

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28

AIM ROYAL INSULATION, INC.  
and JACOBSON STAFFING, L.C.,  
Joint Employers

and

Cases 28-CA-22605  
28-CA-22714

INTERNATIONAL ASSOCIATION OF  
HEAT & FROST INSULATORS & ALLIED  
WORKERS, AFL-CIO, LOCAL NO. 73

**RESPONDENT AIM ROYAL'S ANSWER  
TO GENERAL COUNSEL'S EXCEPTIONS TO THE ALJ'S DECISION**

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## **I. FACUTAL SUMMARY**

### **A. Overview of Parties**

#### **1. Aim Royal**

Aim Royal is a small, family owned and operated mechanical insulation company based in Phoenix, Arizona since 1984. (TP 30-31). Aim Royal's management structure is minimal: Mike Gibbs is the President and Owner of Aim Royal; Jeff Heron is the Vice President and part owner; and Lazaro Campos ("Campos") is the superintendent. (TP 30, 34, 954). As superintendent, Campos' duties include recommending, interviewing and hiring new employees. (TP 35-36, 82, 145-46). Before hiring new permanent employees, Campos must discuss the hiring decision with Gibbs, but Gibbs puts great weight on Campos' opinion. (TP 35-36, 82, 141). With respect to the hiring of temporary workers, Campos gets approval from Gibbs on whether temporary workers are needed and how many to hire, but the decision regarding which temporary workers to hire rests with Campos. (TP 38, 225-26).

#### **2. Jacobson**

Jacobson Staffing ("Jacobson") is a national staffing company with an office in Phoenix, Arizona. Jacobson's Phoenix office consists of one employee, Sandy Chavez ("Chavez"), who is in charge of finding, hiring, and placing temporary workers. (TP 339-41). Jacobson has various businesses as clients who contact Chavez when they are in need of temporary workers. When Chavez is contacted by a client with a particular need, she finds applicants through various means, screens them, and if appropriate, will set up an interview for the applicant with her client. (*Id.*).

From time-to-time, Aim Royal has had a need for temporary workers. When this need arises, Campos contacts Chavez and requests a particular number of temporary workers. (TP

227). Generally, Chavez will continue to set up interviews for Aim Royal until she hears from them when the position has been filled. (TP 342-47). In some cases, Campos will fill the position before informing Chavez of that fact. (TP 347-50).

## **B. Aim Royal's Hiring Practice**

### **1. Overview of Aim Royal's Hiring Practice.**

A central issue in this case has been Aim Royal's hiring practices. From January 2008 forward, Aim Royal has filled its hiring needs for permanent employees using a rehire/referral-based hiring system. (TP 35, 37:18-21, 45:14-18, 109:1 to 191:10). The General Counsel clarified that Aim Royal's hiring procedures are not alleged in the Amended Consolidated Complaint (herein "Complaint") as an unfair labor practice. (TP 25:21 to 26:3). This hiring system, looking to rehire former employees or those recommended by current employees, is the criteria Aim Royal used when Campos became superintendent in 2007. (TP 139:8-22, 145:11 to 146:5). It is also the criteria used by Campos' prior employer, Quality Mechanical Insulation. (TP 139:18 to 140:1, 145:11 to 146:5); *Quality Mechanical*, 340 NLRB 798, 811-12 (2003).

When Aim Royal needs additional employees, it first looks to rehire former employees who were honest, could be trusted and have done good work and who were laid off, fired or who otherwise left for reasons that do not make them ineligible for rehire. Aim Royal ("rehires"). (TP 37:3-7, 139:18 to 140:1, 190:1 to 191:10).<sup>3</sup> Alternatively, Aim Royal will consider for hire individuals who are referred by current employees (TP 37:8-21, 190:1 to 191:10, 225:24 to

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<sup>3</sup> Example of this practice are the rehiring of George Campos (TP 321-323; ARX-1), Mario Chavez (TP 237-238, 241-241), Brett Herron (TP 295:21 to 296:5), Stephen Green (TP 295:5-6, 325:16 to 326:4), William Loy (TP 79-80, 326:18 to 327:20; ARX-1; originally referred by Eric Madau (TP 297:21-25)), Manuel Murrieta (TP 299:3-4), Carlos Sanchez (TP 300:20-21), Anthony Sandoval (TP 301:2-9), Keith Stille (TP 301:13-14), Emeterio Valenzuela (TP 302:3-6), Luis Valenzuela (TP 302:13-14), Joel Vasquez (TP 302:17-18), and Jose Paredes Villa (TP 302:25 to 304:6). See also Aim Royal Trial Exhibit 1 ("ARX-1").

225:20).<sup>4</sup> When rehiring former employees, Aim Royal only rehired those employees that Aim Royal could trust, regardless of whether they had been previously fired for “cause.”

The General Counsel spends considerable time suggesting that because some employees were rehired after having been fired for cause, Aim Royal somehow violated its own hiring practices. While clearly there are some reasons that Aim Royal would consider an employee ineligible for rehire (regardless of whether the employee was laid off or fired), the rehire of former employees who were fired may be appropriate. Based on the evidence presented, the ALJ correctly found that Aim Royal had a referral based hiring system that it consistently followed throughout the Relevant Period.

Aim Royal presented consistent and substantial evidence that one reason that it has hired employees that it had previously fired for cause lies in the nature of the workforce itself:

Well, . . . , there’s a lot of people in this industry that you can use for the time being and . . . , if you need the person, you know that you can trust them, you know he’s going to get the job done.

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<sup>4</sup> Example of this are the hiring of Leopoldo Alvarado, referred by Lazaro Campos (TP 286:3-9), Jacob Aranda, referred by Greg Fallgatter (TP 144, 286:12-17), Alberto Campos, referred by Lazaro Campos (TP 288:9-13), George Campos, referred by Lazaro Campos (brother) (TP 288:14 to 289:6), Joseph Campos, referred by Lazaro Campos (TP 289:7-12), Lazaro Campos, referred by Greg Fallgatter (TP 144-145, 289:13-15), Jose Cardenas, referred by Manuel Murrieta (TP 289:16 to 290:7), Mario Chavez, referred by Lazaro Campos (TP 290:21 to 291:9), Lorenzo Delgado, referred by Lazaro Campos (TP 291:10-18), Scott Denessen, referred by Mike Gibbs (TP 291:19 to 292:24), Edward Enos, referred by Mike Gibbs (TP 142), Jose Tacho Esquer, referred by Luis Roque (TP 293:3-13), Alvaro Garcia, referred by Lazaro Campos (TP 293:14-15), Alejandro Guerra, referred by Lazaro Campos (TP 295:7), Victor Hernandez, referred by Lazaro Campos (TP 295:17-20), Javier Hielo, referred by Lazaro Campos (TP 296:12-13), Luis Jaime, referred by Manuel Murrieta (TP 296:19 to 297:1), Alfredo Lopez, referred by Lazaro Campos (TP 297:7-10), William E. Loy, referred by Ryan Mahan (TP 297:11-18), Ryan Mahan, referred by Paul Trejo (TP 298:1-7), Matthew Martinez, referred by Ralph Olguin (TP 298:10-11), Zackariah McCune, referred by Brett Herron (TP 298), Shawn McMillan, referred by Billy Calderon (TP 447), Roland Nunez, referred by Jeff Herron (TP 299:5-6), Juan Olguin, referred by Lazaro Campos (TP 299:10-11), Ralph Olguin, referred by Lazaro Campos (TP 299:12-13), Jacob Ollarsaba, referred by Joseph Campos (TP 299:14-15), Jose Pearson, referred by Lazaro Campos (TP 299:16-17), Juan Pearson, referred by Lazaro Campos (TP 299:18-19), Matthew Pelligrino, referred by Sean Herron (TP 299:20-21), David Rascon, referred by Jacob Aranda (TP 299:22-23), Cesar Rebollo, referred by Alberto Campos (TP 299:24-25), Ryan Roark, referred by J. Herron (TP 300:3-4), Jose Rodriguez, referred by Lazaro Campos (TP 300:5-6), Paul Sanchez, referred by J. Herron (TP 300:11-13), Ronald Sanchez, referred by B. Herron (TP 300:18-19), Armando Torres, referred by Juan Torres (TP 301:15-16), Juan Torres, referred by Alberto Campos (TP 301:17-21), Paul Trejo, referred by Shawna Trejo (TP 301:22-25), Gabe Trujillo, referred by B. Herron (TP 302:1-2), Genaro Valenzuela, referred by Emeterio Valenzuela (TP 302:7-8), Lucio Valenzuela, referred by Luis Valenzuela (TP 302:9-12), Oscar Valenzuela, referred by Jacob Aranda (TP 302:15-16), and Erickson Wilson, referred by J. Herron (TP 304:17-18). See also ARX-1.

(TP 1011:25 to 1012:3 (testimony by Campos)).

Well, there's a number of reasons why I would bring somebody back. If they worked with us before and you can trust them, you know that if you send them somewhere they're going to get the job done. There's times when you know, there's people out there that you know, they're flaky from time-to-time and you know, I mean, you know we would have to let them go for that, but you know, there's no reason why I wouldn't bring them back over just flakiness even though they've done a good job for us in the past.

(TP 993:11 to 994:4 (testimony by Campos)).

And there is an element of understanding and forgiveness where an employee is honest and was fired or let go for reasons other than the employee's honesty, truthfulness or intent to harm the company and the employee is not otherwise a jerk.

It would boil down to the fact that I don't hold a grudge against people who have personal problems. From time-to-time all persons have personal problems they've got to deal with. That may translate into a problem with their employment. So, the fact that they were laid off, to allow them time to take care of personal problems would not preclude them from coming back provided that while they were there they had done a good job.

(TP 1020:9-22 (testimony by Gibbs)).

Thus, where there has been a problem with the employee in the past, but there is mutual respect and trust, Aim Royal will accept any past personal failures if Aim Royal and the former employee can agree that the prior problem will not reoccur. (TP 64:2-7; 69-70). While a discharged employee will not automatically be considered for rehire, if there has been a meeting of the minds and an understanding of what is expected in the future, Aim Royal will consider rehiring that employee. (*Id.*). Of course, the employee's workmanship is also a factor. (TP 64).

However, some terminations are of such a nature that Aim Royal will *not* consider the employee eligible for rehire, such as when an employee lies, or displays disrespectful or abusive conduct. In considering whether an employee is eligible for rehire, Aim Royal focuses on the

reason for improper conduct (*i.e.*, there is a difference between personal problems as opposed to dishonesty or anger against Aim Royal or intent to cause harm). (TP 1020:9-22). Examples of employees who are ineligible for rehire because of their conduct while employed at Aim Royal include Paul Sanchez, who was fired for lying, stealing and time-card fraud (TP 997-999, 1011:10-17); Aaron Sanchez, who was fired for refusal to take directions, sleeping on the job, not completing work he was assigned and refusing to do hard work necessary to keep the job flowing (TP 999-1000); and Shawn McMillan, who failed to demonstrate an ability or willingness to learn while on the job and, especially, for the anger and rudeness he displayed toward Aim Royal when he was laid off. (TP 1000-1001, 1026:6 to 1027:6).

