

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO BRANCH OFFICE**

**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**

**GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

“Nothing in this Act shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.” National Labor Relations Act, Section 13. The right of employees to strike has been described as the cornerstone of the Congressional scheme under the Act, and without this right, the ability of employees to affect changes in their working conditions, or bargain collectively, would be seriously undermined. *NLRB v. United States Postal Serv.*, 833 F.2d 1195, 1199 (6th Cir. 1987); *McClatchy Newspapers, Inc. v. NLRB* 131 F.3d 1026, 1031, (DC. Cir. 1997). Jose Gurrola, an employee of Aim Royal Insulation, Inc.,¹ who was hired

¹ Aim Royal Insulation, Inc., will be referred to as “Respondent Aim Royal” 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

off the street, but also happened to be a covert Union organizer, took these words to heart when he went on strike in July 2008, to protest the lack of water and dust masks at his worksite, and to support the Union's organizing drive. Because of these activities, Gurrola was subsequently fired. When he when he tried to end his strike in April 2009, by making an unconditional offer to return to work, he was refused and told that he no longer worked at Aim Royal.²

In the face of an organizing drive, shocked by the fact a Union organizer had been hired under their nose, and then had the audacity to go on strike, Aim Royal stopped hiring walk-in applicants. Instead, when faced with an onslaught of qualified applicants, who also happened to identify themselves as Union organizers, at a time when it really needed qualified workers, Aim Royal reverted to hiring previous employees who had been fired for cause, including one worker who was terminated because of drug use. When Union supporters tried applying for work with Aim Royal through Jacobson Staffing, both employers made sure that none of these Union supporters would get hired to work on Aim Royal projects. While the right to strike is the "cornerstone" of the Act's protections, the facts here show how employees are penalized for exercising their statutory rights.

II. ISSUES PRESENTED

- A. Whether Respondent Aim Royal violated Section 8(a)(1) of the Act by maintaining provisions in its employee handbook that interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.
- B. Whether Respondent Aim Royal violated Section 8(a)(1) of the Act by threatening employees by telling them that they have been discharged.
- C. Whether Respondent Jacobson violated Section 8(a)(1) of the Act by threatening employees with loss of employment opportunities.

the General Counsel, Respondent Aim Royal, Respondent Jacobson, and the Charging Party's Exhibits will be referred to as (GC.), (AR.), (J.), and (CP.), respectively with the appropriate exhibit number.

² All dates are in 2009, unless otherwise noted.

- D. Whether Respondent Jacobson violated Section 8(a)(1) of the Act by interrogating employees.
- E. Whether Respondent Aim Royal violated Section 8(a)(1) of the Act by interrogating employees and creating an impression of surveillance.
- F. Whether Respondent Jacobson violated Section 8(a)(1) of the Act threatening them with loss of employment opportunities.
- G. Whether Respondent Jacobson violated Section 8(a)(1) of the Act by interrogating employees.
- H. Whether Respondent Aim Royal violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate employee Jose Gurrola to his former or substantially equivalent position of employment and/or place him on a preferential hiring list.
- I. Whether Respondent Aim Royal violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire or hire Jose Gurrola, Angel Aizu, Shawn McMillan, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabel, and John Rohrback.
- J. Whether Respondent Jacobson violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire or hire Shawn McMillan, Luis Bolaños, Gustavo Gonzalez, and Angel Aziu.
- K. Whether interest on any monetary award should be computed on a quarterly basis.

III. BACKGROUND

A. Respondent Aim Royal's Operations

Aim Royal operates a commercial insulation company, based in Phoenix, Arizona.

(GC. 1(g) ¶2 ; 1(j) ¶2) Mike Gibbs (Gibbs) is the President and owner of Aim Royal, and has held this position since the company's inception in 1984. (Tr. 31) Gibbs has worked in the insulation industry for over 30 years. (Tr. 758) Before owning his own company, Gibbs worked as a union insulator for 19 years. (Tr. 1032) The day-to-day operations in the field

are overseen by Superintendent Lazaro Campos (Campos), who started working at Aim Royal in 2006, and was promoted to Superintendent in February 2007. (Tr. 34, 211-13; AR 1) Campos reports directly to Gibbs and Jeff Herron (Herron), Vice President and part-owner. (Tr. 214; 954) During the relevant time period, Aim Royal employed about 15 to 20 full-time insulators. (Tr. 1031)

B. Respondent Jacobson's Operations

Respondent Jacobson is a logistics company and employment agency, providing temporary-to-permanent labor for various employers throughout the country. (Tr. 22; GC. 1(g) ¶2;1(i) ¶ 2d) Jacobson's Phoenix office consists of one person, Account Manager Sandy Chavez (Chavez), who has worked for Jacobson since about 2005. (Tr. 22, 238, 337) As Account Manager, Chavez is responsible for interviewing and hiring employees to fill client needs. (Tr. 337) When a client requests an employee, Chavez checks employment applications that have previously been submitted to Jacobson, which are stored both in a filing cabinet in the office and in Jacobson's electronic database. (Tr. 393-94) Chavez's superiors have told her to keep these applications for six months, and she has, in practice, referred to these past applications to obtain employees for clients. (Tr. 394) Workers are not hired by Jacobson until they have received a commitment from the client to retain the specific employee. (Tr. 339)

C. Respondent Aim Royal's hiring practices.

Aim Royal has relied on a variety of practices over the years to hire insulators, including newspaper advertisements, cold-call applicants, hiring previous employees, and referrals from current and former employees. (Tr. 37, 45-46) When hiring full-time workers, Campos conducts a quick interview with applicants to obtain information about their

background. If he decides to hire the employee, Campos discusses the matter with Gibbs, and tells him why the applicant should be hired. (Tr. 225-26) Although Gibbs has final authority in deciding whether to hire individual applicants, Campos does not always discuss the matter with Gibbs, and there have been instances when full-time employees were hired without Gibbs knowing the identity of the person being hired. (Tr. 35-36) Gibbs places high importance on Campos' hiring recommendations, and acts upon them favorably. (Tr. 82, 141) Gibbs testified that he has "all the confidence in the world" that Campos would not hire someone detrimental to the company. (Tr. 82)

There is much conflicting testimony about Aim Royal's hiring practices during the relevant period, which Aim Royal tries to rely upon as a defense to the Complaints refusal to hire/consider allegations. These specifics will be addressed below. However, the evidence is clear that, through June 2008, Aim Royal hired unsolicited employee applicants, i.e., those who had no previous affiliation with the company and were not referred for employment by anyone.³ (AR.1; GC. 7) It is also undisputed that, after July 2008, when Aim Royal was informed that one of these unsolicited applicants, Jose Gurrola, was a Union organizer who engaged in a strike over the lack of company-provided water and dust masks, Aim Royal stopped its practice of hiring unsolicited applicants. (GC. 12; Tr. 183-84; AR. 1, GC. 7) Instead, Aim Royal began ignoring applications from numerous (mostly open) Union job

³ AR. 1 was completed by Respondent the week of the hearing, and was described by Aim Royal's counsel as "the most up-to-date and accurate reflection of the information" listed. (Tr. 118, 125) Gibbs created AR. 1 with the help of his secretary, and both he and Campos reviewed AR. 1 before its submission, Campos doing so with counsel present. (Tr. 126-28, 320-21) AR. 1 identifies Jaime Barrera (hired on 2/27/07), Saul Granados (hired on 6/9/07), Jose Gurrola (hired on 5/22/08), and Armando Torres (hired on 6/30/08) as "walk-in" applicants. Barrera, Gurrola, and Torres, are also listed as walk-ins in GC. 7, which was presented to the Board during the underlying investigation in the summer of 2009; however, there is a blank next to Granados' name on that document. (Tr. 58-59; GC. 5) As to the individuals identified as "walk-ins" in GC. 7, Gibbs testified that he exhausted his knowledge surrounding their hires, and discussed the matter with Campos before making the designations. (Tr. 85). During his testimony, Campos claimed that Torres was not a walk-in; however, Campos' testimony is simply not credible because it is contrary to the documentary evidence he reviewed and assisted in creating. (Tr. 263-67, 282).

applicants, and instead hired employees who had previously been fired for cause, or employees without any prior insulation experience. (Tr. 82, 238-241, 549, 835; GC. 9, 10, 47) Tellingly, Campos testified that Aim Royal preferred these employees because they knew the proper channels to use within the company to complain about issues such as water and masks (Tr. 1012-13); the very issues related to Gurrola's strike.

In April 2008, Aim Royal signed a contract with Jacobson for temporary labor. (GC. 3) Under this contract, Aim Royal would pay Jacobson a set hourly rate for each employee that works for Aim Royal. (GC. 3; Tr. 33-34). Jacobson, in turn, would pay the employee, and provide benefits, including medical insurance and workers compensation insurance. (Tr. 341-342) Although these temporary employees were "officially employed" by Jacobson, they really worked for Aim Royal. They were supervised directly by Aim Royal employees at Aim Royal projects. (Tr. 219-223; 341-42) Their hours of work were determined by Aim Royal, and if there was a problem with any of these workers, Aim Royal issued them disciplinary warnings and could have them discharged for performance related issues. (220-25) For example, in August 2008, Campos asked Chavez to replace between 10 to 20 such employees because he was dissatisfied with their work, which she did. (Tr. 222-224) Campos hires temporary workers on his own, and does not usually tell Gibbs the names of the temporary employees he hires. (Tr. 38)

IV. THE UNION'S ATTEMPTS TO ORGANIZE AIM ROYAL

A. Background

For a number of years, the Union has held informal meetings with Aim Royal management officials, discussing with them the benefits of becoming a Union signatory contractor. (Tr. 959-960) In April and May 2008, the Union launched an organizing drive at

Aim Royal with the goal of having Aim Royal sign a contract and having its employees become members of the Union. (Tr. 576-77; AR. 3) Jose Gurrola, an organizer for the International Union, led the organizing committee. The committee also included Local Union Organizer Angel Aizu, Local Union Business Agent Dale Medley, and Local Union Business Manager Kevin Boylan. (Tr. 577, 601, 699, 863)

B. Gurrola Begins Work at Aim Royal

After consulting with Aizu, Gurrola applied for a job with Aim Royal as a covert union applicant. (Tr. 577) On May 16, 2008, Gurrola went to Aim Royal's office, where he asked for an application. (Tr. 578) The woman in the office gave Gurrola an employment application, which he completed and returned it to her. (Tr. 579; GC. 11) The woman told Gurrola that it would be a couple of days before he heard anything. (Tr. 579) Three or four days later, Gurrola received a call from Campos. (Tr. 579) Campos asked Gurrola if he was still unemployed and other questions concerning his background. (Tr. 579) Campos then told Gurrola to report to the Aim Royal Office to complete the rest of the hiring paperwork. (Tr. 249-50, 579) Gurrola did so on May 21, 2008, and started physically working with his tools the next day. (Tr. 249-50, 579; GC. 16)

After Gurrola started working at Aim Royal, the Union began hand-billing various Aim Royal projects and passing out authorization cards. Gurrola also started wearing union paraphernalia. (Tr. 102, 579, 709-713; GC. 13, 46) On July 2, 2008, the Union faxed a letter to Gibbs, informing him that Gurrola was a Union organizer. (Tr. 101; GC. 12)

C. Gurrola's Concerns About Working Conditions

After he began working at Aim Royal, Gurrola became concerned about safety-related issues at the jobsite, including the lack of drinking water, safety glasses, and safety gloves.

