Board agent would use the plant intercom system to notify the employees that it was time to vote. Contrary to this specific agreement, the Board agent, for reasons best known to her, allowed the Petitioner [employer] . . . to summon the voters via the intercom. The employees, hearing the Petitioner’s voice making the announcement that it was time to vote, could easily have concluded that the Petitioner, not the Board agent, was really running the election.¹⁴³

Johansen’s dissent has definite force. First, one questions whether a Board agent should be permitted to break a preelection agreement and arbitrarily delegate the duty of announcing the opening of the polls. Second, even in the absence of such an agreement, permitting either side to read the announcement seems a poor practice. As Johansen realized, employees might well misinterpret this as a sign that either the union or the employer is “running” the election in place of the Board. Unless such delegation is truly necessary in a given election because of competing demands on the

138. 772 F.2d at 1482-83 (citing 29 C.F.R. § 101.19(a)(2) (1985)).

139. *Id.* at 1483 (citing *Alco Iron & Metal Co.*, 269 N.L.R.B. 590 (1984)).

140. *Id.* at 1482.

141. 291 N.L.R.B. No. 64 (October 19, 1988).

142. *Id.*

143. *Id.* (dissenting opinion).

agent's time, one would hope that the Board would ban this practice because of its potentially misleading nature.

In essence, the Board's infidelity toward the *Athbro* standard is as pervasive on delegation issues as it is with the problem of fraternization. In virtually every case where the issue has arisen, the Board has ignored or minimized the prejudicial effect the delegation may have entailed and the circuit courts have accepted this. The lone significant exception is *Alco*,¹⁴⁴ where the Board relied upon *Glacier Packing Co.*¹⁴⁵

C. *The Problem of Allegedly Partisan Statements or Actions*

Perhaps the most obvious manner in which a Board agent may undermine the Board's aura of neutrality is by making statements or engaging in acts that imply favoritism toward a particular party to the election. While a statement that "I want the union (or employer) to win" would be the most flagrant example of this, many other actions or comments have been objected to for allegedly suggesting bias. As demonstrated below, however, the Board's efforts to address this problem in a clear and consistent manner have suffered from the same flaws discussed earlier in this Article.

The Board has been particularly slow to find suggestions of partisanship simply because a Board agent relates her prior experiences representing management or labor. In *Shorewood Manor Nursing Home & Rehabilitation Center*,¹⁴⁶ for example, the employer alleged that the Board agent told the employer's election observer that he had received his position with the Board because he previously had been a union steward, and that the observer then repeated this to employees who had not yet voted. Purporting to apply *Athbro*, the hearing officer concluded that this "did not compromise the Board's standards" and the Board affirmed this determination.¹⁴⁷ The Board also overruled the employer's objection that the male Board agent had tainted the election by playfully inviting a female clerical

144. *Alco Iron & Metal Co.*, 269 N.L.R.B. 590 (1984), discussed *supra* notes 122-30 and accompanying text.

145. 210 N.L.R.B. 571 (1974). For a discussion of *Glacier Packing*, see *infra* notes 186-92 and accompanying text.

146. 217 N.L.R.B. 1106, 1107-08 (1975).

147. *Id.* The hearing officer discredited testimony by the employer's election observers that she related the Board agent's remarks to several eligible voting unit employees who had not yet cast their ballots. Even if the hearing officer's decision to discredit such testimony was correct, that would not change the fact that the Board agent did make the potentially prejudicial statement and that employees later learned of it. Even if the employees' knowledge of the statement occurred after they voted, they still could have been left with the lingering impression that the Board and union were united against the employer.

worker of the Board to sit on a bed with him in the presence of two election observers. The Board explained:

In the midst of a "lot of joking," . . . [the Board agent] invited the clerical to sit on the bed. This is all there is to the incident. Nobody suggests that anything more or different happened. We therefore perceive no need for a hearing to inquire further into the matter nor any reason for believing that the incident could have had any effect on the voters or the election or the sanctity of the Board's processes.¹⁴⁸

The Board's reasoning (or lack thereof) is troublesome with regard to both objections. First, the agent's comment that he received his position because of his union background obviously could have conveyed the impression that he supported labor organizations, including the union seeking representation in that case. This is not to argue that the Board should refrain from hiring people with backgrounds in labor relations; such experience can be extremely useful whether that background be pro-management or pro-labor. A far different issue is presented, however, when a Board agent states that he won his job because of his specific previous alliance with either unions or management. Rather than transmitting the message that he was hired because of his prior *knowledge*, it sends the signal that he was hired because of his previous *affiliation*.¹⁴⁹ The Board failed to appreciate this difference, however, and it did not even note the hearing officer's reliance on (or misapplication of) the *Athbro* doctrine.

Second, one is perturbed by the Board's glossing over of the agent's sexual innuendo toward the female clerical. While such joking may not have connoted a lack of impartiality, it certainly demon-

148. *Id.* at 1107.

149. Many scholars have commented on the intractable problem that governments inevitably must rely on agents drawn from the midst of society's competing political and socioeconomic forces. Roberto Unger, for example, asserts:

Only an entity that somehow stands above the conflicting groups can both limit the power of all the groups and pretend to the posture of impartiality, impersonality, or providential harmony which sanctions its claim to their allegiance. At the same time, the state must reinforce the relationships of domination and dependence, and the persons who man its agencies must necessarily come from particular ranks. All the basic conflicts that mark the history of the contrast of state and society derive in the end from the paradox implicit in this situation. The state, which is the child of the social hierarchy, must also be its ruler; it must be distinct from any one social group in the system of domination and dependence. Yet it has to draw its staff and its purposes from groups that are part of this system. Whenever either side of the paradox is forgotten, the true relationship between state and society is obscured.

R. UNGER, *LAW IN MODERN SOCIETY* 60-61 (1976).

strated a lack of integrity and respect for the sanctity of election procedures. As Board member Kennedy argued in dissent, such misconduct should have been considered in "determining whether the totality of the Board agents' conduct met the standards that the Board expects of its Board agents . . ." ¹⁵⁰ Indeed, even the Board majority seemed to recognize that such sexism could impair its reputation, for it emphasized in a footnote that the mischievous agent was only a work-study student and was no longer employed by the Board. ¹⁵¹

The *Shorewood* Board's lack of concern over an agent's declaration of prior union connections was replicated in *Magic Pan, Inc. v. NLRB*, ¹⁵² where the Seventh Circuit enforced the Board's order overruling an employer's objections. In *Magic Pan*, the Board agent casually informed a union observer that he previously had worked for a legal clinic which had handled workers' compensation matters for a union local affiliated with the labor organization involved in that election. The court concluded that the employer's claim of bias was "frivolous" because:

[The Board agent] testified that he did not think his remarks could be interpreted as either pro-union generally or pro-ACTWU, the union involved in the election. Furthermore, all witnesses agree that no voter was present during this conversation, and all the observers had already voted, so the remarks could not have affected the outcome. ¹⁵³

This rationalization is troublesome in several respects. First, the court's focus is misplaced, for the proper question is not whether the Board agent thought his remarks indicated pro-union bias but whether employees could have construed them as such. ¹⁵⁴ While the Board agent's perception of how his remarks could be interpreted is relevant, it hardly is dispositive of this issue. Furthermore, the court erred in emphasizing that these remarks were made after the polling was completed and therefore could not have affected the election's outcome. As the Board emphasized in *Athbro*, outcome-determinism is "not . . . the only test to apply." ¹⁵⁵ Finally, the court

150. *Shorewood*, 217 N.L.R.B. at 1107 n.5 (Kennedy, dissenting).

151. *Id.* at 1107 n.3.

152. 627 F.2d 105 (7th Cir. 1980) (per curiam), enforcing 244 N.L.R.B. 630 (1979).

153. 627 F.2d at 109.

154. See, e.g., *NLRB v. State Plating & Finishing Co.*, 738 F.2d 733, 739 n.5 (6th Cir. 1984) (stating that "[i]mpairment of Board neutrality is dependent on the employee's perception of the Board agent's comments, not on who is to blame for that perception"), denying enforcement to 262 N.L.R.B. 132 (1982). *State Plating* is discussed *infra* at notes 207-17 and accompanying text.

155. 166 N.L.R.B. 966, 966 (1967).

failed to ask, much less resolve, the deeper question of whether the agent's communication of his prior union-related experiences could have undermined the Board's appearance of impartiality. In fact, the Board and the Seventh Circuit did not even mention *Athbro* in their opinions.

The Board and courts frequently have been slow to move, moreover, even when the suggestion of bias seems far more direct. In *NLRB v. Dobbs Houses, Inc.*,¹⁵⁶ for example, the Fifth Circuit enforced the Board's bargaining order despite the employer's objection that the agent made statements plainly indicating favoritism toward the union. In particular, the employer complained that the Board agent had told union and management observers that the union represented about twenty bargaining units, that he believed the union would win that election, and that "it would do the people a lot of good."¹⁵⁷

The regional director overruled these objections on the grounds that the comments did not actually cause prejudice in the voting. Although his decision was rendered before the Board decided *Athbro*, it was affirmed by the Board after that landmark case had been decided. As the Fifth Circuit explained, however, the Board did not even refer to the *Athbro* decision. Nonetheless, the court stated:

The Board did not refer to *Athbro* nor did it articulate the rationale for its holding on the question of the agent's misconduct. We are confident, however, that the Board did consider the issue. The employer's objections to the Regional Director's determinations, made in his brief to the board, raised the issue of the integrity of the election process, although not explicitly referring to *Athbro*. Again in its brief seeking a rehearing, the employer raised the same issue explicitly claiming a departure from established board policy, although without citing *Athbro*.¹⁵⁸

Such reasoning sounds contrived and inherently implausible. How could the court assume that the Board impliedly considered its recent holding in *Athbro* when that opinion was cited neither by the Board nor by the employer? Although the court emphasized that the employer voiced its concern for the integrity of election standards, that is not equivalent to concluding that the Board actually weighed the evidence in light of *Athbro* and reached a decision in accordance with its holding. Despite this glaring omission to apply or distinguish such a recent, relevant, and potentially far-sweeping

156. 435 F.2d 704 (5th Cir. 1970) (per curiam), enforcing 172 N.L.R.B. 1781 (1968).

157. 435 F.2d at 705.

158. *Id.*

opinion, the court took a leap of faith to assume that the Board's cursory opinion impliedly embodied or reflected a meaningful analysis of the *Athbro* principle.

Perhaps sensing the weakness of its first line of reasoning, the Fifth Circuit then sought to demonstrate that *Athbro* was in fact distinguishable from the case at bar. The court asserted:

The Board could reasonably distinguish this case. . . . [T]he Agent's improper actions were not as public as those in *Athbro*. Additionally, it would be reasonable to distinguish between acts of fraternization and expressions of personal feelings to limited audiences. The former smacks much more of irregularity than the latter. Finally, the Board agent's improper statements were not part of a proselytizing effort on his part or even a simple unprovoked indiscretion. It was the questions of the Employer's own observer that elicited the Agent's statements. An employer cannot through *his* agent lead the Board agent to make improper statements and then rely on such statements to void the election without a showing of prejudice.¹⁵⁹

This second line of support, however, is as permeable as the first. First, its factual distinction between the two cases is specious, for the fraternization in *Athbro* was, if anything, less "public" than the agent's comments in *Dobbs Houses*. Whereas the former involved beer drinking far removed from the polls which was witnessed by only a single employee who already had voted, the latter involved statements made during balloting to at least two observers.¹⁶⁰ Sec-

159. *Id.* at 705-06 (emphasis in original; footnote omitted).

160. With regard to the publicity element, the *Dobbs* court also needed to distinguish its earlier opinion in *Delta Drilling Co. v. NLRB*, 406 F.2d 109 (5th Cir. 1969), *denying enforcement to* 169 N.L.R.B. 617 (1968), discussed *supra* at notes 95-100 and accompanying text. The court attempted to do so as follows:

This Court's decision in [*Delta Drilling*] determined that a Board Agent's activities did not live up to the *Athbro* standard of propriety. It rejected the Board's argument that the amount of publicity of the impropriety to the voting members of the unit was a relevant criterion for limiting the rule. In that case, though, the Board itself had not acted on the merits of the case, relying on an agreement between the parties that the Regional Director's decision would be final. Where the Board does act, it should be accorded reasonable latitude in limiting its own rules.