Aim Royal's practice to meet its hiring needs by hiring former employees (rehires) and workers referred by current employees (referrals) evolved and was in place when Campos became superintendent. (TP 145:11 to 146:5). At one time Aim Royal had placed newspaper ads, but it proved to be ineffective and Aim Royal had stopped using newspaper ads by 2002. (TP 146). Likewise, requesting applications and keeping applications on file for some weeks to use for the purpose of recruitment was discontinued by about 2007. (TP 46-49). Consequently, Aim Royal adopted the practice of *not* accepting *any* applications. (TP 43, 49, 148). Aim Royal found that it was not necessary to take applications because of its workload and Aim Royal had and could easily maintain a sufficient workforce by hiring only rehires and referrals. (TP 148:20 to 149:5, 190:1 to 191:10). To clearly mark its practice, Aim Royal put up signs at its office stating "currently not accepting applications" in 2007. (TP 43, 148:20 to 149:5, 194). Callers and walk-ins were and are told the same. (TP 43-44).

Gibbs testified that unsolicited applicants were not hired nor considered for hire "because we do not take applications over the phone, over the fax. Anything that comes in along those

lines are [sic] shredded so we don't have personal information for people laying around. We did not need to go to any outside source. We had ample personnel in place and in the waiting to fill all our labor needs." (TP 184:7-16, 190:1 to 191:10). The practice of shredding job applications has been in effect since late 2005. (TP 148:4-19, 184:7-16). Aim Royal had no trouble in locating rehires or referrals during the relevant period. (TP 285, 37:18-21, 45:14-18). Aim Royal had no need to call former employees because they contact Aim Royal. (TP 185:10-14, 190:1-8).

In Aim Royal's current hiring procedure, a document entitled "Application" is used to collect employee contact information once an employee has already been hired. These applications are completed in the hiring process and are requested only AFTER the decision to hire has been made (TP 149:6 to 150:6, 194:22 to 195:2, 216); Aim Royal's policy is not to hand out applications before getting hired. (TP 216:12-20). By looking at exhibit Aim Royal Exhibit ("ARX") 1, for applications completed since 2007, the application is almost always completed the day before or the day of actual starting work. A person may be told in advance he can start in the future, and be allowed to delay starting work in order to give notice to a current employer or to move to Phoenix. But it is only after an employee is told he has been hired that the completion of the "application" form is requested. (TP 149:6 to 150:6, 194:22 to 195:2, 216).

Respectfully, the General Counsel in his Exceptions brief confuses use of the term "application." He states that Gibbs said that applications were purged from time to time. However, Gibbs was referring to the time when Aim Royal used applications prior to its change to the rehire/referral hiring system that was implemented in 2007 and was in place by the time Campos was hired as superintendent in February 2007. (TP 147-149). Upon moving to the rehire/referral hiring system, no application document is used prior to hire and the former

“application” forms are used as employee contact information sheets that are filled out by employees *after they are hired*. (TP 149). A person may be told in advance he can start in the future, and be allowed to delay starting work in order to give notice to a current employer or to move to Phoenix. But it is only after an employee is told he has been hired that he is asked to complete Aim Royal’s “application.” (TP 149:6 to 150:6, 194:22 to 195:2, 216).

The unequivocal testimony demonstrated that Aim Royal’s policy is not to accept, and therefore not keep, traditional paper applications on file.<sup>5</sup> After the rehire/referral hiring system was in place, the Aim Royal secretary may have improperly provided or received the form titled “application” to or from people looking for work at Aim Royal after telling them that Aim Royal was not hiring. But that was against Aim Royal policy and the “applications” were never considered in the hiring decision. (See TP 148-49, 184, 250-51, 706). Aim Royal did not seek or use such applications for the purpose of making its hiring decision.

**2. The Evidence Supports the Finding that Aim Royal Consistently Follows Its Hiring Practice.**

Only on a few occasions has Aim Royal’s hiring procedure not been successful. Consideration of other than rehires or those recommended by current employees has occurred only four times since Campos became superintendent in February 2007: Jaime Barrera (TP 286:17 to 288:8), Saul Granados (TP 294:22 to 295:4); Jose Gurrola Jr. (TP 295:11-16) and Luis Roque (TP 300:7-10). However, during the relevant period of the complaint (May 27 through July 15 or August 10, 2009) (herein the “Relevant Period”) all permanent employees who were hired were rehires or those recommended by current employees. (TP 37:18-21, 45:14-18; Aim Royal Exhibit (ARX) 1; ALJD at 4:11-23, 8:37-42).

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<sup>5</sup> As Gibbs testified, the only reason that he kept the batch of applications that was faxed to the ARI office on June 23, 2009 was because he was advised by his lawyer to retain the applications as it was anticipated that an unfair labor practice charge may be filed. (TP 51).

In his Exceptions brief, the General Counsel asserts that there was “much conflicting testimony” about Aim Royal’s hiring practices and that Aim Royal hired many unsolicited applicants. These assertions are simply not supported by the evidence. The ALJ correctly credited Gibbs’ and Campos’ testimony, which was corroborated by business records, in finding that Aim Royal’s hiring practice was valid. In rejecting the General Counsel’s challenge to Aim Royal’s consistent application of that hiring practice because Aim Royal hired two employees as walk-ins, the ALJ properly found that “occasional and sporadic deviations are insufficient to undermine the existence of the general practice.” (ALJD at 10).

For support, General Counsel insists that Barrera, Granados, Gurrola and Torres were hired as walk-ins. As discussed above, Barrera and Grandos were *not* hired during the Relevant Period and were hired *before* AIM had fully instituted its referral-based hiring process. As Gibbs and Campos testified, Aim Royal began to implement its referral based hiring system in 2007, but by 2008 it was fully implemented. (TP 47-48, 179, 190-92, 215-16; ALJD at 10).

The General Counsel also alleges that Armando Torres was hired as a walk-in because he was listed on an exhibit as being a walk-in. But through Campos, Aim Royal demonstrated and the ALJ found that the listing of Armando Torres in the exhibits was mistaken and Armando Torres was actually hired as a referral by his cousin. The General Counsel is mistaken. The ALJ was correct in finding that Torres was not a walk-in.

Finally, as Aim Royal admits and the ALJ considered and found, Gurrola was hired as a walk-in in April 2008. Gurrola called Campos at a time when Aim Royal badly needed assistance and the usual hiring process was unable to timely fill Aim Royal’s hiring needs, so Aim Royal temporarily considered applicants that were not rehires nor employees’ referrals. (TP 248). But as the ALJ correctly found, this was not enough to show that AIM did not follow its

hiring process. (ALJD at 10).<sup>6</sup> The evidence was consistent and supported the ALJ's finding that Aim Royal had and followed a referral-based hiring system.

**3. The Evidence Supports the Fact that Aim Royal's Hiring System Results in Hiring Union Supporters.**

It is undisputed that Aim Royal's hiring practices resulted in the hiring of union supporters, union members and those who had worked for union-contracted companies. In fact, several Aim Royal employees had union affiliations or were known to have worked for union-contracted employers. Those employees included Mario Chavez (TP 239-240, 543-545), Scott Denneson (TP 907-908), Saul Granados (TP 773-774), Bret Herron (TP 774, 1030), Luis Jaime (TP 535-538), Eric Madau (TP 775-776), Manual Murrieta (TP 239-240, 776-777), and Jose Villa (TP 780), all of whom have been hired or rehired since Campos became superintendent in February 2007. (ARX 1). Union organizer Gurrola was the only person hired after January 1, 2008 who was *not* a former employee or a person recommended by a current employee. (ARX 1).

Of these, many were known *at the time of their hiring* to be current or former union members or to have worked for union-contracted employers, including: Chavez (TP 239:16 to 240:7; 543:9 to 545:23; 774:5-13); Denneson (TP 903:11 to 908:19; 770:1 to 771:12); Granados (TP 773:14 to 774:4); Brett Herron (TP 774:16 to 775:2, 1030); Jaime (TP 535:3 to 538:13); Madau (TP 775:21 to 776:18, 1031:4-8); Murrieta (TP 239:16 to 240:7, 776:19 to 777:8); L. Rivera (TP 777:14 to 778:16, 1031:17-25); and Villa (TP 780:6-19, 1031:17-25).<sup>7</sup>

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<sup>6</sup> The General Counsel incorrectly alleges that the ALJ found that Aim Royal did not accept walk-in applications based solely on Gibbs' testimony. The ALJ specifically found that the testimony of Gibbs was "corroborated by Lazarro Campos and to some degree by business records." (ALJD at 10).

<sup>7</sup> The ALJ in the decision stated that prior to hire Murrieta and Chavez had said "bad things" about the union or complained about the union prior to being rehired. (ALJD 4). The specific negative comments by Murrieta and Chavez related to the *lack of work* with the union and a desire to come back to Aim Royal; Chavez and Murrieta had been calling for some time looking for work with Aim Royal. (TP239:16 to 240:21). Murrieta reported he had just been laid off and was constantly being laid off. (TP 241:8-14). Murrieta did not make further negative

Significantly, of the eight<sup>8</sup> permanent insulators hired or rehired during the Relevant Period, five were union members or had worked for union-signatory companies: Mario Chavez, Saul Granados, Luis Jaime, Manual Murrieta and Jose Villa. (TP at 8:37-42).

Further, no employees other than McMillan (whose testimony is disputed, see Aim Royal's Brief In Support of Its Cross Exceptions) have observed or heard, or heard complaints about any inquiry, monitoring or other activity by Aim Royal related to steps to learn union status or sympathies. *See* testimony of Luis Jaime (TP 538:14-20, 540:4-7), Mario Chavez (TP 239-240, 543-545, 547:2-21) and Scott Denneson (TP 907-908). Campos also did *not* ask any questions of Gurrola about the Union. (TP 579).

Thus, based on this undisputed evidence, Aim Royal's hiring procedures actually resulted in the hiring and rehiring of union members and supporters.

### **C. Overview of Jose Gurrola's Employment at Aim Royal**

As discussed above, Gurrola was hired through an aberration in AIM's hiring process. (*See* ARX-1). On July 18, 2008, Gurrola was working at a construction site called the Sacaton site. There were several AIM employees regularly assigned to work at the Sacaton site. On that morning, however, all of those employees but Gurrola were assigned to work at different job sites. Because Gurrola would be the only AIM employee at the site that morning, his site lead man, Joseph Campos, met him at the AIM office at 5:30 that morning to make sure he had the

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comments about the union about other than the lack of work. (TP 240:18-21, 241:4-14). Other than lack of work with the union, Chavez' negative comment about racism was not in relation to the union itself, but to the union-signatory company for which he had worked. (TP 240:8-17, 240:24 to 241:12). These complaints as to lack of work through the union were no different then the complaint of McMillan that he could not get work through the union. *See* McMillan's testimony that Gibbs told McMillan that he had heard McMillan had become a member of the Union and asked how it was going and McMillan replied that it wasn't "going," because he did not have any work, and that he was just trying to get a job. (TP 426). In light of the recession in the construction industry in the spring-summer of 2009, reporting of the lack of work through the union would not have been surprising nor would it have improved or interfered with chances for hire with Aim Royal.

