

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**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**

**ACTING GENERAL COUNSEL’S BRIEF IN REPLY TO
THE ANSWERING BRIEF FILED BY AIM ROYAL INSULATION, INC.**

Counsel for the Acting General Counsel submits the following Reply Brief to the Answering Brief filed by Respondent Aim Royal Insulation, Inc.¹ For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit, and the Board should grant the Acting General Counsel’s Exceptions.

I. The ALJ Erred by Refusing to Find that Aim Royal Violated the Act by Failing to Recall Jose Gurrola or Place Him on a Preferential Hiring List.

The Acting General Counsel asserts that the ALJ erred by refusing to properly apply Board precedent, as set forth in *Lee A. Consaul, Co.*, 192 NLRB 1130 (1979) enf. denied on other grounds 469 F.2d 84 (9th Cir. 1972). In *Lee Consaul, Co.*, 192 F.1130, 1158-59 (1971), a group of strikers were fired while they were on strike, and later made unconditional offers to

¹Aim Royal Insulation, Inc., will be referred to as “Respondent” and/or “Aim Royal.” Jacobson Staffing, L.C., will be referred to as “Respondent Jacobson” and/or “Jacobson.” The International Association of Heat & Frost Insulators & Allied Workers, AFL-CIO, Local No. 73, will be referred to as “Union.” References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the General Counsel, Respondent Aim Royal, Respondent Jacobson, and the Charging Party Union’s Exhibits will be referred to as (GC.), (AR.), (J.), and (CP.), respectively with the appropriate exhibit number. All dates are in 2009, unless otherwise stated.

return to work. The terminations occurred outside the 10(b) period, but the offers to return to work were made within the 10(b) period. *Id.* at 1158. The Board found that the discharged strikers occupied two positions, one of a discharged employee and the other of a striker, and that these two rights are distinct. *Id.* Therefore, the Board found that, at the end of the strike, the discharged strikers could still exercise their reinstatement rights by making unconditional offers to return to work, notwithstanding the fact they were discharged outside the 10(b) period. *Id.* at 1159.

Such is the case here. Even though Gurrola's discharge occurred outside the 10(b) period, he was still privileged to exercise his reinstatement rights by making an unconditional offer to return to work, which he did in April, May, and July. However, the ALJ disregarded the Board's guidance in *Lee A. Consaul, Co. v. Aim Royal*, in an attempt to justify the ALJ's error, tries to distinguish the indistinguishable, arguing that, because the workers in *Lee A. Consaul* made offers to return to work five days after their termination, while Gurrola waited eight months, this fact somehow makes *Lee A. Consaul, Co.*, inapplicable. *Resp't Ans. Br.*, at 26. However, there are no time limits on the reinstatement rights of economic strikers. *Brooks Research & Mfg., Inc.*, 202 NLRB 634, 636 (1973) (Board dismisses employer's argument that time limits should be placed on the reinstatement rights of economic strikers). It simply does not matter whether Gurrola waited one day, or one year, to make an unconditional offer to return to work. Even though he had been fired while on strike, he still retained the privilege to exercise his reinstatement right, which is a right separate and distinct from his rights as a discharged employee.²

² Counsel for the Acting General Counsel acknowledges the ALJ's conclusion that *Aim Royal* violated Section 8(a)(1) and (3) by refusing to reemploy Jose Gurrola, a finding to which no exceptions were taken, makes any remedy to this allegation duplicative.

Moreover, the fact that the parties in *Lee A. Consaul, Co.*, had reached a subsequent agreement acknowledging the possible reinstatement of the discharged strikers is not “significant” as argued by Aim Royal, and the ALJ. *Resp’t Ans. Br.*, at 26; ALJD at 7. As the Board in *Lee A. Consaul, Co.*, noted, this agreement constituted “another ground peculiar to the facts” supporting a violation, which was “*separate and distinct*” from the finding that the discharged workers still retained their reinstatement rights as strikers, and that the employer violated the Act by denying their reinstatement. *Id.* at 1159-60 (emphasis added).

Finally, Aim Royal’s complaint that the Acting General Counsel has only cited to *Lee A. Consaul, Co.*, to support his position that Gurrola was entitled to reinstatement is without merit. *Lee A. Consaul, Co.*, has not been overturned by the Board, or by the Courts; while Aim Royal may not like the results reached by the Board, *Lee A. Consaul, Co.*, it is established Board precedent. In sum, and notwithstanding the fact that any remedy regarding this violation may be duplicative, the ALJ erred by not finding that Aim Royal violated Section 8(a)(1) and (3) by refusing to reinstate Jose Gurrola, or place him on a preferential recall list, upon his unconditional offer to return to work.

II. The ALJ Erred in Dismissing the Allegation that Aim Royal Violated the Act by Refusing to Hire Angel Aizu, and the Nine Other Voluntary Union Organizers.