435 F.2d at 705 n.1.

This distinction, although hardly specious, is ultimately dissatisfying. While the Board's decisions may be entitled to more "latitude" than those of a regional director, the Fifth Circuit should not have permitted the Board to curtail *Athbro's* reach without any explicit and well-reasoned analysis as to why it was doing so. Rather than an exercise in judicial tyranny, it is a prudent and commonly accepted practice for courts to insist, at a minimum, that the Board and other administrative bodies explain their departures from their own rules and standards. Indeed, as the Fifth Circuit itself later stressed in *NLRB v. Osborn Transportation, Inc.*:

ond, it is difficult to see how statements of bias—which cut directly at the Board’s appearance of impartiality—are less offensive than fraternization, which conceivably could involve nothing more than social acquaintance unaccompanied by professional prejudice.¹⁶¹ Third, by the court’s own admission the agent’s statements were “improper.” Given that impropriety, how could one justify not defending the integrity of the election? The best the court could do was to blame the employer’s observer for asking questions that prompted the improper remarks. One may agree wholeheartedly with the court that private parties should not be permitted to “entrap” the Board into election-nullifying statements, but neither the Board nor the court referred to any evidence suggesting that such entrapment actually took place. To the contrary, we are told simply that the employer’s observer asked unspecified questions. Moreover, even assuming *arguendo* that such inquiries carried the secret motive of leading the agent into error, the agent simply could have refused to answer them.¹⁶²

Ironically, the court’s opinion in *Dobbs Houses* seems both too deferential toward the Board and too eager to impose its own standards for judging elections. The opinion is too deferential insofar as it enforces an opinion devoid of any persuasive reasoning on how to assure that the Board’s standards of integrity and neutrality are preserved. The opinion apparently seeks to limit the Board’s prerogatives in future cases, however, by stating that a party must make “a showing of prejudice” when the actions of its representative allegedly induced Board agent misconduct. While that conclusion has

We emphasize . . . that in exercising the discretion entrusted it in representation matters, the Board must faithfully adhere to the policies and procedures previously announced in its rules and decisions. “Such policies are controlling until the Board announces a change and its reasons for the change.” *Delta Drilling Co. v. N.L.R.B.*, 406 F.2d 109, 113 (5th Cir. 1969); *Rayonier, Inc. v. N.L.R.B.*, 380 F.2d 187 (5th Cir. 1967).

Osborn Transportation, 589 F.2d 1275, 1279 (5th Cir. 1979), discussed *supra* at notes 101-08 and accompanying text.

161. As one commentator has observed:

[An employer] is confronted, on the one hand, by an agent who indicated he had prounion sentiments, and on the other hand, by an agent who drank beer with a union representative or who briefly stopped in at the representative’s motel room. Either of these situations is serious enough to raise an inference of partiality on the part of the agent and probably casts a shadow of doubt over the integrity of the election itself. While the latter two acts of misconduct are suspicious, the former is almost self-indicting.

WILLIAMS, *supra* note 4, at 423.

162. Williams, unfortunately, succumbs to the court’s excuse mongering on this issue, concluding that “[o]nly on this ground is *Dobbs Houses, Inc.* distinguishable from the *Athbro* rationale.” *Id.*

a certain commonsensical appeal, one can question whether the court was justified in attempting to impose a new standard that the Board apparently never had considered. The Board might agree on such a solution, but the court's eagerness to lay down this standard seems at odds with its passivity in assuming that the Board had engaged in a sub silentio analysis and application of the *Athbro* principle.

In any event, the Board has remained skeptical toward objections based on the allegedly biased behavior of its agents. In *Hotel Equities*,¹⁶³ for example, the Board remained unconvinced that the election had been tarnished despite a litany of objections by the employer. The employer alleged:

During the polling period and in the presence of voting employees and election observers a Board agent conducted herself in a highly improper manner by making loud, rude, abusive and threatening statements and comments to election observers and other persons in the voting area and by other threats and improper conduct created an atmosphere of fear and confusion and thereby destroyed the necessary laboratory atmosphere. Because of the threatening nature of such conduct a large number of employees refrained from visiting the polling place for the purpose of casting their ballots.¹⁶⁴

These charges were not only dramatic; they also appeared to be substantially justified for the employer introduced a plethora of testimony concerning the agent's misconduct. First, witnesses for both the employer and the union stated that the agent engaged in a testy exchange with a non-employee who had wandered into the voting area.¹⁶⁵ Second, three of the employer's election observers testified that the agent abrasively supervised their conduct during the election.¹⁶⁶ Third, the agent allegedly ordered a black employee to "come back here gal" when she did not push her ballot sufficiently deep into the ballot box.¹⁶⁷ And fourth, an additional witness testified that she had complained to another Board agent that the cantankerous one had "been ranting and raving and screaming all afternoon."¹⁶⁸

Taken together, such testimony would seem to constitute damning evidence that the Board agent had acted in a woefully unprofes-

163. 180 N.L.R.B. 489, 489-90 (1969). For further discussion of this case, see *supra* notes 113-21 and accompanying text.

164. 180 N.L.R.B. at 499.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

sional manner, engaged in condescending behavior toward a black employee (which could have discouraged other workers from voting), insulted the employer's election observers (which could have instilled a reasonable belief among employees that the Board disapproved of the employer), and alienated a member of the general public (upon whose faith and taxes the Board ultimately must depend). Despite this parade of horrors, the trial examiner overruled the employer's objections in a decision adopted in all relevant respects by the Board.

First, the trial examiner discounted the testimony of the woman who alleged that the Board agent had been "ranting and raving and screaming" even though neither that agent nor the one who initially heard the complaint testified at the hearing. As the trial examiner rationalized:

while I agree with the contention of the Employer that since neither [of the Board agents] were called as witnesses, I should assume the truthfulness of the Employer's witnesses on this point, I cannot close my eyes to the fact that [the woman testifying] impressed me as being a rather highly charged and emotional person who might very well utilize hyperbole in describing the characteristics of others.¹⁶⁹

Such reasoning is highly suspect. Without questioning the trial examiner's opportunity to observe the demeanor of witnesses and base credibility judgments thereon, it seems curious that he would discredit the observer's statement as an emotional exaggeration when no Board agent came forward to rebut her testimony.

The trial examiner then made the equally dubious decision to cripple the employer's ability to present evidence regarding the effect of the Board agent's behavior on the potential voters. He justified this restriction by arguing that he "merely limited testimony of witnesses to statements they may have made to other prospective voters. Testimony sought to be elicited from witnesses respecting rumors or statements of employees made outside the voting area to the witness was sustained [sic, presumably excluded] as being the rankest form of hearsay."¹⁷⁰

This justification is questionable at best. First, it misapplies the hearsay rule by failing to consider the purpose for which the testimony was to be introduced. "Hearsay" is commonly defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

169. *Id.* at 499 n.51.

170. *Id.* at 500 n.52.

matter asserted."¹⁷¹ The employer, in contrast, was not necessarily seeking to introduce such testimony to "prove" that the Board agent actually was ranting and raving; it was sufficient for it to introduce testimony establishing that employees believed that she was ranting and raving and that this belief discouraged them from voting, prompted them to vote for the union, or undermined faith in the Board's professional neutrality.¹⁷² The trial examiner, however,

171. See, e.g., FED. R. EVID. 801. See also C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 246 (3d ed. E. Cleary 1984). For an insightful critique of traditional hearsay doctrine, see Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786 (1980).

The Board has decided it will not strictly apply the hearsay rule in its proceedings. For example, in *Alvin J. Bart & Co.*, 236 N.L.R.B. 242 (1978), *enforcement denied on other grounds*, 598 F.2d 1267 (2d Cir. 1979), the Board refused to adopt a per se rule automatically excluding hearsay. The Board explained that:

If this case involved solely the question of the admissibility of hearsay in Board proceedings, which it does not, we would be reluctant to adopt a rule which mechanically excludes evidence, regardless of its intrinsic reliability, because it is technically hearsay. Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies. In *Richardson v. Perales*, the Supreme Court held that reports, which were clearly hearsay in character, by themselves constituted substantial evidence sufficient to support an administrative finding. The Court made clear that although "hearsay in the technical sense . . . would be deemed formally inadmissible in judicial proceedings," it would not reject "administrative reliance on hearsay irrespective of reliability and probative value."

Bart, 236 N.L.R.B. at 242 (quoting *Perales*, 402 U.S. 389, 407 (1971)) (citations omitted).

The *Bart* Board also reasoned that the statements should not be excluded because they arguably were not hearsay and no objection had been made to them at the hearing. More generally, the Board reiterated that "the Board is not bound to follow the strict rules of evidence applicable in the Federal Courts" even though Section 10(b) of the Act requires that "so far as practicable" Board proceedings be conducted in accordance with the Federal Rules of Evidence. *Id.*

Bart's message that the Board need not follow strictly the Federal Rules' approach to hearsay has been noted in at least two subsequent Board opinions, *Bohemia, Inc.*, 266 N.L.R.B. 761, 762 n.11 (1983), *aff'd*, 119 L.R.R.M. (BNA) 3160 (11th Cir. 1985), and *United Rubber, Cork, Linoleum & Plastic Workers of America, Local 878*, 255 N.L.R.B. 251, 251 n.1 (1981). See also *Eisenberg v. Honeycomb Plastics Corp.*, 125 L.R.R.M. (BNA) 3257, 3267 (D.N.J. 1987) (citing *Bart* on hearsay and stating: "It has long been recognized that the Board is not bound to follow the strict rules of evidence").

172. The trial examiner also failed to consider the practical problems the employer may have faced in finding employees to testify on its behalf. The union had received a majority of the votes and bargaining unit employees may have been reluctant to incur the wrath of their pro-union brethren by giving testimony that would jeopardize that organization's victory. In light of that reluctance, the employer may have been forced to rely on the secondhand statements which the trial examiner excluded from the hearing. The unfortunate result is that the Board never had an opportunity to determine whether its agent's misconduct had a chilling effect on any employee's right to vote, whether he be pro-union or anti-union.

rejected such potentially crucial testimony and settled for issuing a rather meaningless admonition and rationalization:

In assessing the conduct of the Board agent in question, as reflected by the evidence herein, it may be stated at the outset that rudeness and impolite conduct on the part of Board agents is not to be condoned. This is particularly true with respect to those agents who work in the field offices of the Board and who are in daily contact with the public. In the field of labor law, highly charged as it is with the emotions of the parties to the contest, the standards of conduct of a Board agent are set extremely high. Clearly, conduct of a threatening or intimidatory nature which may reasonably be said to thwart the right of an employee to cast his ballot in the election would be sufficient grounds for setting aside such election. However, while the conduct of Mrs. Reel [the Board agent] may be legitimately criticized for being impolite, abrupt, and even abusive as respects her relationship with the election observers and a member of the general public, I find, contrary to the contentions of the Employer, no substantial evidence upon which I may draw an inference that eligible employees did not vote in the election because of fear of Mrs. Reel.¹⁷³

In effect, therefore, the trial examiner applied a narrow outcome-determinative test to decide whether the Board agent's abusive misconduct invalidated the election. However offensive such behavior may have been, it was not deemed significant enough to require a new election unless it made employees so fearful of casting ballots that they forfeited their right to vote. And given the trial examiner's refusal to admit further testimony concerning the alleged climate of alienation, the employer could not make that requisite showing. As a consequence, the trial examiner (with the Board's subsequent blessing) merely wagged a disapproving finger at the Board agent without moving to redress the harm she may have caused to the workers' sense of dignity and freedom to vote.

The trial examiner justified this curious result on the grounds that the Board agent was an equal opportunity tyrant, stating:

[T]here is no contention or evidence that Mrs. Reel's officious attitude was directed at one particular person or party to the election, and therefore could be characterized as partial or discriminatory. As Company Observer McDonald pointed out, Mrs. Reel was not simply rude to the Company or Union, "she was just plain rude." While . . . rudeness and other such impolite conduct on the part of a Board agent is certainly not to be

173. *Hotel Equities*, 180 N.L.R.B. at 500.

condoned, the evidence in the record here considered as a whole simply does not measure up, in my judgment, to the allegation that it created "an atmosphere of fear and confusion and thereby destroyed the necessary laboratory atmosphere." . . . [N]o employee testified that he was deterred from casting a ballot because of reports of intimidation emanating from the polling area [n]or, indeed, was there any testimony of observers or employees who had voted to other employees advising them against exercising their franchise.¹⁷⁴

This argument contains a certain logic: given that the Board agent was rude to all, neither side could assert that she was biased against its particular stance in the election. Such reasoning fails to appreciate, however, that the agent's blanket hostility could have destroyed the employees' belief in the Board as an entity committed to protecting their rights in the workplace. The Board ignored this potential problem, however, and adopted the trial examiner's rulings. In an opinion lacking any reasoned analysis of the evidence, the Board concluded that "even assuming, *arguendo*, that [the offensive acts] occurred, we find that under the circumstances they did not create an environment of tension or coercion such as to preclude employees from exercising a free choice."¹⁷⁵

The Board also refused to invalidate an election because of an agent's alleged partisanship in *Wald Sound, Inc.*¹⁷⁶ In this case the Board's field examiner reportedly told two colleagues "that they had gotten themselves a 'winner' " when their tally of the ballots revealed that the union had received a majority of the votes but that there were also numerous challenged ballots.¹⁷⁷ Based on this remark, which the employer viewed as "a partisan characterization which clearly violates the principles expressed in *Athbro*," the employer argued that the election was invalid.¹⁷⁸ The Board disagreed, however, stating:

While we view the Board agent's choice of language as unfortunate, and to be avoided, we agree with the Regional Director's finding that the language, viewed in context, simply indicates that in the Board agent's view the new Board agents who accompanied her were participating in an election

174. *Id.*

175. *Id.* at 490 (footnote omitted). See also *Sioux Prods. Inc. v. NLRB*, 703 F.2d 1010 (7th Cir. 1983), denying enforcement to 258 N.L.R.B. 287 (1981), where the court accepted the Board's determination that an agent's alleged rudeness did not invalidate the election but denied enforcement of the Board's bargaining order for other reasons.

176. 203 N.L.R.B. 366 (1973).

177. *Id.* at 367 (appendix to opinion).