<sup>8</sup> The ALJ correctly identified Sean Herron as one of the nine employees who were hired or rehired during the Relevant Period. (ALJD at 4:11-23). The other eight carried tools and worked in the field and were expected to be employed beyond the summer. Sean Herron is the son of Jeff Herron and grandson of Mike Gibbs, the owners of Aim Royal, who only worked during the summers in the warehouse when he was not in school. (ALJD 5:1-4).

keys to the materials on the site. At that time, as the ALJ correctly found, Joseph Campos informed Gurrola that there was no AIM water at the site because he had it with him, but that he would be bringing it back to the site later that morning. J. Campos anticipated what Gurrola would do before Campos got there with the Aim Royal water: that he would get water from one of the three other subcontractors that had water in that area on July 18. (TP 847). While J. Campos did not specifically tell Gurrola he could use other subcontractors' water, he informed Gurrola that if there was anything that he needed or was lacking, he should contact J. Campos or contact superintendent L. Campos. J. Campos anticipated that Gurrola could contact him via Gurrola's cell phone. However, on the morning of July 18, 2008, Gurrola did not contact J. Campos with regard to any problem at the work site. (TP 850-852). Gurrola testified that he and J. Campos did not discuss drinking water, but the ALJ did find J. Campos' testimony credible on this point.

When Gurrola arrived at the site, there was no AIM water jug because as Joseph Campos testified, he had it with him. According to Gurrola's testimony, he found that there was no AIM water on site and also alleged that there were no dust masks available. He then called L. Campos and told him he was going on strike because of the lack of water. Gurrola proceeded to call Angel Aizu and the two of them carried handmade signs picketing AIM at the gate to the job site.

When Joseph Campos arrived at Sacaton later that morning, he did not see Gurrola or Aizu. He did inspect the work site, however, and found dust masks at the worksite. (TP 843-844, 852-853). At the same time, J. Campos looked to determine what, if any, work had been performed by Gurrola that day and he noted that Gurrola had done no work that day. Gurrola's work area was the same as it had been the day before, which is in stark contrast to Gurrola's

testimony that he had worked for two hours before leaving to go make his sign and go on strike. (*compare* TP 845-847 *with* TP 647-651). Also in contrast to Gurrola's testimony is that the job manager of Russell Air Conditioning, with whom Aim Royal was contracted, encountered Gurrola carrying his strike sign at 6:00 on the morning of July 18, 2008. (TP 915-917).

Several of Gurrola's co-workers who were not at the Sacaton job site that morning, but had worked with Gurrola regularly testified that not only was water regularly available at the site, but that Gurrola never even drank water from the AIM water jug. He regularly drank water from jugs of other contractors', which were present at the Sacaton site the morning of July 18.

Russell Air Conditioning notified Aim Royal that because the water wasn't drinkable on site, if any of Russell's subcontractors (AIM Royal, Gen Electric, or the commercial test and balance sub) needed water, that it was available: "There's water available, drinking water available through Russell A.C.'s water jugs, and [Russell] would request that you bring water as well." Russell's Job Manager, Dale Gibson, had many conversations with AIM Royal personnel over the project regarding the availability of water. He told J. Campos that Aim Royal could also use other sub-contractors' water. Gibson stated to AIM Royal that all of the sub-contractors on site had made an agreement because there was not any water available from the tribal authority, and that if somebody needed some water he could actually drink water from another subcontractor's jug. Gibson had the same or similar conversation with others at AIM Royal, including L. Campos. He also periodically talked to the workers of the foreman that was on the job. (TP 927- 932).

Ralph Olguin was a co-worker of Gurrola in July 2008 at Sacaton. He observed Gurrola at times when Gurrola was getting water. He testified that Gurrola would not drink from Aim Royal's water container. Instead, "he would get water from another group . . . some Mexican

guys that were working there.” Olguin also testified that water was also always available at the site from Russell Air Conditioning. Olguin himself at times used other subcontractors’ water. Likewise, Gurrola’s former co-worker at the site, Jacob Ollarsaba, drank water from other containers provided on the site by other than AIM Royal and observed employees from other contractors or subcontractors on the job drinking water provided by AIM Royal. (TP 830:14-25).

Even Gurrola admitted that non-Aim Royal water has been available at the site that he could and did use in the past. There were other subcontractors there from whom Gurrola obtained water a couple of times. He also carried his own water bottle sometimes. (TP 631-633). On July 18, 2008, Gurrola claims he did not have his own water bottle, but there was a store a half a block away.<sup>9</sup> (TP 632-634).

L. Campos repeatedly attempted to contact Gurrola over the next several days to talk about what had happened to no avail. On July 18, Aim Royal sent Gurrola a letter by regular and certified mail requesting that he contact Aim Royal. (TP 163). Aim Royal was concerned that Gurrola had failed to communicate with the office about the problems at the job site, that his alleged concerns regarding availability of water and masks were untrue, and that he abandoned his job. (TP 162:1-19; GCX 41). When Gurrola did not respond, he was terminated on July 24, 2008. (TP 200). Thereafter, but still on July 24, Gurrola showed up at the AIM office with a list of demands. Gurrola was told he had been sent “a bunch of messages” and a regular and

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<sup>9</sup> Gurrola testified he stopped working at 8:00-8:15, a little over two hours after he had arrived. He had called Aizu earlier that morning, about 6:30. He did not request Aizu to bring water. When he stopped working at about 8:15 he put his stuff/material away and locked up the ladders. He then went outside to the dumpster to make his sign until about 8:30-8:40, then he went to a little driveway and called Campos, then went to the entrance gate. (TP 647-651). Gurrola picketed until 9:30 or 10:00 a.m., about 3½ to 4 hours after arriving. Then Gurrola and Aizu left to go something to eat. During all that 3½ to 4 hour period, Gurrola claims he had no water and he did not request or obtain water from any source – in July. (TP 660-661). For a man thirsty early in the morning, that is a long time without using water that was available on the site.

certified letter directing him to contact the superintendent and he had not responded. (TP 166). In response, Gurolla stated first that he went on strike for unfair conditions. After being told he had been fired for leaving the job and refusing to communicate with Aim Royal, he asked for a raise and stated that if it was not granted he would go on “economic strike.” (GCX 41).

Aim Royal did not hear from Gurrola for another eight months. Then, in April or May 2009, Gurrola called L. Campos and offered to return to work unconditionally. At that time, Campos reminded Gurrola that he had been discharged from AIM eight months earlier.

**D. Discussion of Applications/Attempts to Apply for work**

A majority of the General Counsel’s Complaint and Exceptions focus on various instances when Aim Royal failed to hire or consider for hire particular applicants.

**1. Jose Gurrola**

The ALJ concluded Aim Royal violated Section 8(a) (1) and (3) in failing to hire or reconsider for hire Jose Gurolla, rejecting Aim Royal’s evidence that its decision was based on its good faith belief that Gurrola is a liar and cannot be trusted in light of his actions on July 18, 2008, wherein he falsely claimed (lied) that water and masks were not available for Aim Royal employees to use at the site on the morning of his one-employee strike against Aim Royal. (TP 1001:12-18, 1003:2-15, 1008:1-22). Because such a good faith belief may constitute a legitimate reason for discharge, *see Foothill Sierra Pest Control, Inc.*, No. 32-CA-22419, 2006 WL 3415969 (N.L.R.B. Div. of Judges Nov. 26, 2006), it follows then that such a belief may also constitute a reason not to rehire an employee. Accordingly, issues of veracity and trust made Gurrola ineligible for rehire, which is why Aim Royal neither hired him nor considered him for hire when he requested his former position back on or about May 2009. However, in light of the ALJ determinations, for which there is some evidence in the record to support his credibility

determinations, and despite its good faith belief that Gurrola is untrustworthy because of his lack of veracity is a legitimate reason not to rehire Gurrola, Aim Royal did not take exception to this finding by the ALJ.

## **2. Batch Applicants**

The General Counsel alleged in the Complaint that on or about June 23, 2009, Aim Royal failed to hire or consider for hire Luis Bolanos, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal and John Rohrback (collectively, “the batch applicants”). (Complaint ¶ 6 (g)). This allegation relates to the facsimile sent by the Union to Aim Royal on Tuesday, June 23, 2009, enclosing nine separate applications. (GCX 26.) On that day the sign at Aim Royal stated “Not Accepting Applications,” (TP 43, 148:20 to 149:5, 194) and Aim Royal had just rehired George Campos on June 16, 2009. (TP 321-323; ARX 1). The ALJ found that Aim Royal did not violate the Act in refusing to hire or consider for hire these applicants because “none of the nine employees whose applications were faxed to Aim by the Union on June 23 fit into Aim’s hiring practice.” (ALJD at 10).

As discussed previously, the usual practice of Aim Royal was to shred unsolicited applications. That practice would have been followed, with respect to the facsimile applications received on June 23rd except that due to the large number sent on one day, Aim Royal contacted its legal counsel who advised Aim Royal to preserve the facsimiled applications on the suspicion that there was likely to be a ULP filed by the union. (TP 51). The applications sat on Gibb’s desk for a couple of days before he looked at them. (TP 85).

During the Relevant Period, former employees seeking rehire regularly contacted Aim Royal. (TP 285). By the week that included Tuesday, June 23, 2009, “[Aim Royal] had already

received inquiries from former employees seeking rehire and already had been approved for hiring at that point. . . . probably four, possible five people that were returning.” (TP 86). Gibbs testified that he “never considered any of those faxed job applications for any open position” because “[Aim Royal’s] hiring process at that point didn’t dictate that would be an option. . . . [Aim Royal] had multiple people that [it] was willing to hire that had been laid off and wanted to come to work for [Aim Royal]. So, no, [he] would not have gone to a new source if [he] had a source that [he] knew that they [sic] were capable of doing.” (TP 87). The only anticipated need for an additional permanent employee the week that included June 23 had been filled by the rehire of William Loy, who started work on June 26, 2009. (TP 79-80; ARX 1, p. 2).

Thus, although Aim Royal hired some insulators after June 23, 2009 (TP 86), they were former employees who had already sought reemployment and were approved for hire by Gibbs *before* June 23. They had already been approved for hire and were then offered those jobs as the need arose. (TP 79-80). Aim Royal had no need to consider for employment anyone outside of its normal hiring procedures and no one other than rehires already approved by Gibbs prior to June 23 was hired during the relevant period. (TP 86-87).

