

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 REPLY BRIEF TO ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO AIM ROYAL'S CROSS-EXCEPTIONS**

Thomas M. Rogers
LASOTA & PETERS PLC
State Bar No. 003285
722 E. Osborn Rd., Suite 100
Phoenix, AZ 85014
Phone: 602-248-2900
Fax: 602-248-2999
Email: trogers@lasotapeters.com
Attorneys for AIM Royal Insulation, Inc.

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**RESPONDENT AIM ROYAL’S REPLY BRIEF TO ACTING GENERAL COUNSEL’S
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Respondent Aim Royal submits the following Reply Brief to the Acting General Counsel’s Answering Brief to Respondent Aim Royal’s Cross-Exceptions. For the reasons described below, the matters asserted by the General Counsel in his Answering Brief are without merit, and the Board should grant Respondent Aim Royal’s Cross-Exceptions.

I. The ALJ Erred In Concluding That Antiunion Animus Contributed To The Failure To Hire Or Consider For Hire Shawn McMillan When The ALJ Failed To Consider Undisputed Evidence And Find That Aim Royal’s Hiring Practices Often Resulted In The Hiring Of Union Supporters And That During The Relevant Period, Over Half Of Those Hired Or Rehired Were Union Supporters, Former Or Current Union Members, Or Had Worked For Union-Signatory Companies.

Aim Royal asserts that the ALJ erred by finding that antiunion animus contributed to Aim Royal’s employment decision concerning McMillan. It is undisputed (and the General Counsel does not address in his Answering Brief) that Aim Royal’s hiring practices resulted in the hiring of union supporters, current or former union members, or those who had worked for union-signatory companies. In fact, several Aim Royal employees hired or rehired since Lazaro Campos became superintendent had union affiliations or were known to have worked for union-contracted employers.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.² Of the eight³ permanent insulators hired or rehired during the Relevant Period,⁴ five were union members or had worked for union-signatory companies. This finding should have been made and included in

¹ See Aim Royal Cross-Exceptions Brief at 5-6.

² See *id.* at 6.

³ See *id.*

⁴ The “Relevant Period” was found to be May 27 through July 15 or August 10, 2009. (ALJD at 4:11-23, 8:37-42).

the ALJ's decision because it is highly significant to the quantum of evidence supporting a determination of whether union animus was a factor in Aim Royal's decision regarding McMillan. *See E & I Specialists, Inc.*, 349 NLRB 446 (2007) (overruling conclusion that respondent possessed antiunion animus where, among other factors, ALJ failed to give "proper weight to the [respondent's] hiring of union members"); *KRI Constructors, Inc.*, 290 NLRB 802 (1988) ("Statistics are competent in proving employment discrimination") (citing *Teamsters v. United States*, 431 U.S. 324, 339-40 (1977)).

Instead, the General Counsel seeks to redirect the Board's attention from the real issue: whether the quantum of evidence properly supports a finding that there was union animus *in connection with the rehire of McMillan* due to his union affiliation. The General Counsel suggests that because Aim Royal did not file exceptions related to the ALJ's finding that Aim Royal interrogated McMillan (a fact vigorously disputed in the record before the ALJ) or Gurrola (likewise disputed, but no exceptions filed), Aim Royal is somehow barred from challenging the ALJ's findings related to the rehire of McMillan. The fact that a party chooses not to file exceptions does not mean that it agrees with the ALJ's findings; where an ALJ's findings are based on credibility determinations, they should only be excepted to when there is some other basis to support a contrary position. *See ULP Casehandling Manual* § 10438.3 ("Generally, exceptions should be filed when there is a reasonable possibility of success and the matter involved is of sufficient importance to the overall case. The standard for cross-exceptions should be substantially similar. Credibility findings are often difficult to successfully overturn and should normally be attacked only when other factors besides "demeanor" are the basis of the resolution."); *U.S. Postal Serv.*, 345 NLRB 409, 412 fn.11 (2005) (where the Board noted that "a respondent's failure to file exceptions does not necessarily show that it had a weak case.").