(Tr. 579) Because it was the middle of summer, Gurrola was particularly troubled that Aim Royal did not have water at the jobsite. (Tr. 579-580) Gurrola discussed the lack of water at the jobsite with a various coworkers and also discussed with Aizu the possibility of going on strike if his working conditions did not change. (Tr. 579-80, 606-07)

D. Gurrola Engaged in a Strike Over Working Conditions

In late June or early July 2008, Gurrola started working at an Aim Royal construction project located on the Gila Indian Reservation in Sacaton, Arizona. (Tr. 580-81, 627) Aim Royal was working on this project as a subcontractor to Russell Air Conditioning, and the Aim Royal lead-man on this project was Joseph Campos (J. Campos), Lazaro Campos' brother. (Tr. 635, 837, 843, 916) On July 17, 2008, the Aim Royal employees working at the Sacaton project ran out of drinking water. (Tr. 255-56, 860-61, 1007-09) The next day, at about 5:00 a.m., Gurrola met with J. Campos at Aim Royal's office in Phoenix to pick up keys to unlock the ladders at the Sacaton project. (Tr. 635-36) J. Campos told Gurrola that he was going to be a few minutes behind him, because he had to visit another job site "down the road" before going to the Sacaton project. (Tr. 637) In reality, J. Campos was going to another Aim Royal project in Mesa, about a 30 to 40 minute drive from Aim Royal's Phoenix office and an hour drive from the Sacaton project. (Tr. 636-39, 841, 858) J. Campos and Gurrola did not discuss the lack of water issue at the Sacaton project; their only conversation related to Gurrola unlocking the ladders.⁴ (Tr. 698)

Gurrola drove to the Sacaton project, arriving at around 6:00 a.m. (Tr. 638) He unlocked the ladders and set everything up for the workday. (Tr. 641) It was a hot day, and Gurrola was sweating and thirsty. (Tr. 641) He looked for the Aim Royal water jug, but it

⁴ J. Campos testified that, at this meeting, he told Gurrola that he had the Aim Royal water jug with him and would be an hour late bringing water to the Sacaton project. (Tr. 840-41) However, as will be shown in the analysis section, Joseph Campos' testimony is simply not credible. See Section VI (D)(1) infra.

was not there. He also noticed that there were no dust masks available. (Tr. 582, 641)

Gurrola then called Aizu, told him that he was going to strike, and asked Aizu to come to the Sacaton project to assist with the picketing and take pictures. (Tr. 582, 641, 649, 701-02)

Gurrola went back to work and, about 45 minutes later, Aizu arrived at the Sacaton project.⁵ (Tr. 582, 702) After Aizu arrived, Gurrola put away his materials, got a piece of card board from the dumpster, and using a black marker from his tool belt, made a sign indicating that he was on strike. (Tr. 582, 650; GC. 31)

Gurrola stopped working and started picketing between 8:15 and 8:30 a.m. He called Lazaro Campos, telling him that he on strike because Aim Royal had not provided him with water or dust masks.⁶ (Tr. 583; 647-48; GC. 31, 38-39) Gurrola then went to the project entrance and started patrolling with Aizu until around 10:00 a.m. (Tr. 640, 660)

Just after Gurrola went on strike, Dale Gibson, the project manager for Russell Air Conditioning, called J. Campos, telling him that Gurrola had gone on strike over the lack of water. (Tr. 842) J. Campos then called Lazaro, telling him that he had the Aim Royal water jug with him in Mesa. (Tr. 843) J. Campos then drove straight to the Sacaton project where he met with Gibson, who wanted to know if Aim Royal was striking. (Tr. 858, 927)

J. Campos told Gibson that the strike involved an employee who had been “complaining a lot” that there was not enough water at the jobsite. (Tr. 927)

Around 10:00 a.m., after the general contractor contacted the police to remove them, Gurrola and Aizu left the Sacaton project. (Tr. 640-41, 940) After getting something to eat,

⁵ J. Campos stated that, when he arrived at the Sacaton project after Gurrola’s strike, he went to Building E, and it did not appear that Gurrola had performed any work. (Tr. 838, 845-46, 852, 858). However, according to Russell Air Conditioning Project Manager Dale Gibson, Aim Royal was working on Buildings A and B that day, and not Building E. (Tr. 921; AR. 6)

⁶ Gurrola’s call to Campos appears as call # 1003, at 8:12 a.m., on Campos’ phone bill for July 18. (Tr. 969, GC. 49) The parties stipulated that the designation “Call Wait” on the phone bill indicates an incoming call while Campos was on the telephone on another call. (Tr. 970)

they went to the Union office to discuss what had occurred that day with Union officials. (Tr. 666-67) Gurrola explained that he had struck because of a lack of water and safety equipment.⁷ (Tr. 667) According to the Union, Gurrola's strike helped its organizing drive, because the strike demonstrated that Aim Royal did not care about its employees' working conditions. (Tr. 888)

E. Gurrola's Post-Strike Meeting with Aim Royal

On July 18, 2008, Gibbs sent Gurrola a letter about his strike and the availability of water on the day in question. (GC. 14) In his letter, Gibbs asserted that, had Gurrola asked, he would have been told that the water was going to be a half-hour late that day. (GC. 14) The letter instructed Gurrola to contact Aim Royal by July 23, for assignment and that, if he did not, he faced termination. (GC. 14) This letter did not reach Gurrola until much later, because it was sent to his father's address. (Tr. 587-88, 673-76) Indeed, the Postal Service's confirmation shows that the letter was not delivered until August 21, 2008. (Tr. 588-89, 674)

On July 24, 2008, Gurrola went to the Aim Royal's office with a list of demands that he wanted met as a condition of his returning to work. (Tr. 585, 668) Gurrola's demands were simple – that Aim Royal provide proper safety equipment and water to all its employees, at all jobsites. (GC. 32) When he tried to present this document, which he had drafted a few days earlier, Herron, Campos, and Gibbs refused to accept it. (Tr. 72)⁸ Gurrola then told them that he was on strike, and that he would return to work only if Aim Royal provided proper safety equipment and water to all employees, at all jobsites. Herron responded that, as far as Aim Royal was concerned, Gurrola had walked off the job. When Gurrola reiterated that he had gone on strike and that there had been no water at the worksite, Herron told

⁷ There were no notes taken of this meeting. (Tr. 665-67, 983, 988-89)

⁸ Unless otherwise cited, the facts supporting this meeting at Aim Royal are found in GC. 40 and GC. 41.

Gurrola to leave. Gurrola then asked for a raise on behalf of all employees, stating that he would be on an economic strike if Aim Royal refused. After some further discussion, Gibbs told Gurrola that he had walked off the job, had quit, and that he no longer worked for Aim Royal. In other words, Gibbs fired Gurrola for abandoning his job. (Tr. 70; GC. 18) About a week after this meeting, Gurrola and other Union members picketed various Aim Royal jobsites. Tr. (589; GC. 33)

V. EMPLOYEES APPLY FOR WORK AT AIM ROYAL

A. Gurrola's and Aizu's Attempts to Gain Employment in 2009

In April 2009, Aizu went to Aim Royal's offices and asked the secretary if Aim Royal was hiring. (Tr. 706) The secretary said that it was not, but gave Aizu an employment application and Campos' business card. (Tr. 705-06)

Gurrola did not have any contact with Aim Royal between July 2008 and April 2009. (Tr. 259, 687-88) In April, Gurrola called Campos and unconditionally offered to return to work. (Tr. 257-59) Campos replied that Gurrola did not work at Aim Royal any longer. (Tr. 258-59) Campos then called Gibbs and told him that Gurrola wanted to return to work at Aim Royal. (Tr. 259)

On May 27, Gurrola and Aizu went to Aim Royal's office.⁹ (Tr. 591) Aizu had his completed employment application with him, and when they arrived he gave the application to the secretary, who accepted it. (Tr. 706) Aizu asked her if Aim Royal could call him to let him know how long his application was good for, and the secretary said that she would give the application to Campos. Gurrola then asked Herron if Aim Royal had any work, so he could return to work unconditionally. Herron told Gurrola that Aim Royal was laying off employees. Gurrola told Herron that, if Aim Royal needed people, he was available to come

⁹ Unless otherwise cited, the facts supporting the May 27 meeting at Aim Royal are found in GC. 34 and GC. 35.

back to work and be “off strike.” He also told Herron that Aizu had submitted an application. Herron asked Aizu his name, and the two exchanged greetings. Aizu and Gurrola then left.

That same day, after the meeting, Gurrola called Campos to ask Campos if Aim Royal was doing any hiring now or anytime soon, and Campos told them that they were not. (Tr. 595, GC. 42, 43) Notwithstanding Herron and Campos’ statements, Aim Royal actually hired 12 insulators between May 27 and October 12, and even hired one person on May 27. (AR. 1, GC. 6) Gurrola told Campos that he was willing to return to work unconditionally, and further told him that he had talked to Herron earlier. (GC. 42, 43) Campos never called Gurrola back. (Tr. 595)

On June 1, Aizu called Aim Royal’s office to check on his application. He told the female who answered the phone his name, that he had filled out a job application, and that he was calling to see if there were any openings. She replied that things were real slow. (Tr. 708) Aizu again called on June 9 and spoke to a female secretary. He again told her his name, that he had filled out an application, and asked if there were any openings. The secretary again replied that it was slow. (Tr. 708)

Gurrola and Aizu again returned to Aim Royal’s offices on July 7, where they had a conversation with Herron and Gibbs.¹⁰ Gurrola asked if Aim Royal was hiring or accepting applications. Herron replied that they were not, and that the economy was slow. Gurrola again stated his desire to end his strike and return to work for Aim Royal unconditionally, and also told Herron that Aizu had submitted an application about a month earlier. (Tr. 995) Herron replied that Aim Royal was laying people off. Gurrola asked how long applications were kept, and Gibbs replied that there was no set time frame and employment applications were “purged from time to time.” Gibbs then told Gurrola that they were not accepting

¹⁰ Unless otherwise cited, the facts supporting this meeting are found in GC. 36 and GC. 37.

applications and had not been for some time because they were cutting back on personnel. Gurrola reminded Gibbs that he was available for work, and Gibbs told him that “we’ll keep it on [sic] mind.” Aizu then told Gibbs his first name, and further told him that he had submitted an employment application. Gibbs replied “OK.” Gurrola and Aizu then left.

Neither Gurrola nor Aizu were ever contacted by Aim Royal about any job openings. (Tr. 598, 708) Moreover, it is undisputed that Aim Royal never placed Gurrola on a preferential hiring list or offered him a job. (Tr. 108) Finally, Gibbs testified that Gurrola was “ineligible” for reemployment with Aim Royal because of his strike. (Tr. 163)

B. The Union Faxed Applications to Aim Royal

On June 23, Aizu faxed to Aim Royal completed job applications on behalf of Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback. (GC. 26) Before faxing the applications, Aizu wrote the word “Organizer” on the top each application so Aim Royal would know that the applicants were affiliated with the Union. (Tr. 740) Each applicant was out of work at the time, was experienced as an apprentice or journeyman insulator, credibly testified that they would have accepted employment with Aim Royal if offered, and had agreed that Aizu could submit the completed application to Aim Royal on their behalf.¹¹ Gibbs admits that he received the applications, and he assumed that they came from the Union. (Tr. 85)

C. Luis Bolaños and Gustavo Gonzales Applied for Work at Aim Royal Through Jacobson.

Luis Bolaños and Gustavo Gonzales are both experienced insulators, Union members, and were out of work in mid-July 2009. (Tr. 462, 469, 488-90) Aizu knew they were

¹¹ See the chart in Section VI (C) *infra*, discussing why each applicant is an employee pursuant to Section 2(3) of the Act for the relevant transcript citations.

unemployed and sent them separately to Jacobson to apply for employment with Aim Royal. (Tr. 475, 490, 717) On July 14, Gonzales and Bolaños went to Jacobson's office, both arriving sometime between 11:00 a.m. and 11:30 a.m. (Tr. 366-67, 463, 507)

Gonzales arrived first. Chavez told him that she had an opening for insulation work and gave him an application. (Tr. 366-67) Chavez told Gonzales that Aim Royal was hiring four workers, but had already hired two.¹² (Tr. 480) As Gonzales started filling out his application, Bolaños walked in. (Tr. 463, 492) Bolaños told Chavez that he wanted to work as an insulator, and she gave him an application, telling him that she was looking to hire two people to work as insulators. (Tr. 491) Bolaños finished his application first, walked back to Chavez' office, and gave her his completed application. (Tr. 492) Chavez reviewed the document and told Bolaños that she wanted him for the job opening. (Tr. 492; GC. 23) Gonzales then walked back to Chavez' office and gave her his completed application. (Tr. 492; GC. 22)

Chavez testified that she had received a call earlier that morning from Campos, sometime between 9:00 a.m. and 10:00 a.m., telling her that he wanted to hire two additional people through Jacobson, and that he wanted one of these hires to be Isidro Ortega, whom he was sending over to Jacobson. (Tr. 406) Chavez also claimed that an unemployed Jacobson employee, Claudio Rendon, happened to be in her office at the time of this call, and that she immediately sent Rendon to Aim Royal. (Tr. 406-07) Contrary to Chavez' testimony, however, Campos' phone records show that no such call ever occurred.¹³ (GC. 29, 30)

¹² In fact, Aim Royal had already hired two workers through Jacobson, Imuris Garcia and Marcellino Trujillo, a few weeks earlier. (GC. 20) Chavez also told Bolaños that Aim Royal was looking for two people to work as insulators. (Tr. 491)

¹³ Jacobson provided four telephone numbers used by Chavez: (602) 272-2121; (602) 233-9300; (602) 272-2224; and (602) 272-2765 (GC. 29; Tr. 362, 556) The first time any one of these numbers appears on Campos' phone records, as either an outgoing or incoming call, for July 13 or July 14, is at 11:40 a.m. on July 14. (GC. 30) See also, footnote 15 infra.