178. *Id.*

presenting unusual complications. Moreover, there is no way in which her remark, made after the ballots had been cast, could have affected the election results.¹⁷⁹

Board member Kennedy took issue with this reasoning in a dissent that relied heavily upon *Athbro*. Asserting that the agent's comment did "not inspire confidence in the impartiality of the Board's election processes" and "was a departure from the standards which the Board seeks to maintain," Kennedy concluded:

When unions and employers invest substantial time, effort, and money in an organizational campaign, it is incumbent upon the Board to conduct an election in a manner which inspires confidence in the impartiality and competence of the Board and its agents. *There is no function or mission of this agency of greater importance than running fair elections.*¹⁸⁰

One could possibly agree with the substantive result reached by the majority in *Wald Sound* while acknowledging that Kennedy's idealism is more in keeping with the spirit of *Athbro*. The majority's basic reasoning—that the agent's "winner" remark was an innocuous comment on the balloting—may well be valid, for it would serve no purpose to permit parties to invalidate elections whenever they can take an ambiguous remark out of context and claim that it demonstrates bias. The majority ignored the spirit of *Athbro*, however, when it emphasized that the remark could not have affected the election's outcome. As Kennedy reasoned, the *Athbro* standard is designed to preserve faith in the Board's standards of integrity, professional competence, and neutrality, not merely to assure that the results are unadulterated. One is particularly disturbed by the fact that the Board majority omitted any discussion of *Athbro* and utilized reasoning that seems contrary to its principle. Moreover, that approach seems superfluous given that the majority rationally could have concluded that the "winner" remark simply did not rise to the level of apparent partisanship condemned by *Athbro*.

*Wabash Transformer Corp.*¹⁸¹ reaffirmed the Board's refusal to set aside elections based on ambiguous statements by its agents. Here the Board agent failed to follow the Board's official language for announcing the opening of the polls and instead stated that the employees could "now vote for your union representative," or words to that effect.¹⁸² The employer argued that this announcement was

179. *Id.* at 366 n.1.

180. *Id.* at 367 (Kennedy, dissenting) (emphasis added).

181. 205 N.L.R.B. 148 (1973), *bargaining order issued*, 210 N.L.R.B. 462 (1974), *enforced*, 509 F.2d 647 (8th Cir.), *cert. denied*, 423 U.S. 827 (1975).

182. 205 N.L.R.B. at 148.

prejudicial because it implied that the workers could not also choose to vote against the union. In a split decision, however, the Board ruled:

[W]e cannot agree that the mere statement of the Board agent that the polls were open and the employees could, if they desired, "now vote for your union representative" is a sufficient basis to set aside the election. Obviously, a Board election is an election to select a union representative. While the Board agent may have and should have made explicit what was implicit in the announcement, i.e., that the right to vote for the union necessarily carried with it the right to vote against the union, we do not believe that the agent's statement was *per se* so violative of the Board's standards of neutrality or so prejudicial to the employees' right to cast a negative vote that a new election must be directed.¹⁸³

Relying on *Athbro*, Chairman Miller dissented:

It is undisputed that the Board agent identified herself as a representative of this Board and then proceeded to announce the opening of the polls in a manner which substantially departed from our official instructions to voters. My colleagues are willing to excuse this particular deviation since in their opinion the Board's preelection notices and the Employer's campaign literature distributed to employees adequately neutralized any prejudicial effect the Board agent's statement may have [had] on the prospective voters. I am unwilling to so speculate, and am of the view that where a representative of this Board, even unwittingly, fails to preserve not only the fact of our neutrality, but also the appearance of neutrality, we must rerun the election.¹⁸⁴

The Eighth Circuit agreed with the Board majority on the grounds that no evidence indicated that employees were misled by the agent's statement, that there was no claim that the agent actually favored the union, and that under the circumstances "the ruling that the questioned statement did not breach the neutrality of the election procedures fell within the Board's discretionary powers."¹⁸⁵ In all probability, the Eighth Circuit was correct; the agent's statement appears to have been nothing more than an innocent slip of the tongue and it would be wasteful to permit parties to force rerun elections based on such trivial miscues. Once again, however, one is troubled by the Board's paucity of analysis. Given dissenting Chairman Miller's reliance on *Athbro*, the majority needed

183. *Id.*

184. *Id.* at 149 (dissenting opinion) (footnote omitted).

185. *NLRB v. Wabash Transformer Corp.*, 509 F.2d 647, 648-49 (8th Cir. 1975).

to explain why the statement did not impair the Board's standards of integrity and impartiality. Instead, however, the Board once again disregarded *Athbro* as irrelevant jurisprudential flotsam.

In a decision soon to follow, however, the Board reiterated the concern for procedural integrity that had flourished in *Athbro*. Although it curiously did not cite that precedent, *Glacier Packing Co.*¹⁸⁶ took a carefully prophylactic approach toward improprieties of a field agent that allegedly impaired the free choice of employees. In that case, the Board agent confronted two of the employer's election observers, tore off their anti-union badges, and loudly chastised them for wrongfully electioneering in the polling area. In addition, the agent castigated the employer's director of personnel for distributing anti-union literature near the polling place, which precipitated an argument in which numerous employees sided with the agent and jeered at the director of personnel. Based on these actions, the employer challenged the validity of the victory by one of the two competing unions.¹⁸⁷

The Board's opinion is noteworthy, for it first emphasized that the agent was correct in stopping the employer's electioneering. The Board explained:

At the outset, we reject the Employer's argument that observers designated by the parties involved in Board-conducted elections have a right to wear campaign material favoring one of the choices on the ballot. Clearly the Board's instructions to its agents conducting elections . . . are consistent with the prohibition against electioneering at or near the polls. Board agents conducting elections may therefore delineate an area within which electioneering is prohibited; they must exercise their judgment as to what constitutes electioneering activity; and they are required to take reasonable measures to restrict electioneering activity which comes to their attention, consistent with their other obligations.¹⁸⁸

The Board then stressed, however, that its agents must always preserve the appearance of neutrality:

Board agents in conducting elections on behalf of the Board must endeavor to maintain and protect the integrity and neutrality of its procedures. Therefore, while taking all practicable measures to implement the prohibition against electioneering at or near the polls, they must take care that their actions do not tend to foster in the minds of the voters

186. 210 N.L.R.B. 571 (1974).

187. *Id.* at 571-72.

188. *Id.* at 573 (footnotes omitted).

the impression that the Board is not neutral with regard to the choices on the ballot. For, the Board's role in conducting elections must not be open to question. Thus, actions by a Board agent conducting an election, which could reasonably be interpreted as impugning the election standards we seek to maintain, are sufficient grounds for setting aside the election.¹⁸⁹

Applying this philosophy to the case at hand, the Board concluded that employees who witnessed the two incidents could have interpreted the Board agent's remarks and actions as indicative of the Board's opposition to the employer's position. Furthermore, because the Board agent's conduct "may have had a substantial impact on the results of the election," the Board set aside the election and ordered a new one.¹⁹⁰

On one level, *Glacier* appears to reject a focus on possible outcome-determinism in favor of a return toward the idealism of *Athbro*. Upon closer inspection, however, the idealism is actually quite cautious. True, the Board's statement that "actions by a Board agent conducting an election, which could reasonably be interpreted as impugning the election standards we seek to maintain, are sufficient grounds for setting aside the election,"¹⁹¹ plainly harks back to *Athbro*. The Board also emphasized, however, that the agent's misconduct in *Glacier* "may have had a substantial impact on the results of the election,"¹⁹² which smacks of outcome-determinism. It therefore was left unclear whether the *Glacier* Board accepted the full import of *Athbro* that elections could be set aside due to the appearance of partisanship regardless of the effect on the workers' voting behavior.

Subsequent Board decisions have aggravated rather than resolved this facial ambiguity in *Glacier*. In *Abbott Laboratories v. NLRB*, for example, the Fourth Circuit held that there was "no error of fact or law" in the Board's conclusion that allegedly improper remarks were not prejudicial "since they were not made within the hearing of anyone who had not yet voted, and were not so extreme . . . that they destroyed the appearance of the Board's impartiality."¹⁹³ This statement seemingly suggests that either actual voter prejudice in the election *or* an impairment of the Board's perceived neutrality would justify rerunning an election. In practice, however, the Board

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. 540 F.2d 662, 665 n.1 (4th Cir. 1976), *enforcing* 217 N.L.R.B. 859 (1975).

has remained reluctant to find that either condition exists. In *NLRB v. Michigan Rubber Products*,¹⁹⁴ the Sixth Circuit reviewed a Board decision that represented the converse of *Glacier*: the agent wrongfully prohibited a form of acceptable electioneering (posting anti-union cartoons) but did so in a manner that arguably did not suggest partisanship (because the agent ordered both the union's observer and the employer's representatives to remove the employer's cartoons). The court enforced this decision, stating:

The case here is much weaker for the Board agent's compromise of neutrality [than in *Glacier*]. The union and company observer together removed the cartoons, with help from the company personnel director. This bipartisan action should have negated any inference of impartiality [sic, presumably partiality] on the part of the Board. There would have been more of an appearance of bias if the Board agent had removed the cartoons herself, as in *Glacier*. The Board found that its agent was overzealous; however, the Board did not abuse its discretion in determining that it was highly unlikely that the action could have had any effect on the outcome of the election.¹⁹⁵

This reasoning is misguided in several respects. First, as the court acknowledged, the employer "was within its rights in so displaying the cartoons" and the Board admitted that its agent was "overzealous" in demanding their removal.¹⁹⁶ Given this clear violation of the employer's campaign rights,¹⁹⁷ one could argue that the Board

194. 738 F.2d 111 (6th Cir. 1984) (per curiam), enforcing 251 N.L.R.B. 74 (1980). For further discussion of *Michigan Rubber* see *supra* notes 131-133 and accompanying text.

195. 738 F.2d at 115.

196. *Id.*

197. Scholars such as Paul Weiler might object to any line of analysis that focuses on the campaign "rights" of employers. In his insightful critique of existing law, Weiler argues: "Because only the employees' interests are supposed to count in the certification decision, the employer can claim no positive right to influence the employees' vote." Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1814 (1983). Even Weiler acknowledges, however, that an argument can be made in favor of our current system which permits employers to campaign against unionization:

A proponent of the current American model of the extended representation campaign . . . might grant that the employer has no inherent right to protect its own interests by campaigning against collective bargaining, yet at the same time he might defend the employer's participation in election campaigns as an aid to informed employee choice. An inevitable imbalance, he would argue, exists between the employees who support the union and those who oppose it. The supporters of the union have its resources and expertise to help them make their case. The antiunion employees are disorganized and unsophisticated. Such an unequal contest seems incompatible with section 7 of the NLRA, which grants employees the right to decide not to

had engaged in a per se violation of its own election standards. Second, the court's insistence that the Board agent did not remove the cartoons herself seems woefully misdirected; forcing a party to dig its own grave (with the cheerful assistance of its rival) could, if anything, heighten the appearance of Board partisanship. Third, the Board's determination that it was unlikely that the coerced removal affected the outcome of the election conspicuously ignores *Athbro's* insistence on the intrinsic importance of maintaining the purity of election standards. For these reasons, *Michigan Rubber* involves both a questionable distinction of *Glacier* and a failure to heed the message of *Athbro*.

Furthermore, as *NLRB v. Fenway Cambridge Motor Hotel*¹⁹⁸ exemplifies, even when tribunals purport to apply the principle of *Athbro* they frequently distinguish the case on rather counterintuitive grounds. In *Fenway*, the employer sought to overturn an election based on an employee's affidavits that when he voted the Board's agent originally instructed him to mark the pro-union box on the ballot but, when he became angry, then pointed to both choices.¹⁹⁹ The regional director acknowledged that if he credited the employee's affidavits rather than the conflicting testimony of the agent and election observers, then a "serious breach may have occurred in

engage in collective bargaining. If this right is to have any meaning, employees opposing unionization need the support of the employer, which, in pursuit of its own interest in fending off unionization, will perform the function of deflating the promises of the union proponents and pointing out the risks for the employees in taking the path of collective bargaining. This argument for designing the representation process to permit effective employer participation rests, then, not on the principle of fairness to employers, but rather on the practical judgment that only the employer can defend the statutory rights of the antiunion employees.

Id. at 1815 (footnotes omitted). I concur with Weiler's assessment that "this is the best case that can be made for the American-style representation campaign." *Id.* It is not the employer's "right" to campaign that concerns me, it is the freedom of employees to make an informed choice in a laboratory free from the appearance of Board partiality. Despite Weiler's recognition of the argument quoted above, his primary assertion throughout *Promises to Keep* is that the current campaign system is so fraught with unfair labor practices by employers and the remedies are so inadequate that it should be replaced by a Canadian-style system of "instant elections." It would be beyond the scope of this Article to explore all of my objections to his provocative thesis, but two points are in order. First, however prevalent employer abuses may be, I believe that the answer lies in more rigorous prosecution and punishment of such employers than in depriving workers of a full opportunity to hear and evaluate arguments both in favor of and in opposition to unionization. Second, given that Weiler's bold proposal has not come to pass, we should at least try to assure that the Board maintains its integrity and impartiality in representation matters.

198. 601 F.2d 33 (1st Cir. 1979), enforcing 237 N.L.R.B. 1540 (1978).

