

**EXCEPTIONS TO THE REGIONAL DIRECTOR' S
REPORT ON OBJECTIONS, AND BRIEF IN SUPPORT**

IN THE MATTER OF

SEIU DISTRICT 1199

AND

THE AVENUE CARE AND REHABILITATION CENTER

CASE No. 8-RC-088734

FREDRICK ENGLEHART, ROLF, GOFFMAN, MARTIN AND LANG.

I. FACTS

On November 14, 2012, the Regional Director of Region 8 of the National Labor Relations Board (“RD”), issued his Report on Objections (“REPORT”) in response to a single Objection filed by the Employer regarding the representation election held on October 12, 2012 in which SEIU District 1199 (the “Union”) sought to represent certain employees of the Employer, The Avenue Care and Rehabilitation Center, 4120 Interchange Corporate Center Road, Warrensville Heights, Ohio.

The Employer’s single objection to this election is that Region 8 Field Examiner Roberta Montgomery conducted the entire election wearing SEIU’s official color, purple, thus impugning the Board’s neutrality. The REPORT found that:

[T]he Board Agent wore a purple vest throughout conducting the election.

[T]he Union uses the color purple as a way to brand itself.

REPORT at 3, ¶1, and states that

[Both employer management witnesses] noticed that the Board Agent was wearing a purple vest when she arrived[, and both] claim they mistook the Board Agent for a representative of the Union until she was introduced.

Id at 2, ¶3, and that

[T]he Union contends that, without the Union’s logo the vest could not reasonably be construed as designating the wearer as one of their representatives.

Id at 2, ¶7. By this Exception, the Employer asserts that the Regional Director erred by miscomprehending and/or misapplying Board doctrine on the matter, making findings of fact in a conclusory manner without analysis and, as a result the REPORT represents a stunning violation of the Board’s professed neutrality in the conduct of elections.

II. ARGUMENT AND LAW

A. THE MISAPPREHENSION/MISAPPLICATION OF CASE LAW

In its analysis of the seminal Board case on the subject of the Board's required neutrality, *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967), the REPORT concludes that the Board Agent's conduct in *Athbro* (Board Agent having a beer with the union representative between polling periods at a café one mile distant from the election site), was "undoubtedly egregious," REPORT at 3, ¶3, while Agent Montgomery's wearing of a purple vest "throughout conducting the election" was not. The conclusion is offered without analysis of any kind. Instead, the REPORT merely states the obvious; *i.e.*, that wearing the union's color throughout the election is not factually identical to fraternization.

Here, on the other hand, there is no allegation or evidence that the Board engaged in any fraternization with representatives of either party.

Id. To properly and effectively distinguish a cited case because the relevant underlying *facts* are different than the case at hand, the analyst must explain *why* the factual differences render the cited case either distinguishable or supportive. Supplying the "*why*" is called analysis. Why is having a drink at a café a mile distant from the polling site, conduct that was not observed by any voter who had not yet voted "undoubtedly egregious" while wearing clothing of a color the Union uses to identify itself in plain sight of all voters, pre-vote, is not? Below is an example of *analysis* from *Sonoma Health Care Center*, 342 NLRB 933 (2004), a case cited in the REPORT.

In our view, like the Chairman's, a statement of personal opinion by a Board agent may be sufficiently partisan to warrant setting aside an election, even if made to a limited audience and even if unaccompanied by procedural irregularities or other "actions that reasonably create the appearance that the election procedures will not be fairly administered."

While agreeing with the Chairman's adherence to the *Athbro* standard, we ultimately agree with Members Liebman and Walsh that the Board agent's remarks here, while intemperate and inappropriate, do not mandate setting aside

this election under *Athbro*. As our colleagues note, the agent's impulsive remarks, only one of which could be construed as partisan, were not as public as the conduct in question in *Athbro*, came in response to questions asked by the election observers, were heard by only two employees—the election observers chosen by the parties—in an election won by a large margin, and do not reflect such a level of bias or impropriety that they tend to destroy confidence in the Board's election process or truly impugn the election standards the Board seeks to maintain. Nor, when considered in context, do they taint the “indispensable perception of Board neutrality.” *Citing Hudson Aviation Services*, 288 NLRB 870 (1988).

342 NLRB at 934 (excerpt from Concurrence of Members Schaumber and Meisburg). Unlike this example of proper *analysis*, the REPORT provides no analysis whatsoever.

Commenting on the District Court’s injunction decision in *Athbro*, the First Circuit Court wrote:

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.

423 F.2d at 574 (internal citation omitted, emphasis added). Surely, the Board’s integrity and public image are at least due a modicum of analysis.

Additionally, the REPORT misapprehends the relevant application of *Glacier Packing Co., Inc.*, 210 NLRB 571 (1974). The REPORT distinguishes *Glacier Packing* on the sole ground that a Board Agent wearing a purple vest throughout a SEIU election is not akin to the Board Agent’s conduct in *Glacier Packing*, yet contains no analysis why the conduct is so different or what, if any, effect Agent Montgomery’s conduct may have had on the results of the election especially where emotion was heightened in light of the vigorous campaign. REPORT at 3, ¶¶4, 5. Again, to properly and effectively distinguish a cited case because the relevant underlying *facts* are

different than the case at hand, the analyst must explain *why* the factual differences render the cited case either distinguishable or supportive.