The General Counsel disappointingly misstates the clear evidence and specific finding that Aim Royal's hiring practice is "consistent with similar policies that the Board has found to be lawful." The General Counsel falsely states that "most of the individuals listed in Aim Royal's brief as union affiliated were hired well before it became aware of the union's organizing drive in July 2008." GC's Br. at 7. That organizing drive in July 2008 *preceded* the question regarding Aim Royal's hiring practices during the Relevant Period by an entire year, which the ALJ found was May 27 through July 15 or August 10, 2009. (ALJD at 4:11-23, 8:37-42). And during that Relevant Period, five of the eight hires/rehires were current or former union members or had worked for union-contracted employers.

Likewise, the General Counsel misleadingly implies that Aim Royal's hiring practice was not firmly established prior to the Relevant Period. GC's Br. at 4. This incorrect assertion is clearly contrary to the evidence in the record, as well as the ALJ's findings. 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). Only on a few occasions has Aim Royal's hiring procedure not been successful. Consideration of people 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 all permanent employees who were hired were rehires or those recommended by current employees. (TP 37:18-21, 45:14-18; ALJD at 4:11-23, 8:37-42).

Further, the General Counsel's allusion to the ALJ's finding that two of those hired during the Relevant Period had said "bad things" or otherwise complained about the union to

Aim Royal before the company agreed to rehire them is misleading. (GC's Br. at 7).⁵ The specific "negative" comments by those rehires, Murrieta and Chavez, related to the *lack of work* with the union and a long-time desire to return to work at Aim Royal. (TP 239:16 to 240:21). Other than lack of work with the union, Chavez made a negative comment about racism related to a union-signatory company for which he had worked, not the union itself. (TP 240:8-17, 240:24 to 241:12). These complaints regarding lack of union work were no different than McMillan's complaint that he could not get union work.⁶ In light of the recession in the construction industry at the time, reporting lack of work was not surprising and no evidence suggested that such comments about the union had any effect on employment with Aim Royal.⁷

Based on the undisputed evidence, Aim Royal's hiring procedures, to which it adhered, actually resulted in the hiring and rehiring of union members and supporters during the Relevant Period regardless of whether anything was said about the union. It did not exclude union members and supporters, nor was it designed and implemented to exclude union members and supporters. Therefore, the ALJ's failure to make the finding that "during the relevant period the majority of the insulators rehired/hired by ARI (5 of 8) were union members or those who had worked for union-signatory companies" withholds vital information highly relevant to consideration of the other findings and conclusions in the decision.

⁵ In his Answering Brief, the General Counsel refers to the ALJ's finding at page 10 of his decision. However, Aim Royal believes that the General Counsel meant to refer to the ALJ's decision at page 4.

⁶ 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).

⁷ In fact, if Aim Royal did consider complaints about the lack of work through the union a "positive" factor in rehiring, then by the General Counsel's logic, Aim Royal would have favored rehiring McMillan.

II. The ALJ Erred In Finding That “Aim Specifically Relies On Its Practice Of [Hiring Former Employees] As A Means Of Supplying Its Hiring Needs So As To Avoid Hiring Unknown Applicants, Including Those Who Might Be Supporting A Union.” The ALJ’s Finding Is Misleading And The Suggestion That Aim Royal Sought To Determine Whether Those It Hired Might Be Supporting A Union Or Would Decline To Hire An Employee Who Might Be Supporting A Union Is Unsupported By The Evidence.

As discussed in Aim Royal’s Cross-Exceptions Brief, no evidence supports the ALJ’s finding that Aim Royal relies on its hiring practice to avoid hiring union-supporters. Moreover, the General Counsel failed to even respond to this exception.

