

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region Eighteen

JT ELECTRIC SERVICE, INC.

Employer

and

CHRISTIAN LABOR ASSOCIATION, UNITED  
CONSTRUCTION, LOCAL 84

Petitioner

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 292

Intervenor

Case 18-RC-107613

**HEARING OFFICER'S REPORT  
AND RECOMMENDATION TO THE BOARD ON OBJECTION  
TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

This report contains my findings and recommendation regarding an objection filed by the Petitioner, Christian Labor Association, United Construction, Local 84, to conduct allegedly affecting the results of the election. The Petitioner's objection alleges that after the election petition was filed, the Intervenor, International Brotherhood of Electrical Workers, Local 292, made unlawful promises of benefits to employees contingent on its success in the election; that it made these promises for the purpose of influencing the employee's vote; and that it was capable of carrying out these promises. Petitioner further alleges that this conduct interfered with employee free choice in the election, and that the election should be set aside.

Upon the entire record in this case,<sup>1</sup> and from my careful observation of the demeanor of the witnesses while testifying under oath, I recommend overruling the objection and issuing an appropriate Certification of Representative.

**I. PROCEDURAL HISTORY**

A certification petition was filed on June 20, 2013,<sup>2</sup> by Christian Labor Association, United Construction, Local 84 (“Petitioner” or “CLA”). On about June 21, International Brotherhood of Electrical Workers, Local 292 (“Intervenor” or “Local 292”) filed a motion to intervene. A Stipulated Election Agreement executed by the parties was approved by the Regional Director on June 28, and an election by secret ballot was conducted among certain employees<sup>3</sup> of JT Electric Service, Inc. (“Employer” or “JT Electric”) on July 15. The results of the election are set forth in the Tally of Ballots that issued at the conclusion of the election.<sup>4</sup> On July 19, Petitioner timely filed two Objections to conduct affecting the election. On July 29, Petitioner untimely filed a third Objection. Thereafter, on July 31, the Regional Director for the Eighteenth Region issued a Report on Objections to Conduct Affecting the Results of the

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<sup>1</sup> Permission was granted by the undersigned for the filing of briefs. The Petitioner and Intervenor subsequently filed briefs, which I have duly considered in formulating my recommendations.

<sup>2</sup> Unless otherwise indicated, all subsequent dates are in 2013.

<sup>3</sup> The collective bargaining unit contained in the Stipulated Election Agreement is as follows:

All employees performing electrical work assigned out of the Employer’s Albany, Minnesota office; excluding all guards and supervisors, as defined by the Act, as amended.

<sup>4</sup> Approximate number of eligible voters.....	20
Number of void ballots.....	0
Number of votes cast for CLA – UNITED CONSTRUCTION – LOCAL 84.....	7
Number of votes cast for IBEW, LOCAL 292.....	9
Number of votes cast against participating labor organizations.....	0
Number of valid votes counted.....	16
Number of challenged ballots.....	0
Number of valid votes counted plus challenged ballots.....	16

Election, Order Directing Hearing and Notice of Hearing, in which he approved the Petitioner's withdrawal of Objection 2 and untimely Objection 3 and ordered that a hearing be conducted for the purpose of receiving evidence to resolve the issue raised by the remaining Objection to the election.

In his July 31 Report and Order, the Regional Director directed the hearing officer to prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues. On August 1, the Regional Director issued an Order Rescheduling Hearing and ordered that the hearing be rescheduled to August 9.

Accordingly, on August 9, a hearing was held pursuant to said notice in Minneapolis, Minnesota, before the undersigned hearing officer duly designated for the purposes of conducting such hearing. The Petitioner and Intervenor<sup>5</sup> were represented at the hearing and had full opportunity to call, examine, and cross-examine witnesses, and to introduce evidence regarding the issues.

## **II. THE OBJECTION**

Pursuant to the remaining objection, the Regional Director's Report and Order directed that the hearing be held with respect to the allegation that agents of the Intervenor made an alleged promise to employees eligible to vote in the election, offering to provide up to \$250,000 to assist the employees in buying the Employer's business.

## **III. FINDINGS OF FACT**

The Employer, JT Electric Service, Inc., performs electrical contracting work. JT Electric is owned by Terry Oehrlein and Jerry Mergen. At the time of the hearing, JT Electric

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<sup>5</sup> The Employer did not attend or participate in the hearing.

employed fifteen employees performing electrical work in the field and four office personnel employees. The electrical employees of the Employer have been represented by IBEW Local 292 since 1999.