199. 601 F.2d at 36.

the laboratory conditions required by the Board.”²⁰⁰ He concluded, however, that no hearing was necessary to resolve this conflict because even if the employee were telling the truth those present at the time already had voted, the employee did not relate the incident to anyone else until after the election, and his own vote had not been swayed by the alleged partisanship.²⁰¹

This determination, which was adopted by the Board, was upheld by the First Circuit even though it rejected the regional director’s reasoning. The court held that “the Regional Director erred in applying only an ‘impact’ standard to determine whether the elective process was contaminated” and stated that, in light of *Athbro*, the proper approach “is to assess on a case by case basis whether the alleged misconduct ‘tends to destroy confidence in the Board’s election process’ or ‘could reasonably be interpreted as impugning the election standards’ sought to be maintained.”²⁰²

This assertion of *Athbro* proved hollow, however, for the court enforced the Board’s opinion based on reasoning quite similar to that of the regional director. The court argued:

Examined in light of the *Athbro* standard, the facts reveal that the Board could reasonably decide that the neutrality of the Board’s procedures was not compromised by the agent’s purported statement to the employee. Assuming that [the employee’s] affidavits reflect the truth, he clearly indicated that the agent immediately cured whatever contamination of the election process she might have caused when she informed him that he was free to check either the “Yes” or “No” box. Given that no complaints of this nature were presented by any of the other some one hundred voters, that no one else was a party to the alleged conversation, and that [the employee] stated that he was not influenced by the agent’s conduct, we consider this case distinguishable from *Athbro*²⁰³

Rather than a reasoned application of *Athbro*, the First Circuit’s logic appears to be an alarming departure from its precepts. In the first place, its assertion that the agent “cured” whatever flaw she created is singularly unconvincing. If we believe the employee’s story—as the court did for purposes of its analysis—the agent retreated from her pro-union stance only after the employee displayed anger at her partisanship. The message that she favored the union

200. *Id.*

201. *Id.*

202. *Id.* at 36-37. The court noted that “[w]hile the procedural history of *Athbro* is curious, its holding continues to be the yardstick against which misdeeds of Board agents are measured.” *Id.* at 37 (footnote omitted).

203. *Id.*

had already been sent, and its original force was not completely abated by the fact that she later pointed to both boxes to avoid a confrontation.

The court's other reasons are equally unsatisfactory. That no other misconduct occurred and that there were no other parties to the conversation fail to distinguish *Fenway* from *Athbro*, for the latter case involved only an isolated act of fraternization that was witnessed solely by an employee who already had voted. Furthermore, the First Circuit's insistence that the employee's vote was not influenced also ignores *Athbro*'s focus on whether the Board's appearance of integrity and impartiality has been undermined, regardless of whether particular votes have been influenced.

Fenway thus presents a double irony: first, that the court disagreed with the regional director's reasoning but affirmed the Board's result on equally unsatisfactory grounds; and second, that the court diminished the force of the *Athbro* standard while purporting to uphold it. We are thus left with a case involving allegations of grave bias in which the Board failed to apply *Athbro* and the court of appeals distinguished away its true significance and power.

Moreover, *Fenway* was not an isolated aberration. In fact, a similar issue was resolved in a practically identical fashion in *Eskimo Radiator Manufacturing Co.*,²⁰⁴ where the employer objected that the Board agent had encouraged an employee to vote for the union. The Board overruled that objection based on the regional director's determination that the evidence "revealed, at most, only an apparent misunderstanding by one voter of the agent's explanation to him of how to mark the ballot, and this was insufficient evidence to establish the 'reasonable possibility of irregularity requisite to setting the election aside.'"²⁰⁵

This determination was enforced by the Ninth Circuit, which concluded:

Generally, the board will overturn an election if the conduct of the board agent tends to destroy confidence in the board's election process, or [if it] could reasonably be interpreted as impugning [sic] the [Board's] election standards. The board agent's statements were misunderstood. No other employees heard what the agent said. Furthermore, *Eskimo Radiator* does not offer evidence which shows that voters were swayed by the agent's statement.²⁰⁶

204. 255 N.L.R.B. 304 (1981), enforced *per curiam*, 688 F.2d 1315 (9th Cir. 1982).

205. 255 N.L.R.B. at 305.

206. 688 F.2d at 1319 (citing *NLRB v. Fenway Cambridge Motor Hotel*, 601 F.2d 33, 37 (1st Cir. 1979)).

As in *Fenway*, both the Board and the court failed to subject the alleged misconduct to the careful scrutiny of *Athbro*, choosing instead to emphasize that no votes actually were influenced. One might argue that the result in *Eskimo Radiator* is palatable given the underlying factual conclusion that the Board agent had not encouraged the voter to support the union. The problem persists, however, that the employee believed the agent had done so, which also could impair the Board's image of impartiality.

This, of course, raises the fundamental question of whether the Board should evaluate the appearance of impropriety based on its own conclusion as to whether the agent acted improperly or, in contrast, from the employee's perspective of what took place. Although *Eskimo Radiator* plainly prefers the former position, the Sixth Circuit disagreed in *NLRB v. State Plating & Finishing Co.*²⁰⁷ In *State Plating*, the company's vice president explained that the employer could not increase wages during the time period between the union's demand for recognition and the election because it might appear as though it were unlawfully attempting to buy votes.²⁰⁸ When the employees contacted a Board agent by telephone to confirm this, however, she told them that "it was possible for an employer to give a pay raise even though an election is coming."²⁰⁹ This, unfortunately, led many employees to believe that the vice president had lied to them and the Board refused his request to clarify the law regarding pre-election benefits after the employees rejected his explanations.²¹⁰ The employer therefore argued that the election was fatally unfair because the agent had given the employees her opinion on a local issue that was important to the outcome of the election.²¹¹

207. 738 F.2d 733 (6th Cir. 1984), *denying enforcement to* 262 N.L.R.B. 132 (1982).

208. 738 F.2d at 735. The vice president's statement was based upon the fact that benefits granted during the critical preelection period frequently are found to be unlawful inducements not to support the union. In fact, as the Sixth Circuit noted, "[i]t would have been well nigh impossible for State Plating to rebut the presumption of illegal motive with respect to any raises it might have awarded before the election." *Id.* at 741 (footnote omitted). As the Supreme Court declared in *NLRB v. Exchange Parts Co.*:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

375 U.S. 405, 409 (1964) (footnote omitted). For a provocative critique of this presumption of inherent coercion, see Jackson & Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1 (1982).

209. 738 F.2d at 736.

210. *Id.*

211. *Id.* at 738.

This objection was overruled by the Board²¹² but sustained by the Sixth Circuit. The court, which cited *Athbro*, first explained that whether the agent knew she was wrongfully commenting on a local issue was irrelevant because “[i]mpairment of Board neutrality is dependent on the employee’s perception of the Board agent’s comments, not on who is to blame for that perception.”²¹³ Indeed, “[t]he appearance of compromise of Board neutrality will warrant setting aside an election even if the Board in fact remains neutral.”²¹⁴ The court then concluded:

The Board’s neutrality was destroyed by the NLRB agent’s comment on a local issue which misled employees into believing that their employer had lied to them. The Board’s findings to the contrary are not supported by substantial evidence. As the election was tainted by this failure of Board neutrality, the union was improperly certified. Accordingly, the Board’s application for enforcement of its bargaining order is denied.²¹⁵

State Plating thus marked a rejection of *Eskimo Radiator* (as well as Judge Gasch’s pre-*Athbro* decision in *Bullard*²¹⁶) in that it focused on the employees’ perception of bias rather than on whether bias existed in fact. This departure seems entirely reasonable given that the primary reasons for ordering new elections are to assure the employees’ freedom of choice and preserve faith in the voting process rather than to punish Board agents for misconduct. Moreover, it is in keeping with the approach of *Provincial House, Inc. v. NLRB*²¹⁷ that elections must be invalidated even when agents “involuntarily” undermine the Board’s appearance of neutrality. As was also true in *Provincial House*, however, it is regrettable that it was left to a circuit court rather than the Board to defend the vitality of *Athbro*.

Furthermore, as *NLRB v. Allen’s I.G.A. Foodliner*²¹⁸ demonstrates, the public cannot rest assured that appellate courts routinely will uphold the spirit of *Athbro* when the Board itself fails to do so. In

212. 262 N.L.R.B. 132 (1982).

213. 738 F.2d at 739 n.5.

214. *Id.* at 740.

215. *Id.* at 742 (footnote omitted). In contrast with *State Plating*, the Board held that *Athbro* was not violated when union advocates mischaracterized a regional director’s report during a representation campaign. See *Six Flags Over Mid-America, Inc.*, 253 N.L.R.B. 111 (1980), enforced per curiam, 638 F.2d 59 (8th Cir. 1981). *Six Flags*, of course, represents a far different situation from *State Plating* because it did not involve a Board agent’s commenting on a campaign issue.

216. *Bullard Co. v. NLRB*, 253 F. Supp. 391 (D.D.C. 1966), discussed *supra* at text accompanying notes 50-53.

217. 568 F.2d 8, 10-11 (6th Cir. 1977), discussed *supra* at text accompanying notes 90-94.

218. 652 F.2d 594 (6th Cir. 1980), enforcing 236 N.L.R.B. 1342 (1978).

Allen's, the Sixth Circuit enforced the Board's bargaining order even though the Board agent stated her belief that the employer and the union were just putting on a show for the workers and that, in her opinion, "if the employees had been treated right she would not be there holding the election."²¹⁹ Although such a statement plainly suggests that the employer had been abusing its workers, the court concluded:

The Board's determination that the Board Agent's conduct did not prevent a fair election was well within its discretion. The Agent's statement to the Company observer was improper, but it was not prejudicial. The evidence establishes that no voters were present in the polling place at the time when the remark was made and that the incident took place at a time when most of the voters had cast their ballots. Also, there is no evidence in the record that the Agent's remark was relayed to any voter who had not yet cast his/her ballot.²²⁰

Once again, we are faced with a situation in which the Board and court blithely ignored *Athbro*, where it was equally true that the objectionable conduct did not occur in the presence of employees who had not yet voted and in all probability did not influence their votes. Furthermore, the court could even cite a Board opinion—*Shorewood Manor Nursing Home & Rehabilitation Center*²²¹—to legitimate its apparent neglect of *Athbro*. Given that the Board itself frequently has abandoned the teachings of *Athbro*, it is only to be expected that circuit courts may follow suit.²²²

219. 652 F.2d at 595.

220. *Id.* at 595-96.

221. 217 N.L.R.B. 1106 (1975), discussed *supra* at text accompanying notes 146-151.

222. Of course, the Board's inconsistent and unclear treatment of the *Athbro* principle in no way excuses the equally arbitrary decisions by various reviewing courts. After all, it is the assumption of careful judicial review that helps legitimate the very existence and power of the Board and other administrative agencies. As Gerald Frug has reasoned:

Unlike both the formalist and the expertise models [of administrative law], which seek to justify bureaucracy by properly organizing its subjective and objective components, the judicial review and market/pluralist models seek outside help to legitimate the bureaucratic structure. The judicial review and market/pluralist models take as their premise that no form of bureaucratic organization can be self-policing. The judicial review model assigns the role of police officer to the courts, and the model's ability to legitimate bureaucracy rests on this judicial role. Bureaucratic legitimacy is derived from the courts' own legitimacy: it is because we can trust the courts that we can trust the bureaucracy.

Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1334 (1984).

Although Professor Frug delivers a provocative theoretical critique of the judicial review model (as well as other traditional conceptualizations of administrative law), it is fair to say that many of us share that model's concern for the role of judges in assuring bureaucratic legitimacy and are troubled when courts apparently fall into the same errors as the administrative agencies themselves.

In light of decisions such as *Allen's*, one might be tempted to assume that *Athbro* is a dead letter. In truth, however, its principle was applied recently in *Hudson Aviation Services*,²²³ where the Board agent engaged in a heated argument with the employer's assistant manager over whether a preelection agreement had been breached. In a divided opinion, the Board reasoned:

[T]he Board agent's conduct communicated the impression that the Board was displeased with and was criticizing the Employer's assistant manager and, thereby, undermined the indispensable perception of Board neutrality in the election.

. . . [E]ven if the Board agent had correctly relied on a preelection agreement to achieve her goal of removing the assistant manager from the dispatcher's office, her conduct nevertheless would warrant setting aside the election. Contrary to the dissent's implication, the issue before us is not whether the Employer engaged in objectionable conduct but, rather, whether the actions of the Board agent reasonably could be interpreted as impugning the election standards we seek to maintain.²²⁴

Hudson Aviation stands as a prominent and long overdue resurrection of the *Athbro* doctrine by the Board itself. As the hearing officer reasoned, under *Athbro* the election was invalid even though only two employees learned of the agent's outburst before they voted and the Board agent's tantrum could not have altered the election's outcome.²²⁵ The Board approved of this reasoning, stating:

We further agree with the hearing officer's reliance on *Athbro Engineering Corp.*, and *Glacier Packing Co.* As noted by the hearing officer, the Board in *Athbro* abandoned a standard of assessing only whether Board agent conduct affected the votes of employees. Thus, the Board there set aside the election because the Board agent's conduct . . . tended to destroy confidence in the Board's election process or reasonably could have been interpreted as impugning the standards of integrity and neutrality which the Board seeks to maintain in elections. Significantly, the Board set aside the election where the Board agent's conduct was observed only by one employee who had already voted and who, in turn, had reported the incident to the employer, and notwithstanding the fact that the Board agent's conduct did not affect the votes of employees.²²⁶

223. 288 N.L.R.B. No. 94 (April 29, 1988).