### **3. Jacobson Applicants**

In the Complaint, the General Counsel alleged that Aim Royal refused to hire or consider for hire several applicants who applied to Jacobson for employment with Aim Royal: Angel Aizu and McMillan, Balaños and Gustavo Gonzales. (Complaint ¶ 6 (l), (k)). With respect to any allegation that Aizu went to Jacobson to apply for work at Aim Royal, Aim Royal was unaware of him seeking employment with Jacobson before it had filled all of its temporary needs. With respect to McMillan, Balaños and Gustavo Gonzales applying for work at Aim Royal through

Jacobson, Aim Royal had already filled its hiring needs by the time that Jacobson referred each applicant to Aim Royal.

In late June to mid-July 2009, Campos called Jacobson asking for temporary employees when Aim Royal needed short-term help because Aim Royal's workload had increased. (TP 242). However, Campos anticipated the increased workload would be temporary and he did not want to bring someone on and then have to let them go. As Campos testified, "Jacobson was called during this period because it was just going to be temporary work. We were coming to the end of certain jobs. I didn't want to just hire somebody and then lay them off. It's just better to hire somebody temporarily and then lay them off." (TP 285:10-18). Throughout June and July of 2009, Aim Royal maintained a permanent workforce of 22-24 insulators until it suddenly lost three insulators on July 31, 2009. (ARX 1; Aim Royal Employee Employment Chart – Attachment 1).<sup>10</sup> Due to this unexpected loss of permanent employees, Aim Royal was required to utilize the temporary employees hired on July 2 and 16 for more than the few days or weeks it had intended to employ them. Aim Royal did not respond to this loss in permanent employees by hiring new permanent employees, however, because Aim Royal's busy workload was expected to decline as several of their jobs at the time were close to finishing.

However, after the loss of the three insulators on July 31, 2009 and five additional employees on October 2, 2009 due to documentation issues, the temporary employees worked much longer than originally planned. (TP 329-330; ARX 1; Aim Royal Employee Employment Chart – Attachment 1).

When Campos called Chavez in July 2009, he asked her to send two workers. The first two workers that Chavez sent to Aim Royal were Edgar/Imuris Garcia and Marcellino Trujillo.

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<sup>10</sup> This chart was generated from the dates of employment in ARX 1 that presents employment information in graph format.

(TP 228-229, 308-309). After interviewing them, Campos told them they could start the next day. (TP 228-229, 318). The first day of work for Garcia and Trujillo was July 2, 2009. (TP 308-309). After Campos had hired Edgar/Imuris Garcia and Marcellino Trujillo to begin work the next day, two more people from Jacobson came to Aim Royal for an interview. Because Campos had already hired the first two workers that Jacobson had sent, he told the other Jacobson employees that Aim Royal did not have any more work. (TP 311, 318). Campos did not know that Jacobson had sent these two additional men until they told him “Ms. Chavez had sent them [to Aim Royal] for an interview.” (TP 318 to 319). When Chavez called Campos with another potential candidate, he told her that he had already hired the first two that she had sent (Edgar/Imuris and Marcelino) and that he had turned away two others that she had sent. (TP 349:13-25). Campos informed her that he did not want her to send any more workers and that she should keep good candidates on file. (TP 347:19 to 350:8).

Over the following weekend, July 4 and 5, Campos learned from his sister that Isidro Ortega, a friend of his, was looking for work. (TP 310, 230). Because Aim Royal’s workload varies from day-to-day and can increase or decrease all of a sudden, (TP 314:2-8), the following week Campos told Gibbs he would need a couple more laborers and Gibbs agreed Aim Royal should hire two more workers. (TP 312). Because the work was only for a short time and Campos did not want to terminate a permanent employee after a short time, he told Ortega (thru Campos’s sister) to go to Jacobson. (TP 230-231). Campos then called Chavez and told her that he had sent Ortega to Jacobson for her to send to Aim Royal and he also asked her to send another worker. (TP 230-231, 362, 364). At that time, Chavez had an employee, who had just finished a job at which he had been for over a year, that she thought would be a good candidate and Campos asked her to send him to Aim Royal. (TP 364). Chavez then sent Ortega and the

second worker, Claudio Rendon to Aim Royal for interviews. (TP 231). Chavez later called Campos and said she wanted to send two more candidates, but he told her he had already hired the first two. (TP 408-409). As to McMillan applying for work at Aim Royal through Jacobson, Chavez never gave McMillan's name to Campos and Aim Royal had hired all the temporary employees it needed at the time before McMillan applied at Jacobson. (TP 347:10-11).

#### **4. Angel Aizu**

The General Counsel alleged in the Complaint that on various occasions, Aim Royal refused to consider for hire or hire Angel Aizu. (Complaint ¶ 6 (e), (f), (i)). The ALJ found that Aizu did not “fit into Aim’s [hiring] practice” and therefore dismissed those counts relating to Aizu. (ALJD at 10).

As set forth above, during the Relevant Period Aim Royal had long used its hiring procedures of rehiring former employees or persons who are recommended by its current employees. Aim Royal was not seeking employees and did not hire any insulation employees in May 2009. (ARX 1; Aim Royal Employee Employment Chart – Attachment 1 to Aim Royal’s Opening Brief to the ALJ). When Aizu went to Aim Royal with Gurrola, he was told that Aim Royal was not taking applications and that as far as the secretary knew, Aim Royal was not hiring. (GCX 35 at 1). Aim Royal’s sign was up that day: “Not Accepting Applications.” (TP 43, 148:20 to 149:5). No one was hired through the Relevant Period who was not a former employee of Aim Royal. (ARX 1; Aim Royal Employee Employment Chart – Attachment 1).

Further, in July 2009, Gibbs testified that Aim Royal “had an ample supply of previous employees who were wanting to come back to work for us and we already knew their work ethics, how they conducted themselves, and that was our prime source. We felt no need to go outside of that.” (TP 187:1-6). In addition, Gibbs testified that Aizu would not have been

considered for hire due to Aizu's attitude and disruptiveness in the Aim Royal Office when he was quizzing and interrogating the secretary and Gibbs was forced to come out of his office and stop the intrusion. (TP 50-51, 97).

## **5. Shawn McMillan**

The General Counsel alleged in the Complaint that on or about July 1 and July 10, 2009<sup>11</sup>, Respondents refused to consider for hire and failed or refused to hire Shawn McMillan. (Complaint ¶ 6 (h), (j)).

With respect to the application alleged on July 1, 2009, the allegation relates to the contacts between Jacobson staff and McMillan. Aim Royal was not informed McMillan had sought employment at Jacobson. Further, as discussed above, Aim Royal hired the first referrals sent by Jacobson which met Aim Royal's needs and no further referrals were requested or considered. In addition, the ALJ found "that McMillan did not apply for work on this occasion" and dismissed that count of the complaint. (ALJD at 12).

With respect to McMillan's attempts to apply for work at Aim Royal on or about July 15 or 16, 2009, Aim Royal presented testimony that McMillan was ineligible for rehire based on McMillan's actions at the time that he was originally laid off from Aim Royal in 2007. (TP 93-94). Gibbs testified that "[i]t was decided between Lazaro and myself not to respond [to McMillan] due to his actions when he was terminated." (TP 93). McMillan was not considered for rehire because of "his attitude in his previous employment [with Aim Royal]. When he left he was very disgruntled because of getting laid off. He came in and grabbed his check and on his way out told us to lose my phone number . . . in a very dramatic tone." (TP 156:12 to 157:10). "[I]t was in essence a 'screw you.'" (TP 160:24 to 161:18, 1000:14 to 1001:10). Gibbs

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<sup>11</sup> The Complaint alleged that Aim Royal failed to hire or consider McMillan for hire on or about July 10, 2009. However, Aim Royal's testimony and the ALJ's decision indicate that this date was more like July 15 or 16, 2009.

further stated: “There’s no reason for me to have to put up with belligerence. It was the normal course of business and I was being subjected to his disdain for being discharged.” (TP 157:11-17). As Campos summarized it: “That’s a good way to burn a bridge.” (TP 1001:5-10).

When McMillan asked Campos over the phone and Gibbs at the office for a job, neither sought to embarrass McMillan by telling him they would not consider him for rehire because Gibbs did not want to offend or “bring him down.” (TP 157:18 to 159:10, 160:24 to 161:11). Likewise, Campos does not tell former employees that they are ineligible for rehire. (TP 1004:20 to 1005:4).

Further, although not as significant a reason for considering McMillan ineligible for rehire, Aim Royal believed that McMillan was a poor performer. Before his promotion to superintendent, Campos worked with McMillan and he and Gibbs believed that McMillan did not demonstrate an ability or willingness to learn and do his job properly. (TP 296).

Q BY MR. ROGERS: Okay. Let me ask this. There’s been testimony in this matter that Mr. Shawn McMillan was laid off, correct?

A [Campos] Yes.

Q Okay. And after his layoff, did you consider that Mr. McMillan would be eligible for rehire at AIM Royal?

A No, he wouldn’t be considered because of his past with the company.

Q And tell me what specifically about him would make him ineligible for rehire?

A Well, when I worked with him out in the field, he wouldn’t catch on. You know, you try to train this person and he wouldn’t catch on. Then when he was let go, when he was let go, he stormed out of the you know, the office, you know, in a rude manner. He pretty much told all of us, you know, just “lose my number.” “You guys can just lose my number,” then he stormed out and stuff, so yeah, I wouldn’t consider him for rehire at all. *That’s a good way to burn a bridge.*

(TP 93-94; 1000:18 to 1001:10) (emphasis added). McMillan’s poor performance in the field combined with his anger and rudeness when being laid off led Aim Royal to conclude that

McMillan was not eligible for rehire. (TP 1000-1001, 1026:6 to 1027:6 1026:6 to 1027:4).

In his testimony, McMillan denied that he was rude, angry or inappropriate when he told Gibbs to “to lose my number” and walked out. (TP 427). He claimed that he was upset, but was not angry and did not yell at Gibbs, raise his voice, “or anything like that.” (TP 427). He testified that he was calm and that he did not express anger on his face. He left in what he considers to be a “respectful manner.” (TP 427). He also testified that working for Aim Royal was a job and he was “not going to sit there and fly off the handle for a job to where [he] could lose [his] freedom or lose anything that [he had] going for [himself] . . . (TP 440). So according to McMillan, he “simply walked in, [said] [‘]lose my number, *sir*,[’] and then [he] simply walked out . . . .” (*Id.*) (emphasis added). And when Gibbs allegedly said he would call McMillan if there was any more work coming up, McMillan responded: . . . “[N]ope, lose my number, and I just walked right out just like that.” TP 440-441). McMillan’s testimony is clearly contrary to the recollections and testimony of Campos and Gibbs. When challenged as to whether he had said “Lose my number, *sir*,” McMillan admitted he had not said anything but “lose my number.” (Emphasis added. TP 441). As discussed below, McMillan’s behavior on this occasion as reported by Campos and Gibbs is consistent with his actions, tone and demeanor when he sought employment with Jacobson.