Bolaños testified that there were three calls between Chavez and Campos while he and Gonzales were in Chavez' office, all of which occurred after he and Gonzalez had given Chavez their completed job applications. (Tr. 496) Bolaños' testimony matches Campos' telephone phone records, which show three calls between Chavez and Campos from 11:40 a.m. to 11:53 a.m.¹⁴ (GC. 29, GC. 30) After one call, Chavez told Bolaños and Gonzales that Aim Royal wanted her to send Gonzales for an interview, which was scheduled at 1:30 p.m. (Tr. 494, 471) This testimony is confirmed by Gonzales' application, on which Chavez wrote "1:30." (Tr. 474; GC. 22) Chavez then received a call from Campos, asking her who had referred Bolaños and Gonzales for work. (Tr. 464, 494, 497)

Neither could remember Aizu's last name, but Gonzales had Aizu's business card in his wallet, which he gave to Chavez.¹⁵ (Tr. 466, 494, 502, 507; GC. 25) Chavez wrote the word "Union" on Gonzales' application, and she then read the card to Campos, telling him that it was Angel Aizu from the Union who referred them. (Tr. 494, 475, 502; GC. 22) Then, either at the end of this telephone conversation between Campos and Chavez or after another one a few minutes later, Chavez told Bolaños and Gonzales that Aim Royal was no longer interested in either one of them. (Tr. 467, 494, 496) Bolaños told Chavez that maybe Aim Royal did not want them because they were with the Union. (Tr. 410-11, 500) Chavez claimed that she did not understand what the Union was and was upset because she had to look for two more people for the openings. (Tr. 500-01) At some point, Bolaños gave Chavez a business card from Argus, Bolaños' previous employer, so Chavez could check to see the type of work he could do, because Chavez was also considering him for a job driving a fork lift. (Tr. 495, 504-05, 508-09) Chavez told them that she would keep their applications

¹⁴ These calls appear as call #600, #602, and #603 to telephone number 602-233-9300. (GC. 60)

¹⁵ Chavez denies this ever occurred. (Tr. 1046) But at some point, Chavez also wrote the word "Union" on Bolaños' application. (GC. 23)

on file, but she never contacted them again for a potential Aim Royal job. (Tr. 370) She also never called Bolaños about the fork-lift job, even though he told her that he would accept it. (Tr. 494-96, 505)

After Bolaños and Gonzales left the Jacobson office, both called Aizu. Gonzales told Aizu that he showed Aizu's business card to Chavez and did not get the job. (Tr. 468; Tr. 718-20) Bolaños told Aizu that an interview had been scheduled for Gonzales at 1:30. (Tr. 718-720) Then, after getting Aizu's business card from Gonzales, and telling the person on the phone that Aizu had referred them, Chavez told them that they did not have an interview or a job. (Tr. 718-720)

D. Angel Aizu Applied for Work at Aim Royal Through Jacobson.

Aizu went to the Jacobson offices on July 14, to apply for work with Aim Royal. (Tr. 720-21) When Chavez gave him the application, she told him that she was really busy and that he should return the application the next day. (Tr. 721) Aizu completed the application and returned on July 15. (Tr. 721) When Aizu returned the application to Chavez, she asked him to follow her to the back part of the office. (Tr. 725) As they were walking, Chavez asked Aizu questions about his background and experience, and specifically asked him if he belonged to the Union. (Tr. 721, 725) Aizu, who was trying to get employment as a covert union member (Tr. 742), replied that he did not belong to the Union, and asked if his union membership mattered. Chavez replied that union members had more experience.¹⁶ (Tr. 721) Aizu then gave Chavez his application. (Tr. 721) At some point, Chavez wrote "not with Union" on Aizu's application. On the completed application, Aizu used his mother's maiden

¹⁶ Chavez did not deny that this conversation occurred.

name, Garcia, because he did not want anyone to know that he was a Union organizer.¹⁷ (Tr. 742; GC. 24)

After Chavez took the application, she told Aizu to call her three times a week. (Tr. 721) Although Aizu did not call back, he did return July 31, with a group of about six Union members, all of whom were wearing Union t-shirts. (Tr. 722, 383, 390-91) Chavez testified that she recognized Aizu as having come in a few weeks earlier. (Tr. 391) She asked Aizu why he was filling out another application, because he already completed one a few weeks earlier. (Tr. 391) Despite the fact that Jacobson dispatched one employee to Aim Royal in August 2009, and another in October 2009, Aizu never heard back from anyone at Jacobson.¹⁸ (Tr. 232, 278, 722)

E. Shawn McMillan Applied for Work at Jacobson and Aim Royal On His Own.

Sean McMillan had previously worked for Aim Royal as an insulator for almost a year. (Tr. 90, 445; AR.1) He was laid off in April 2007, along with other employees, as part of a reduction in force, because the project he was working on was completed. (Tr. 90, 445; AR.1) Gibbs told McMillan that he was being laid off due to a shortage of work and would call him if Aim Royal got more work. (Tr. 427) McMillan was upset at being laid off and told Gibbs to “lose my number.” (Tr. 427, 440) McMillan then became a Union member, and is a third-year apprentice. (Tr. 423, 449-50)

F. McMillan Met with Chavez at Jacobson

On June 30, Chavez spoke with McMillan’s friend, Imuris Garcia. (Tr. 344) Garcia told Chavez that McMillan had insulation experience and was looking for a job. (Tr. 344)

¹⁷ Aizu is a resident alien, and his official name is “Angel Aizu Garcia,” but he goes by Angel Aizu. (Tr. 699, 742)

¹⁸ Jacobson’s invoices show that it sent employee Gilbert Cervantez to work at Aim Royal in August 2009, and employee Vincent Chavez in October 2009. See, J. 1 (tab marked invoices).

Chavez telephoned McMillan, and asked him if he had insulation experience and was looking for a work.¹⁹ (Tr. 344) McMillan told Chavez that he was not sure if he could work at Jacobson because of his union status. (Tr. 432) Upon hearing this, Chavez told McMillan that she could not use him because he was part of the Union and hung up. (Tr. 432, 946)

On July 14, McMillan met with Chavez at Jacobson's offices.²⁰ As he was filling out the application paperwork, Chavez asked McMillan how his applying would affect his union status. (Tr. 428-29) When McMillan asked Chavez what she meant, Chavez changed the subject, telling him that he needed to watch a safety video. (Tr. 428) Chavez then told McMillan that he needed his social security card. McMillan went home and returned with his card. (Tr. 429) McMillan then completed the employment application. (GC. 21) Chavez told McMillan that he was a good candidate, she was going to send him for an interview with Aim Royal, she would call Aim Royal to let the company know that he was coming, and she thought he would get the job. (Tr. 346, 436) At some point that day, Chavez called Campos. When questioned by Jacobson's counsel, Chavez testified "I told Lazaro that I was sending out Shawn," and Campos told her that he had already filled the positions. (Tr. 404) However, at other times during her testimony, Chavez specifically denied telling Campos McMillan's actual name. (Tr. 347, 405)

The testimony as to what occurred next differs. Chavez asserts that McMillan was still present when she got off the phone with Campos; she told him that there was no longer a

¹⁹ Chavez claims she called McMillan on June 30. (Tr. 344) However, McMillan's phone records show that there was no call that day; instead it appears that this call occurred on July 1. (GC. 27, p. 10, call at 1:24 p.m.; GC. 29)

²⁰ Chavez testified that this meeting occurred on July 1 (Tr. 346), and McMillan testified that he could only remember that the meeting occurred "four or five days" after their initial conversation. (Tr. 433) McMillan's phone records support a finding that this meeting actually occurred on July 14, especially when Chavez testified that she had no other contact with McMillan after the date of this meeting (Tr. 405). See GC. 28, p. 17, which show three calls to/from Chavez and McMillan on July 14: 8:55 a.m., 9:06 a.m., and 12:05 p.m. Jacobson's phone numbers are shown in GC. 29.

position at Aim Royal; and McMillan then stormed out of the office swearing and slamming the door. (Tr. 405) McMillan testified that Chavez had told him to go home and expect a call from Aim Royal for an interview at 1:00 or 1:30 p.m. McMillan did so, and he then received a call from Chavez around 12:30 p.m., telling him that the contractor backed out and she did not have any work for him. (Tr. 436-37) McMillan's phone records support his version of events, showing that he received a call from Jacobson at 12:05 p.m. that day. (GC. 28, p. 17; GC. 29) Regardless, the result was the same – Jacobson did not hire McMillan to work at Aim Royal.

Chavez admits knowing that McMillan was affiliated with the Union by July 1. (Tr. 350) Chavez further admits that after her last contact with him, she never contacted McMillan for any other jobs that became available at Aim Royal. (Tr. 364, 405)

G. McMillan Tried to Get Re-Hired at Aim Royal Directly

On July 15, McMillan called Campos and told him that he was unemployed and looking for work. (Tr. 233) Campos told McMillan that he would have to speak with Gibbs about job availability, and that Gibbs was out of town. (Tr. 234) The next day, McMillan went to Aim Royal's office and spoke with Gibbs directly. (Tr. 90, 425)

McMillan told Gibbs that he wanted to come back to work for Aim Royal and asked if they were hiring. (Tr. 90, 425-26) Gibbs told McMillan that he had heard McMillan had become a member of the Union and asked how it was going. (Tr. 426) McMillan replied that it wasn't "going," because he did not have any work, and that he was just trying to get a job. (Tr. 426) Gibbs told McMillan that he did not know what his present labor needs were; that Campos had told him that they would need additional workers; and that he would check with Campos to see about the need for additional labor. (Tr. 90) Although Gibbs testified that he

did check with Campos about Aim Royal's labor needs in relation to McMillan, Campos testified that this never occurred. (Tr. 91, 236) Quite the contrary, Campos testified that he and Gibbs never discussed job availability for McMillan at any time. (Tr. 236)

When McMillan called Campos on July 15, Campos testified that he did not know if he could use McMillan, because he did not have a chance to check his workload. (Tr. 235) Nonetheless, the evidence shows that after McMillan's meeting, Aim Royal hired full time insulators in July, August, September, and October. (AR. 1; GC. 6) It is undisputed that Aim Royal never considered McMillan for any of these openings. (Tr. 94, 236)

VI. ANALYSIS

A. Provisions in Respondent's Employee Handbook violate Section 8(a)(1) [Compl. ¶ 5(e)-(g)].

During all relevant times alleged in the Complaint, Respondent Aim Royal has maintained an employee handbook that applies to all employees. (Tr. 28-29; GC. 2) The handbook specifically states that the any rule violation is considered grounds for discipline, including termination. The handbook is given to employees, who sign a document stating that they have reviewed it, and understand that failing to abide by its rules could result in termination. (GC. 15) Respondent's handbook includes the following provisions:

III. Company Rules

Employees shall not leave the project other than at designated quitting times, unless authorization is obtained from the foreman or superintendent. (GC. 2, p.5)

Employees are required to be at their assigned work areas at the beginning of each work day and shall not [l]eave the designated area without obtaining authorization fro[m] their foreman or superintendent. (GC. 2, p.5)

IV. Intolerable Offenses

Leaving Job Site. Any employee leaving the job site without the approval of the office or the supervisor may be automatically terminated. (GC. 2, p. 8)

1. Analysis

In determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) enfd. 203 F.3d 52 (D.C. Cir. 1999). Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement or a showing that the rules were illegally motivated. *Id.*; *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

In *Labor Ready, Inc.*, 331 NLRB 1656 n. 2 (2000), the Board found that a “no walk-off” rule, threatening employees with discharge if they walked off the job, was overly broad in violation of Section 8(a)(1) of the Act. The Board reasoned that, when two or more employees participate in withholding their services for the purpose of pressuring their employer into resolving grievances over working conditions they engage in protected concerted activity within the meaning of the Act, and it is a violation of the Act to discipline employees for engaging in such activity. *Id.* at 1659; *Crowne Plaza Hotel*, 352 NLRB 382, 386-87 (2008) (rules prohibiting employees from walking off the job and leaving work without authorization a violation).

An employee walk-out constitutes concerted activity for mutual aid and protection when it is aimed at changing working conditions or is done to protest unfair labor practices. *Id.*; *NLRB v. Bridgeport Ambulance Service*, 966 F.2d , 729 (1992) (employee walk-out aimed at changing working conditions for the mutual aid and protection of employees is protected by the Act); *Workroom For Designers*, 274 NLRB 840, 856 (1985) (employees who had walked off the job in protest of a discriminatory discharge, and posted signs announcing

publicized. *Marriott Corp.*, 313 NLRB 896, 896 (1994); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1285 (2001).