It is undisputed that on June 24, IBEW Local 292 Lead Organizer Dennis Kalthoff had a conversation with bargaining unit employee Troy Killinger outside of Killinger's home in Gilman, Minnesota and on the same day, Kalthoff had a conversation with bargaining unit employee Shaun Sauer in the electrical room at a facility of St. Cloud Medical Group, where Sauer was working. It is also undisputed that Lead Organizer Kalthoff had conversations with unit employee Sheldon Sauer following the filing of the petition on June 20 and prior to the election conducted on July 15, including a phone conversation on June 24 and a conversation in Kalthoff's office on "the Thursday before the vote." (Tr. 41). What is disputed is the content of these conversations. In the following paragraphs, I will summarize the record evidence, point out conflicting and/or inconsistent testimony, and make credibility resolutions, as necessary.<sup>6</sup>

#### **A. CONVERSATION BETWEEN EMPLOYEE TROY KILLINGER AND ORGANIZER DENNIS KALTHOFF**

##### Employee Troy Killinger's Testimony

Troy Killinger has worked for JT Electric for nineteen years. For the past fourteen years, he has held the position of journeyman electrician and has performed electrician work out in the field. On June 24, Killinger was on vacation at his home in Gilman, Minnesota. That morning, Killinger received a phone call from his coworker, Shaun Sauer. Sauer told Killinger that he had

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<sup>6</sup> In the resolution of all issues where credibility of oral testimony became a factor, I have carefully considered the demeanor and conduct of the witnesses, as well as their candor, their objectivity, their bias or lack thereof, and have carefully weighed the witnesses' understanding of the matter to which they have testified, the plausibility, consistency and probability of their testimony, as well as whether parts of their testimony should be accepted when other parts are rejected.

received a visit from Local 292 Organizer Dennis Kalthoff, who told him that Local 292 would be willing to help give Killinger money to buy the shop. Killinger testified, “And that was about it, as far as my conversation with Shaun.<sup>7</sup> And then later that day, probably 4:30 or so, Dennis [Kalthoff] showed up at my house.” (Tr. 14). Killinger gave the following testimony on direct regarding that conversation:

A: And he said that he heard that I was interested in purchasing the shop, that he was happy as hell to hear that and...that I was the “ace in the hole” for that, and to please let the IBEW help you out with that so you’re not eyeball deep in debt. He said that several times. And I asked, “well, why—how can you give that to me and not other electrical shops in St. Cloud, you know, Al’s Electric or Augusta [sic] with the favored nations?”<sup>8</sup> And he said, “Well, we would have to make it work out—get the attorneys involved and make it work out whether it’s Market Recovery or something that would work for me; and that the Union has the—or IBEW has the resources to make this work.” The conversation was probably—oh, I don’t know, half hour—45 minutes, something like that.<sup>9</sup> (Tr. 14-15).

Q: Did—were you told a specific amount of money.

A: I was not told a dollar amount. (Tr. 15).

...

Q: So did you talk about other things other than this?

A: Ah, it was pretty much about just letting them—letting them help out. There wasn’t a whole lot, you know, and saying that—you know, that they needed to help JT because we bid against different companies than other contractors. For the most part, it was about that issue.

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<sup>7</sup> This testimony is clearly hearsay, but is referenced herein as evidence of dissemination.

<sup>8</sup> There appears to be a gap in the conversation, as Killinger reports it. Killinger’s response (“well, why—how can you give that to me and not other electrical shops...”) to Kalthoff’s supposed statement appears disjointed in the conversation as he reports it, whereas his response would flow logically in the context provided by Kalthoff, who testified that he was explaining the possible benefit of a Market Recovery grant to Killinger as a potential future owner of JT Electric, as discussed later herein.

<sup>9</sup> I note that the conversation reported by Killinger does not reflect 30-45 minutes of discussion.

Q: And how many times did Mr. Kalthoff mention this to you, the helping you out with buying the business?<sup>10</sup>

A: Three times. (Tr. 16).

Employee Killinger testified that he had no other conversations with Organizer Kalthoff or anyone else at Local 292 about this subject, but he talked to fellow employees Jeff Leuthmer, Ross Tople, and Sheldon Sauer about his conversation with Kalthoff.

Employee Killinger was asked during cross-examination, “When [Organizer Kalthoff] was talking to you about you buying the company, he was making his pitch. He was telling you what he thought would be a good thing about being a Local 292 contractor, right?” Killinger testified in response, “He was basically that—to give me money to purchase it.”<sup>11</sup> (Tr. 19).