224. *Id.* (footnote omitted).

225. *Id.*

226. *Id.* at n.6 (citing *Athbro Precision Eng'g Corp.*, 166 N.L.R.B. 966 (1967); *Glacier Packing Co.*, 210 N.L.R.B. 571 (1974)).

Upon reading *Hudson Aviation*, it could be argued that the Board has returned wholeheartedly to the idealistic, prophylactic standard of *Athbro*. The most recent Board decision in this area, however, suggests that it would be premature to conclude that *Hudson Aviation* will join *Athbro* and *Glacier* as a powerful triad protecting the Board's appearance of integrity and neutrality.

In *S. Lichtenberg & Co.*, the Board refused to vacate a union's victory despite a Board attorney's highly ambiguous comments that were published shortly before the election.²²⁷ Unfair labor practice charges had been filed against the employer and a local newspaper reporter interviewed a union advocate, representatives of the employer, and a Board attorney concerning those charges. The article summarized the union's allegations, the employer's responses, and the Board attorney's comments, all in a colloquial manner. In one part of that article, the Board attorney was quoted as stating that "[w]hat is illegal . . . is an employer that does not give a flying fig before about what is wrong [at the workplace] and all of a sudden, when the union comes in [to campaign], they want to be Mr. Good Guy."²²⁸

At least two employees testified that this statement led them to believe that the Board favored the union.²²⁹ Nonetheless, the Board upheld the election on the following grounds:

We have reviewed under the standard set forth in *Athbro Precision Engineering Corp.*, the judge's overruling of the Employer's objection that a Board attorney's comments in a local newspaper article published 5 days before the election impaired the Board's appearance of neutrality. The Board attorney's statements, read in the context of the entire article, which included statements of the Employer's attorney as well, no more than explained, in an accurate (although colloquial) manner, the nature of the allegations of an unfair labor practice complaint that had recently issued against the Employer, pursuant to the Regional Director's investigation of contemporaneous charges filed by the Union. That complaint had already been copied by the Union and widely distributed among unit employees, so the Board attorney's statements did not refer to a matter whose existence was unknown to the employees. The article repeatedly asserted that the complaint against the Employer involved "allegations." It also noted that the decision on the complaint would be made by a special magistrate. Nevertheless, some confusion among employees, not fa-

227. 296 N.L.R.B. No. 167 (Oct. 11, 1989).

228. *Id.*

229. *Id.*

miliar with Board processes, concerning the nature of the Board's role in the pending election was both reasonable and unavoidable. That confusion, however, stemmed not from the attorney's comments, but from the exercise of the Regional Director's dual responsibilities, on behalf of the General Counsel in the unfair labor practice proceeding and on behalf of the Board in the representation proceeding. In these circumstances, the mere fact that the attorney described the position the General Counsel was taking in the complaint cannot reasonably be found to constitute objectionable conduct destructive of Board neutrality under the *Athbro* standard.²³⁰

Whether *Lichtenberg* reaches a just result is debatable. Although this case is not as troublesome as *Botany Worsted Mills*,²³¹ the Board's reasoning in *Lichtenberg* leaves much to be desired. The Board agent's remarks were ill-considered, ambiguous, and may well have caused employees to believe that the Board favored the union in the election. Furthermore, the fact that laypersons can easily be confused about the Board's different roles in elections and unfair labor practice proceedings would seem to condemn rather than excuse the agent's remarks. Given the likelihood of confusion, the agent should have taken particular care to clarify the Board's neutrality with regard to the upcoming election. The result in *Lichtenberg* may be defensible but the Board's reasoning is just too shallow.

Furthermore, it is troublesome that the Board simply cited *Athbro* without any discussion of its rationale or explicit effort to apply its reasoning to the facts at hand. In this regard, *Lichtenberg* exemplifies the Board's frequent and regrettable habit of merely citing *Athbro* to legitimate diverse conclusions in cases that appear highly analogous. Citing *Athbro* in such a perfunctory manner can only deepen the confusion in this area of the law. Indeed, *Lichtenberg* suggests that the Board will continue to send occult and contradictory messages concerning the problem of perceived partisanship.

D. *The Problem of Other Administrative Irregularities*

As discussed above, fraternization, the delegation of duties, and allegedly partisan statements or actions may all raise serious questions concerning the Board's appearance of integrity and impartiality. There are a number of other ways, however, in which the Board's aura of neutrality may be undermined. Although these problems do not fit neatly into discrete categories, the concerns they

230. *Id.* (citing *Athbro Precision Eng'g Corp.*, 166 N.L.R.B. 966 (1967)).

231. 56 N.L.R.B. 370 (1944). For a discussion of *Botany Worsted*, see *supra* notes 30-36 and accompanying text.

raise merit the attention of anyone seriously concerned about the Board's role in conducting representation elections. Furthermore, the same doctrinal conflicts and competing visions of election standards are replicated in such cases, with the same disturbing inconsistencies we have seen above. Regardless of the type of alleged misconduct involved, the Board and the courts have failed to present a coherent and predictable picture of how these problems should be resolved in particular cases.

Regardless of the particular allegation at issue, the Board is reluctant to hold that its agents have spoiled an election's laboratory conditions so severely that the vote must be set aside. This reluctance persists, moreover, even when Board agents have failed to follow the Board's own procedures. In *Polymers, Inc.*,²³² for example, the employer requested reconsideration of the Board's prior decisions in representation and complaint proceedings on the grounds that an agent had failed to comply with a then-current version of the Board's Casehandling Manual and a memorandum issued by the local regional director to his professional staff. More specifically, the employer argued that the agent's failure to retain physical custody of the sealed ballot box and blank ballots at all times violated instructions set forth in those two documents and that this deviation "requires the invalidation of the election, either because such rules are an official embodiment of what constitutes 'appropriate standards' or because adherence to said rules is 'required.'"²³³ The Board rejected that assertion, however, stating that "the Board and its agents cannot be considered 'bound' by [such rules] in the sense that any deviation from these rules by a Board agent would *require* nullification of an election."²³⁴

The Board reasoned that although the introduction to the Casehandling Manual stated: "Adherence to [the contents of the Manual] is required," this was merely "an instruction by the General Counsel to his subordinates relating to the performance of their duties, and not a declaration by the Board as to the standards to be applied in appraising the validity of an election."²³⁵ The Board then explained:

Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought

232. 174 N.L.R.B. 282, *enforced*, 414 F.2d 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970).

233. 174 N.L.R.B. at 282.

234. *Id.* at 282 (emphasis in original).

235. *Id.* at 282 n.5.

to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.²³⁶

Indeed, the Board reasoned:

It might well be that, in a given case, even literal compliance with all of the rules, regulations, and guidelines would not satisfy the Board that the integrity of the election was not compromised. Conversely, the failure to achieve absolute compliance with these rules does not necessarily require that a new election be ordered, although, of course, deviation from standards formulated by experts for the guidance of those conducting elections will be given appropriate weight in our determinations. In considering whether there has been a breach of security in an election, or a reasonable possibility of such a breach, we are examining into questions of fact and inference. To answer these questions, we look at all the facts.²³⁷

The Board then concluded that "desirable election standards were met" despite the agent's alleged violation of the rules because of "the extreme improbability of any violation of the ballot box" and "the absence of any affirmative indication of tampering."²³⁸ This decision may be defended on the grounds that the Board wisely chose to focus on whether the election's integrity actually had been compromised in that particular case rather than on whether its internal instructions had been precisely followed. This approach

236. *Id.* at 282 (footnotes omitted).

237. *Id.* at 282-83. The Manual now states the following in its introductory "Purpose of Manual":

This manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to powers delegated to him/her by the Board. It is intended to provide procedural and operational guidance for the Agency's staff in the handling of representation cases under the National Labor Relations Act. It is not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law. The guidelines included are not Board rulings or directives and although it is expected that they will be followed by staff employees in the handling of cases, it is also expected that there may be departures through exercise of professional judgment in varying circumstances. They are not intended to be and should not be viewed as binding procedural rules.

NLRB, NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL (PART TWO) REPRESENTATION PROCEEDINGS (Sept. 1989).

238. 174 N.L.R.B. at 283.

may be sensible because, as the Board realized, technical violations of the Casehandling Manual may not necessarily raise real doubts concerning an election's fairness whereas such concerns can exist even when an agent rigidly adheres to the Manual.

The downside, of course, is that the Board's failure to insist on the strict observance of its own rules and guidelines could convey the perception that the Board is "above" its own internal law. Intertwined with this concern is the problem that it becomes increasingly difficult for citizens to appraise the legitimacy of Board actions when those actions are measured on an ad hoc case-by-case basis rather than in accordance with written, strictly-enforced rules. This case-by-case approach may well be justified insofar as it permits the Board to preserve flexibility and concentrate on the actual procedural fairness of elections, but its inevitable price is that it deprives the public of clear, formal criteria by which to judge the Board's conduct.

Similar issues appeared in *Benavent & Fournier*,²³⁹ where a majority of the Board overruled the employer's objection that the agent had left an unsealed ballot box and unused ballots in the custody of election observers for several minutes. The majority reasoned that although "it is better procedure for the Board Agent to retain custody of the unmarked ballots at all times," the election was valid because the observers safeguarded the ballots, no one touched them in the agent's absence, and therefore "there could not have been any effect on the election."²⁴⁰

Such reasoning seems acceptable if one focuses on the fact that no "harm" was done in the sense that apparently no one stuffed the ballot box. Citing *Athbro*, however, Board member Kennedy dissented on the grounds that the agent's action transgressed the "cardinal principle" of the Board's 1967 Field Manual that "before, during, or after an election, no one should be permitted to handle any ballot except a Board agent and the individual who votes that ballot."²⁴¹ Based on this "serious irregularity," the fact that unauthorized access to the ballot box was "possible," and that the employer's observer had refused to sign a certificate stating that the box had been protected at all times, Kennedy believed that the agent's conduct violated *Athbro's* concern for maintaining the Board's election standards.²⁴²

239. 208 N.L.R.B. 636 (1974).

240. *Id.* at 636 n.2.

241. *Id.* at 637 (Kennedy, dissenting).

242. *Id.* at 636-37 (Kennedy, dissenting).

Benavent & Fournier is a difficult case, for one can sympathize with Kennedy's position that the agent's failure to follow the Field Manual had made election tampering possible and that this obviously could raise doubts concerning both the integrity of the Board's processes and the validity of the results. Those doubts should be counterbalanced, however, by the majority's conclusion that no one actually had tampered with the ballots. Kennedy's concern for election standards is commendable, but the majority may have been correct in its conclusion that there was no threshold proof of ballot interference to give rise to legitimate questions regarding the Board's neutrality or integrity. *Polymers* and *Benavent & Fournier* therefore may be consistent with the *Athbro* principle in that they simply refused to invalidate elections based on what seemed to be technical transgressions by Board agents that did not seriously undermine the Board's appearance of fairness and impartiality.²⁴³

Many alleged improprieties can arise from a Board agent's handling of challenges to voters. Under the Department of Labor's regulations, a Board agent, the employer, and the union may each challenge a potential voter's eligibility to participate in an election. The voter then casts a challenged ballot and the Board later resolves the eligibility question if it could alter the election's outcome.²⁴⁴ As

243. Cf. *Skyline Corp. v. NLRB*, 613 F.2d 1328, 1332-33 (5th Cir. 1980), enforcing 240 N.L.R.B. 737 (1979) (upholding election despite employer's allegation that Board Manual was violated because agent did not seal envelopes containing challenged ballots with tape, there was no label identifying the person who sealed envelope, and no document was filed stating where challenged ballots were stored); *NLRB v. Capitan Drilling Co.*, 408 F.2d 676 (5th Cir. 1969), enforcing 167 N.L.R.B. 144 (1967) (upholding election in the face of employer's contention that one of the seams on the ballot box was not sealed with tape); *Brink's Armored Car*, 278 N.L.R.B. 141 (1986) (disapproving of Board agent's decision to let employee pick up mail ballot for coworker but certifying election because the ballot never actually left the agent's possession); *Niagra Wires, Inc.*, 238 N.L.R.B. 1347, 1347 n.2 (1978) (holding that slight movement of tape sealing the ballot box was "truly *de minimis*"). My discussion of *Polymers* and *Benavent & Fournier* is by no means an exhaustive treatment of the various approaches the Board has taken concerning allegations that ballot boxes were left unattended during an election. To the contrary, I have chosen to examine only two leading cases in that area which contain discussions most relevant to the topic of this Article. Readers seeking a more in-depth analysis of the Board's efforts to safeguard the integrity of ballot boxes should consult WILLIAMS, *supra* note 4, at 408-13.

244. As 29 C.F.R. § 102.69 (1988) provides:

Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded . . . [I]f the challenged ballots are sufficient in number to affect the results of the election, the regional director shall . . . initiate an investigation, as required, of such objections or challenges.