B. Respondents Violated Section 8(a)(1) of the Act in Multiple Respects

1. Legal Standard

Statements to employees engaged in union activities are unlawful if, in light of the totality of the circumstances, they reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Postal Service*, 345 NLRB 1203, 1216 (2005); *Millard Refrigerated Services, Inc.*, 345 NLRB 1143, 1146 (2005); *Rossmore House*, 269 NLRB 1176, 1177-78 (1984). Relevant factors to consider include whether the employees in question were active and open union supporters, the background, timing, and nature of information sought, the identity of the questioner, the place and method of the questioning, whether a valid purpose for the questioning was communicated to employees, and whether employees were given assurances against reprisals. *Id.* Finally, in determining whether a statement made to an employee is a threat, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. It does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump and Plumbing*, 334 NLRB 824, 824 (2001).

2. Campos's statement to Gurrola that he no longer worked at Aim Royal is an illegal threat.²¹

When Gurrola called Campos in April 2009, to unconditionally offer to return to work, Campos told him that he no longer worked at Aim Royal. (Tr. 257-59) An employer violates Section 8(a)(1) when it connects an employee's discharge with protected activity. See *H.B. Zachry Co.*, 319 N.L.R.B. 967, 969 (1995) (unlawful threat where employer's statement

²¹ This allegation was amended into the complaint at the hearing. (Tr. 260-62)

Chavez' claim that the conversation ended when McMillan said he could not work for Jacobson because he was with the Union is simply not believable. McMillan's version of events was corroborated by Mark Waters, who testified that McMillan was told he either could or could not be hired because he was in the Union. (Tr. 945, 950). Moreover, Chavez' credibility is suspect, as she gave contradictory answers, and her testimony was repeatedly impeached by her previous affidavit. (Tr. 348-50, 380-82, 420-21) Under these circumstances, McMillan's testimony should be credited. Accordingly, Chavez' statement to McMillan that she could not use him because he was part of the Union was an unlawful threat in violation of Section 8(a)(1) of the Act.

4. Chavez interrogated McMillan on July 14. [Complaint ¶ 5(c)(1)]

On July 14, McMillan went to the Jacobson office to apply for a job. As he was filling out his paperwork, Chavez asked him "how is this going to affect your union status." Chavez did not deny that this conversation occurred. (Tr. 402-05) When McMillan asked what she meant, Chavez changed the subject, telling McMillan that he had to watch a safety video. Under these circumstances, it appears that Chavez's question was an attempt to ascertain the level of McMillan's union sympathies, i.e., whether he valued a job with Jacobson/Aim Royal over the Union. This type of questioning is prohibited by the Act. See *Casey Elec., Inc.*, 313 NLRB 774, 785 (1994) (in the context of a job application, employer violated the Act by asking applicant if he was still a union member, whether he worked outside the union, and if he understood that the job was non-union); *Quality Control Elec., Inc.*, 323 NLRB at 238. Accordingly, the Administrative Law Judge should find that Chavez' statement constituted an unlawful interrogation.

5. Gibbs interrogated McMillan and created an impression of surveillance 8(a)(1). [Complaint ¶ 5(b)]

When McMillan went to the Aim Royal office on July 15 to ask for a job, Gibbs told McMillan that he heard McMillan became a member of the Union, and asked how it was going with the Union. McMillan replied that it was not “going” and said he was simply seeking work. It is “well settled that questioning a job applicant about his union preferences during a job interview is inherently coercive and unlawful even when the applicant is hired.” *M.J. Mechanical Services, Inc.*, 324 NLRB 812, 812 -813 (1997) enfd. 172 F.3d 920 (D.C. Cir. 1998). Under these circumstances, where the statement was made during McMillan’s job interview, there was no valid purpose for the question, and Gibbs is Aim Royal’s highest ranking official, with final say over hiring, his inquiry about McMillan’s Union membership constituted an illegal interrogation.

Moreover, by telling McMillan that he had “heard” McMillan was part of a union, Gibbs also illegally created the impression of surveillance. See *Conley Trucking*, 349 NLRB 308, 315 (2007), enfd. 520 F.3d 629 (6th Cir. 2008) (employer unlawfully created impression that employees’ union activities were under surveillance by telling employees that he had heard that certain employees were trying to bring in a union).

In an attempt to make it appear that he was not questioning McMillan about his Union status and sympathies, Gibbs testified that McMillan volunteered this information. His testimony is not credible. Gibbs was not a believable witness where his testimony was inherently contradictory, and was continuously impeached by his affidavit. (Tr. 46-48, 55-56, 78-79, 96-97, 96-97, 99-100, 192, 198-99) Moreover, Gibbs and Campos participated in group meetings with Respondent’s attorney “jointly and often” where the subject matter of this case was discussed, just before they testified. (Tr. 33-32) See John S. Applegate, *Witness*

Preparation, 68 Tex. L. Rev. 277, 351 (1989) (discussing that group preparation of witnesses poses extraordinary dangers of collusion, influence, and fabrication). Finally, Respondent's other witnesses contradicted Gibbs' testimony as it relates directly to McMillan. For example, Gibbs testified that, after meeting with McMillan, he checked with Campos about Aim Royal's labor needs as it related to McMillan. (Tr. 91) However, Campos admitted that this discussion never occurred. (Tr. 236) Under these circumstances, Gibbs' testimony should be discredited, and the Administrative Law Judge should find that Gibbs interrogated McMillan and created an impression of surveillance, in violation of Section 8(a)(1).

6. Chavez' July 14 Statement to Gonzales and Bolaños was an improper threat. [Complaint ¶ 5(c)(2)]

On July 14, Gustavo Gonzales and Luis Bolaños were in Chavez' office, and Gonzales had already been scheduled for a job interview with Aim Royal at 1:30 p.m. After speaking with Campos, and telling him that Angel Aizu from the Union referred Gonzales and Bolaños for work, Chavez then told the pair that Aim Royal was no longer interested in either of them. Under the totality of the circumstances, where Gonzales and Bolaños were in the middle of a job interview, and Gonzales had another interview with Aim Royal scheduled, Chavez' statement is coercive, in that it implies that Aim Royal and Jacobson were no longer interested in them because of their Union status.

7. Chavez interrogated Aizu on July 15. [Complaint ¶ 5(d)]

The record establishes that on July 15, when Aizu was seeking employment through Jacobson, as a covert Union applicant, Chavez interviewed Aizu about his background and experience, specifically asking him if he belonged to the Union. After Aizu denied any union ties, Chavez noted on his application, "not with Union." There can be little question that such blatant questioning about an applicant's union affiliation, during the course of a job interview,

is inherently coercive and violates the Act. See *M.J. Mechanical Services, Inc.*, 324 NLRB at 812 -813.

C. The Alleged Discriminatees are Employees under the Section 2(3) of the Act.

Respondents may initially claim that no violations occurred because the alleged discriminatees are not entitled to protection as statutory employees, citing *Toering Electric Co.*, 351 NLRB 225 (2007). In *Toering*, the Board found that, in a salting context, an employer may challenge the Section 2(3) status of a job applicant by questioning the genuineness of the applicant's interest through evidence that creates a reasonable doubt as to the applicant's actual interest in going to work for the employer. *Id* at 234; *Air Management Services Co.*, 352 NLRB 1280, 1287 (2008).

Although *Toering* was referenced during Aim Royal's opening statement (Tr. 14), Respondents presented virtually no evidence calling into question the genuineness of the alleged discriminatees' interest in going to work at Aim Royal. They asked few, if any, questions to the alleged discriminatees about this issue.²² Moreover, Respondents did not present any of the evidence that the Board set forth in *Toering* demonstrating a lack of a genuine interest in obtaining work for an employer. For example, there is no evidence that any of these applicants refused similar employment with Respondents in the recent past; incorporated belligerent or offensive comments on their applications; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. *Toering Electric Co.*, 351 NLRB at 233.

The record, as a whole, supports a finding that Respondents have not raised the genuineness of the alleged discriminatees' interest in employment. See *Air Management*

²² A search of the transcripts show that *Toering* was only mentioned twice, once by Aim Royal during its opening statement, and once by the Administrative Law Judge. (Tr. 14-15, 877-78)

Services, Inc., 352 NLRB 1280, 1287-88 (2008). But even if such evidence were in this record, the record is also clear that the discriminatees did, in fact, have a genuine interest in employment with Aim Royal and Jacobson. *Id.* at. 1280 n.1, 1288. More specifically:

Jose Gurrola. Gurrola, a journeyman insulator, attempted to return to work at Aim Royal from April 2009 through July 2009, but these attempts were rebuffed by the company. (GC. 35, 37, 43; Tr. 247-249, 575-76) The fact that Gurrola had previously accepted employment with Aim Royal should end the inquiry. *Cf. Toering Electric Co.*, 351 NLRB at 233 (genuineness of applicant's interest in employment can be contested by showing individual refused similar employment with employer in the recent past). Also, his actual interest in returning to work for Aim Royal is fully demonstrated by the tape recordings he made of each interaction he had with Aim Royal management. He was never disruptive, insulting, or antagonistic during his attempts to regain employment. *Id.* (GC. 35, 37, 43; Tr. 247-249)

The fact that Gurrola was a paid union-organizer does not preclude him from the Act's protection. *Air Management Services, Inc.*, 352 NLRB at 1288 (paid union organizer genuinely interested in seeking to establish employment relationship with employer); *NLRB v. Towne & Country Electric, Inc.*, 516 U.S. 85 (1995) (unanimously approving the Board's holding that paid union organizers who seek employment are statutory employees). In 2008, Gurrola had actually worked at Aim Royal, while still being employed by the Union, and the quality of his work was praised by Aim Royal's counsel. (Tr. 17) Clearly Gurrola was qualified to work at Aim Royal, and as shown by his past work record, he could easily fulfill his obligation to both Aim Royal and the Union. Accordingly, the evidence shows that Gurrola was seeking to re-establish an employment relationship with Aim Royal, and is

therefore an employee pursuant to Section 2(3) of the Act. See *id*; *Cossentino Contracting Co.*, 351 NLRB 495, 496 (2007) (evidence shows that union organizers would have accepted job with employer and could have fulfilled their obligations to both the union and employer).

Respondent may argue that Gurrola's July 2008 economic strike was somehow conduct inconsistent with a genuine interest in employment with Aim Royal. Relying upon the Union's organizing plan, during the hearing, Aim Royal attempted to argue that Gurrola's strike was somehow planned even before Gurrola was hired at Aim Royal, and therefore Gurrola was no longer subject to the Act's protections. However, there is simply no record evidence that Gurrola's strike was pre-planned. On the contrary, the fact that Gurrola had to use an old piece of cardboard he took from dumpster, and a black marker which were part of his tools, to make a sign indicating he was on strike, belies Respondent's claim that the strike was somehow pre-planned. (Tr. 582, 650; GC. 31) Had the strike been planned, clearly the Union would have had strike signs ready.

Moreover, Gurrola credibly testified that, while he had discussed the possibility of striking with Aizu, he did so only after he started working at Aim Royal, and considered striking only if his working conditions continued unchanged. (Tr. 606-07) Gurrola also credibly testified that he never discussed going on strike before July 18, 2008 with the Union's Business Manager Kevin Boylan. (Tr. 607-608) Gurrola's testimony is buttressed by the testimony of Union Business Agent Dale Medley, who credibly testified that the Union discussed a possibility of Gurrola going on strike, but only if it was deemed necessary, and that there was no pre-planning for a date of a potential strike. (Tr. 869)

Respondent's attempt to rely upon the Union's written organizing plan to somehow claim Gurrola's July 18 strike was pre-planned, runs counter to the written document itself, as

there is no mention of the word “strike” anywhere in the document. (AR. 3) While the organizing plan discusses possible picketing, the document contemplates that any such picketing would not occur until after July 18. (AR. 4, pp. 5, 7) Also, lawful picketing can occur in many forms, and does not have to accompany a strike. See *NLRB v. Carpenters Dist. Council of St. Louis*, 200 F.Supp. 112, 116 -117 (D.C. Mo. 1961) (Union engaged in pure informational picketing, whose purpose was to educate and inform). Finally, even assuming that Gurrola’s strike-date was pre-planned, any claim that an employee who engages in a pre-planned strike loses the Act’s protection runs counter to Congress’ intent, as set forth in the express language in Section 13 of the Act, which states that “[n]othing in this Act shall be construed so as to either interfere with or impede or diminish in any way the right to strike or affect the limitations or qualifications of that right.” Therefore, Gurrola is an employee within the definition of Section 2(3) of the Act.