Employee Killinger further testified that JT Electric has sought and received Market Recovery funding numerous times over many years from Local 292. When asked, Killinger did not deny that what Organizer Kalthoff was talking about was in fact Market Recovery funding:

Q: And Mr. Kalthoff was talking about the possibility of 292 providing Market Recovery funds should you purchase the company right?

A: In a roundabout way. I mean, how would that—that wouldn’t help with the debt, thought [sic], you know, with the debt of buying the shop. (Tr. 20).

When asked on re-direct to clarify what Organizer Kalthoff was talking about, employee Killinger testified that Kalthoff was talking about Market Recovery funds:

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<sup>10</sup> Killinger’s testimony regarding Kalthoff’s statements is vaguer than this leading question suggests. As demonstrated below, Killinger testifies more than once regarding what he contends Kalthoff actually said, and none of Kalthoff’s reported statements constitute a promise to help Killinger purchase the business. The only statements that reflect that possibility are Killinger’s own interpretations of the conversation.

<sup>11</sup> Killinger’s demeanor and use of the word “basically” in this context reflects that the statement is not what was actually said, but rather, an interpretation of what was said. I also note that this statement is inconsistent with his version of the conversation on direct, which contains no reference to giving him money to purchase the business.

Q: What was your impression of Mr. Kalthoff's statement to you? Was he only talking about you receiving funds, Market Recovery Funds, as a new employer?

A: The way I took it, it was Market Recovery Funds as far as keeping the debt down, you know, so you're not buying the shop "eyeball deep in debt" with his words. (Tr. 21).<sup>12</sup>

Q: And using the Market Recovery Funds to do what exactly?

A: It wasn't specifically said. Just said we have to get our attorneys involved and make this work somehow.

...

Q: Was Market Recoveries said?

A: Yes.

...

Q: When was the word, "Market Recovery" mentioned in the conversation? At what point. (Tr. 22).

A: Right after I asked, "How can you give me money and not have everybody else want it, all the other shops, as far as the favored nations?" And that's when he said we needed to get our attorneys involved and make it work for you, whether it's through Market Recovery or somehow make it work for you.

Q: So when he first mentioned giving you money, what, exactly, did he said? [sic]

A: It was "Please let us help you out so you're not eyeball deep in debt."

Q: And did he also mention that he knew you wanted to buy the business?

A: Yes.

Q: What did he say about that?

A: "I heard from Shawn Sauer that you were interested in buying the business and I'm happy as hell to hear that, and you're the ace in the hole for that."

Finally, when asked on cross-examination if what Organizer Kalthoff actually said was, "You would be crazy to buy the company because you will be eyeball deep in debt; that you could just as easily go to Menards, get your equipment, have your pick-up truck and start up a business that way," Killinger testified that he did not remember.

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<sup>12</sup> Thus it appears this reference is also in relation to Market Recovery funds versus straight monetary assistance to buy the business.

## Organizer Dennis Kalthoff's Testimony Regarding his Conversation with Employee Killinger

Consistent with Killinger's testimony, Organizer Dennis Kalthoff testified that he and Killinger had just one conversation regarding the issue before the Board. This conversation occurred prior to the election, outside of Troy Killinger's house, on the driveway next to Killinger's truck and trailer. The conversation was approximately 10 minutes in duration.<sup>13</sup> As to the content of the conversation, Organizer Kalthoff testified that they discussed the benefits of staying IBEW; that it has a long history of Market Recovery with JT; and that Kalthoff would like to continue to work with employees of JT and continue to help them. Kalthoff testified that he said he thought it was great that the employees were coming together and staying together and staying with the customers.

According to Organizer Kalthoff, during their conversation, employee Killinger mentioned to Kalthoff that he was interested in buying JT Electric. Kalthoff testified that he responded, "I'm surprised that you would invest hundreds of thousands of dollars to be eyeball deep in debt when you have a truck and trailer, you could go into business for yourself and pretty much get anything you need at Menards. Why would you spend hundreds of thousands of dollars to buy Terry's wore out equipment." Kalthoff testified that Killinger acknowledged this statement but did not further comment.

Organizer Kalthoff testified that he has no authority on behalf of Local 292 to commit Local 292 to provide Market Recovery funds to any contractor; he has no authority to make the determination of how much of a grant to provide to a particular contractor if a grant application is approved; and at no time did he promise to give anything to Mr. Killinger or any other

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<sup>13</sup> Kalthoff's testimony is more specific than that of Killinger. Kalthoff testified that when he pulled up to Killinger's house, Killinger was outside framing up to pour some concrete in front of his garage. Kalthoff testified that the conversation was roughly 10 minutes long, because Troy obviously had work to do and Kalthoff felt like he was just holding him up. (Tr. 46).

employee at JT Electric. Kalthoff further testified that Market Recovery funds are not used to help an employee buy a business, and the context in which he discussed Market Recovery funds with Mr. Killinger was to explain that they are a potential benefit of being a Local 292 contractor:

Q: When you were discussing the possibility of Market Recovery funds being available to JT Electric with Mr. Killinger, were you discussing them in the context of him using the money to purchase the company?