Similarly, 29 C.F.R. § 101.19 (1988) (Board's Statements of Procedure) states that "[t]he Board agents and authorized observers have the privilege of challenging for rea-

the Board acknowledged in *Schwartz Brothers, Inc.*,²⁴⁵ section 11338 of the Board's Field Manual at that time provided that "the Board agent will not make challenges on behalf of the parties, whether or not such parties have observers present." In that case, however, the agent stated challenges raised by the union because the employer refused to permit the union's would-be observer (a recently terminated employee) to remain on the premises. Citing *Athbro*, the employer argued that this gave the impression that the Board favored the union in the election. The regional director disagreed, however, finding that the Board's neutrality had not been compromised by the action and that the agent's departure from the Field Manual's guidelines was justified because the union could not supply another observer and potentially ineligible voters could have cast ballots if the agent had not taken the role of challenging them.²⁴⁶ Based on this ruling, the Board certified the election and ordered the employer to bargain with the union.²⁴⁷

This bargaining order was then enforced by the D.C. Circuit.²⁴⁸ The court emphasized that the Field Manual simply provides guidance for Board personnel that must be tempered according to the particular circumstances that arise in elections²⁴⁹ and that the agent had merely "stated" the challenges that the union had "made" on its list of challenges.²⁵⁰ The court therefore concluded that "neutrality

sonable cause employees who apply for ballots" and that "[i]f challenged ballots are sufficient in number to affect the results of the election, the Regional Director conducts an investigation and rules on the challenges."

245. 194 N.L.R.B. 150, 151 (1971), *enforced*, 475 F.2d 926 (D.C. Cir. 1973).

246. 194 N.L.R.B. at 150-51.

247. *Id.* at 151, 153.

248. NLRB v. *Schwartz Bros., Inc.*, 475 F.2d 926 (D.C. Cir. 1973).

249. *Id.* at 929 n.3.

250. *Id.* at 928, 930 (emphasis in original). Section 11338 now provides in relevant part:

Any observer has the right to challenge a voter for cause. The Board agent must challenge anyone whose name is not on the eligibility list or who has been permitted by the Board to vote subject to challenge. Also, the agent must challenge a voter if he/she knows or has reason to believe that the voter is ineligible to vote, but, in this instance only if none of the parties voices a challenge on that ground: The Board agent will not make challenges *on behalf of the parties* whether or not such parties have observers present. See *Galli Produce Co.*, 269 NLRB 478 (1984). However, if any party genuinely cannot obtain an observer, the Board agent should, on good cause alleged by the party, state that party's challenge to a voter whose eligibility that party questions. The Board agent should advise the party that he/she does not assume responsibility for assuring that the voter's ballot will be challenged. Except when directed in the Regional Director's decision or the Board action on a request for review or when a prospective voter's name is on the eligibility list, the challenge is not made on behalf of the Board but is in terms of

was maintained in the manner in which the challenges were stated” and that the employer failed to carry its burden of showing that the election was unfair.²⁵¹

An employer’s objection to a Board agent’s handling of challenges was also rejected in *NLRB v. Computer Sciences Corp.*,²⁵² where the Fifth Circuit explained:

The Company . . . contends that the election should be invalidated since the Agent exhibited his pro-union feelings to the voters by suggesting that the Company’s challenges were frivolous and by denying these challenges In this case, there is no indication in the record that any voter even observed the colloquy between the Agent and the Company’s attorney regarding the challenges. Moreover, the administration of the system is an essential part of the Agent’s job, and the conduct of the Agent here in disallowing the challenges did not demonstrate partiality toward the Union.²⁵³

Schwartz Brothers and *Computer Sciences* are not difficult opinions; in each case the Board and court of appeals fairly recognized that an agent’s role in the voter challenging process must not be circumscribed by frivolous allegations of bias. Other cases, however, are not so simple. In *Sonoma Vineyards, Inc.*,²⁵⁴ the employer made several objections to the agent’s conduct, including an allegation that the agent told the union’s observer that there were various ways to prove challenges and he believed it would be easy for the union to do so. This remark seems improper because it borders on the giving of legal advice to one party for its use against the other. Furthermore, this appearance of favoritism toward the union may well

stating the party’s challenge (e.g., “the union has challenged your right to vote on the ground that you are a supervisor”). When directed by the Board, the challenge is to be made in terms of the basis for the Board’s reservation (e.g., “The Board has been unable to decide whether you are eligible to vote based on the union’s contention that you are a supervisor rather than an employee”). The voter should then be voted under the challenge.

NLRB, NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL (PART TWO) REPRESENTATION PROCEEDINGS § 11338 (Sept. 1989) (emphasis in original).

251. 475 F.2d at 930. The court emphasized:

If a charge is levied that the Board agent was not completely impartial, the burden shall be on the alleging party to prove the partiality. As is always the case, the challenging party has the burden of showing that the election was not fairly conducted, for it is not up to the Board to establish the validity of the election.

Id.

252. 589 F.2d 232 (5th Cir. 1979) (per curiam), enforcing 234 N.L.R.B. 1163 (1978).

253. 589 F.2d at 235.

254. 264 N.L.R.B. 642, 643 (1982), enforced, 727 F.2d 860 (9th Cir.), cert. denied, 469 U.S. 836 (1984).

have been magnified by the fact that the agent later resigned from the Board and accepted a position with the union in which he helped the union gain representation rights in that particular bargaining unit. The Board, however, accepted the regional director's conclusion that even if the statements were made, they were not overheard by the employees and "could not have had a material impact on the election."²⁵⁵ In addition, the Board stated that although it "might question the former Board agent's judgment in accepting responsibility for the Union's efforts to secure recognition" from the employer, "his employment with the Union in connection with this proceeding does not vitiate our earlier findings regarding his conduct during the election."²⁵⁶

This resolution of the case is problematic because it apparently applies only an outcome-determinism test to judge the agent's comments. Given the regional director's conclusion that the remarks did not have a material impact on the election's result, the Board was not interested in asking whether they nonetheless could have impaired the Board's image of neutrality. Furthermore, although a former Board agent should not be forever barred from representing a party in an election he once supervised, the fact that the agent joined the union's efforts to gain recognition from that particular employer quite easily could have strengthened the employees' perception that the Board was pro-union. The Ninth Circuit enforced the Board's opinion, however, on the grounds that "[i]t is unlikely that this allegedly offending conduct interfered with or inhibited the free choice of the employees in selecting their bargaining representative, or with the employee's [sic] actions at the polls" and that the agent's subsequent employment with the union "did not affect the impartiality of the election."²⁵⁷

*Sioux Products, Inc. v. NLRB*²⁵⁸ marks another example of where the Board and court concluded that an agent's handling of challenges did not contaminate the election. In addition to the objections mentioned earlier,²⁵⁹ the employer argued that the agents impermissibly aided the union in making its challenges and that one agent even "bugg[ed] her eyes out" to signal the union to challenge a particular voter.²⁶⁰ The court approved the Board's rejection of

255. 264 N.L.R.B. at 643-44.

256. *Id.* at 644.

257. *NLRB v. Sonoma Vineyards, Inc.*, 727 F.2d 860, 863-64 (9th Cir. 1984).

258. 703 F.2d 1010 (7th Cir. 1983), *denying enforcement on other grounds to* 258 N.L.R.B. 287 (1981).

259. *See supra* note 121.

260. 703 F.2d at 1015.

these objections, however, because the hearing officer had discredited the testimony regarding eye signals and held that the other alleged assistance was not fatally improper.²⁶¹

In other cases, however, the Board has taken a strict approach toward alleged agent misconduct in cases involving the handling of challenged ballots. In *Laszlo & Paulette Fono*,²⁶² the Board set aside a union victory because the agent violated the Board's Casehandling Manual by failing to place the small envelopes containing challenged ballots in a larger, sealed envelope immediately after the election and by later examining the smaller envelopes outside of the presence of the parties' representatives. The Board explained:

The Board, through its entire history, consistently has gone to great lengths to assure that its role in the conduct of elections is not subject to question. Board election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election, ballot count, and determinative procedure We are not questioning the integrity or neutrality of the Regional Office personnel involved here. Rather, the appearance of irregularity created by the procedures used and the impact of that appearance on the election's validity leads us to conclude that this election must be set aside.²⁶³

The *Fono* decision represents the Board at its most idealistic. Without questioning its agent's honesty or the accuracy of the reported results, the Board invalidated the election due to the possible appearance of irregularity. As the Board reasoned, "if this Agency is to maintain the public's confidence in its election processes, it is imperative that the Board act dutifully to set aside elections *whenever* there is *any appearance* of irregularity in the handling of ballots."²⁶⁴ Similarly, in *D & N Delivery Corp.*,²⁶⁵ the Board set aside an employer's victory because the regional director violated the Board's Rules and Regulations by counting several challenged ballots when the parties had not waived their right to challenge his rulings concerning the validity of those ballots. The Board reasoned that "inasmuch as the Regional Director's breach of the Rules and Regulations may create the appearance that the Board has prejudged the issues as to the eligibility of the [challenged vot-

261. *Id.*

262. 273 N.L.R.B. 1326 (1984).

263. *Id.* at 1328 (footnotes omitted).

264. *Id.* (emphasis added).

265. 201 N.L.R.B. 277, 278 (1973).

ers], we . . . shall vacate the election results and direct the holding of a new election.”²⁶⁶

The Board also took a rigorous approach toward the treatment of challenged ballots in its recent *Jakel* decision.²⁶⁷ In *Jakel*, a woman had just finished voting when the union observer reminded the Board agent that she should have been allowed to cast only a challenged ballot. The agent responded by removing a ballot from the ballot bag, showing it to the woman, and destroying it when she said it was hers. She was then given another ballot which was placed in an envelope for challenged ballots.

Quoting *Athbro*, the regional director decided that this occurrence constituted grounds for setting aside the union’s electoral defeat. He explained:

[T]he removal of a ballot from the ballot bag by the Board agent compromised the integrity of the election process and constituted conduct which would destroy confidence in the Board’s election process. Moreover, it cannot now be determined with reasonable accuracy whose ballot was extracted from the ballot bag. Further, [the woman voting] was one of three voters whose challenged ballots were sufficient in number to affect the results of the election, and the desires of the employees in the election can be accurately ascertained only by setting the election aside and directing a new one.²⁶⁸

The Board then denied the employer’s request to review the regional director’s decision.²⁶⁹ That refusal was sound, for the regional director had applied *Athbro* in a clear and correct manner. It is worth noting, however, that *Jakel* is not the “pure” *Athbro* scenario where an election was invalidated even though the agent’s misconduct almost surely did not affect the election’s results. To the contrary, as the regional director remarked, in *Jakel* the vote was so close that the election’s outcome as well as the Board’s image may have been affected. It therefore is unclear whether the Board will now apply *Athbro* in its full idealistic force—as it did in *Hudson*²⁷⁰—or continue with its spasmodic behavior.

266. *Id. Cf. NLRB v. Chelsea Clock Co.*, 411 F.2d 189, 194 (1st Cir. 1969) (holding that regional director wrongfully abandoned his responsibility to determine validity of challenged ballots and citing *Athbro*’s “salutary concern for propriety in the conducting of consent elections”), *denying enforcement to* 170 N.L.R.B. 69 (1968).

267. *Jakel, Inc.*, 293 N.L.R.B. No. 72 (April 3, 1989).

268. *Id.* (citation omitted).

269. *Id.*

270. 288 N.L.R.B. No. 94 (April 29, 1988), discussed *supra* at notes 223-26 and accompanying text.

The Board occasionally has taken steps to preserve the integrity of representation elections from other administrative irregularities as well. In *Kerona Plastics Extrusion Co.*,²⁷¹ for example, the Board set aside an election because the agent's premature closure of the morning polling session allegedly prompted rumors that the agent favored the employer and induced many workers to respond by voting for the union in the afternoon's polling session.²⁷² The Board reasoned:

It is impossible here to determine whether the aforementioned irregularity affected the outcome of the election. However, we find that the laboratory conditions have been disturbed to such a serious extent that in the interest of maintaining our standards there appears to be no alternative but to set this election aside and to direct a new election.²⁷³

In *Summa Corp. v. NLRB*,²⁷⁴ the Ninth Circuit showed equal concern for the effect administrative blunders may have on employees' perceptions and their voting behavior. In *Summa*, the Board certified an election even though, in violation of a preelection agreement, the union had been represented by more observers than the employer.²⁷⁵ The Ninth Circuit reversed, however, on the following grounds:

We find that the stipulation providing for an equal number of observers is material to the election process. The language of the stipulation itself indicates that the parties intended to rely upon their observers to carry out the important functions of challenging voters and generally monitoring the election process. Each party reasonably desired to prevent the other from enjoying a relative advantage in this function. Moreover, we agree with *Summa* that there is a significant risk that an imbalance in the number of observers, with the acquiescence of the Board agent, could create an impression of predominance on the part of the Union and partiality on the part of the Board.²⁷⁶

271. 196 N.L.R.B. 1120 (1972).

272. *Id.* at 1120. *Kerona* demonstrates how the appearance of Board favoritism can be a two-edged sword: parties may be hurt as well as benefited by the voting employees' perception of preferential treatment by Board agents.

273. *Id.* (citation omitted).

274. 625 F.2d 293 (9th Cir. 1980), *denying enforcement to* 242 N.L.R.B. 590 (1979).

275. 242 N.L.R.B. 590 (1979) (granting summary judgment based on an earlier, unpublished decision).

276. 625 F.2d at 295. The court also reasoned: "The impact that the breach had upon the minds of voters would be difficult to prove. We think that a party to a consent election, reasonably anticipating this difficulty of proof, has a right through pre-election contract to guard against misconduct material to the election process." *Id.* at 295-96 (footnote omitted).