When McMillan applied for work at Jacobson, Chavez reported that he repeatedly cursed and extensively used the F-word and stormed out of her office and slammed the door. (TP 400, 403-405). McMillan denied under oath that there was any cursing, stating that he does not swear and he has never used the F-word. (TP 429). “That word is not part of my vocabulary.” (TP 434:10-17). Ms. Chavez testified that he certainly did use the F-word. (TP 401, 405). So did his former Aim Royal co-worker, Joe Grubowski. (TP 808-820). McMillan also testified that he

never slammed the door leaving Jacobson because he was happy he got an interview. (TP 437, 439-440). But Chavez' testimony was to the contrary. (TP 465).

That the ALJ would disregard the consistent testimony of Gibbs and Chavez as to McMillan's rude and disrespectful behavior when he was upset and would ignore McMillan's untruthful testimony (regarding his being a three-year apprentice with the union and denying he ever used the F-word), while overlooking Campos' credible testimony as to what he observed, is regrettable and in error. As to the rude departure by McMillan, the clear preponderance of all relevant evidence shows that the ALJ's conclusions as to McMillan's tone and demeanor when telling Campos and Gibbs to "lose my number" was accurately reported by Campos and the ALJ's findings and conclusion to the contrary are in error. In light of the hiring of many others who in the relevant period were hired regardless of their union affiliation or sympathies, the ALJ's finding is in error.

## **II. AIM ROYAL'S ANSWERS TO GENERAL COUNSEL'S EXCEPTIONS**

**A. The Administrative Law Judge's (ALJ) failure to find that Respondent Aim Royal Insulation, Inc. ("Aim Royal") violated Section 8(a)(1) and (3) of the Act by refusing to recall Jose Gurrola or place him on a preferential hiring list, upon his unconditional offer to return to work. (ALJD at 6-7). Included in this exception is the ALJ's finding that this allegation is time-barred by Section 10(b) of the Act. (General Counsel Exception No. 1)**

The ALJ properly dismissed the General Counsel's claim that Aim Royal had an obligation to reinstate Gurrola upon his unconditional offer to return to work or to place him on a preferential hiring list. Essential to this finding, the ALJ correctly found that because Gurrola did not timely file a charge regarding his termination, his claim for reinstatement or preferential hiring rights flowing from his strike is barred by Section 10(b). Gurrola only filed a charge from the refusal to reinstate him or place him on a preferential hiring list, *nine months after* his July 2008 termination. The ALJ properly found that because the 10(b) period had elapsed, the

termination of Gurrola could not be challenged and his termination must be considered final and legal. Thus, Gurrola was a former employee and not a striking employee when he made his unconditional offer to return to work. The General Counsel alleges, however, that the ALJ's findings and conclusions were in error based on the single case of *Lee Consaul*, 192 NLRB 1130 (1972), which was never again applied by the Board. Not only is there no other support for the General Counsel's argument, but *Lee Consaul* as General Counsel interprets it goes against the great weight of Board authority.

**1. A Discharged Employee Who Fails To Challenge His Discharge Within The 10(b) Period Has No Right To Reinstatement.**

A legitimately discharged employee has no right to reinstatement. Simply put, Gurrola went on strike, he was discharged, he did not file an unfair labor practice charge challenging that discharge, and therefore, under Section 10(b), that termination cannot be challenged.<sup>12</sup> The termination must be considered final. Gurrola does not then have a right to reinstatement upon his unconditional offer to return to work because he was not a striking employee when he made the offer to return to work. As a result, he lost his right to reinstatement under the Act. *See Precision Concrete v. N.L.R.B.*, 334 F.3d 88 (2d Cir. 2003). Allowing reinstatement under these circumstances would resurrect expired claims and nullify the Section 10(b) requirement.

In *Precision Concrete*, the Second Circuit vacated an order of the Board requiring a company to reinstate striking workers insofar as the order was based on the Board's consideration of an uncharged unfair labor practice as the cause of the strike. 334 F.3d 88. In the underlying case, the union had filed a series of unfair labor practice charges relating to a

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<sup>12</sup> The General Counsel alleges that the fact that Gurrola was discharged for going on strike is undisputed (GC's Brief, p. 18), but he is mistaken. Aim Royal vigorously disputed this fact, but the ALJ found against Aim Royal on this issue. The ALJ correctly determined that Gurrola's termination could not now be challenged because of the application of Section 10(b). (ALJD at 7-8). Accordingly, Aim Royal does not challenge this finding by the ALJ. (See Aim Royal's Cross Exceptions and Brief In Support thereof).

strike and after investigation, the General Counsel filed an amended complaint alleging that the employer committed a variety of unfair labor practices. *Id.* at 89. After a hearing, an administrative law judge found, among other things, that one particular unfair labor practice “was a cause of the strike and therefore all striking employees, upon their unconditional offer to return to work, were entitled to reinstatement.” *Id.* at 90. The ALJ then found that there was no charge filed from that particular unfair labor practice. The Board, however, found that although the particular unfair labor practice that was deemed the cause of the strike was not specifically charged, it was sufficiently related to timely filed charges to satisfy Section 10(b). *Id.* The Second Circuit noted that Section 10(b) functions much like a statute of limitations and limits the Board’s ability to prosecute uncharged conduct. *Id.* Consequently, the burden rests upon the Board, and not the employer, to establish its authority to act. *Id.* at 91. The Second Circuit then found that the Board erred in concluding that the uncharged conduct was sufficiently related to the charged conduct because the only link between the incidents was that they occurred during a union organizing drive. *Id.* at 93.

In this case, as in *Precision Concrete*, it is undisputed that no timely charge was filed from the event that caused Gurrola’s initial strike, nor was a timely charge filed regarding his discharge. Consequently, the Board has no jurisdiction to order the reinstatement of Gurrola upon his unconditional offer to return to work. The General Counsel would argue, however, that somehow Gurrola is entitled to reinstatement even though he is a discharged employee. He cites to only one case, a case that has never since been cited for the proposition that a discharged employee on a proper strike is entitled to reinstatement. General Counsel’s citation to *Lee Consaul*, 192 NLRB 1130 (1972) in support of Gurrola’s reinstatement right is inapposite for several reasons.

## 2. *Lee Consaul* Is Inapplicable And Its Application Here Leads to Absurd Results

There are two important distinctions between this case and *Lee Consaul* that General Counsel cannot ignore. First, the particular facts of *Lee Consaul* create an insurmountable distinction between that case and this case. In *Lee Consaul*, the employer had a union contract and discharged several employees who engaged in a wild cats strike in breach of that contract. 192 NLRB at 1158. The employer discharged the employees on June 16, 1965 and then five days later on June 21, the employees requested reinstatement. *Id.* at 1160. The employees then filed an unfair labor practice charge on December 21, 1965. In addition, at the conclusion of the strike, the union and the employer entered into a memorandum of understanding, which stated that the discharged employees would be eligible for rehire. Significantly, the ALJ found that this acknowledgement in the MOU amounted to a “rescission of the discharge and restoration of the status of striking employee.” *Woodlawn Hospital*, 233 NLRB 782, 789-790 (1977) (discussing and distinguishing *Lee Consaul*).

These facts stand in stark contrast to the facts of this case. Most significantly, Gurrola waited *eight months* after his discharge to request reinstatement and not just five days as did the strikers in *Lee Consaul*. Thus, Gurrola’s discharge itself could not even be challenged by the time that he requested reinstatement, unlike in *Lee Consaul*. In *Lee Consaul*, the striking employees waited less than a week after their discharge, which was by no means final and unchallengeable as was found in this case.

The second and most important distinction between this case and *Lee Consaul* lies in the natural but untenable consequences of General Counsel’s argument. According to the General Counsel, *Lee Consaul* stands for the proposition that in any case, an employee who leaves work claiming to go on strike may nevertheless revive an expired claim for wrongful termination and

back pay by later claiming to be returning from the strike unconditionally and filing an unfair labor practice charge from the denial of the request for reinstatement.

That interpretation makes Section 10(b) meaningless. The ALJ correctly agreed that if an employee after an unchallenged and lawful termination can receive the right to reinstatement or reemployment simply by walking in and offering unconditionally to return to work, Section 10(b) is nullified. If that were the case, anyone working in construction during the summer in Arizona could allege to go on strike, be terminated and fail to file a charge from that termination, but nevertheless be entitled to his or her job back when the weather cooled just by offering to return to work unconditionally. If the employer discharges the employee in the meantime and the jurisdictional time period runs, surely the employee cannot have rights to reinstatement or reemployment.<sup>13</sup> Such a result would be absurd.

### **3. A Discharged Employee Who Fails To Challenge His Discharge Within The 10(b) Period Also Does Not Have Any Preferential Hiring Right.**

The General Counsel also alleged in the Complaint that, Respondent Aim Royal violated the Act because it failed or refused to place Jose Gurrola on a preferential hiring list. (Complaint ¶ 6 (d)).

Under *Fleetwood* and *Laidlaw*, the right of replaced economic strikers to be placed on a preferential hiring list once they have made an unconditional offer to return to work is a basic right guaranteed by Section 7 of the Act. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968). As the ALJ properly noted, the rights under *Laidlaw* “flow to former striker who remain employees and not to former employees.” (ALJD at 7).

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<sup>13</sup> Of course, as the ALJ found in this case, if the unconditional offer to return to work was denied because the employee engaged in the strike in the first instance, then Respondent Aim Royal concedes that the denial would be a distinct unfair labor practice. Damages would then run from the denial of the request for employment and not from the date of original discharge.

The ALJ correctly concluded that because no charge was filed to challenge the legality of the termination and the Section 10(b) period had long expired, no finding concerning the legality of the termination can now be made. (ALJD at 7 (citing *Laidlaw*)). Accordingly, after the unchallenged termination, Gurrola was no longer an employee. Thus, as a former employee, he was not entitled to the rights of a replaced striker. An employer must be allowed to rely on the legitimacy of a termination in declining to put an employee on a preferential hiring list. Accordingly, the ALJ properly dismissed this count of the Complaint.

**B. The ALJ’s dismissal of the allegation that Aim Royal violated Section 8(a)(1) and (3) of the Act by refusing to hire, or consider for hire, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrbach. (ALJD at 4, 8-9). Included in this exception is the ALJ’s finding that Aim Royal had a hiring practice in place that precluded accepting applications from walk-in applicants, but instead relied upon hiring former employees and the recommendations from employees to fill its hiring needs. (General Counsel Exception No. 2)**

**1. Referral-based hiring systems like Aim Royal’s are legitimate and non-discriminatory.**

As discussed in the Factual Summary above, Aim Royal has a rehire/referral hiring system that since 2008, has filled all of its hiring needs.