A: No, it was in the intent that the guys are familiar with Market Recovery and how it is used. I was telling Troy that the potential to continue to help him, if he pursues buying the shop, is going to be there, just as well as we had been doing with JT Electric since 1999. (Tr. 53).

Q: When you were talking to Mr. Killinger about his possible purchase of the company and the benefits of being a Local 292 contractor, were you talking to him any differently when you talk to other contractors that you are seeking to organize?

A: No, I was talking to Troy as a potential owner. (Tr. 54).

Q: Do you make promises—have you ever made promises to contractors that you are seeking to organize in terms of payment of money?

A: No, I don't have that authority. That's way above my pay level.

Q: Did you do that here?

A: No, I did not.

Kalthoff testified that there is not a written description of the Market Recovery program, but rather, the written description would follow, "if they were awarded the project." (Tr. 54)

## **B. CONVERSATION BETWEEN EMPLOYEE SHAUN SAUER AND ORGANIZER DENNIS KALTHOFF**

### Employee Shaun Sauer's Testimony

Shaun Sauer has been an employee of JT Electric for nine years and has held his current position of journeyman electrician for five years. According to Sauer, on June 24 at about 9:00 or 9:30 a.m., Sauer received a visit from IBEW Local 292 Organizer Dennis Kalthoff while he

was in the electrical room at St. Cloud Medical Group. Kalthoff told Sauer that he was trying to reach everyone with JT Electric and Sauer was the first employee he was speaking with.

Kalthoff asked Sauer what was going on. Sauer informed Kalthoff that “the guys” didn’t know what the future was going to be like with JT Electric. According to Sauer, Organizer Kalthoff responded that the CLA was a bad thing to do and said “You don’t want to do that.” Sauer then told Kalthoff that the employees want to purchase JT, but they don’t want to do it with it being IBEW, that that would be a hard thing to do. Then Sauer testified on direct examination:

A: So Dennis was—he said he was relieved to hear that, and then he gave me a number—\$250,000 to help us out. I don’t know how he came up with that number and then I pretty much said that Troy Killinger was the main guy interested in purchasing the shop. (Tr. 25).

Q: You said he mentioned \$250,000. Did he say what that was for?

A: To—it would help Troy [Killinger] and send [Owners] Jerry and Terry on their retirement, an early retirement, send them on their way. (Tr. 26).

Sauer testified that he told Organizer Kalthoff that fellow employee Troy Killinger wanted to buy the business, and to contact Killinger about it. Sauer testified that he did not recall Kalthoff’s response, and that Kalthoff did not express whether or not he was supportive of Killinger purchasing the business.

After this conversation with Organizer Kalthoff, Sauer called fellow employee Troy Killinger. According to Sauer, he told Killinger:

“When [Dennis Kalthoff] left, I called Troy up and told him about Dennis saying that the Union would help us or help Troy buying the shop with \$250,000. And after I got done talking to Troy, I believe I called Ross Tople and told him the same thing.” (Tr. 26).

Shaun Sauer testified that employees Troy Killinger, Ross Tople and Ryan Kasella knew about his conversation with Kalthoff because he, Sauer, discussed it with them. He testified that he discussed it with no one else. (Tr. 29). He testified there were no other conversations regarding the alleged offer of \$250,000, apart from what he testified to.

When asked on cross-examination whether Organizer Kalthoff mentioned the \$250,000 in reference to a grant provided by Local 292 to Premium or Premier Electric, Sauer testified, “From my knowledge, it’s just—he said \$250,000 to help Troy out. It wasn’t with—he never said Market Recovery with me.” Sauer then testified that he *did not remember* whether Kalthoff mentioned or was talking about a grant to Premier Electric. (Tr. 32, 33, 34).