In essence, the *Summa* court did nothing more than to insist upon fair play in accordance with a previously arranged agreement. That can hardly seem controversial; the only peculiarity is that the Board did not reach the same conclusion on its own.²⁷⁷ A court also had to take the initiative to protect election standards in *Home Town Foods, Inc. v. NLRB*,²⁷⁸ where the Fifth Circuit remanded the Board's decision for a full hearing on whether an agent's alleged failure to stop union supporters from unlawfully electioneering and engaging in other forms of misconduct destroyed requisite laboratory conditions. Upon remand, the Board determined that the election was valid, but the Fifth Circuit once again set aside the Board's order.²⁷⁹ Citing *Athbro* and quoting from *General Shoe Corp.*,²⁸⁰ the court concluded:

Because in the instant case the Board acquiesced in pre-election misconduct by the union supporters and in election day misconduct by the union agent, union supporters and the Board agent, which, viewed cumulatively obviously resulted in "the standards of election campaigning [and conduct] drop[ping] too low, the requisite laboratory conditions [were] not present, and the experiment must be conducted over again."²⁸¹

277. In two recent cases the Board has shown greater sensitivity toward allegations that a Board agent's blunders contaminated the balloting process. In *Sugar Food Inc.*, 293 N.L.R.B. No. 123 (May 10, 1989), the Board invalidated an election because the agent permitted balloting to take place in violation of a stipulation that a union observer would be present. In *Case Egg & Poultry Co.*, 293 N.L.R.B. No. 120 (May 8, 1989), the Board directed a hearing on an employer's objection alleging that the agent compromised ballot secrecy by failing to supply a voting booth. In *Ashland Chemical Co.*, 295 N.L.R.B. No. 117 (July 24, 1989), however, the Board refused to set aside an election even though the agent failed to wait for the arrival of the employer's election observer before slitting open the ballot box for the start of the second voting session.

278. 379 F.2d 241 (5th Cir. 1967), *denying enforcement to* 160 N.L.R.B. 8 (1966). Although the Board's original opinion was rendered before *Athbro*, *Home Town Foods* is discussed here because the subsequent opinions by the Board and court in that case were written well after *Athbro*.

279. *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392 (5th Cir. 1969), *denying enforcement to* 172 N.L.R.B. 1242 (1968).

280. 77 N.L.R.B. 124 (1948), quoted *supra* in text accompanying notes 5-6.

281. 416 F.2d at 399-400. The court later rejected the Board's claim that it had imposed an "unrealistically 'ideal' standard" upon it. *Id.* at 400. Although the court agreed with the message of *Morganton Full Fashioned Hosiery*, 107 N.L.R.B. 1534, 1538 (1954), that "the adoption of a laboratory standard should not be construed to mean that the Board will ignore the realities of industrial life" and the teaching of *Liberal Market Inc.*, 108 N.L.R.B. 1481, 1482 (1954), that "[w]e seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct," it still believed that the Board had failed to live up to its own standards for the supervision of elections. 416 F.2d at 400 & nn.1-2.

In *Home Town Foods*, therefore, the Fifth Circuit emphasized that the Board has an affirmative duty to regulate its electoral laboratory and to prevent prejudicial misconduct by the competing parties. In *Amalgamated Service & Allied Industries Joint Board v. NLRB*,²⁸² however, the Board and the Second Circuit rejected the employer's argument that the Board agent transgressed *Athbro* by failing to stop union observers from conversing with employees while they waited to vote and by not preventing certain employees from chanting pro-union slogans during the balloting. The court concluded that "the failure of the Board to prevent the alleged misconduct did not impugn the integrity of the election"²⁸³ and emphasized that the "laboratory conditions" standard must be applied in a practical fashion which recognizes that the ideal may never be completely satisfied. The court declared:

The idea of laboratory conditions is a useful guide for measuring the conduct of an election. However, it is probably not possible to completely achieve such ideal conditions, and elections will not automatically be voided whenever they fall short of that standard. Rather, the idea of laboratory conditions must be realistically applied. The Board has broad discretion to determine whether the circumstances of an election come sufficiently close to laboratory conditions so that employees can exercise free choice in deciding whether to select the Union as their representative.²⁸⁴

This statement may be viewed as a well-reasoned caution that the laboratory conditions standard must be interpreted and applied in a reasonable manner, for neither the Board nor the courts can demand that elections occur in a vacuum devoid of human foibles. The problem, however, is that the court provided no guidance on how to ascertain whether proper election conditions have been met. No guidelines were established other than the vague reference to laboratory conditions and no authority was cited to provide the Board, courts, and public with any criteria to apply. The court's treatment of *Athbro* was equally problematic. The court noted that *Athbro* involved fraternization rather than failure to prevent misconduct, but failed to explain why this distinction might be meaningful.²⁸⁵ *Amalgamated Service* therefore offered a practical direction not

282. 815 F.2d 225, 227-31 (2d Cir. 1987), enforcing *Angelica Healthcare Serv. Group, Inc.*, 280 N.L.R.B. 864 (1986).

283. 815 F.2d at 231-32.

284. *Id.* at 227.

285. *Id.* at 231. The court merely concluded that *Athbro* was not "on point" because "the Board agent in charge of the election drank a beer with one of the union's representatives during a break in the polling Here, however, the failure of the

to demand the impossible from Board agents, but failed to delineate what standards of conduct fall above or below the line of objectionability.²⁸⁶

Even worse, *Fotomat Corp. v. NLRB*²⁸⁷ cited *Athbro* only to ignore its meaning in a case involving plain misconduct by the Board. In *Fotomat*, the Board's hearing officer admitted that he erred in not granting the employer access to the pretrial affidavits of witnesses who testified at the hearing but the Board nonetheless accepted his determination to uphold the election even though its own regulations on this matter had been violated.²⁸⁸ Furthermore, the Board even refused to produce these documents for the court of appeals, which could have precluded the judges from effectively weighing the potential prejudice of the wrongful denial to the employer.²⁸⁹ Although the Sixth Circuit cited *Athbro* and disapproved of "this un-

Board agent to prevent the alleged misconduct did not impugn the integrity of the election." *Id.* This statement naturally begs the question as to why fraternization fatally violates laboratory conditions whereas failure to end a union's election day misconduct does not.

286. Notwithstanding this criticism, I would agree that the Board and courts wisely have overruled objections that plainly did not raise questions of serious impairment of election standards. In *NLRB v. First Union Management*, 777 F.2d 330 (6th Cir. 1985) (per curiam), enforcing 271 NLRB No. 163 (1984) (unpublished decision), for example, the court rightfully rejected an employer's claim that a Board agent compromised the Board's neutrality by permitting the union's election observer to wear an observer badge slightly different from that worn by the employer's observer. More recently, in *Kleen Brite Laboratories*, 292 N.L.R.B. No. 75 (January 31, 1989), enforced *sub nom.* *Rochester Joint Bd., Amalgamated Clothing & Textile Workers Union*, 896 F.2d 24 (2d Cir. 1990), the Board correctly applied *Athbro* and overruled an employer's objection that laboratory conditions were destroyed when the Board prematurely disclosed a bargaining unit determination to the union.

At other times, unfortunately, the Board and courts have offered insufficient reasoning to explain their results. In *Victoria Station, Inc. v. NLRB*, 586 F.2d 672, 675 (9th Cir. 1978), enforcing 233 N.L.R.B. 33 (1977), for instance, the court baldly stated: "While it is true that the Board's agent at times might have been more attentive to the election, these lapses caused no harm and provide no basis for setting the elections aside." 586 F.2d at 675. Although this conclusion may have been correct, neither the court's opinion nor the Board's published decision specified precisely what this inattentiveness entailed and why it did not corrupt the election process. For this reason, both opinions fail to convey any adequately defined normative message concerning the standards which must be met in representation elections. A far better approach was taken in *NLRB v. Monroe Auto Equip. Co.*, 406 F.2d 177 (5th Cir. 1969), denying enforcement to 164 N.L.R.B. 1051 (1967), where the court remanded a Board decision for further hearings on allegations that the Board agent showed favoritism toward the union and left the ballot box unattended. After these hearings were held, the court enforced the Board's bargaining order. See 186 N.L.R.B. 90 (1970), enforced, 470 F.2d 1329 (5th Cir. 1972), cert. denied, 412 U.S. 928 (1973).

287. 634 F.2d 320 (6th Cir. 1980), enforcing 233 N.L.R.B. 56 (1977).

288. 634 F.2d at 322 & n.1. These affidavits were potentially crucial because they could have helped the employer rehabilitate witnesses.

289. *Id.* at 324.

fair procedure," it concluded that the record failed "to suggest any prejudicial effect upon the fairness of the election."²⁹⁰

This result is most unsatisfactory. As the court acknowledged, in an earlier case it had remanded a Board decision based on the exact same procedural error.²⁹¹ Furthermore, it seems specious (or at least premature) for the court to conclude that the election was not unfair when the Board's hearing to determine that matter had been demonstrably flawed by the refusal to let the employer examine the affidavits. As Judge Merritt stated in dissent:

I cannot conclude that the Company was not prejudiced when it was denied certain affidavits. The affidavits may contain unique evidence favorable to the Company. They may not. We simply cannot tell, regardless of where the probabilities may lie. Nor is it reasonable for us to require the Company to prove the usefulness of the affidavits['] contents. This smacks of *Catch-22*. If the Company knew what the contents were, [it] would not need to ask for them. I do not believe our Court should condone such heavy-handed action by the Board.²⁹²

Judge Merritt clearly had the better of this argument. *Fotomat* did not involve a type of "harmless error" where the Board failed to follow the precise wording of its internal guidelines. To the contrary, it involved both an initial failure to honor the employer's right to prepare its case and a subsequent refusal to provide such documents to the Sixth Circuit so it could make a knowledgeable determination of that earlier failure's consequences. Not only is one left with doubts concerning the election's fairness, one is also left with a sense that the Board could freely ignore published regulations, wrongfully deny a party its right to relevant documents, and cripple a reviewing court's ability to evaluate the impact of its misconduct. Rather than healthy deference toward administrative discretion, *Fotomat* represents nothing less than judicial complicity in bureaucratic lawlessness.²⁹³

290. *Id.*

291. *Id.* at 323-24 (stating: "In *NLRB v. American [Federation] of Television and Radio Artists*, 285 F.2d 902 (6th Cir. 1961), where the trial examiner refused to require the General Counsel to disclose pretrial statements of witnesses who testified at the hearing, our court remanded the cause to the Board with instructions to correct the procedural error.") No effort was made to distinguish *American Federation* or to reconcile it with the case at bar.

292. *Id.* at 327 (Merritt, J., dissenting).

293. In its defense, the court argued that "[t]he Board's acknowledgement of error largely dissipates any prophylactic effect upon the Board and is offset by the harm of further frustrating the plainly expressed will of the employees who voted in the election." *Id.* at 325. That purported justification crumbles, however, upon

Fotomat starkly demonstrates how *Athbro* all too frequently has been treated as a poetic statement of the ideal whose prescriptive vision must give way to everyday realities. As such, it is symbolic of the tension between idealism and outcome-determinism that plagues the Board and courts whether they are addressing fraternization, the delegation of duties, behavior suggesting partisanship, or other breakdowns and peculiarities in the Board's electoral procedures. In no area have the Board and courts reached a clear consensus on how best to address the problem of apparent Board agent bias in representation elections, although a generation has now passed since *Athbro* was decided.

V. CONCLUSION

As I hope to have demonstrated, the Board and courts have been unnervingly inconsistent in their responses toward allegations of Board agent bias in representation elections. Although more than twenty years have passed since *Athbro* was decided, the Board has applied its standard in only a fitful manner. At times the Board rigorously has applied *Athbro* and invalidated elections regardless of whether the alleged favoritism of a Board representative could have affected the workers' votes. On many other occasions, however, the Board has refused to set aside elections unless it appeared that an agent's misconduct may have had an impact on the balloting's results. Adding to the confusion, the Board also has *purported* to apply *Athbro* in cases where it really seemed to focus on whether the election's outcome could have been affected. As a result, it remains uncertain when and why elections will be invalidated due to the appearance of Board partisanship. Furthermore, the circuit courts frequently have exacerbated this indeterminacy by mirroring rather than rectifying the Board's wavering on this point.

examination. First, the Board's admittance of its error in denying access to the affidavits does not alleviate the plight of the party that was not permitted to use such documents to prepare its case and does not assure that the Board will not repeat its mistake. If anything, the court's opinion insulates such errors from reversal (and therefore fails to deter them) by claiming that they are not material as long as the Board acknowledges them. Such acknowledgements of error are trite unless the Board moves to correct them in particular cases, and the courts should not permit administrative agencies to indulge in a modern game of confession and avoidance. Second, that the Board acknowledged its initial error in denying access to the employer in no way justifies its later refusal to grant access to the court. Third, the court cannot conclude with confidence that the vote did indeed reflect the employees' free choice when the hearing to determine that very issue contained such a potentially prejudicial procedural error. The court waves the banner of employee sovereignty without adequately examining—or remanding so the Board must examine—whether that sovereignty was undermined by the allegedly objectionable activity that the employer sought to prove.