III. The ALJ Erred In Finding That “AIM was hostile to the Union” In Connection With The Reemployment Of McMillan. While Aim Royal Did Not Consider McMillan For Rehire, The Reason For Not Doing So Was Based On His Conduct While Working At And Immediately After His Termination From Aim Royal, Not A Hostility To The Union Itself.

Aim Royal asserts that the ALJ erred by finding that antiunion animus contributed to Aim Royal’s employment decision concerning McMillan. Aim Royal respectfully disagrees with the General Counsel’s suggestion that Aim Royal’s decision not to file exceptions to the ALJ’s finding regarding Gibbs’ “interrogation” of McMillan is somehow dispositive. GC’s Br. at 8. The decision of a party not to file exceptions to findings based on credibility determinations does not mean that it agrees with the ALJ’s findings. *See* ULP Casehandling Manual § 10438.3; *U.S. Postal Serv.*, 345 NLRB at 412 fn.11. That finding was based on the ALJ crediting McMillan’s recollection of that conversation over that of Gibbs’ testimony. While the ALJ found a Section 8(a)(1) violation for Gibbs asking McMillan “I kind of heard that your were part of the union and how is that going for you,” McMillan’s response was “it’s not really going for me at all because I didn’t have no work at the time, and I was just trying to get some work any way I could honestly.” (ALJD 10-11). McMillan’s response was similar to the information provided by Murrieta and Chavez, who were both hired. Thus, there is no basis to find that the decision not

to rehire McMillan was based on union animus or hostility to the union in light of the mere fact that McMillan had no work available through the union.

The General Counsel also wrongly asserts that Aim Royal admitted its unlawful refusal to rehire Gurrola and suggests that the ALJ's findings related to the rehire of Gurrola and the handbook provisions should be relevant to whether union animus contributed to the decision not to rehire McMillan. GC's Br. at 8-9. Again, a party's decision not to file exceptions does not mean that it agrees with the ALJ's findings. *See* ULP Casehandling Manual § 10438.3; *U.S. Postal Serv.*, 345 NLRB at 412 fn.11.

There is no evidence in the record that union animus or hostility to the union was a factor in the decisions to hire any of the eight insulators hired in the Relevant Period, five of which were current or former union members or those who had worked for union-signatory companies, or in the decision not to hire McMillan. The disclosure that McMillan was looking for work because he could not get work through the union is no different from the disclosures by Murrieta and Chavez, who were both rehired. The ALJ erred in finding that "AIM was hostile to the Union" in connection with the reemployment of McMillan.

IV. The ALJ Erred In Concluding That Aim Royal Violated The Act By Not Hiring Or Considering For Hire Shawn McMillan Because McMillan Engaged In Union Activity When The ALJ Disregarded The Legitimate And Non-Discriminatory Right Of Aim Royal To Refuse To Rehire Or To Consider Employees For Hire Who Engage In Objectionable Conduct. Related To This Cross-Exception Is The Finding Of The ALJ That Aim Royal's Reason For Not Rehiring McMillan Is False.

The ALJ erred in completely disregarding Aim Royal's legitimate and non-discriminatory reasons for not hiring or considering McMillan for hire.

A. Aim Royal Exercised Its Discretion Not To Rehire McMillan Because Of His Conduct That Gibbs And Campos Found Offensive.

The General Counsel asserts that Aim Royal has not presented “any relevant evidence” to demonstrate that the ALJ’s credibility resolutions were flawed. GC’s Br. at 11. However, Aim Royal’s Cross-Exceptions Brief outlines the relevant and credible evidence that the ALJ did not address and which by a clear preponderance of the evidence shows that the ALJ erred.

The ALJ clearly made his determination based on his findings of the relative credibility of Gibbs and McMillan, rejecting Gibbs’ recollection in favor of McMillan’s. However, the ALJ’s conclusion ignored the credible testimony of Campos, whose testimony was consistent with Gibbs’ and contrary to McMillan. In fact, the ALJ acknowledged Campos’ testimony regarding McMillan’s storming out of the office as he rudely said “lose my number.” (ALJD at 11). The ALJ did not question Campos’ credibility and found Campos credible in other testimony. (ALJD at 5). However, nothing supports his ignoring Campos’ testimony. *See* Aim Royal Cross-Exceptions Brief at 13-14.