#### Organizer Dennis Kalthoff’s Testimony Regarding His Conversation with Shaun Sauer

Dennis Kalthoff testified regarding his conversation with employee Shaun Sauer. Kalthoff testified that he and Sauer were at the St. Cloud Medical Clinic, on the north campus, which gave way to discussion regarding the fact that they were trying to get work for JT Electric at the St. Cloud Hospital. Kalthoff testified that he raised the number \$250,000 in the conversation because he was explaining to Sauer a grant the IBEW recently made to a different electrical contractor, Premier Electric, to get them work at a major facility where another non-union contractor had been doing work. Kalthoff testified:

“...I had actually wired the south campus, and we had talked about the relationship with a facility director with the medical group, Bob Kramer, and how that relationship benefits JT to get the work at the medical clinic, because when I wired the south campus, I wired it for Al’s Electric, and I thought it was odd when we finished the campus, JT was right there to take over the service work and things. And as we were talking about medical facilities, I had brought up a grant that we had just put together a week prior to meeting with Shaun that was pertaining to Premier Electric at the St. Cloud Hospital, and it was a big grant. It was a \$12.00 an hour grant up to \$18,000, which equates to \$216,000, and that’s where I probably mentioned 250 to Shaun, because it was irrelevant as to exact dollar amounts.” (Tr. 49).

Organizer Kalthoff also testified that JT electric employee Ryan Kasella was present for half of this conversation.<sup>14</sup>

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<sup>14</sup> Kasella was not present at the hearing or called as a witness. As discussed later in the report, a hearing officer may consider a party’s failure to call a potentially corroborating employee witness when evaluating whether the objecting party has carried its burden. See, *C&S Distributors Inc.*, 321 NLRB 404, fn. 2 (1996).

Organizer Kalthoff subsequently authenticated Intervenor Exhibit 1, which was received into the record. The exhibit is an email from Dennis Kalthoff to Andrew Snope (the IBEW “Market Recovery guy,” Tr. 51) dated June 10, 2013, in which Kalthoff discusses a grant to Premier Electric for St. Cloud Hospital maintenance work in the amount of \$12 per hour, up to 18,000 hours, for a total value of \$216,000.<sup>15</sup>

### **C. CONVERSATION BETWEEN EMPLOYEE SHELDON SAUER AND ORGANIZER DENNIS KALTHOFF**

#### Employee Sheldon Sauer’s Testimony

Sheldon Sauer is Shaun Sauer’s father, as well as a JT Electric employee. Sheldon has worked for JT Electric for twenty-seven years and has been a journeyman electrician for 18 years. On June 24, Sheldon received a phone call from Organizer Dennis Kalthoff. Sheldon testified:

“[Kalthoff] just stated to me that he had a—he was out to see my son, Shaun, about a job, and to see how things were going, and he said that he was very relieved that he had—Shaun had told him that the employees wanted to buy JT Electric and he was very relieved.” (Tr. 37).

When asked on direct-examination, “Did Mr. Kalthoff say anything to you about offering anything to Troy?” Sheldon testified:

“He just told me that he would—he’s going to try to find some funding for Troy to purchase JT Electric, no dollar amount was given or anything, it was just find some funding for Troy.” (Tr. 37).

Sheldon further testified that Kalthoff just wanted to know what was going on, because the vote was coming up, and he wanted to know if Sheldon had heard anything. Sheldon responded that he was working out of town and doesn’t see anybody and hadn’t heard anything.

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<sup>15</sup> The email states: “I’m leaving this morning by motorcycle for vacation. I hadn’t heard back from Doug Olson with Premier Electric yet on the St Cloud Hospital maintenance work. The grant was set up as \$12 per hour, up to 18,000 hours = total value \$216,000...”

Sheldon testified that he told Troy Killinger that Organizer Kalthoff offered to find him some money. Sheldon did not tell anyone else. (Tr. 39).

During cross-examination, Sheldon testified that Organizer Kalthoff never sat down with him personally and discussed how the Market Recovery program works. Sheldon then changed his testimony and stated that he did discuss Market Recovery for JT Electric and some other companies when he went into Kalthoff's office the Thursday before the election:

Q: Now you talked about a conversation or communications you had with Mr. Kalthoff. Isn't it true that he actually sat down with you and explained the Market Recovery program—how it works? (Tr. 41).

A: He never sat down personally with me and explained how that works, no.

Q: Are you denying that he's ever explained to you how the Market Recovery program works?

A: I know how it works.

Q: Because he helped explain it to you, right? (Tr. 42).

A: Through the years, not any particular day, no.

Q: Are you denying that Mr. Kalthoff actually communicated with you about Market Recovery programming?

A: I say no, I don't remember that.

Q: Okay.

A: I did go into his office about my retirement plan the Thursday before the vote, and he showed me some papers of Market Recovery for JT and some other companies, but—

Q: So he did, in fact, sit down with you and—

A: I guess you could call it that, yah.