Referral-based priority hiring systems like Aim Royal’s have been upheld as a “valid, nondiscriminatory hiring policy” on numerous occasions. *See, e.g., T.E. Briggs Construc. Co.*, 349 NLRB 671, 671 n.3 (2007); *Ken Maddox Heating & Air Conditioning, Inc.*, 340 NLRB 43, 44 (2003) (collecting cases validating similar referral-based hiring policies); *Quality Mechanical*, 340 NLRB 798, 812 (2003) (“Under existing Board law, the Respondent’s hiring policy designed to give preference to former employees and those employee-applicants being recommend by existing employees is a legitimate practice.”). In *T.E. Briggs*, the judge found that the respondent “maintained a valid, nondiscriminatory hiring policy according to priority to former

employees, individuals recommended by supervisors, and individuals that the Respondent's owner had observed personally working on job sites.” 349 NLRB at 671 n.3. The Board then found that because the alleged discriminate applicants did not fall into one of these priority categories, the respondent's refusal to consider them for hire did not violate the act. *Id.* In *Maddox*, the Board found that a respondent's hiring decisions in accordance with its referral-based hiring policy “were based on neutral hiring policies [and] uniformly applied” and therefore, not motivated by antiunion animus irrespective of the number of union members actually employed through this process. *Maddox*, 340 NLRB at 44.

As the ALJ correctly and specifically found, Aim Royal consistently followed its referral-based hiring policy when seeking to enlarge or maintain its workforce throughout the Relevant Period. (*See* Factual Summary above; ALJD at 10). The General Counsel takes exception to the ALJ's finding that Aim Royal did not violate the Act when it refused to hire or consider for hire the union applicants who faxed job applications to Aim Royal on June 23, 2009 (“the batch applicants”). Because during the Relevant Period the need for permanent employees was timely filled using Aim Royal's usual hiring procedure, none of the alleged discriminatees would have been considered.

Also as discussed above, when rehiring former employees, Aim Royal only rehired those employees that Aim Royal could trust, regardless of whether they had been previously fired for “cause.” The General Counsel and counsel for the Union spent considerable time suggesting that because some employees were rehired after having been fired for cause, Aim Royal somehow violated its own hiring practices. While clearly there are some reasons that Aim Royal would consider an employee ineligible for rehire (regardless of whether the employee was laid off or fired), Aim Royal presented sufficient evidence on which the ALJ could and did find that Aim

Royal did actually follow its own hiring practice. As discussed above, the nature of the workforce itself was the reason that Aim Royal sometimes had to rehire employees previously fired for cause.

For instance, Aim Royal presented evidence that Manuel Murrieta was fired for showing up late to a jobsite and getting customer complaints. He was one of those employees who would work really well and then “flake-off” from time to time. (TP 994:4 to 995:5, 1011:25 to 1012:3). Later on, Murrieta started calling Aim Royal and requesting to return to work. He explained his reasons for being flakey (and steps he could take to correct the problem), expressed his remorse, and explained that he had worked hard, was dependable and could be relied upon to do a job right when he was not being flakey. (TP 994-996, 1011:25 to 1012:3, 1021:17 to 1022:10). Murrieta started calling two months prior to his rehire on July 27, 2009, and was selected as a rehire when Aim Royal’s workload required an additional full-time worker. (TP 996, 1012:4-14). However, upon being fired a second time for cause, Murrieta is now considered ineligible for rehire. (TP 1022:11 to 1023:9).

## **2. Aim Royal relies exclusively on its rehire/referral hiring practice.**

Although Aim Royal does not have a written hiring policy,<sup>14</sup> the ALJ properly found that Aim Royal relies on its rehire/referral hiring system, correctly relying upon the testimony of Gibbs, Campos and the supporting documentary evidence. (ALJD at 10). The General Counsel attempts to discredit Gibbs’ testimony regarding acceptance of “applications.” As discussed above, Aim Royal used to collect traditional paper applications from job seekers, but since it implemented its rehire/referral hiring system, it uses a form titled “application” only to collect

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<sup>14</sup> The General Counsel seems to take exception to the fact that the Aim Royal hiring policy was not in writing, but there is no such requirement under the Act. Furthermore, as discussed, Aim Royal is a very small company with only a single secretary, minimal management structure and no human resources department. Its unwritten hiring policy fits with the needs of the company.

personnel information after an employee has already been hired. These applications are completed in the hiring process and are requested only AFTER the decision to hire has been made (TP 149:6 to 150:6, 194:22 to 195:2, 216); Aim Royal does not hand out applications before getting hired. (TP 216:12-20). By looking at exhibit ARX-1, for applications completed since 2007, it is clear that the “application” is almost always completed the day before or the day of actual starting work, although an employee may be hired and request to start at some point in the future.

The ALJ specifically found that Gibbs’ testimony regarding the fact that unsolicited applicants were not hired nor considered pursuant to Aim Royal’s referral-based hiring practices was credible. (TP 184:7-16, 190:1 to 191:10). Further, the ALJ found that Gibbs’ testimony in this regard was corroborated by Campos and the documentary evidence. (ALJD at 10). Contrary to the General Counsel’s argument, the ALJ’s finding was not made lightly, was not based solely on Gibbs’ testimony, and was in fact based on the complete record. (*Id.*).

The General Counsel attempts to show that Aim Royal did not consistently follow its policy by citing Gurrola’s application dated 5/16/08 (General Counsel Exhibit (“GCX”) 11) and W-4 (GCX 16) dated 5/21/08 as proof that applications were received in advance of informing an employee he had been hired. (TP 197). However, Gurrola called Campos on May 19 or 20 and Campos told him to come in to the office to fill out an application and the rest of the paperwork. When Gurrola did come in he started the next workday. (TP 249-250). Gurrola’s filled out the job “application” AFTER he had been recommended [to Mr. Gibbs] for hire. (TP 250). In response to questions regarding why Gurrola’s application stated it was signed 5/16/08, Campos testified: “I don’t know why that date is there because when I called I told him to come and then he filled out the application and the employee package and he started the next day.

That's all I know.” (TP 251:1-12). Campos was in the office when Gurrola filled out the new employee paperwork with the application. He sat Gurrola in front of the secretary, but did not watch him fill it out. (TP 251). The secretary had not already given Gurrola a copy of the application because when Gurrola called Campos, Gurrola was told to come in to get the application. (TP 251). Neither Gibbs (TP 83) nor Campos (TP 203-204) saw any completed “application” before the decision to hire Gurrola was made. (TP 83, 203-204). Campos saw Gurrola completing the new-employee paperwork after being told he was hired, but Campos did not monitor him to ensure he put the correct date on each of the documents, all of which but the application are dated 5/21/08, the day before Gurrola started working. (TP 205:18 to 206:9, 249-250; ARX-1; GCX-16 (W-4 form)). The ALJ found Campos’ testimony credible and supportive of Gibbs’ testimony. (ALJD at 10).

Occasionally and despite the sign posted outside of the Aim Royal office, people seeking jobs at Aim Royal may walk-in and request or give an application to the receptionist. On a few occasions, the receptionist has handed out or taken a completed application in violation of the Aim Royal policy. These applications are never considered by Aim Royal in accordance with its policy. *See* discussion in Factual Summary Section II.A. above. Respectfully, Aim Royal did not seek or use applications for the purpose of making its hiring decision. For a small company with only a secretary for staff, Aim Royal’s hiring procedure is appropriate to the needs of the company.

The General Counsel’s Exceptions seek to discredit the legitimate hiring practice by pointing out that witnesses indicated different times for the implementation of the hiring practice. However, the testimony clearly showed that the implementation of the hiring process was not an overnight event. Transition into the exclusively referral-based hiring system was a work in

progress, and there may have been breakdowns in the process while that was being worked out. (TP 47-48, 179, 190-92, 215-16). But, it is clear that by the Relevant Period, Aim Royal consistently used its referral-based hiring system to meet its hiring needs. (ALJD at 10).

The General Counsel also takes exception to the motivation behind Aim Royal's hiring practice. No evidence was presented, however, that the hiring system was implemented to avoid hiring union members or supporters or that it was applied discriminately. The General Counsel never challenged the validity of Aim Royal's hiring process at the hearing. Moreover, through Aim Royal's hiring processes, union supporters, members and a union organizer were in fact hired. Further, during the Relevant Period, five out of eight employees hired were union members, had been in the union or had worked for union-signatory companies. *See* Factual Summary above. Even though Aim Royal's policy was unwritten, it was consistently applied. And as the ALJ properly noted, "occasional and sporadic deviations are insufficient to undermine the existence of the general practice." (ALJD at 10). The General Counsel has failed to show any evidence other than one or two "occasional and sporadic deviations" that Aim Royal did not follow its own hiring procedures. Whatever criticism the General Counsel may have, the hiring process by Aim Royal did not exclude union members and supporters and does not violate the Act. *Cf. Brant Construc.*, 336 NLRB 733 (2001) (citing *FES*, 331 NLRB 9 (2000)); *accord Kanawha Stone Co.*, 334 NLRB 235 (2001); *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999); *Centex Indep. Elec. Contractors*, 344 NLRB 1393 (2005).

**3. At The Time Of The Alleged Unlawful Conduct, Aim Royal Was Not Hiring Or Had No Concrete Plans To Hire.**

In refusal-to-hire and consider for hire cases, the General Counsel also has the burden of establishing that the employer had job openings at the time of application by employee-

applicants, or that the employer excluded applicants from the hiring process. *Delta Mechanical*, 323 NLRB 76 (1997); *FES*, 331 NLRB at 12, 15. This burden has not been met.

Throughout the relevant period, Aim Royal had no trouble filling any needed positions through its established practice of hiring former employees and referrals. (TP 285). The evidence clearly shows that throughout the relevant period Aim Royal was contacted by former employees seeking rehire with Aim Royal. (TP 283-285).

Campos called the temporary employment company Jacobson during late June to mid-July 2009 for temporary employees when Aim Royal needed short-term help. Campos testified that he called Jacobson instead of hiring permanent employees “because it was just going to be temporary work. We were coming to the end of certain jobs. I didn’t want to just hire somebody and then lay them off. It’s just better to hire somebody temporarily and then lay them off.” (TP 285:10-18).