Moreover, the ALJ credited McMillan’s testimony even though it was inconsistent with the recollections of *three* different people – Gibbs, Campos and Sandy Chavez from Jacobson. McMillan denied that he was rude, angry or inappropriate when he told Gibbs to “to lose [his] number” and walked out. (TP 427). So according to McMillan, he “simply walked in, [said] [‘]lose my number, *sir*,[’] and then [he] simply walked out. . . .” (*Id.*) (emphasis added). But McMillan alleges he also told Gibbs to lose his number not just once, but a second time when Gibbs allegedly said he would call McMillan if there was any more work coming up and McMillan responded: “[N]o, 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. McMillan first testified he had said “Lose my number, *sir*.” (Emphasis

added). But he later admitted under cross-examination he had not said anything but “lose my number.” (TP 441) (emphasis added). No respectful use of the word “sir” was uttered.

Further, McMillan’s behavior as reported by Campos is consistent with his actions, tone and demeanor when he sought employment with Jacobson. Sandy Chavez reported that when applying for work at Jacobson, McMillan repeatedly cursed while speaking to her, used the F-word extensively, and stormed out of her office slamming the door behind him. (TP 400, 403-405). Under oath, McMillan denied any cursing, stating that he does not swear and he has never used the F-word: “That word is not part of my vocabulary.” (TP 429; 434:10-17). But Chavez testified that he certainly did use the F-word. (TP 401, 405). McMillan’s co-worker Joe Grubowski also testified that McMillan certainly did use the F-word. (TP 808-820). Disappointingly, the ALJ excused McMillan’s obvious lie, and rather than evaluating McMillan’s credibility in light of the lie, the ALJ discredited McMillan’s testimony only “to the extent it indicates that he never used the f-word.” (ALJD at 13).

The General Counsel suggests that even if Aim Royal’s evidence were credited, it still does not suggest that McMillan engaged in the type of conduct that would disqualify him from future employment because McMillan did not yell at Gibbs, was not violent, made no threats nor caused damage to Aim Royal’s property. GC’s Br. at 12. That is *not* the level of conduct required. “An employer is privileged to refuse to hire a disrespectful applicant.” *Fresh Organics, Inc.*, 350 NLRB 309, 314 (2007). Threats or actual violence (about which McMillan was thinking at the time of his disrespectful tone and words),⁸ yelling or property damage is not

⁸ McMillan 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). It is encouraging that McMillan at the time he was telling Aim Royal to “lose my number,” he was thinking about conduct that would result in his arrest and decided not to engage in such conduct. But that is hardly supportive of his testimony as to his calm and respectful behavior. It is, however, consistent with Campos’ testimony as to McMillan’s demeanor on that occasion.

required before an employer is privileged to not hire a rude or disrespectful applicant.

B. Though Not As Significant A Reason For Its Decision Not To Rehire McMillan, Observations Of McMillan's Inability Or Unwillingness To Learn And Do His Job Properly Was Also Considered And Was Not Pretext.

Finally, the General Counsel alleges McMillan's marginal work performance and inability or unwillingness to learn and do his job properly, which Aim Royal admitted was not as significant a reason for its decision not to rehire McMillan, is a pretext. GC's Br. at 12. As discussed above, McMillan's rude and disrespectful behavior alone justifies not considering him for rehire. But in addition to that, Campos had informed Gibbs of his observations of McMillan's inability or unwillingness to learn and do his job properly when Campos was a coworker of McMillan's. See Aim Royal Cross-Exceptions Br. at 14. Both factors were considered. The General Counsel's suggestion that Aim Royal's explanation is a pretext because of the lack of prior written counseling or other documents is untrue. Aim Royal is a small employer with no human resources department and it simply does not generate written warning documents on a consistent basis. Moreover, at the time Campos observed McMillan in the field he was not a supervisor of McMillan and so no written warning would have been generated.