Q: Okay, so you're changing your testimony. He did sit down with you at some point and talk to you about how Market Recovery works at least in some respect, right?

A: In some respects, yes.

Organizer Dennis Kalthoff's Testimony Regarding His Conversation with Sheldon Sauer

Dennis Kalthoff does not deny having a conversation with Sheldon Sauer.

**IV. BURDEN OF PROOF**

“Representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5<sup>th</sup> Cir. 1991). The Board’s standard for evaluating objectionable conduct is whether such conduct reasonably tends to interfere with the employees’ exercise of their free choice; the test is objective. *Cambridge Tool & Mfg. Co., Inc.* 316 NLRB 716 (1995). The burden is on the objecting party to prove its case. *Waste Management of Northwest Louisiana, Inc.*, 326 NLRB 1389 (1998). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election. *NLRB v. WFMT*, 997 F.2d 269 (7<sup>th</sup> Cir. 1993) citing *NLRB v. Chicago Tribune Company*, 943 F.2d 791, 794 (7<sup>th</sup> Cir. 1991). To meet the burden, the objecting party must present specific, detailed evidence in support of its position; general conclusory statements by witnesses are not sufficient.

**V. FACTUAL AND LEGAL ANALYSIS**

The Petitioner argues in its brief that the actions of the Intervenor not only are objectionable and warrant a rerun election, but additionally, through its actions, the Intervenor has violated the Act. Specifically, the Petitioner argues the evidence supports its allegations that IBEW Local 292 Organizer Dennis Kalthoff promised that Local 292 would give bargaining unit employee Troy Killinger money to assist him in buying JT Electric; that this promise was

communicated to at least three other employees; and that all fifteen employees in the bargaining unit had knowledge of this promise. If the evidence established these assertions, the election would appropriately be set aside and a re-run conducted.<sup>16</sup> A union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election. “It is, like an employer, barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled.” *Mailing Services*, 293 NLRB 565, 565 (1989), citing *McCarty Processors*, 286 NLRB 703 (1987). However, as detailed below, the record evidence fails to substantiate the allegations. Rather, Petitioner’s witnesses’ testimony is subjective, at times inconsistent, and often open to interpretation, forcing conclusions to be drawn in light of the ambiguities. Furthermore, testimony provided by the Intervenor offers a valid explanation to the Petitioner’s ambiguities. A hearing officer may evaluate the inherent probability of events in assessing the consistency or the truthfulness of the witness and may discredit a witness in part and credit a witness in part. *Universal Camera v. NLRB*, 340 U.S. 474 (1951). Based on the foregoing, I recommend the Petitioner has failed to meet its burden to prove both that the alleged conduct occurred and that the conduct interfered with the free choice of employees to such a degree that it materially affected the results of the election.

#### Relevant Board Law

The Board has found in certain circumstances the grant of benefits by employers and unions during the critical period has impermissibly influenced voter free choice and the outcome of the election. The following Board decisions provide examples of objectionable grants of benefits during the critical period: *Mailing Services*, 293 NLRB 565 (free medical screenings);

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<sup>16</sup> Particularly given the closeness of the vote (7 to 9), if I concluded that even three employees heard from Local 292 that it was going to give an employee money to purchase JT Electric, I would recommend that the election be set aside.

*Owens-Illinois, Inc.*, 271 NLRB 1235, 1235-1235 (1984) (jackets); *General Cable Corp.*, 170 NLRB 1682, 1682-1683 (1968) (gift certificates); *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967) (life insurance). The Board’s analysis as to whether benefits are objectionable or not has consistently included, first, whether the promise or grant of benefit was made during the critical period after the election petition was filed, and second, whether it was a tangible, financial benefit to which employees would otherwise not be entitled.<sup>17</sup>

Alternatively, a union *may* promise an existing benefit to new members if its receipt is not conditioned on the recipient’s demonstration of *preelection* support. See *Mailing Services*, 293 NLRB 565, citing *Dart Container*, 277 NLRB 1369, 1370 (1985) (Board found union’s leaflets promising “ONCE WE WIN THE ELECTION YOU WILL BE ELIGIBLE FOR...3/4 OF A MILLION DOLLARS STRIKE FUND” and “FREE LEGAL HELP” not objectionable because no employee needed to have demonstrated preelection support for the union to be able to take advantage of the promised benefits; promising strike benefits does not impair free choice; and because the union promised to provide free legal help only as an existing incident of union membership or representation).