The General Counsel alleged in the Complaint that on or about June 23, 2009, Respondent (Aim Royal) failed to hire or consider for hire Luis Bolanos, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal and John Rohrback. (Complaint ¶ 6 (g)). However, when these applicants faxed their applications on June 23, 2009, Aim Royal was not hiring. Because they did not apply during a hiring window, the necessary element of General Counsel’s burden cannot be met and the ALJ correctly found as such, dismissing this count of the Complaint. *See Post Tension*, 2008 WL 1816573 (N.L.R.B. 2008) (dismissing refusal to hire allegation where employer’s hiring practice involved hiring acquaintances and relatives and General Counsel could not establish that union member was excluded from the hiring process when employer prevented union member from

filing an application when the hiring process of employer was based solely on referrals); *cf.*, *Delta Mechanical*, 323 NLRB 76.<sup>15</sup>

Additionally, as discussed above, Aim Royal was not hiring at the time these applications were received. During that time, Aim Royal had plenty of requests for work from former employees seeking rehire. Aim Royal also did not have a great need to hire any new employees. That week, Aim Royal needed only one employee, which was satisfied by rehiring Loy, who began work on June 26, 2009. (TP 79-80; ARX 1, p. 2). Thereafter, as permanent employees left employment, those already approved for rehire were hired to maintain an appropriate labor balance. Departing employee R. Nunez (last workday July 3, 2009) resulted in the rehire of Mario Chavez, who started July 8, 2009. (ARX 1: TP 237-238, 241). Chavez had been calling Campos to come back since January 2009 and had called three or more times over the two weeks prior to his starting work on July 8, 2009. (TP 240, 242, 543:18 to 545: 25). Departing employee Anthony Sandoval (last workday July 13, 2009) resulted in the rehire of Luis Jaime, who started July 14, 2009. (ARX-1). With the anticipation of letting go of temporary-agency (Jacobson) workers (TP 285:10-18), rehires Jacob Ollarsaba started July 24, 2009 (ARX 1) and Manuel Murrieta started July 27, 2009. (ARX-1). Murrieta had been calling Campos to come back for a month or two prior to his rehire. (TP 39-240, 242).

Thus, although Aim Royal hired some insulators after June 23, 2009 (TP 86), it hired only former employees who had already sought reemployment and were approved for rehire by Gibbs before the faxed applications were received. The rehires were offered jobs only as the need arose. (TP 86). Because Aim Royal had a great demand of former employees seeking

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<sup>15</sup> As discussed above, these applications would not be considered, and thus normally shredded, in accordance with Aim Royal's referral-based hiring procedure. The only reason the applications were not immediately shredded is on advice of Aim Royal's legal counsel as it was anticipated that an unfair labor practice charge may be filed. (TP 51).

reemployment, Aim Royal had no need to consider for employment anyone outside of its normal hiring procedures at this time.<sup>16</sup> (TP 87).

**4. Aim Royal Demonstrated That It Would Not Have Hired The Alleged Discriminatees Even In The Absence of Union Activity Because They Were Not Former Employees or Referrals.**

Respectfully, as shown above, the General Counsel did not show that Aim Royal was hiring or had concrete plans to hire at the time of the alleged unlawful conduct. Even if the General Counsel had met its burden, Aim Royal demonstrated and the ALJ correctly found that it would not have hired the applicants even in the absence of their union activity or affiliation because it followed an exclusively referral-based hiring practice. *See Brant Construc.*, 336 NLRB 733 (citing *FES*, 331 NLRB 9); *accord Kanawha Stone Co.*, 334 NLRB 235; *Zurn/N.E.P.C.O.*, 329 NLRB 484; *Centex Indep. Elec. Contractors*, 344 NLRB 1393. Here, none of the alleged discriminatees fell within the categories from which Aim Royal hires.

Like the employers in *Brant*, *FES*, *Kanawah Stone*, *Zurn* and *Centex*, Aim Royal has shown that it would not have hired the alleged pro-union applicants *even in the absence of their union activity or affiliation*. The record shows that Aim Royal's established hiring policy or practice was to prefer former employees, those who had performed satisfactorily and were laid off or who left voluntarily, or those who are referred by current employees. This policy was a long-standing and legitimate practice, and not one recently initiated or enforced just in the months of May to mid-July, 2009. Aim Royal used this policy to fill its hiring needs in all instances in the relevant period. Thus, Aim Royal has successfully met this burden.

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<sup>16</sup> As explained in the Factual Summary, Aim Royal maintained a permanent workforce of 22-24 insulators throughout June and July of 2009 until the sudden loss of three insulators on July 31 forced them to keep their temporary employees longer than originally anticipated. This was compounded by the fact that Aim Royal lost five more permanent employees on October 2, 2009 due to documentation issues. Because of these unforeseen and sudden reductions in their workforce, Aim Royal retained the Jacobson employees longer.

**C. The ALJ’s dismissal of the allegation that Aim Royal and Respondent Jacobson Staffing, L.C. (“Jacobson”) are joint employers, and his subsequent dismissal of the allegation that Jacobson violated Section 8(a)(1) and (3) of the Act by refusing to hire, and consider for hire, Luis Bolaños, Gustavo Gonzalez, Shawn McMillan, and Angel Aizu. (ALJD at 13-16). (General Counsel Exception No. 3)**

As discussed at section 1(D)(3) above, Aim Royal uses Jacobson to obtain temporary workers. On two occasions in late June – mid-July 2009 Aim Royal requested two workers. Jacobson initially sent two potential workers and those two were hired. Until learning that Aim Royal had agreed to accept the first two employees that were referred, Jacobson referred additional candidates to Aim Royal. However, because Aim Royal had already filled its needs, it declined to further interview applicants and notified Jacobson it had no further needs. For those hired by Aim Royal, the joint-employer relationship existed. The parties handled this issue by stipulation at the hearing. For those that Jacobson interviewed for *possible* referral or for *tentative* appointments to interview with Aim Royal, there was no joint-employer relationship. Once Aim Royal’s needs for temporary help were satisfied, Aim Royal did not have any joint-employer relationship with Jacobson regarding people that came into Jacobson’s office that Aim Royal did not need or even meet. The ALJ thus correctly found that there was no joint-employer relationship between Aim Royal and Jacobson at the pre-hire stage. (ALJD at 15-16).

**D. The ALJ’s dismissal of the allegation that Jacobson refused to hire, or consider for hire, Scott McMillan<sup>17</sup> on July 1, 2009, in violation of Section 8(a)(1) and (3) of the Act. (ALJD at 12-16). (General Counsel Exception No. 4)**

The General Counsel alleged in the Complaint that on or about July 1, 2009, Respondents refused to consider for hire and failed or refused to hire Shawn McMillan. (Complaint ¶ 6 (h)).

General Counsel’s Exception number 4 evidently refers to the contacts between Jacobson and McMillan. Aim Royal was not informed McMillan had sought employment at Jacobson.

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<sup>17</sup> Aim Royal believes that General Counsel mistakenly states that this exception concerns “Scott McMillan” when he intended it to refer to “Shawn McMillan.”

Further, Aim Royal hired the first referrals sent by Jacobson, which met Aim Royal's needs and thus, no further referrals were necessary or considered. *See* discussion at above.

**E. The ALJ's dismissal of the allegation that Aim Royal, through its supervisor Lazaro Campos, violated Section 8(a)(1) of the Act by telling Jose Gurrola that he no longer worked at Aim Royal while Gurrola was making an unconditional offer to end his protected strike and return to work.** (ALJD at 7-8). (General Counsel Exception No. 5)

The General Counsel next takes exception to the ALJ's dismissal of the allegation that Aim Royal, through Campos, violated the Act when he told Gurrola that Gurrola no longer worked at Aim Royal when Gurrola made his unconditional offer to end his strike and return to work.

As discussed at length in Section A above, the ALJ properly found that at the time that Gurrola made the offer to return to work unconditionally, he was not an employee of Aim Royal. Therefore, any statements that Campos made to Gurrola did not relate to activity protected by Section 7. (ALJD at 8). The rights under *Laidlaw* only "flow to former strikers who remain employees and not to former employees." (ALJD at 7 (citing *Laidlaw*, 177 NLRB 1366)). The ALJ correctly concluded that because no charge was filed to challenge the legality of the termination and the Section 10(b) period had long expired, no finding concerning the legality of the termination can now be made. (*Id.*). Accordingly, after the unchallenged termination, Gurrola was no longer an employee and as the ALJ also properly concluded the legality of Gurrola's discharge cannot now be challenged. (*Id.* at 7-8). Thus, as a former employee, Gurrola was not entitled to the rights of a replaced striker. An employer must be allowed to rely on the legitimacy of a termination in declining to put an employee on a preferential hiring list. The ALJ properly dismissed this count of the Complaint.

- F. The ALJ’s erroneous finding that, on the day Jose Gurrola went on strike, Aim Royal supervisor Joseph Campos told Gurrola that Joseph would fill the water jug with water and bring it to the jobsite later that day. (ALJD at 6). (General Counsel Exception No. 6)**

The General Counsel alleges that the ALJ erred in finding that Aim Royal’s lead man Joseph Campos told Jose Gurrola on the day that he went on strike that he would bring water to the jobsite later that day. It is well established policy that the Board will overturn factual findings by an administrative law judge only upon a clear preponderance of the evidence. *Standard Dry Wall*, 91 NLRB 544 (1950), enf’d 188 F.2d 362 (3d Cir. 1951). The ALJ’s decision states that “Joseph Campos told Gurrola that he would fill the jug with water and bring it to the jobsite later.” (ALJ at 6). This is a factual finding the ALJ made that is supported by the relevant evidence. Joseph Campos testified that he did indeed have such a conversation with Gurrola:

- Q Would you relate what time did you start working on July 18, 2008?
- A Our hours?
- Q No, what time did you start that particular day?
- A Oh, I started about 5:15.
- Q And where did that start?
- A We met up at the office.
- Q The AIM Royal office?
- A Yes.
- Q On McDowell in Phoenix?
- A Yes.
- Q And you say “we” met up. Who did you meet up with?
- A Me and Gurrola.
- Q You and who?
- A Gurrola.
- Q Mr. Gurrola?
- A Yeah, Gurrola.
- Q And why were you meeting with Mr. Gurrola at the McDowell offices of AIM Royal?
- A Because I was being sent to another job, so I went there to give him the key and let him know I was going to be late, an hour late, because I had to go do another job.

Q Okay. Now as foreman, what is your normal duty with regard to getting water to the job site?

A My duties is to prepare everybody, set them up, place them in the areas they're going to start working in and provide them with all the safety equipment that they need.

Q Okay. And with regard to water, what is your role?

A Water -- fill up the jug, ice, you know, provide it.

Q Now how do you go about doing that?

A Got to stop at a store and fill it up -- you know, bring water to the site.

Q Okay. On this particular day, did you go -- were you going directly to the site?

A No, I was going to another job site, and I was going to go and fill up the jug, go to the site, and then meet them over there at the other job site.

Q On that morning when you met Mr. Gurrola at the AIM Royal offices, did you have any discussion with him regarding water?

A Yeah, I let him know that I was going to bring the water about an hour late, because I got -- I would finish the -- go to the other job and meet them over there.

Q And did Mr. Gurrola depart before you did?

A Yeah.

(TP 839:10 to 841:3).

When directly questioned by the ALJ, Joseph Campos related the same conversation:

Q What did you tell Gurrola about using water?