This indeterminacy takes its toll in several respects. First, it leaves management, unions, workers, and even the Board's own field agents dancing in the dark, for how can they evaluate whether laboratory conditions have been spoiled when even Board members and judges have not spoken in a clear and consistent manner? It becomes difficult to appraise an election's validity with any certitude when the Board and courts apply yardsticks that are ever-shifting.²⁹⁴

This uncertainty begets conflict which begets litigation. Confronted with the incessant waffling of administrators and judges, parties can be expected to appeal adverse decisions and urge tribunals to adopt whichever standard best suits their purposes. As long as the Board and courts fail to adhere consistently to *Athbro*, parties will often push litigation into appellate forums, increasing costs for themselves and the government alike.²⁹⁵

Perhaps even worse, this indeterminacy cripples the ability of the Board and courts to convey a clear and persuasive normative vision concerning the problem of possible Board agent partisanship. As Professor Nesson asserts:

Our legal system reflects our collective aspirations, just as it shapes our conduct through the projection of norms embodied in the substantive law. Our belief in the legitimacy of the legal system is a function of the extent to which we feel it re-

294. The effects of this phenomenon extend to state labor cases as well as federal litigation. See, e.g., *George Arakelian Farms v. Agricultural Labor Relations Bd.*, 150 Cal. App. 3d 664, 198 Cal. Rptr. 194 (1984), *vacated*, 40 Cal. 3d 654, 710 P.2d 288, 221 Cal. Rptr. 488 (1985). The California Agricultural Labor Relations Board argued that "the NLRB does use an outcome determinative test to evaluate allegations of board agent misconduct. There are, in fact, two different strains of NLRB precedent on the subject, and the Board's use of an outcome determinative test is supported by one of them." *Arakelian*, 150 Cal. App. 3d at —, 198 Cal. Rptr. at 204 (emphasis omitted by the court).

295. As Judge Posner explains:

Settlement out of court is cheaper than litigation. So only if each disputant expects to do better in the litigation than the other disputant expects him to do are the parties likely to fail to agree on settlement terms that make them both consider themselves better off compared with how they anticipate faring in litigation. Uncertainty is a necessary condition of such a divergence of estimates. It can be either factual or legal but only legal uncertainty is relevant here. If it is great, there will be much litigation, including much appellate litigation.

R. POSNER, *ECONOMIC ANALYSIS OF LAW* 511 (3d ed. 1986). Posner adds that "[b]ut since litigation, especially at the appellate level, generates precedents, the upsurge in litigation will lead to a reduction in legal uncertainty. Hence the amount of litigation will fall in the next period." *Id.* Unfortunately, this subsequent reduction in litigation cannot come to pass as long as the Board and appellate courts produce a plethora of competing and conflicting "precedents" whose meaning, vitality, and persuasive power are constantly subjected to questioning by the same or different tribunals.

flects our values, and to a considerable extent our values are influenced by the effect the legal system has upon us.²⁹⁶

This dialectic is distorted, however, when the Board and courts send conflicting and internally inconsistent messages regarding the standards to be applied in cases of alleged bias. Such opinions neither reflect a shared understanding of how to safeguard elections nor guide us to an enlightened understanding of how best to approach and protect the elusive ideal of laboratory conditions. One hesitates to regard such opinions as "legitimate," and therefore worthy of respect, when they do little more than radiate on a larger scale the same conflicting impulses emanating from the briefs of opposing parties. We are left with no readily discernible normative vision, but only with a disconcerting array of result-oriented rhetoric heading in diverse paths.

Perhaps this chronic infidelity to the *Athbro* standard is symptomatic of a congenital defect in the standard itself. One cannot deny, for example, that *Athbro's* language is open-ended and may lend itself to differing interpretations. The directive that Board agent misconduct "which tends to destroy confidence" in the electoral process or which "could reasonably be interpreted as impugning" the Board's standards is a "sufficient" basis for requiring a new election is certainly not free from ambiguity.²⁹⁷

One wonders, however, whether that language could be tailored much more precisely and still cover the myriad forms of misconduct *Athbro* was conceived to address. *Athbro* was never intended to provide a fail-safe formula for automatically determining an election's validity. Instead, like any other standard, it can only attempt to lay down a reasonably clear and useful guideline for the resolution of future disputes. Hard cases will still exist, but *Athbro* adequately fulfills its purpose by emphasizing that the Board must safeguard its aura of integrity and neutrality even if the workers' voting behavior has not demonstrably been affected in a particular case.

Athbro's critics might also argue that it is perversely counterintuitive to invalidate elections simply because a Board agent has misbehaved.²⁹⁸ That line of attack falters, however, once we remember that an election's true legitimacy depends as much on people's perceptions as on whether particular votes have been influenced. To a

296. Nesson, *supra* note 109, at 1391.

297. *Athbro Precision Eng'g Corp.*, 166 N.L.R.B. 966, 966 (1967).

298. See, e.g., WILLIAMS, *supra* note 4, at 402, 427 (giving examples of such criticisms).

real extent, "thinking makes it so"²⁹⁹ and no election can be regarded as "valid" in a meaningful sense if its aftermath is marred by reasonable doubts concerning its integrity. It is better to hold a new election than to undermine the Board's appearance of impartiality and leave all concerned with continuing doubts as to the election's legitimacy.

A related criticism is that application of the *Athbro* standard leads to delays and expense for all concerned. Moreover, there may be a legitimate concern that parties will capitalize on trivial bureaucratic missteps to antagonize opponents, overturn unfavorable election results, and (in the case of employers) postpone having to bargain with a new union.³⁰⁰

These problems are undeniable, but again they seem outweighed by the need to preserve faith in the sanctity of representation elections. A worker's decision on whether or not to unionize may be the most critical choice of her professional life. Not only will it affect vital material issues such as her future wages, hours, and other terms and conditions of employment, it is also a primary act of self-expression and collective self-determination. Given the centrality of this choice to workers' material rewards and psychological identity, it must not be corrupted by the fear that it merely reflects the effects of a Board agent's partisanship.

Furthermore, the concern over costs may be mitigated (at least partially) in other ways. The consistent application of *Athbro* would lead most probably to a diminution in both Board agent misconduct and in parties' eagerness to appeal the Board's conclusions: there would be both a deterrence of acts suggesting bias and less reason for parties to believe they could convince a tribunal not to follow *Athbro*. This in itself should reduce the cost of vigorously protecting the rights of workers and the Board's good name.

Furthermore, we could discourage parties from raising frivolous allegations of bias by subjecting them to sanctions similar to those under Rule 11 of the Federal Rules of Civil Procedure.³⁰¹ Any party

299. W. SHAKESPEARE, *HAMLET*, act II, sc. 2, lines 249-50 (Riverside ed. 1974) (stating Prince Hamlet's belief that "there is nothing either good or bad, but thinking makes it so").

300. See WILLIAMS, *supra* note 4, at 402, 427.

301. As Rule 11 states in pertinent part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper

that raises an allegation or defense in bad faith should be compelled to pay its opponent's expenses in litigating the matter. And in cases

purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

Rule 11 itself may not be applicable to Board proceedings. *See, e.g.*, M.J. Santulli Mail Servs., Inc., 281 N.L.R.B. 1288, 1290 (1986) (containing administrative law judge's assessment that Rule 11 and the other Federal Rules of Civil Procedure "are not applicable to administrative hearings"); Shrewsbury Motors, Inc., 281 N.L.R.B. 486, 491 (1986) (stating administrative law judge's conclusion that "I am inclined to agree with the General Counsel that Rule 11 is not applicable to Board proceedings"). As the administrative law judge observed in *Santulli*, however, "[s]ection 102.21 of the Board's Rules and Regulations is very similar to Rule 11" 281 N.L.R.B. at 1290. 29 C.F.R. § 102.21 (1988) provides in pertinent part:

The signature of an attorney constitutes a certificate by him that he has read the answer; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the answer had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.

In practice, however, the Board appears reluctant to invoke sanctions pursuant to section 102.21. In *Santulli*, for example, the Board agreed that the employer had violated this section but concluded:

As our attention has not been called to other instances where counsel for the Respondent [employer] has engaged in similarly inappropriate conduct, in the circumstances of this case the Board will limit its disciplinary action to expressing our strong disapproval of such conduct and cautioning counsel for the Respondent against similar conduct in future appearances before the Board.

281 N.L.R.B. at 1288 n.1.

In particularly egregious cases, however, the Board has relied on its broad remedial powers to compel the guilty party to compensate its opponent and the Board. In *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), *enforced as modified*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975), for example, the Board ruled:

[F]rivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent [the employer] to reimburse the Board and the Union for their expenses in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, sala-

where the charges are well-founded, there is no reason why the innocent party should bear the cost of a second campaign. Parties that knowingly participate in a Board agent's misdeed (e.g., as in cases of fraternization), should be compelled to pay their opponents' reasonable litigation costs and campaign expenses. When the Board appears to be the sole culprit, the government itself should bear the costs of both the employer and the union.

In this manner, we could increase the deterrent effect of invalidating elections while easing the burden on parties that have done no wrong. Board representatives would be deterred by the onus of professional embarrassment and by the prospect that their agency would have to compensate the wronged parties. Private parties would also be deterred from inducing or participating in an agent's misconduct by the fear that they too would be penalized for their misconduct. Finally, parties would be deterred from raising frivolous objections by the prudent application of sanctions. This approach obviously would not eliminate all costs and delays, but it would make their distribution more equitable and, one would hope, reduce incidents of Board agent misconduct.³⁰²

ries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses.

194 N.L.R.B. at 1236.

Although *Tudee Products* is a prominent example to the contrary, the Board has proved reluctant to impose sanctions on guilty parties. See, e.g., *American Thoro-Clean, Ltd.*, 283 N.L.R.B. 1120 (1987); *Lang Towing, Inc.*, 201 N.L.R.B. 629 (1973); *International Union of Operating Eng'rs*, 200 N.L.R.B. 593 (1972); *United Steelworkers of America*, 200 N.L.R.B. 40 (1972); *Terri-Flex Prods., Inc.*, 200 N.L.R.B. 3 (1972); *Marsal Transp., Inc.*, 199 N.L.R.B. 689 (1972). *But cf.* *DPM of Kan., Inc.*, 261 N.L.R.B. 220 (1982), *enforced*, 744 F.2d 83 (10th Cir. 1984) (striking an employer's answer for violating § 102.21).

On the appellate level, Rule 38 of the Federal Rules of Appellate Procedure may be invoked by the circuit courts to discourage frivolous appeals. As Rule 38 provides, "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." This sanction has been imposed by courts in a variety of labor cases. See, e.g., *Sparks v. NLRB*, 835 F.2d 705 (7th Cir. 1987) (imposing sanctions for frivolous appeal of General Counsel's decision not to file an unfair labor practice charge on behalf of a terminated employee); *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585 (6th Cir. 1987) (sanctioning employer for appeal from civil contempt holding); *NLRB v. Limestone Apparel Corp.*, 705 F.2d 799 (6th Cir. 1982) (permitting union to recover double costs for employer's frivolous appeal of Board order), *enforcing* 255 N.L.R.B. 722 (1981).

Although none of the cases cited above concerned litigation stemming from an allegation of Board agent bias in a representation election, they demonstrate that the Board and courts do have substantial discretion to fashion equitable remedies and to sanction parties for bad faith litigation tactics.

302. For an insightful analysis of the effects of different systems of allocating litigation expenses, see Shavell, *Suit, Settlement, and Trial: Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

I believe, therefore, that the *Athbro* game is worth the candle. If properly applied, the salutary effects of the *Athbro* standard should overcome its undeniable ambiguities and expense. But even if *Athbro* were simply impractical, that would not justify how numerous Board members and judges have deliberately ignored or misconstrued its meaning. Not since Judge Sirica in 1968³⁰³ has a judge or Board member explicitly attacked *Athbro* and its underlying premises. Rather, all too frequently tribunals have simply ignored this precedent or misapplied it to limit its significance and power. Such manipulation parasitically weakens *Athbro* without explicitly attempting to replace it with any alternative analysis of how to protect representation elections from the appearance of Board partisanship.

This is most unfortunate, for the stakes are high: in addition to assuring that workers vote in a clean laboratory we must assure that Board representatives maintain their integrity and neutrality, in appearance as well as in fact. This, of course, is part of a larger effort to insist that government officials act within their proper bounds and do not illegitimately infringe upon decisions explicitly left by law to individual choice. As Gerald Frug asserts: "Bureaucracy is the primary form of organized power in America today, and it is therefore a primary target for those who seek liberation from modern forms of human domination."³⁰⁴ On a small but important level, we can further our struggle by preventing Board representatives from even inadvertently interfering with the right of workers to embrace or reject particular unions.

I conclude, therefore, that the Board's and courts' frequent departure from the path blazed in *Athbro* is pernicious on both normative and practical grounds. Until and unless a convincing demonstration is made to the contrary, the Board and federal courts should move vigorously to nurture the *Athbro* standard and keep faith with the workers' rightful expectations that their freedom of choice shall remain unfettered.

303. For a discussion of *International Union of Elec., Radio & Mach. Workers v. NLRB*, 67 L.R.R.M. (BNA) 2361 (D.D.C. 1968), see *supra* notes 61-72 and accompanying text.

304. Frug, *supra* note 222, at 1295. Although I have strong disagreements with both Frug's prescriptive and descriptive analyses of American bureaucracy, I applaud his recognition of its power and the need to redress its antidemocratic tendencies.