#### The Evidence and Credibility Resolutions

In the instant case, the record does not establish that Local 292 Organizer Dennis Kalthoff promised to give money (\$250,000 or any other amount) to employee Troy Killinger to help him buy the business, as alleged. Rather, the record shows that Organizer Kalthoff communicated with employees—including Troy Killinger, Shaun Sauer, and Sheldon Sauer—prior to the election regarding the benefits of staying with Local 292, which included Local 292’s

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<sup>17</sup> In *Owens-Illinois, Inc.*, the Board noted that the union gave employees jackets not only during the critical period but on the day of the election, between polling periods, and a significant number of those employees had not yet voted.

ability to provide Market Recovery<sup>18</sup> grants over the years to signatory contractors, including JT Electric. Further, there is no evidence that Organizer Kalthoff conditioned access to Local 292's Market Recovery fund on voters' preelection support, or that any promise or grant of Market Recovery funding was actually made to JT Electric employees during the critical period. Rather, Kalthoff provided an example to Shaun Sauer of a recent grant by Local 292 to another contractor in the amount of nearly \$250,000. Organizer Kalthoff did not promise money to employees<sup>19</sup> and the Market Recovery fund was only discussed as an existing advantage of union representation.

As to the testimony of employee Troy Killinger, it is vague and inconclusive. Even if I were to credit Killinger's testimony, I would have to fill in blanks to be able to draw the conclusion that Organizer Kalthoff promised Local 292 would give Killinger funds to purchase JT Electric.<sup>20</sup> Further, there is no evidence that Kalthoff ever told employee Killinger that Local 292 would give him up to \$250,000, or that the IBEW offered any amount of money at all. The only source through which Killinger (or any other employee) was told that Local 292 promised to give up to \$250,000 to purchase JT Electric was through employee Shaun Sauer.

As to the testimony of employee Shaun Sauer regarding his conversation with Organizer Kalthoff, the ambiguities in Sauer's testimony are explained by Kalthoff. Shaun testified that

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<sup>18</sup> Market Recovery grants have consistently found to be protected under Section 7 by the Board. See, *J.A. Croson Company*, 359 NLRB No. 2 (2012), citing *Manno Electric*, 321 NLRB 278, 298 (1996), *enf'd* 127 F.3d 34 (5<sup>th</sup> Cir 1997) ("Job targeting program" protected by Section 7); *Associated Builders & Contractors*, 333 NLRB No. 116 (2001), and *Can-Am Plumbing*, 335 NLRB No. 93 (2001). See also, *Local Union 257 v. Sebastian Electric, et al*, 121 F.3d 1180, 1186-86 (8<sup>th</sup> Cir. 1997).

<sup>19</sup> Indeed, Kalthoff testified that as a Lead Organizer, he has no authority to promise or grant Market Recovery funds to a contractor.

<sup>20</sup> Killinger testified that Kalthoff told him, "Please let us help you out so you're not eyeball deep in debt." This alleged statement would be problematic if it was instead, for example, "Please let us give you money..." However, that is not the testimony. Further, as noted above, this statement appears to have been made in the context of a discussion of Market Recovery money.

Kalthoff gave him a number, \$250,000 “to help us out.” Shaun testified, “I don’t know how he came up with that number and then I pretty much said that Troy Killinger was the main guy interested in purchasing the shop.” (Tr. 25). Organizer Kalthoff on the other hand provided detailed testimony regarding his conversation with Shaun Sauer. Their conversation took place at the St. Cloud Medical Clinic. Organizer Kalthoff was discussing with Sauer that fact that Local 292 recently provided a grant around the amount of \$250,000 to another contractor to help that contractor, Premier Electric, successfully bid a job at the St. Cloud Hospital. This claim appears to be supported by Intervenor Exhibit 1, an internal union email which reflects the comments Organizer Kalthoff made to employee Shaun. I also note that on cross-examination, Shaun was evasive (testifying that he could not remember) as to whether the entire context of his conversation with Organizer Kalthoff related to a grant given to Premier Electric.

In addition to Shaun’s evasiveness on cross-examination, Organizer Kalthoff testified that employee Ryan Kasella was in fact present for at least half of his conversation with Shaun. However, Petitioner, who issued subpoenas ad testificandum prior to the hearing (and as the objecting party, has the legal burden to prove its case), did not call Ryan Kasella as a witness. A hearing officer may, in making credibility determinations and evaluating whether the objecting party has carried its burden, weigh a party’s failure to call a potentially corroborating employee bystander to corroborate the party’s witness. *C&S Distributors Inc.*, 321 NLRB 404, fn. 2 (1996). Thus, it may be inferred that the witness, if called, would have testified adversely to the party on that issue.