Angel Aizu. Aizu, a journeyman insulator and Union organizer, attempted to secure employment with Aim Royal in May, June, and July 2009, but was unsuccessful. (GC. 35, 37; Tr. 700, 706-708, 717) Aizu also attempted to apply for employment to work with Aim Royal through Jacobson on July 15, 2009. (Tr. 721-22) Aizu credibly testified that he would have accepted employment at both Aim Royal and Jacobson if offered, and that he would have received both his Union salary along with the Respondent’s salary if hired. (Tr. 706, 721-22, 743)

As with Gurrola, the fact that Aizu was a paid union organizer does not preclude him from the Act’s protection. *Air Management Services, Inc.*, 352 NLRB at 1288; *NLRB v. Towne & Country Electric, Inc.*, 516 U.S. at 85; Although he had not worked with his tools as an insulator recently, as a journeyman insulator, Aizu was clearly qualified to work at Aim

Royal and Jacobson, and more experienced than many that were hired by Aim Royal. *Cossentino Contracting Co.*, 351 NLRB at 496 (union organizers who were experienced and licensed were qualified to work for employer despite not having worked recently as operators). Moreover, the Union clearly deemed organizing Aim Royal as a priority, and Aizu therefore could have easily fulfilled his obligations to both the Union and Respondents, and testified he would have collected both salaries. *Id.* at 496, 503. Finally, Aizu's credible and uncontradicted testimony that he would have accepted employment with Respondents resolves any doubts about whether Aizu had a genuine interest in establishing an employment relationship with them.²³ *Id.* at 496 (union organizers who credibly testified they would have accepted a position with the employer have a genuine interest in establishing an employment relationship). The preponderance of the evidence shows that Aizu reflected a genuine interest in becoming employed by Respondents and is, therefore, an employee within the definition of Section 2(3) of the Act.

June 23, 2009 Applicants: On June 23, 2009, Aizu faxed completed applications to Aim Royal on behalf of Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback. (GC. 26) As shown by the below chart, each applicant was an experienced apprentice or journeyman insulator, was out of work at the time, credibly testified that they would have accepted employment with Aim Royal if offered, and had agreed that Aizu would submit the completed application to Aim Royal on their behalf.

²³ Any ambiguity in this regard is resolved against the wrongdoer. *Cossentino Contracting Co.*, 351 NLRB at 503.

Name	Out of Work at time of Application	Accepted Employment if Offered	Years of Experience	Knew Aizu was submitting Application
Luis Bolaños ²⁴	Yes (Tr. 489)	Yes (Tr. 495)	3 years (Tr. 488)	Yes (Tr. 489, 714)
Ezequiel Macias	Yes (Tr. 943)	Yes (Tr. 943)	6 + years (Tr. 942)	Yes (Tr. 714, 943)
Jose Flores	Yes (Tr. 512)	Yes (Tr. 512)	13 years (Tr. 510)	Yes (Tr. 512, 715)
Adrian Anaya	Yes (Tr. 518)	Yes (Tr. 518)	3 years (Tr. 515)	Yes (Tr. 518, 715)
Nathan Collison	Yes (Tr. 570)	Yes (Tr. 570)	1 year (Tr. 569)	Yes (Tr. 570, 715)
Darrel Speakman	Yes (Tr. 486-87)	Yes (Tr. 484)	1 year (Tr. 482)	Yes (Tr. 484, 715)
Chester McClure	Yes (Tr. 564, 566)	Yes (Tr. 566)	32 years (Tr. 564)	Yes (Tr. 566, 715)
Pablo Equizabel	Yes (Tr. 560, 562)	Yes (Tr. 562)	6 ½ years (Tr. 529)	Yes (Tr. 715) ²⁵
John Rohrback	Yes (Tr. 525-26)	Yes (Tr. 526)	2+ years (Tr. 524)	Yes (526, 715)

The evidence also shows that the Union would have allowed each applicant to work at Aim Royal if hired, and that the Union was trying to get its members hired at Aim Royal as part of the organizing plan. (Tr. 740) Under these circumstances, it is clear that each applicant was genuinely interested in seeking to establish an employment relationship with Aim Royal, and that they were all employees pursuant to Section 2(3) of the Act. *Cossentino Contracting Co.*, 351 NLRB at 496 (employees credibly testified they would have accepted employment if offered); *Air Management Services, Inc.*, 352 NLRB at 1288 (applicants were employees pursuant to Section 2(3) where the applications were timely, complete, and made under circumstances indicating that the applicants were genuinely seeking work); *Toering Electric Co.*, 351 NLRB at 233 n. 51 (fact applications are submitted in a batch, in itself, does not destroy the genuine applicant status if the submitter of the applications had the requisite authorization from the individual applicants).

²⁴ Bolaños' attempt to apply for employment with Aim Royal, through Jacobson, on July 14, 2009, is discussed separately below.

²⁵ Although Equizabel could not identify the application that was faxed to Aim Royal as the one he provided Aizu, Aizu credibly testified that Equizabel gave him a copy of the completed application, and that Aizu informed Equizabel that he would be faxing the application to Aim Royal. (Tr. 530-31, 715) Moreover, Equizabel credibly testified that in May 2009, he took a completed application to Aim Royal to attempt to gain employment, and gave it to the secretary, who accepted it. (Tr. 530-31) These facts show that Equizabel was trying to establish an employment relationship with Aim Royal, and wanted his application submitted to the company.

Gustavo Gonzalez and Luis Bolaños. On July 14, 2009, Bolaños and Gonzalez attempted to apply for employment with Aim Royal through Jacobson, but were not hired. (Tr. 367) The evidence shows that both were respectful when they applied, and that Chavez had initially decided to send both for an interview with Aim Royal. (Tr. 367-70) Bolaños and Gonzalez both had experience working as insulators, were out of work at the time, and credibly testified that they would have accepted employment if offered. (Tr. 462, 469, 488-89, 494-95, 477) Under these circumstances, both Gonzalez and Bolaños showed a genuine interest in establishing an employment relationship with Jacobson, both are employees as defined under Section 2(3) of the Act.

Sean McMillan In July 2009, McMillan, a third-year apprentice who previously had worked for Aim Royal, spoke to Gibbs and Campos about getting a job with Aim Royal, to no avail. (Tr. 423-27) In July 2009, McMillan also attempted to apply for employment with Aim Royal through Jacobson, but again was unsuccessful. (Tr. 428-430). There is no evidence that the Union sent McMillan to apply for work at either Aim Royal or Jacobson, or that he applied for work in furtherance of the Union's organizing drive; therefore Respondent has not met its burden to show that McMillan was a Union salt. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348, 1349 n. 6 (2007) (employer bears the burden of showing that a discriminatee is a salt); *Toering Electric Co.*, 351 NLRB 225 n. 3 (defining "salting" as the act of a union sending members to an unorganized jobsite to organize the workforce, and a "salt" as an individual, paid or unpaid, who applies for work with a nonunion employer in furtherance of a salting campaign). Instead, the evidence shows that McMillan sought work at Aim Royal on his own accord, and it was Chavez from Jacobson who had initiated contact with McMillan, through a referral. (Tr. 344, 425-25) Because *Toering* involves a refusal to

hire union salts, its analysis should not apply to McMillan's attempts to gain employment with Aim Royal or Jacobson.

But even assuming that *Toering* applies, and that Respondents met their burden under *Toering*, the record establishes McMillan's genuine interest in obtaining employment with Respondents. As a third-year apprentice who had previously worked for Aim Royal as an insulator, McMillan was certainly qualified to work there again. Also, McMillan credibly testified that he was not employed at the time, and would have taken a job with either Jacobson or Aim Royal if it was offered. (Tr. 429-30, 453) Under these circumstances, McMillan had a genuine interest in establishing an employment relationship with both Aim Royal and Jacobson, and is entitled to the Act's protection. *Cossentino Contracting Co.*, 351 NLRB at 496 (employees credibly testified they would have accepted employment if offered); *Air Management Services, Inc.*, 352 NLRB at 1288 (applicants were employees pursuant to Section 2(3) where the applications were timely, complete, and made under circumstances indicating that the applicants were genuinely seeking work).

D. Aim Royal Violated Section 8(a)(1) and (3) by Refusing to Reinstate Gurrola, or Place Him on a Preferential Hire List, After He Made an Unconditional Offer to Return to Work.

1. Gurrola engaged in a protected strike

It is undisputed that Gurrola, a Union organizer, went on strike in July 2008, over safety issues, including Aim Royal's failure to provide drinking water or dust masks to its employees. It is also admitted that Aim Royal did not provide its own water jug at Gurrola's job site on the day of the strike, and that Aim Royal had run out of water at this site the day before the strike. Furthermore, before the strike, Gurrola had discussed safety issues with his coworkers, including the lack of drinking water, and had discussed the possibility of striking if his working conditions did not change with Aizu. Finally, it is uncontested that the Union

had an organizing drive in place when the strike occurred, that the strike furthered the Union's organizing interests, and that Aizu joined Gurrola on the picket line patrolling and taking pictures. These facts establish that Gurrola's strike was protected, and he retained the rights of an economic striker. *Mauka, Inc.*, 327 NLRB 803, 804 n. 8 (1999) (Board reverses ALJ finding that, because the discriminatee was engaged in union activity, it is irrelevant that no other employee joined him in striking); *TNS, Inc.*, 309 NLRB 1348, 1365 (1992) (employees striking in order to have their concerns about safe working conditions addressed were engaged in an economic strike).

During the hearing, relying on J. Campos' testimony, Respondent implied Gurrola somehow knew there would be no water that morning, and that this somehow affected the legality of Gurrola's strike. Specifically, J. Campos testified that, on the day in question, he told Gurrola that he would be arriving late at the Sacaton project with the water jug because he had to go to another Aim Royal project in Mesa, and had the water jug with him. (Tr. 840) Gurrola denied that J. Campos said anything about a water jug on the day in question. As between the two, Gurrola's testimony is far more believable, and should be credited. J. Campos' testimony was contradictory and evasive in key aspects of what occurred that day. For example, he could not remember the location or type of project he went to in Mesa. (Tr. 855) Furthermore, he testified that, when he finally arrived at the Sacaton project he set up the Aim Royal water jugs, and that they were full with water. (Tr. 859) However, he had previously testified that, the morning of the strike, he drove straight from his meeting with Gurrola to the Mesa project, and then directly to Sacaton, without making any stops. (Tr. 857-59) When asked how he could have filled the water jugs with water if he did not make any stops, J. Campos changed his testimony, claiming that he stopped on his way to the Mesa

project to fill the water jugs at a convenience store. (Tr. 859) J. Campos was not a credible witness.

Respondent next inferred that Gurrola's strike was somehow unprotected, because there was water available from other contractors when Gurrola went on strike. The only evidence supporting this claim is the testimony of Bob Bylinowski, a Russell Air Conditioning foreman, who was working in Building F on the day of the strike. (Tr. 794; AR. 6) Although Bylinowski testified that there was water available, he also admitted that he did not look in the various water jugs to see if they were full of water that day. (Tr. 809) In other words, his testimony was mere speculation. Moreover, Bylinowski admitted that he did not see Gurrola on July 18, and did not know where he was working that day. (Tr. 808) This would make sense, because Dale Gibson, Russell's Project Manager, testified that Aim Royal was working on Buildings A and B the day of the strike, and not Building F where Bylinowski was working. (Tr. 921; AR. 6) Respondent simply presented no testimony that there was potable water available at Gurrola's work area when he went on strike. Furthermore, whether Gurrola exaggerated about the amount of water available that day is irrelevant, as he clearly had the right to complain about, and go on strike over, the amount of water available at the job site. Compare, *Al Monzo Const. Co., Inc.*, 198 NLRB 1212, 1214 (1972) *enfd.* 485 F.2d 680 (3d Cir. 1973) (employees who were fired about complaining about drinking water were engaged in protected concerted activities, even if the complaints were exaggerated).

2. Aim Royal Violated Section 8(a)(1) and (3) by Refusing to Reinststate Gurrola or Place Him on a Preferential Hiring List.

Under *Laidlaw Corp.*, 171 NLRB 1366, 1368-69 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), an economic striker is entitled to reinstatement upon his unconditional offer to return to work, contingent upon the existence of a job vacancy. The General Counsel has the burden of establishing the existence of a *Laidlaw* vacancy. *Aqua-Chem, Inc.*, 288 NLRB 1108, 1110 n. 6 (1988). Here, it is not disputed that Respondent hired insulators in June, July, August, September, and October, well after Gurrola made his unconditional offers to return to work. (AR. 1; GC. 6) It is also undisputed that Aim Royal never put Gurrola on a preferential hiring list, and never reinstated him. Accordingly, Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate Gurrola, and by further refusing to place him on a preferential rehire list. *Laidlaw Corp.*, 171 NLRB at 1368-69; *Pirelli Cable Corp.*, 331 NLRB 1538, 1540 (2000).

3. The Filing of the Charge 14 Months After Gurrola's Discharge Does Not Preclude a Violation.

Respondent may argue that Section 10(b) of the Act precludes the finding of an unfair labor practice, because the underlying charge in this matter was not filed until September 28, 2009, well after Gurrola's strike, and 14 months after Gibbs informed Gurrola that he had been discharged. (GC. 1(c)) However, there is no 10(b) defense to Gurrola's right to reinstatement as an economic striker.