In its Answering Brief, Aim Royal asserts that the company did not discriminate against Angel Aizu and the nine other volunteer Union organizers, because the company followed its “long-standing” referral-based hiring practice, giving hiring preference to former employees and referrals from current employees.³ *Resp’t Ans. Br.*, at 36. However, the

³ The nine other volunteer Union organizers are: Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback.

evidence, as found by the ALJ and admitted to by Aim Royal, shows that Aim Royal applied this hiring practice disparately when Union organizers attempted to apply for employment.

As a former employee, Gurrola should have been subject to Aim Royal's purported non-discriminatory hiring preference when he attempted to gain reemployment in April. However, he was never rehired, or even considered for reemployment, simply because of his Union activities. (ALJD at 9) Aim Royal has not taken exception to this finding by the ALJ, and therefore admits the violation. *Kings Electronics Co., Inc.*, 109 NLRB 1324, 1324 (1954) (upon respondent's failure to file exceptions, the Board abides by Section 102.48 and adopts the ALJ's findings, conclusions, and recommendations). Similarly, as a former employee who had been laid-off, Shawn McMillan should have been subject to Aim Royal's purported non-discriminatory hiring preference. However, he too was never considered for reemployment because of his Union conduct. (ALJD at 11) It is clear that this purported hiring preference only applied if employees were not seeking to organize Aim Royal's workplace; those considered untrustworthy Union activists did not receive the benefit of the hiring preference.

The fact that Aim Royal's hiring preference was disparately applied is bolstered by the circumstances surrounding the actual hires that occurred when the Union organizers were attempting to secure employment with the company. In its Answering Brief, Aim Royal describes its preferential hiring system as follows:

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. . . . Aim Royal used this policy to fill its hiring needs in all instances during the relevant period.⁴ *Resp't Ans.Br.* at 36. (emphasis added)

⁴ In its Answering Brief Aim Royal describes the relevant period as "May 27 through July 15 or August 10, 2009," the time period the various Union organizers were seeking employment with the company *Resp't Ans.Br.*, at 7.

The record evidence shows that the actual individuals who were hired during this period, in lieu of the Union organizers, do not fit into Aim Royal's hiring policy as described by Respondent in its Answering Brief. For example, Anthony Sandoval was fired for not showing up at work, but was rehired on June 10 (Tr. 328; ALJD at 4); Manuel Murrieta was fired for not showing up at work, coming in late, leaving early, and for other "deficient work performance," but he was rehired on July 17 (Tr. 241; GC. 8; ALJD at 4); William Loy was fired because of a drug problem, but was rehired on June 26 (Tr. 326-27); Mario Chavez was fired because he was lazy, had received customer complaints, caused Aim Royal a deep "loss of revenue," and hurt the company by his actions. (Tr. 238, 1037; GC. 9) Nonetheless, he was rehired on July 8. (ALJD at 4) George Campos was fired for not working hard enough, but was rehired on June 16. (Tr. 323; ALJD at 4) Finally, Jacob Ollarsaba was fired in June because he stopped coming to work, but was rehired again a few weeks later, on July 24, in lieu of the Union organizers. (Tr. 835; GC. 47; ALJD at 4)

None of these rehired former employees had previously "performed satisfactorily," were "laid off" or had "left voluntarily," as dictated by Aim Royal's purported hiring policy. Nonetheless, all were hired instead of the Union organizers.

Clearly, Aim Royal relies upon its supposed hiring policy as a sword and a shield: as a sword to fend off workers who might try to organize the company and as a shield to deflect against violations of Federal law. The Board has consistently found that employers cannot use a purported neutral hiring policy as a shield, when it is applied disparately to discriminate against union supporters. *Monfort of Colorado*, 298 NLRB 73, 83 (1990) (employer violated the Act by failing to rehire former employees and disparately applying its facially neutral hiring policy to those workers); *Kentucky General, Inc.*, 334 NLRB 154, 162 (2001)

(employer's disparate and discriminatory application of its facially neutral hiring policy violates the Act). Here, Aim Royal attempted to use this policy to conceal its discrimination against Gurrola, McMillan, Aizu, and the nine other volunteer Union organizers.

Aim Royal tries to deflect attention from the disparate application of its purported hiring policy, by claiming that various other people the company hired were somehow associated with the Union, or worked for union signatory contractors, at one time or another during their careers. *Resp't Ans. Br.*, at 33. However, the Board and the Courts have long held that an employer's failure to discriminate against all union applicants does not bar the finding of a violation. *Zurn/NEPCO*, 345 NLRB 12, 46 (2005); *Fluor Daniel*, 333 NLRB 427, 440, 455 (2001); *KRI Constructors, Inc.*, 290 NLRB 802, 812 (1988) (the fact an employer did not discriminate against all union applicants does not preclude a violation). *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964) (a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents). *NLRB v. Nabors* 196 F.2d 272, 276 (5th Cir. 1952) (the fact that respondent retained some union employees does not exculpate him from the charge of discrimination as to those discharged). Moreover, none of these individuals hired by Aim Royal had ever identified themselves to the company as Union organizers. It is telling that, in its Answering Brief, Aim Royal states that when rehiring former employees, the company seeks workers it "could trust," or knows "could be trusted." *Resp't Ans. Br.*, at 2, 3, 29. Clearly Aim Royal could trust former employees, who never tried to organize the company during their previous employment, over those, whether it be Jose Gurrola or the other Union applicants, who identified themselves as a Union organizers.