The General Counsel then asserts that because some employees who had been fired for poor work performance were later rehired, that concern with McMillan's inability or unwillingness to learn and do his job properly was not a rehiring criteria. GC's Br. at 12. Respectfully, there is a difference between an employee who has demonstrated a desire and willingness to learn and has shown he is capable of performing at an acceptable level and an employee who has not demonstrated an ability or willingness to learn and do his job properly and whose performance has been marginal.

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. *See* Aim Royal Cross-Exceptions Brief at 20. Where there has been a problem with the employee in the past, but there is mutual respect and trust, Aim Royal will accept past personal failures if Aim Royal and the former employee can agree that the prior problem will not reoccur *and their workmanship was good*. *Id.* at 21. For instance, employees fired for not showing up to work would be considered for rehire if they had been good workers when they did show up and committed to correct their prior attendance/tardiness problems. (TP 993:11 to 994:4, 1011:25 to 1012:3). Likewise, an employee who had been a good worker, but when asked to serve as a lead man, he had not been able to properly lead a crew and caused customer complaints and a loss of revenue, he could be considered for rehire, but would not be asked to again serve in the role of a lead man. (TP 1042:8-23; 1043:15-20). However, in each of the instances discussed at the hearing, good workmanship was a prerequisite for rehire. That would not include marginal performers or those who had not demonstrated an ability or willingness to learn and do his job properly, such as McMillan. Accordingly, McMillan's past performance and his conduct upon leaving Aim Royal was more than enough evidence for Aim Royal to choose not to rehire him.

V. Conclusion

Based on the foregoing, the Board should make and add additional findings⁹ and also reverse the ALJ's erroneous ruling and find that Aim Royal did not commit the violations as set forth in Aim Royal's Cross-Exceptions.

⁹ Findings: 1) that Aim Royal's hiring practice resulted in the hiring of union supporters, current or former union members, or those who had worked for union-signatory companies and that many were known *at the time of their hiring* to be current or former union members or to have worked for union-contracted employers; 2) that 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; 3) that of the eight 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; and 4) that at the time of rehire those five were known by Aim Royal to be union members or to have worked for union-signatory companies.

DATED this 30th day of July, 2010.

LASOTA & PETERS PLC

By /s/ Thomas M. Rogers
Thomas M. Rogers
State Bar No. 003285
722 E. Osborn Rd., Suite 100
Phoenix, AZ 85014
Phone: 602-248-2900
Fax: 602-248-2999
Email: trogers@lasotapeters.com

Attorneys for AIM Royal Insulation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2010, RESPONDENT AIM ROYAL'S REPLY BRIEF TO ACTING GENERAL'S ANSWERING BRIEF TO AIM ROYAL'S CROSS-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
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via Email:

John Gianopolous
NLRB – Region 28
2600 N. Central, Suite 1800
Phoenix, AZ 85009
Email: John.Giannopoulos@nlrb.gov
Field Attorney for NLRB

Kevin J. Kinney
Krukowski & Costello, S.C.
7111 W. Edgerton Ave.
Milwaukee, WI 53220
Email: kjk@kclegal.com
Attorneys for Jacobson Staffing, L.C.

Gerald Barrett
Ward, Keenan & Barrett, P.C.
3838 N. Central Ave., Suite 1720
Phoenix, AZ 85012
Email: gbarrett@wardkeenanbarrett.com
Attorneys for Union

Via U.S. Mail:

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/ Dinah I. Holm
LaSota & Peters PLC
722 E. Osborn Rd., Suite 100
Phoenix, AZ 85014
Telephone: 602-248-2900
Facsimile: 602-248-2999
Email: dholm@lasotapeters.com