The Board addressed this issue in *Lee Consaul Co.*, 192 NLRB 1130, 1158-59 (1971), where a group of strikers were fired while they were on strike, and later made unconditional offers to return to work. The terminations were outside the 10(b) period, but their offers to return to work were made within the 10(b) period. *Id.* at 1158. In his analysis, which was

adopted by the Board, the ALJ drew a distinction between employees who were discharged for non-strike related protected union activity who subsequently apply for reinstatement (category A employees); employees engaged in a protected strike who apply for reinstatement at the end of the strike (category B employees); and employees engaged in a protected strike who are unlawfully fired during the strike and who subsequently apply for reinstatement at the end of the strike (category C employees). In the case of employees in category A, the ALJ noted that they have a single status, i.e., that of discharged employees, and that their requests for reinstatement could not revive time-barred claims based on their terminations. *Id.*, citing *NLRB v. Penwoven, Inc.*, 194 F.2d 521 (3rd Cir. 1952), and *NLRB v. Textile Machine Works, Inc.*, 214 F.2d 929 (3rd Cir. 1954). In the case of employees in category B, the ALJ held that they have “a distinct right as a striker, namely to apply for reinstatement at the end of the strike,” and that any denial of this right constituted “a distinct and distinguishable unfair labor practice committed at the time of the refusal.” *Id.* at 1159. Finally, in the case of employees in Category C, the ALJ explained that they had the status, and rights, of employees in both categories, which are independent of each other:

As a discharged employee, an employee who was a striker and discharged for that reason, [a category] C [employee] has the rights of [a category] A [employee], no more and no less, since both were discharged for protected activity. [A category] C [employee], no more than [a category] A [employee], cannot, assuming for instance that he continues on strike for 8 months after his discharge, then file a viable charge that he was illegally discharged 8 months previously

But at the end of the strike, [a category] C [employee] can exercise his rights as a striker to request reinstatement. Our illustration above, with regard to [category] A and B [employees], illustrates, we believe, that these are two different rights, first that of a dischargee, and second the rights of a striker at the end of a strike.

Id. Thus, the ALJ, affirmed by the Board, held that, at the end of the strike, the discharged strikers could still exercise their reinstatement rights by making unconditional offers to return

to work, even though they were discharged outside the 10(b) period. *Id.* In doing so, the ALJ made clear that an employer could not unilaterally limit or extinguish striking employees' reinstatement rights guaranteed under *Laidlaw Corp.* by firing them after they engage in a work stoppage.

Gurrola is a category C employee as described in *Lee Consaul*. Therefore, even though his discharge occurred outside the 10(b) period, he still had the independent right to be reinstated upon making an unconditional offer to return to work, which he did in April, May, and July, all within the 10(b) period. Respondent refused to reinstate Gurrola or place him on a preferential rehire list, as was his right under *Laidlaw Corp.* This refusal constituted "a distinct and distinguishable unfair labor practice" in violation of Section 8(a)(1) and (3).

4. Gurrola's Offer to Return to Work Was Not Untimely.

Respondent may also try to argue that Gurrola is not entitled to be reinstated because his offer to return to work was not made within six months of the strike, or was otherwise untimely. This issue was addressed by the Board in *Teledyne Industries, Inc.*, 298 NLRB 982 (1990), *enfd.* 938 F.2d 627 (6th Cir. 1991). In *Teledyne Industries*, the Board found that two economic strikers who did not make unconditional offers to return to work until 21 months after the end of the strike did not abandon interest in their jobs, and that the employer violated Section 8(a)(1) and (3) of the Act by refusing to reinstate them. *Id.* at 985-86.

Here, there is no evidence that Gurrola's economic strike ended any time before his initial offer to return to work in April 2009. However, even assuming that Respondent had the ability to "end" the strike by firing Gurrola in July 2008 (a notion not supported by any Board law), his first offer to return to work occurred in April 2009, nine months later. Clearly Gurrola did not abandon interest in returning to his job, and was entitled to reinstatement. *Id.*

E. Aim Royal Violated Section 8(a)(1) and (3) of the Act by Refusing to Hire or Consider for Hire the Various Union-Affiliated Applications.

1. Legal Framework.

To establish a discriminatory refusal to hire violation in the salting context, the General Counsel must show the following: (1) the applicant's actual interest in employment, if challenged by the employer; (2) that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (3) that the applicants had experience or training relevant to the announced or generally know requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements or that the requirements were themselves pretextual or applied as a pretext for discrimination; and (4) that antiunion animus contributed to the decision to not hire the applicants.²⁶ *Air Management Services, Inc.*, 352 NLRB 1280, 1287 (2008), citing *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000), supplemented 333 NLRB 66 (2001); and *Toering Electric*, 351 NLRB at 234. To establish that an employer discriminatorily refused to consider an applicant for hire, the General Counsel bears the burden to show that the employer excluded applicants from the hiring process, and that antiunion animus contributed to the decision. *Air Management Services, Inc.*, 352 NLRB at 1289. Once the General Counsel has shown a discriminatory refusal to hire, or consider for hire, the burden shifts to Respondent to show that it would not have hired the applicants even in the absence of their union activity. *Id.* citing *FES (A Division of Thermo Power)*, 331 NLRB at 12, 15.

²⁶ This framework is consistent with the allocation of burden of proof set forth in *Wright Line*, 251 NLRB 1083 (1980). See *Air Management Services, Inc.*, 352 NLRB n. 10.

2. Respondent's Hiring Practices

Respondent may argue that Gibbs' testimony establishes that it would not have hired any of the discriminatees because it maintains a nondiscriminatory hiring practice giving preference to former employees and those being recommended by current/former employees.²⁷ (Tr. 16-17) However, Gibbs' testimony should not be believed, as he was not a credible witness. Moreover, there is no credible evidence that any such a hiring policy existed at Aim Royal. Instead, the evidence showed that Respondent manufactured this excuse in order to avoid hiring applicants who were interested in organizing its workforce.

a. Gibbs' Credibility

Gibbs was inconsistent, contradictory, and equivocal both in his testimony, and in the sworn affidavit he provided to the Board during the underlying investigation. It is clear that, at all times, Gibbs was motivated by one priority, to avoid an unfair labor practice finding. For example, Gibbs knew that, in 2009, Gurrola wanted to return to work at Aim Royal. Campos had told him, and Gibbs met with Gurrola personally in July. (Tr. 259; GC. 36, 37) However, in his affidavit to the NLRB, which was given under oath, Gibbs said "In 2009, I did not know that Jose Gurrola was looking for work with AIM Royal." (Tr. 96) When asked about this inconsistency, Gibbs claimed that Gurrola had never made direct contact with him, so he had "no direct knowledge" of Gurrola's attempts to go back to work with Aim Royal. (Tr. 97) This testimony was exposed as a lie by Gurrola's tape-recorded conversation with

²⁷ In his opening statement, Aim Royal's counsel cited to *Quality Mechanical*, 340 NLRB 798 (2003), as support for its hiring practices. (Tr. 16) However, the issue of the employer's hiring practices was never before the Board in *Quality Mechanical*, and it therefore has no precedential value. *T.E. Briggs Construction Co.*, 349 NLRB 671, 671 n. 3 (2007).

Gibbs on July 7, 2009, which shows that Gibbs did, in fact, meet and speak with Gurrola, and knew he wanted to return to work at Aim Royal.

Similarly, Gibbs' testimony regarding Aizu's application for work with Aim Royal was not truthful. When asked whether he knew that Aizu wanted to work for Aim Royal in 2009, Gibbs testified that he never had personal contact with Aizu. (Tr. 186) He also testified that he did not have direct knowledge of Aizu "showing up and asking or stating that he had an application in" for employment. (Tr. 183) Again, Gibbs' testimony is clearly false. On July 7, Aizu told Gibbs that "I put in my application too, I'm Angel OK," to which Gibbs replied "OK." Gibbs simply was not concerned about telling the truth, either during the taking of his affidavit or his testimony.

b. Aim Royal's Purported Hiring Practices

Aim Royal argues that the reason none of the discriminatees were hired was because it maintained a hiring policy giving preference to former employees, and then to applicants who were referred by current/former employees. (Tr. 37, 75) Its argument is based on Gibbs' testimony, which was inconsistent, equivocal, and contradicted by documentary evidence. For example, Gibbs testified that, by the beginning of 2007, Aim Royal stopped keeping employee applications on file. (Tr. 46) However, he was then contradicted by his affidavit, which stated that Aim Royal had a policy of keeping applications on file for four to six weeks, but the policy was changed in August 2007, because it was inefficient and not cost effective. (Tr. 46) Both of these statements were contradicted by Gibbs' tape-recorded conversation with Aizu and Gurrola, in July 2009, where he told them that employment applications were "purged from time to time." (GC. 36, 37)

working hard enough. (Tr. 323) Ollarsaba was fired in June 2009, just three weeks before he was rehired again, because he stopped coming to work. (Tr. 835; GC. 47)

Aim Royal presented no evidence that, before the applications from the Union organizers, it had a practice of rehiring employees previously fired for cause. Instead, Aim Royal's only explanation was that Campos had discussed the previous terminations with each employee, who was then given a chance to apologize and be rehired. (Tr. 243-45, 327, 329) Tellingly, this same courtesy was never extended to former Aim Royal employees Gurrola or McMillan, who seemed to have been excluded from Aim Royal's purported preferential hiring system, and were never given a chance to apologize. Moreover, during this time Campos even hired one employee, Anthony Hernandez, who never previously worked as an insulator. (GC. 10)

Aim Royal's claim that it relied upon a nondiscriminatory hiring system is simply an avarice to avoid an unfair labor practice finding. Aim Royal's counsel stated that, by using this purported system of hiring former employees, and referrals from current employees, Aim Royal was looking for "capable, honest, and hardworking" employees. (Tr. 16) It is difficult to see how employees who had previously been fired for failing to show up to work, drug problems, laziness, causing "loss of revenue," and the like are the type of "capable, honest, or hardworking" employees Aim Royal was looking for. It is much easier to see that their hiring is evidence of Aim Royal's anti-union animus. See *Fluor Daniel*, 333 NLRB 427, 432, 455 enf'd in relevant part 332 F.3d 961 (6th Cir. 2003) cert. denied 543 U.S. 1089 (2005) (hiring previously terminated employees rather than volunteer union organizers evidence of antiunion animus). Any doubt as to the unlawful motive is erased by Campos's testimony that Aim Royal preferred these workers because they knew the proper channels to use within the

company to complain about issues like water and masks (Tr. 1012-13), as opposed to the lawful methods used by Gurrola.

3. Respondent Aim Royal Refused to Hire or Consider for Hire Jose Gurrola, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback and Shawn McMillan.

The evidence reflects that Gurrola and Aizu sought employment with Aim Royal on May 27, and July 7; Aizu by himself on June 1, June 9; that Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback sought employment with Aim Royal on June 23; and Shawn McMillan sought employment with Aim Royal beginning around July 15. The evidence also reflects that Aim Royal received these applicants' completed applications; was aware of their union affiliations;²⁹ and told several of them that Aim Royal was not hiring or was "cutting back."³⁰ See G.C. 34 and 35. Finally, it is undisputed that Aim Royal never considered hiring any of them. (Tr. 64-65, 70, 86-87, 94, 187)

As discussed above in Section VI (C), the evidence establishes that each of these employees desired to work for Aim Royal and would have accepted an offer of employment. The record also establishes that all of them had the appropriate training to work for Aim Royal. All were either journeyman or apprentice insulators, and Gurrola and McMillan had previously worked for Aim Royal. In fact, Aim Royal's counsel called Gurrola a "good employee" who "knew what he was doing" and "quickly got a raise." (Tr. 17) They certainly exceeded Aim Royal's qualification standards, particularly where the company hired someone

²⁹ Campos testified that he has known that Aizu was a Union organizer since 2008. (Tr. 218)

³⁰ The General Counsel asserts that Respondent had a duty to reinstate Gurrola, an economic striker, upon his unconditional offer to return to work. In the event the Administrative Law Judge finds that Aim Royal had no such duty, the refusal to hire/consider for hire allegations relating to Gurrola are pled an alternative theory.

with no prior experience working as an insulator for at least one of its job openings during the relevant period. (GC. 10)

The record also shows that Aim Royal was hiring or had concrete plans to hire during the relevant period. In determining this issue, the Board does not focus on one specific date, but looks at the employer's hiring pattern within the relevant time period. Thus, in *Zarcon, Inc.*, 340 NLRB 1222, 1228-29 (2003), the Board found that 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. Here, contrary to Herron's, Gibbs' and Campos' claims that Aim Royal was laying off employees, and was not hiring, the record establishes that the opposite was true. As the chart below shows, between May 27, and October 16, Aim Royal hired no fewer than 12 employees directly to perform insulator work.³¹ (AR. 1, GC. 6, GC. 7)

Name	Hire Date
Sean Herron	5/27/09
Anthony Sandoval	6/9/09
George Campos	6/16/09
William Loy	6/26/09
Mario Chavez	7/8/09
Luis Jaime	7/14/09
Jacob Ollarsaba	7/24/09
Manuel Murrieta	7/27/09
Victor Hernandez	8/10/09
Ralph Olguin	9/30/09
Gabe Trujillo	10/2/09
Scott Denessen	10/16/09

³¹ During the hearing, Respondent tried to claim that Sean Herron did not work as an insulator, but instead worked in the warehouse (Tr. 136-37). However, the evidence showed that work performed by Herron, pre-fabricating insulation, is the type of work generally performed by insulators. (Tr. 187, 576)

Moreover, Campos testified that in July 2009, Aim Royal was in a “tight situation” and needed to hire employees. (Tr. 995, 1012) Campos testified that Aim Royal needed to hire more workers because the workload was increasing substantially, employees had been working a lot of overtime, and he had been “putting on his tools” quite frequently, which was unusual. (Tr. 242) In light of these facts, Aim Royal was clearly hiring and had no concrete plans to hire during the relevant period. *Zarcon, Inc.*, 340 NLRB at 1229 (supervisor’s testimony that employer “was in need of carpenters” supports a finding that employer has hiring or had concrete plans to hire).