Instead of analysis, the REPORT merely distinguishes the facts of *Glacier Packing* dubiously claims the use of a “most powerful microscope” in doing so, REPORT at 3, ¶5, and then flippantly claims that were this Objection sustained, “employers would have to submit a list of acceptable colors along with the *Excelsior* list[,] and I am confident that voters are savvy enough not to mistake the color of clothing as a signal of identification with a party.” *Id.* at n.3.

First, those statements contain no analysis whatsoever. Furthermore the Regional Director’s flippant claim that employers would have to submit a list of acceptable colors along with the *Excelsior* list is pure nonsense. Simple directives issued to Board election personnel would suffice. Moreover, the Regional Director’s expressed “confidence” in the electorate is faulty for at least two reasons. First, the Board must take administrative notice that any person who ever attended a sporting event where fans routinely wear jackets and caps in team colors and/or wave pennants and/or towels in team colors clearly do so to “identify” themselves as supporters of a team. Second, the Regional Director’s confidence is subjective and, as expressly stated in the REPORT; the Board’s standards for evaluating alleged objectionable conduct are objective, not subjective.” REPORT at 4, ¶1. What factors did the Regional Director evaluate? What method of evaluation did he employ? We do not know.

B. ANALYSIS-FREE CONCLUSIONS

In addition to the conclusory statements and findings already discussed, as set forth above, the REPORT also states the Union’s “**contention**” that

[W]ithout the Union’s logo the vest could not reasonably be construed as designating the wearer as one of their representatives,” that

“[Both employer management witnesses] noticed that the Board Agent was wearing a purple vest when she arrived[, and both] “**claim**” they mistook the Board Agent for a representative of the Union until she was introduced.”

REPORT at 2, ¶¶3, 7 (emphasis added). These two seemingly contradictory statements together express the essential question at issue; *i.e.*, did Agent Montgomery’s wearing of the purple vest throughout the entire polling process, which was seen by each and every voter before voting reasonably be interpreted as impugning election standards? The Union contends not, yet two employer witnesses unequivocally testified that they took the Agent for a Union representative **because** of the purple vest she wore.

The REPORT concludes that the Union’s logo “contention” is a “persuasive argument.” *Id.* at 3, ¶1. On the other hand, the REPORT essentially ignores the Employer representatives’ testimony, concluding that the Employer witnesses were “influenced by their own assumptions and beliefs.” REPORT at 4, ¶1. Why is the Union’s contention “persuasive,” while the Employer “claims” are influenced by assumption and belief? Again, because there is not one word of analysis to explain those conclusions—conclusions that decide the issue and conclusions upon which rest the Board’s integrity—the answer can only be because the Regional Director says so.

III. CONCLUSION

In *Sonoma Health Care Center*, then-Chairman Battista expressed his dissent from the *result* of the case, and in doing so revealed his reverence for the Board’s integrity and the required purity of its processes.

The Board’s election process is rightly called the “crown jewel” of the Board’s endeavors. The election is the place where the ultimate Section 7 choice is made, and the Board goes to extraordinary lengths to see to it that the election is conducted in a fair and impartial manner.

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

dissent.

342 NLRB at 936-937.

In OM 04-26, issued on February 12, 2004, the General Counsel advised the Regions that “it is preferable to err on the side of proceeding to hearing rather than be told by a circuit court years later that it was inappropriate to resolve the issues administratively.”

The Employer submits that for all the reasons above, this REPORT and its recommendations must be rejected by the Board. Like the Regional Director here, the regional director in *Athbro*, found the cited conduct insufficient to set aside the election, but the Board disagreed, understanding that it must maintain strict neutrality. The First Circuit used the phrase, “the appearance of bias,” former Board Chairman Battista feared tarnishing the crown jewel, and the General Counsel’s office advises Regions to “err on the side of caution.” This election must be overturned. A small price to pay for the preservation of public respect.

RESPECTFULLY SUBMITTED,

ATTORNEY FOR THE EMPLOYER, THE AVENUE CARE AND REHABILITATION CENTER



11-28-12

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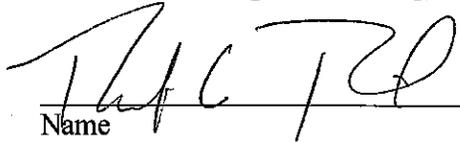
Date

CERTIFICATE OF SERVICE

I, Robert C. Pivonka, do hereby affirmatively state that on the 28th day of November, 2012, I served copies of this Exception to the Regional Director's Report on Objections and Brief in Support upon:

Frederick Calatrello, Regional Director, National Labor Relations Board, Region 8 via the Board's electronic filing system, and upon

Frank Hornick, Ohio Health Care Director, SEIU District 1199 via email (fhornick@seiu1199.org)


Name

11/28/2012
Date