The record evidence shows that, even if Aim Royal maintained a neutral hiring system, it was applied disparately to avoid hiring known Union organizers. Counsel for the Acting General Counsel respectfully requests that this Exception be adopted by the Board in full.

III. Aim Royal was Hiring, and Had Plans to Hire, When the Nine Volunteer-Union Organizers Applied for Work.

Inexplicably, in its Answering Brief, Aim Royal claims that it was neither hiring, nor had concrete plans to hire, when the applications of the nine voluntary-union organizers were faxed to the Aim Royal office on June 23, 2009. *Resp't Ans. Br.*, at 33-35. However, the evidence introduced by Aim Royal at the hearing shows that the exact opposite was true. As found by the ALJ, six employees were hired between June 26 and August 10.⁵ (ALJD at 4; AR. 1) One employee, who had previously been fired because of drug problems (Tr. 326-27), was even hired on June 26, just three days after Aim Royal received the faxed applications of the volunteer union organizers. There is simply no basis in fact for Aim Royal to claim that it was neither hiring, nor planning to hire, when the evidence introduced by Aim Royal at hearing shows the opposite to be true.

IV. The Acting General Counsel's Exception No. 6 is Now Moot.

In Exception No. 6 to the ALJD, the Acting General Counsel asserts that the ALJ erred by 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. This Exception was made based upon the presumption that Aim Royal, or

⁵ In describing the various Aim Royal hires, the ALJ did not list one person who was hired in September, and two people who were hired in October 2009. (GC. 6; AR. 1) For purposes of determining the number of job openings that existed at Aim Royal, the Acting General Counsel asserts that the relevant time period is from May 27, 2009, through October 2009. See, *Zarcon, Inc.*, 340 NLRB 1222, 1228-29 (2003) (appropriate job openings existed to support a refusal to hire violation, where the employer hired two and three months after the applicants applied for work).

Jacobson, would take an exception to the ALJ's finding that Gurrola's strike was protected. Since neither Aim Royal nor Jacobson filed exceptions to this finding, the ALJ's conclusion that Gurrola engaged in a protected strike is conclusive. *Kings Electronics Co., Inc.*, 109 NLRB at 1324. Therefore, Counsel for the Acting General Counsel withdraws this Exception.

V. CONCLUSION

Based on the foregoing, the Board should reverse the ALJ's erroneous rulings and find that Respondent committed the additional violations as set forth in the Acting General Counsel's Exceptions.⁶

Dated at Phoenix, Arizona, this 16th day of July, 2010.

Respectfully submitted,

/s/ John T. Giannopoulos
John T. Giannopoulos
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2123
Facsimile: (602) 640-2178

⁶ In his Exceptions, the Acting General Counsel inadvertently refers to "Scott McMillan" instead of "Shawn McMillan," and "Armando Lopez" instead of "Armando Torres." In its Answering Brief, Aim Royal correctly noted this error.

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN REPLY TO THE ANSWERING BRIEF FILED BY AIM ROYAL INSULATION, INC. in AIM ROYAL INSULATION, INC. and JACOBSON STAFFING, L.C., Joint Employers, Cases 28-CA-22605 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 16th day of July 2010, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Thomas M. Rogers, Attorney at Law
LaSota & Peters, PLC
722 East Osborn Road, Suite 100
Phoenix, AZ 85014
E-Mail: trogers@lasotapeters.com

Kevin J. Kinney, Attorney at Law
Krukowski & Costello, SC
7122 West Edgerton Avenue
P.O. Box 28999
Milwaukee, WI 53228-0999
E-Mail: kjk@kclegal.com

Gerald Barrett, Attorney at Law
Ward, Keenan and Barrett, PC
3838 North Central Avenue, Suite 1720
Phoenix, AZ 85012-0001
E-Mail: gbarrett@wardkeenabarrett.com

Via Overnight Delivery:

Aim Royal Insulation, Inc.
1426 North 26th Avenue
Phoenix, AZ 85009

Jacobson Staffing Company, LC
3911 West Van Buren Street, Suite B-8
Phoenix, AZ 85009

International Association of Heat and Frost
Insulators & Allied Workers, AFL-CIO
1841 North 24th Street, Suite #7
Phoenix, AZ 85008

/s/ Katherine A. Stanley

Katherine A. Stanley
Secretary to the Regional Attorney
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004
Telephone (602) 640-2163