Finally, the record establishes that antiunion animus contributed to Respondent’s decision to not hire or consider any of the discriminatees. Anti-union animus can be shown through direct evidence, or it can be imputed from circumstantial evidence, and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001). Conduct that exhibits animus, but is not independently alleged or found to violate the Act, may be used to shed light on the motive for other conduct that is alleged to be unlawful. *Meritor Automotive, Inc.*, 328 NLRB 813, 813 (1999). Also, the Board has long held that events occurring outside the 10(b) period may be used as background to shed light on a respondent’s motivation for conduct within the 10(b) period. See *Grimmway Farms*, 314 NLRB 73, 74 (1994), enf. denied in part on other grounds 85 F.3d 637 (9th Cir. 1996) (Board considered a work stoppage outside the 10(b) period as background evidence for a respondent’s refusal to rehire employees); *Douglas Aircraft Co.*, 307 NLRB 536 fn. 2 (1991) enf. 66 F.3d 336 (9th Cir. 1994) (discipline outside the 10(b) period could be considered as evidence of animus to evaluate a discharge within the 10(b) period). Similarly, statements occurring outside the 10(b) period may be used as evidence to shed light on a respondent’s conduct within the 10(b) period. *Central Transport*,

Inc., 306 NLRB 166, 168 (1992) (statements not alleged as violations of the Act and which fall outside the 10(b) period can demonstrate anti-union animus and be used in judging the employer's motivation), *enfd. in pertinent part* 997 F.2d 1180, 1190 (7th Cir.1993).

Here, the record is replete with evidence of Aim Royal's anti-union animus. First, Respondent's independent handbook violations and various independent 8(a)(1) conduct, including unlawful interrogations into Union association, demonstrates anti-union animus. See *West Michigan Plumbing & Heating, Inc.*, 333 NLRB 418 n. 2 (2001) (employee handbook provision which independently violated Section 8(a)(1) evidences anti-union animus); *Sunrise Health Care Corp.*, 334 NLRB 903, 906 (2001) (independent violations of Section 8(a)(1) constitute evidence of animus toward a union).

Moreover, it is undisputed that Gurrola was fired for going on strike in July 2008, and that Gibbs considered Gurrola ineligible for rehire because of the strike. It is well settled that the discharge of economic strikers constitutes an unfair labor practice and demonstrates an anti-union bias. See *NLRB v. International Van Lines*, 409 U.S. 48, 52 (1972); *Grimmway Farms*, 14 NLRB at 74 (Board considered work stoppage outside the 10(b) period as background evidence for a respondent's refusal to rehire employees). Similarly, the false statements Herron, Campos, and Gibbs, made to Gurrola and Aizu concerning Aim Royal's laying off workers, and cutting back personnel, and Gibbs' false statement to McMillan that he would check with Campos about the company's labor needs, is also evidence of animus because it "tends to show an intention not to consider the applicants for employment." *Progressive Electric Inc.*, 344 NLRB 426, 426 n. 3 (2005) (falsely telling applicants that they would be called in the future should a vacancy occur supports a failure to consider and failure to hire violation).

Respondent has failed to meet its burden of showing that it would not have hired any of these employees in the absence of their union and protected activity. The excuse that it looked to hire previously-terminated employees is, for the reasons discussed above, nothing more than a sham. Similarly, any argument that any inference of unlawful motive is dispelled because Aim Royal hired other employees who had some union affiliation falls far short. The Board has held that an employer's failure to discriminate against all applicants does not bar a finding of a violation. *Zurn/NEPCO*, 345 NLRB 12, 46 (2005); *Fluor Daniel, supra*, 333 NLRB at 440 (failure to discriminate against all applicants in a class is not a defense). But even if this were a defense, the record shows that two of the "union" employees Aim Royal rehired, Murrieta and Chavez, were not really union supporters at all, where they bad-mouthed the Union to Campos before they were rehired. (Tr. 240) Accordingly, the Administrative Law Judge should find that Respondent refused to hire, or consider for hire, Gurrola, Aizu, Bolaños, Macias, Flores, Anaya, Collison, Speakman, McClure, Equizabal, Rohrback, and McMillan, in violation of Section 8(a)(1) and (3) of the Act.

F. Jacobson Violated Section 8(a)(1) and (3) of the Act by Refusing to Hire or Consider for Hire the Various Union-Affiliated Applicants.

1. The Unlawful Refusal to Hire or Consider for Hire

The record demonstrates that McMillan, Bolaños, Gonzales, and Aizu all sought employment through Jacobson; that Chavez interviewed these employees and indicated interest in hiring them, including scheduling interviews for them with Aim Royal, telling them they were good candidates, and noting for at least one of them that he was "not with [the] union" on his application. The record also establishes that these employees desired to work, and that they were qualified. See Section VI (C), above.

There is no question that Jacobson was hiring, and had plans to hire, employees to work for Aim Royal when McMillan, Bolaños, Gonzales, and Aizu applied for work. Specifically, the record shows that, on July 14, Jacobson was hiring two employees for Aim Royal. Although Respondents may try to argue that two positions were already filled when the Union applicants applied for work, Chavez' testimony on this point cannot be credited. Chavez would have the ALJ believe that Campos called her early in the morning of July 14, stating he wanted to hire two additional employees, one of whom was Isidro Ortega. But Campos' telephone records tell another story. There was no such call between Campos and Chavez during the morning of July 14, or even on July 13. (GC. 29, 30) Instead, the first call between the two occurred at 11:40 a.m., while Bolaños and Gonzales were in Chavez' office, and when she scheduled Bolaños for the 11:40 interview. Interestingly, after the series of phone calls between Chavez and Campos, involving the applications of Bolaños and Gonzales, there is another phone call between Chavez and Campos at 1:56 p.m., long after the Union applicants had applied for employment and were sent home. Since Chavez testified that the call with Campos involving Ortega and Rendon occurred on July 14, it must be during the 1:56 p.m. conversation where Campos and Chavez decided that Ortega and Rendon would be interviewed for the openings at Aim Royal, as there is no other explanation for this call. See *Celtic General Contractors, Inc.*, 341 NLRB 862, 875 (2004) (in assessing the credibility of witnesses it is always helpful to have documentary evidence as a guide).

The documentary evidence also supports a finding that Jacobson was hiring, or had concrete plans to hire on July 14, and that those positions were still open when Bolaños, Gonzales, and McMillan applied. More particularly, in the documents submitted to the Board during the underlying investigation, Gibbs noted that the hire dates for Rendon and Ortega

were July 15, 2009.³² (GC. 4 p.2, GC. 5) Gibbs further testified that, when Aim Royal designates a “hire date,” it uses the date the applicant is told “Yes, we’ll hire you.” (Tr. 151) Chavez likewise testified that Jacobson does not hire employees until its client commits to use the particular applicant, and Jacobson’s records indicate that it was not until July 15 that it verified that both employees were eligible to work in the United States. (J. 1, Ortega, Application Tab, p. 7, 9) (J.1, Rendon, Application Tab, p. 9; Tr. 366) Finally, it is undisputed that Jacobson hired employees to work at Aim Royal in August and October, but none of the Union applicants were ever contacted for these positions, despite Jacobson’s policy to keep applications active for six months, and its practice to use these applications to obtain employees for clients. See *Zarcon, Inc.*, 340 NLRB at 1228-29.

Finally, the record establishes that Respondents’ decision to not hire or consider for hire McMillan, Bolaños, Gonzales, or Aizu was based on their union status. This evidence includes Chavez’s interrogation of these employees’ union status; her abrupt cancellation of Gonzales’ interview after he informed her he was referred by Aizu; Chavez’ noting whether applicants are with the Union or not with the Union on their applications; and her inconsistent and deceptive testimony regarding the reasons why none of these employees was hired. See *Galicks, Inc.*, 354 NLRB No. 39 slip op. at 4 (2009) (unlawful motivation also may be inferred from circumstantial evidence, including timing).

2. Jacobson Is Liable for Aim Royal’s Refusals to Hire

During the hearing, Jacobson stipulated that it was a joint employer with respect to those individuals that were Jacobson employees assigned to Aim Royal. (Tr. 357) The record evidence fully supports this stipulation. The Board and the courts will find two employers are “joint employers” then they “exert significant control over the same employees-where from

³² It is clear that the “xi.” next to Ortega’s hire date is a typographical error, and should read “ix.”

the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment.” *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (1982). This standard is met here. Although the record establishes that Jacobson pays the employees directly, and provides their benefits, such as insurance and workers compensation, the record also establishes that Jacobson does not hire any employees without Aim Royal’s approval; Jacobson employees are supervised directly by Aim Royal; Aim Royal sets the employees’ work hours, and can issue them disciplinary warnings; and Aim Royal can cause the employees to be fired. Under these circumstances, there is little question as to joint employer status. *Id.* at 1124-25 (employee contractor and client employer are joint employers where they share the right to hire and fire, client-employer establishes work hours and supervises workers, and client employer’s forms are used for recordkeeping).

In situations where the General Counsel is seeking an order requiring one joint employer to assume responsibility for the other joint-employer’s violations, the General Counsel must show: (1) that the two employers are joint employers of a group of employees; and (2) that one of them has, with unlawful motivation, taken discriminatory action against an employee or employees in the jointly managed work force. *Capitol-EMI Music*, 311 NLRB 997, 1000 (1993) *enfd.* 23 F.3d 399 (4th Cir. 1994). As described in the sections above, these elements have been established. The burden then shifts to the employer who seeks to escape liability for its joint employer’s unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer’s action or that, if it knew, it took all reasonable measures within its power to resist the unlawful action. *Id.* Jacobson has not met its burden. If anything, the record establishes that Jacobson facilitated Aim Royal’s unlawful discrimination, where it interrogated employees about their union status for Aim Royal; kept

track of this status by designating their union affiliations on their application materials; and screened out union supporters by failing to refer them to Aim Royal or any other employer. Any claim that Chavez did not know the significance of Union membership, and thought it was good because it indicated that employees have more experience, is belied by the fact that she never contacted any of the Union members for openings at Aim Royal, or anywhere, after July 14, despite Jacobson's policy to keep applications on file for six months, and to refer to them when openings occur.

G. Interest on the Monetary Awards In this Matter Should be Compounded on a Quarterly Basis

The Act has been interpreted as “essentially remedial,” *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940), meaning that Board orders are to restore the situation to that existing before any unfair labor practices occurred so as to assure employees that they are free to exercise their § 7 rights, see *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 197-98 (1941); *Freeman Decorating Co.*, 288 NLRB 1235, 1235 fn.2 (1988) (Board does not award tort remedies but only makes discriminatees whole for losses incurred because of unlawful conduct). Thus, an employee that was unlawfully discharged is entitled to backpay representing his or her lost wages. Absent an award of interest on that backpay, the discriminatee will not have been returned to the pre-unfair labor practice status quo because there is no consideration for either the discriminatee's lost investment opportunities or need to borrow interest-bearing funds during the period of the unlawful discharge. See *Florida Steel Corp.*, 231 NLRB 651, 651 (1977) (“[t]he purpose of interest is to compensate the discriminatee for the lost of his or her money”), enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978).

The issue then becomes what method of computing interest best returns the employee to the pre-unfair labor practice status quo. Because the established practice among banks and other financial institutions is to charge compound interest on loans³³, the Board's current policy of assessing only simple interest fails to return discriminatees to the pre-unfair labor practice status quo. Thus, if an employer violates § 8(a)(5), for example, by failing to pay unit employees their contractual benefits, a unit employee may need to borrow money from a bank in order to pay bills or maintain private health insurance while awaiting the Board order or the enforcement of that order. The employee will have to replay that loan with compounded interest, and a Board order awarding only simple interest will fail to fully compensate that employee for out-of-pocket expenses caused by the unfair labor practice.