A About using water? That I was going to be there an hour late and I was going to show up with the water.

(TP 849:22-25).

The ALJ had the discretion to properly credit J. Campos' account that he told Gurrola that there would not be water on site that day. While he may have discounted J. Campos' testimony in other parts of his decision, he clearly credited his testimony with respect to his conversation with Jose Gurrola regarding providing water later in the day. The ALJ made this decision in light of all relevant evidence, including the cross-examination of J. Campos and Gurrola's testimony. Simply because he credited Gurrola's testimony with respect to other events does not mean that he cannot credit any other testimony with respect to the account of the

conversation on the morning of July 18th. This was a factual finding made by the ALJ and supported by the relevant evidence and therefore, the Board should not overturn it.

**G. The ALJ's erroneous finding that employee Armando Lopez<sup>18</sup> was hired as a referral from a current employee, and was not a walk-in applicant. (ALJD at 5). (General Counsel Exception No. 7)**

General Counsel also argues that the ALJ's factual finding that Armando Torres was hired as a referral from a current employee was erroneous. In so finding that Mr. Torres was hired as a referral and not as a walk-in applicant, the ALJ properly credited the testimony of Lazaro Campos. Campos consistently testified that he knew that Armando Torres was hired based on a referral from a current employee, his cousin Juan Torres.

Q Armando Torres?

A Juan Torres referred him to me.

Q And again, Juan Torres follows. Are they related?

A Yes, they're cousins and Alberto Campos referred them to me.

Q Alberto Campos referred Juan?

A Yes.

(TP 301:15-21).

The General Counsel's argument completely ignores Campos' testimony and relies exclusively upon the documentary evidence. However, the testimony coupled with the documentary evidence supports the ALJ's finding that Armando Torres was in fact a referral from a current employee and not a walk-in. As explained by Campos, the original documentation submitted to the General Counsel during the course of the investigation (General Counsel's exhibit 7) mistakenly listed Armando Torres as a walk-in applicant.

Q BY MR. GIANNOPOULOS: Now I want to show you a document that's marked General Counsel's 7 and draw your attention to number 24, which is on page 3. It says Armando Torres, do you see that?

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<sup>18</sup> Counsel for General Counsel states "Armando Lopez" but there is no such employee. There was an "Armando Torres."

A Yes.  
Q And if you go to the right-hand side, it says "walk-in".  
A Right.  
Q Were you involved in the hiring of Armando Torres?  
A Yes, I was. But he wasn't a walk-in.  
Q Okay.  
A He's a relative of -- oh, what's his name? Juan Torres.  
Q Okay. And who is Juan Torres?  
A Juan Torres, that's his -- they're cousins. Juan Torres is Alberto Campos's brother-in-law.  
Q Okay. Why would it say walk-in here if it wasn't a walk-in?  
A It was just a misprint.  
Q Misprint?  
A Yeah, but he wasn't a walk-in.  
Q How did it come about that he was hired?  
A He was recommended to me by Juan Torres.  
Q When?  
A Back when he was hired. A couple days before that.  
Q What did Juan Torres tell you?  
A That his cousin -- well I can't recall the exact conversation, but he recommended him to me.  
Q Isn't it true -- I mean you've seen this document before, haven't you?  
A Yes.  
Q And you and Mike Gibbs sat down and you filled this document out together, right?  
A Yes.  
Q And this document was submitted back, to the NLRB, during the investigation right?  
A Yes.  
Q Back then, when you discussed this document with Mike Gibbs, you thought that he was a walk-in, right?

\*\*\*

THE WITNESS: I don't know how it came about. But he wasn't a walk-in.

(TP 263:19 – 265:10).

Campos also testified that this mistake was also made on Aim Royal's exhibit 1, but that he knew for a fact that Armando Torres was a referral.

Q I want to go through that list that we went through, that Mr. Rogers went through. That's AIM Royal 1, do you have that in front of you still?

A Yes, I still do.  
Q Okay. You were asked by Mr. Rogers about an individual named Armando Torres, right? Do you remember that?  
A Yes.  
Q And when do you remember that Armando Torres was not a walk-in?  
A When I saw this list and it was written on it?  
Q And that was when, Monday night?  
A Yes.  
Q Just a couple days ago?  
A Yes.  
Q And Mr. Gibbs was there when you saw this, right?  
A Correct.  
Q So you remembered Monday night that a year and a half earlier that Armando Torres had been recommended by someone?  
A Yes.  
Q But when you were shown General Counsel's 7, on number 24, you didn't remember Armando Torres had been referred by anyone then, did you?

\*\*\*

THE WITNESS: Well, I know who recommended. It probably just slipped my mind.

Q BY MR. GIANNOPOULOS: Back -- ?  
A When we originally did this, yes.  
Q Back when General Counsel's 7 was shown to you?  
A Right.

(TP 319:22 – 321:1).

Campos also explained that despite what the exhibits said, he told Mr. Gibbs that Armando Torres was not a walk-in.

Q BY MR. GIANNOPOULOS: Well, let me ask you this question. On Monday night --  
A Yes?  
Q -- did you discuss with Mr. Gibbs whether Armando Torres was or was not a walk-in?  
A Yes.  
Q And is that when you told him that he was not a walk-in?  
A Yes.

(TP 267:14-21).

Finally, counsel for Aim Royal explained that the General Counsel's exhibit 7 was an early draft of a document that was submitted even though it was not complete or entirely correct. Aim Royal attempted to fix that mistake by creating a new and updated document, Aim Royal 1, but that too, as Campos credibly explained in response to questioning by the ALJ, was not entirely accurate because he knew that Armando Torres was not a walk-in.

MR. ROGERS: Yeah, I was going to say the timing and the addition of it. [Lazaro Campos] did not – [AIM Royal 1] did not exist until Monday morning. He had not seen that when he saw a prior edition, and did not see[] AIM Royal 1 until Monday night at which time this particular thing, it was addressed -- it was a prior edition of AIM Royal 1 that he saw.

(TP 267:5-10).

Q BY MR. ROGERS: I'm handing you what has been marked as AIM Royal exhibit 1 and let me ask, the format of this document, this one is dated February 8, 2010, is that correct?

A Yes.

Q And have you seen and worked on prior drafts of this?

A Yes, I have.

Q Okay. And each time, have you looked at the prior draft and made corrections based upon your review and other information conveyed to you?

A Yes. And stuff that I remember.

Q Now there was a question about Armando Torres. He appears in alphabetical order -- it is much easier -- when you saw this document last night, did you make -- did you spot any error in it that had not been corrected from your prior suggestions?

A Yes. The fact of that walk-in.

\*\*\*

Q BY MR. ROGERS: Again, if I recall the referral with regard to Armando Torres was who?

A It was Juan Torres. It was his cousin.

Q Okay. Now, --

JUDGE KOCOL: Is there anything, Mr. Campos, in your mind that came about that you hadn't referred to on these earlier drafts? Something trigger in your mind that you can explain why, not yesterday, but several days ago --

THE WITNESS: Well, it's just, it's a lot of names.

JUDGE KOCOL: Can you tell me more?

THE WITNESS: I don't know why I didn't remember. I couldn't put a face with the name.

JUDGE KOCOL: And did this prompt you, the name on --

THE WITNESS: Well, once I realized his last name, then I just put two-and-two together because that was his cousin.

JUDGE KOCOL: That was his --

THE WITNESS: His cousin, Juan's cousin, which is our older employee.

JUDGE KOCOL: Please continue.

Q BY MR. ROGERS: Armando's cousin is Juan Torres, who is also listed on exhibit -- AIM Royal 1, correct?

A Correct.

Q So his cousin who referred him was a current employee of AIM Royal, is that right?

A Yes.

(TP 281:3 – 282:25).

The ALJ is entitled to make factual findings regarding the credibility of witnesses, including his finding that Campos was credible in this testimony. *See Standard Dry Wall*, 91 NLRB 544. Such determinations are not to be disturbed unless there is a clear preponderance of the evidence to the contrary. *Id.* The ALJ clearly found that Campos' testimony regarding Armando Torres was credible and more trustworthy than the exhibits. Moreover, General Counsel offers no evidence to rebut Campos' testimony regarding the relationship between Armando Torres and current employee Juan Torres, or Mr. Campos' explanation of the mistakes in the exhibits. The General Counsel simply concludes that because the documents contain information contrary to Campos' testimony, that the ALJ must have been mistaken in his factual finding. In reality, the ALJ was presented with both documentary and testimonial evidence explaining the truth of the origin of Armando Torres' hiring. It was the sole discretion of the ALJ to make that determination and as it is supported by the relevant evidence, it should not now be disturbed.

**H. The ALJ’s failure to order that interest on backpay be compounded on a quarterly basis. (ALJD at 17). This exception should be granted because only the compounding of interest can make adjudged discriminatees fully whole for their losses. (General Counsel Exception No. 8)**

In his next exception, the General Counsel argues that the ALJ should have ordered interest to be compounded on a quarterly basis instead of its standard practice of assessing simple interest. The General Counsel offers no reason why the Board should deviate from its current practice in this case where it has repeatedly and consistently declined to do so in all others. *See, e.g., Transp. Solutions, Inc.*, 355 NLRB No. 22 fn.6 (2010); *Bobbitt Elec. Serv., Inc.*, 355 NLRB No. 37 fn.2 (2010); *Austin Printing Co.*, 353 NLRB No. 54, n.3 (2008); *Woodbury Partners, LLC*, 352 NLRB 1072, 1077 fn. 15 (2008); *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008); *Rogers Corp.*, 344 NLRB 504 (2005). Because the General Counsel has not provided any evidence as to why the Board’s policy is in error, the Board should continue to calculate interest using its current practice of assessing simple interest.

**I. The ALJ’s technical errors in the ALJD, specifically Paragraph 2(a) of the Order, relating to Jacobson (ALJD at 20) which inadvertently states “Respondent Aim” instead of “Respondent Jacobson;” and the misspelling of the Counsel for the General Counsel’s last name (ALJD at 1). (General Counsel Exception No. 9)**

Aim Royal has no objection to correcting these technical errors.

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### III. CONCLUSION

Based upon the foregoing, the requested exceptions of the General Counsel should be rejected.

DATED this 2<sup>nd</sup> day of July, 2010.

LASOTA & PETERS PLC

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## CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2010, RESPONDENT AIM ROYAL'S ANSWER TO GENERAL COUNSEL'S EXCEPTIONS, filed in AIM ROYAL INSULATION, INC. and JACOBSON STAFFING, L.C., Joint Employers, and INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ALLIED WORKERS, AFL-CIO, LOCAL NO. 73, Cases 28-CA-22605 and 28-CA-22714, were served by E-Gov, E-Filing, Email and U.S. Mail on the following:

**Via E-Gov, E-Filing:**

Lester A. Heltzer, Executive Secretary  
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