I also note that the testimony of Sheldon Sauer, Shaun Sauer’s father, is more consistent with Organizer Kalthoff’s testimony, and is not consistent with his son’s testimony. Sheldon Sauer testified that, “no dollar amount was given or anything, it was just find some funding for

Troy.” This vague remark by Organizer Kalthoff is consistent with Kalthoff’s denial that he made any promises to find funding for Troy or any other employee to purchase JT Electric.

Again, it is the hearing officer’s duty to make a resolution of all issues where credibility of oral testimony becomes a factor. Pursuant to that duty, insofar as these conversations occurred between Kalthoff and Shaun, Sheldon and Troy, I credit Kalthoff’s testimony that he did not make any promise that Local 292 would give money to help employees purchase JT Electric.<sup>21</sup>

Based on the record testimony, the evidence fails to establish that the Intervenor engaged in objectionable activity. While the evidence demonstrates that Kalthoff was promoting Local 292 to employees prior to the election, the Board has established that communications by a Union to employees during the critical period, even if those communications constitute campaign “propaganda,” is not objectionable. Only if the communications are so artfully deceptive as to inhibit employees’ rights to free and fair choice is the conduct objectionable. See *Contech Div., SPX Corp. v. NLRB*, 164 F.3d 297 (6<sup>th</sup> Cir. 1998).<sup>22</sup>

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<sup>21</sup> Kalthoff’s testimony was more detailed, specific and logical than that of Shaun, Sheldon and Troy. Sheldon, for example, repeatedly denied that Kalthoff ever sat down with him personally and discussed how the Union’s Market Recovery program works, and then shortly thereafter, changed his testimony and acknowledged that he did in fact sit down with Kalthoff prior to the vote and they discussed how Market Recovery works. (Tr. 41, 42). Shaun’s testimony is simply improbable. See, *300 Exhibit Services & Events, Inc.*, 356 NLRB No. 66, slip op. at 1 fn. 2 (2010) (the Board has held that uncontradicted testimony need not be accepted as true if it contains improbabilities or there are other reasonable grounds for believing it is false). Shaun testified after he told Dennis Kalthoff that the employees want to purchase JT Electric but not with it being IBEW, “So Dennis was—he said he was relieved to hear that, and then he gave me a number—\$250,000 to help us out.” It is unlikely that the IBEW Rep. would say he was relieved to hear that employees want to purchase the business but not with it being IBEW.

<sup>22</sup> The Court found that to the extent that a Union’s communications might be regarded as “propaganda,” such is common in almost all representation elections and not objectionable. Communications were only found to be objectionable when a representation of information was so deceptive as to render employees incapable of separating truth from untruth.

There is no evidence that the claims made by Kalthoff regarding the Intervenor's ability to provide Market Recovery funding were false misrepresentations. To the contrary, Intervenor Exhibit 1 appears to support the Intervenor's comments to an employee that the IBEW is capable of providing Market Recovery grants of the scale claimed by Kalthoff. Further, the employees testified that they are aware the Market Recovery program has existed in years past and that JT Electric has received numerous Market Recovery grants over the years.<sup>23</sup> Thus, this was not a new benefit invented and promised during the critical period, but rather this was an existing benefit of being an IBEW contractor. As the Board has said, "We do not believe that a union interferes with an election when it promises to extend an existing incident of union membership to new members." *Dart Container*, 277 NLRB at 1370.

## VI. CONCLUSION AND RECOMMENDATION

In view of the foregoing findings of fact, and after carefully considering all of the evidence in the record and assessing the credibility of each of the witnesses who testified, I conclude that the evidence does not support Petitioner's objection and I therefore recommend that it be overruled in its entirety. I further recommend that the Board issue an appropriate Certification of Representative.<sup>24</sup>

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<sup>23</sup> Killinger testified that he was aware JT Electric has requested and received Market Recovery over the years. (Tr. 19, 20). Sheldon Sauer testified that he knows how Market Recovery works, and that Local 292 Rep. Kalthoff explained it to him, "through the years." (Tr. 42).

<sup>24</sup> *Right to File Exceptions*: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14<sup>th</sup> Street N.W., Washington, DC 20570-0001.

*Procedures for Filing Exceptions*: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on September 5, 2013, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is

Signed at Minneapolis, Minnesota this 22<sup>nd</sup> day of August, 2013.

/s/ Martha C. Armstrong  
Martha C. Armstrong  
Hearing Officer  
National Labor Relations Board, Region 18  
330 South Second Avenue, Suite 790  
Minneapolis, Minnesota 55401

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**accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). *Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.