1. IRS Practice and Precedent from Other Areas of Labor and Employment Law Provide Ample Legal Authority for Assessing Compound Interest to Remedy Unfair Practices.

A significant amount of legal authority supports a change in remedial policy from simple to compound interest.³⁴ First, the Internal Revenue Service (IRS) requires the compounding of interest on the overpayment or underpayment of taxes and the Board has a history of linking its interest policy with that followed by the IRS. Second, federal courts routinely exercise their discretion to award compound interest for employment discrimination, a policy also adopted by the Administrative Review Board of the U.S. Department of Labor,

³³ When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to assess compound interest on the overpayment or underpayment of taxes, it noted that it was conforming the IRS computation of interest to commercial practice. See S. Rep. No. 97-494(1), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047.

³⁴ As a general matter, it is well-established that the Board has the remedial authority to charge interest on its monetary awards even though the NLRB does not expressly grant that authority. See *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962), *enf. denied* on other grounds 322 F.2d 913 (9th Cir. 1963). See also *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 127 (2d Cir. 2001) ("An award of interest is, of course, well within the Board's remedial authority."); *NLRB v. Operating Engineers Local 138*, 385 F.2d 874, 878 & n.22 (2d Cir. 1967) (listing circuit courts that had explicitly upheld Board's authority to charge interest on monetary awards), *cert. denied* 391 U.S. 904 (1968).

and the U.S. Office of Personnel Management (OPM) charges compound interest on monetary remedies owed to federal employees.³⁵ The Board should update its policy so as to be in line with these practices.

a. The Board Should Follow IRS Policy and Compound Interest on Monetary Remedies.

Since the Board first adopted a policy of assessing interest on monetary remedies in *Isis Plumbing & Heating Co.*, it has linked that policy to the practices followed by the IRS. 138 NLRB at 720-721. Thus in *Isis Plumbing*, the Board adopted a flat interest rate of six percent on monetary remedies, which at the time was the rate used by the IRS with regard to a taxpayer's overpayment or underpayment of federal taxes. See *Florida Steel Co.*, 231 NLRB at 651 (six percent interest rate was used by "the [IRS], in suites by the Government, and was the legal rate of interest in most States"). The IRS later changed to a sliding interest scale and, in *Florida Steel Corp.*, the Board concluded that its flat interest rate "no longer effectuate[d] the policies of the Act" and it adopted that sliding interest scale. *Id.* at 651. Finally, in *New Horizons for the Retarded, Inc.*, the Board, in accord with another change in IRS policy that was mandated by the Tax Reform Act of 1986, again changed the method of determining its official interest rate. 283 NLRB 1173, 1173 (1987). The Tax Reform Act required the IRS to use the short-term Federal rate to calculate interest on tax overpayments and underpayments. See 26 U.S.C. § 6621(a) (2000). The Board adopted the rate applicable to the underpayment of federal taxes, i.e., the short-term Federal rate plus three percent, and

³⁵ Moreover, federal courts routinely compound interest in non-employment cases to make injured parties whole. See, e.g., *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 633 F. Supp. 1047, 1057 (D. Del. 1986) (patent infringement case; compounding interest "will conform to commercial practices and proved the patent holder with adequate compensation for foregone royalty payments"); *Brown v. Consolidated Rail Corp.*, 614 F. Supp. 289, 291 (N.D. Ohio 1985) (Vietnam Veterans Readjustment & Assistance Act case; compound interest awarded regardless of defendant's good faith or justification); *United States v. 319.46 Acres of Land More or Less*, 508 F. Supp. 288, 291 (W.D. Okla. 1981) (eminent domain case; Fifth Amendment "just compensation" standard would be satisfied only by compound interest award).

reasoned that its official interest rate should reflect, at least indirectly, the forces of the private economic market. See *New Horizons for the Retarded, Inc.*, 283 NLRB at 1173.

In both *Florida Steel* and *New Horizons*, the Board followed the lead of the IRS with regard to the appropriate interest rate, but failed to adopt the IRS's practice of compounding interest on amounts owed.³⁶ As part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had mandated that the IRS compound interest on the overpayment and underpayment of taxes. See 26 U.S.C. § 6622(a). The rationale was that calculating simple interest on amounts owed did not conform to commercial practice and that, without compounding interest, "neither the United States nor taxpayers are *adequately compensated* for the value of money owing to them under the tax laws." S. Rep. No. 97-494(1), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047 (emphasis supplied). This same rationale mandates that the Board adopt a policy of compounding interest on its monetary remedies because adjudged discriminatees in NLRB cases are not "adequately compensated," i.e., made whole for their economic losses, with simple interest alone. Thus, the Board should continue to adhere to IRS practices and should access compound interest on all monetary remedies.

b. The Board Should Follow the Practice of Federal Courts Applying Employment Discrimination Law, of the U.S. Department of Labor, and of OPM and Award Compound Interest on Monetary Remedies.

Federal courts routinely award compound interest on backpay awards in Title VII cases, 42 U.S.C. §§ 2000e to 2000e-17 (2000), with one court insisting that "[g]iven that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is

³⁶ In those two cases, the parties did not argue, and the Board did not address, the issue of whether the interest should be compounded.

compounded.”³⁷ *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993), cert. denied 510 U.S. 1164 (1994). See also *Cooper v. Paychex, Inc.*, 960 F. Supp. 966, 975 (E.D. Va. 1997) (Title VII and 42 U.S.C. § 1981 race discrimination case stating “common sense and the equities dictate an award of compound interest”), affd. 163 F.3d 598 (4th Cir. 1998) (table); *Rush v. Scott Specialty Gases, Inc.*, 940 F. Supp. 814, 818 (E.D. Pa. 1996); *O’Quinn v. New York University Medical Center*, 933 F. Supp. at 345-346; *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 676 (E.D.N.Y. 1996), affd. 110 F.3d 210 (2d Cir. 1997); *Davis v. Kansas City Housing Authority*, 822 F. Supp. 609, 616-617 (W.D. Mo. 1993). When discussing the presumption of a backpay remedy for a Title VII violation, the Supreme Court has made clear that Title VII remedies were modeled after those provided under the NLRA, the purpose of which is to put discriminatees in the position they would have been in absent the respondent’s unlawful conduct:

The “make whole” purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under the Act, “[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.”

Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) (citations omitted); see also *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1512 (11th Cir. 1987) (Congress modeled Title VII remedies on those afforded by NLRA). Because Title VII remedies were modeled after those provided by the NLRA and it has been determined that compound interest is needed to make a Title VII discriminatee whole, it follows logically that compound interest is needed to make

³⁷ The analysis in this subsection focuses only on how federal courts routinely compound *prejudgment* interest in employment discrimination cases so as to make adjudged discriminatees whole. Unlike with *post judgment* interest, which must be compounded pursuant to the federal post judgment interest statute, 28 U.S.C. § 1961(b), federal courts have discretion of whether and how to assess prejudgment interest. See, e.g. *O’Quinn v. New York University Medical Center*, 933 F. Supp. 371, 344-345 (S.D.N.Y. 1996) (Title VII case).

whole a NLRA discriminatee who was discriminated against because of his or her exercise of § 7 rights.

Based on circuit court precedent in employment discrimination cases, the Administrative Review Board (ARB) of the U.S. Department of Labor has also adopted a policy of compounding interest on backpay awards. The ARB issues final agency decision for the Secretary of Labor in cases arising under a wide range of labor laws, including whistleblower protection, employment discrimination, and immigration.³⁸ It has stated that a “back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest.” *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *14 (DOL, 2000) (involving whistleblower protection under Energy Reorganization Act of 1974), revd. on other grounds sub nom. *Doyle v. U.S. Sec’y of Labor*, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002). Thus in *Doyle*, the ARB agreed with the rationale of *Saulpaugh* and similar circuit court decisions and concluded that in light of the remedial nature of the whistleblower provisions involved and the make whole goal of back pay, “prejudgment interest on back pay ordinarily shall be compounded interest.” *Id.*, 2000 WL 694384, at *15. It then stated that, absent unusual circumstances, it would award compound interest in all cases involving analogous employee protection provisions. *Id.* See also *Amtel Group of Florida, Inc. v. Yongmahapakorn*, 2006 WL 2821406, at *9 (DOL, 2006) (involving Immigration and Nationality Act).

³⁸ The ARB’s policy of compounding interest pre-dates the passage of the Sarbanes-Oxley Act and the Department of Labor’s responsibility for administering that statute. However, the increase in whistleblower claims as a result of Sarbanes-Oxley has created even greater use of the compound interest methodology by DOL, and makes it even more apparent that the Board’s simple interest methodology is out of sync with other agencies’ practice.

Further support for adopting a policy of compounding interest comes from the public sector. Since the end of 1987, pursuant to Congressional directive, OPM has required all federal agencies to award compound interest on any backpay due to federal agencies for “unjustified or unwarranted personnel action[s].” 5 U.S.C. § 5596(b)(1), (b)(2)(B)(iii)(2000); see also 5 C.F.R. § 550.806(a)(1), (e) (2006); 53 FED. Reg. 45,885 (1988). By that legislation, Congress sought to “mak[e] an employee financially whole (to the extent possible).” 5 C.F.R. § 550.801(a). Thus, in cases where a federal employee is subjected to unlawful discrimination, he or she will receive compound interest on the backpay award. See, e.g., *Bergmann v. Dep’t of Justice*, 2003 WL 1955193, at *3 (EEOC, 2003) (where federal agency had discriminated based on sex, EEOC stated that interest on backpay owed to discriminatee had to be compounded daily as required by 5 C.F.R. § 550.806(e)).

The policy underlying the practice followed by federal courts, the ARB, and OPM is the same: compound interest on backpay awards is necessary to make employees whole for economic losses they have suffered because of unlawful personnel actions taken against them. Backpay awards issued under the NLRB serve the same purpose. See, e.g., *Isis Plumbing & Heating Co.*, 138 NLRB at 719 (“[b]ackpay granted to an employee under the Act is considered as wages lost by the employee as the result of the respondent’s wrong.”) Accordingly, the Board should update its interest policy so as to be consistent with the common practice used to remedy unlawful employment actions in other contexts.

c. The Arguments Made by Opponents of Compound Interest are Without Merit.

First, compound interest is neither punitive nor inconsistent with the Act’s remedial purpose of making discriminates whole. Cf. *Republic Steel Corp. v. NLRB*, 311 U.S. at 11 (Board not vested with “discretion to devise punitive measures, and thus to prescribe penalties

or fines which the Board may think would effectuate the policies of the Act”). The purpose of compound interest is to make individuals whole for losses wrongfully inflicted upon them, and its assessment does not constitute a penalty merely because its calculation results in a larger remedial award.³⁹ Rather, compound interest accounts for the true value of monies lost to a wronged employee during the time the backpay amount was unlawfully withheld, and therefore more accurately measures that value. Indeed, federal courts dealing with claims of employment discrimination have routinely awarded compound interest for this make-whole purpose. See *Saulpaugh v. Monroe City Hosp.*, 4 F.3d at 145 (Title VII case; court stated “[g]iven that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded”); *EEOC v. Kentucky State Police Dep’t*, 80 F.3d 1086, 1098 (6th Cir. 1996) (Age Discrimination in Employment (ADEA) case; approving of *Saulpaugh* rationale), cert. denied 519 U.S. 963 (1996); *Rogers v. Fansteel, Inc.*, 533 F. Supp. 100, 102 (E.D. Mich. 1981) (ADEA case).

Second, there is no merit to the argument that charging compound interest based on the interest rate adopted in *New Horizons*, i.e., the short-term federal rate plus three percent, would amount to a penalty on a penalty because the three percent surcharge already acts as a penalty. One federal district court that was presented with a similar argument in an ERISA case noted that Congress wanted the interest rate applicable to the overpayment and underpayment of taxes to reflect market rates and that the addition of three percent to the short-term Federal rate, which is a low-risk rate that may be below market rates, more

³⁹ Compound interest grows at an increasing rate the longer a monetary award remains unpaid. For example, at a 10% interest rate the satisfaction of a \$10,000 backpay obligation after one year would require \$1,038.13 in quarterly compounded interest versus \$1,000 in simple interest. However, after five years, there would be \$6,386.16 in quarterly compounded interest versus \$5,000 in simple interest. If the backpay award is not paid for an additional sixth year, it would accumulate \$1,701.10 in quarterly compounded interest versus \$1,000 in simple interest for that year alone.

appropriately measured the value of money than the short-term rate alone and was not a penalty. See *Russo v. Unger*, 845 F. Supp. 124, 127 (S.D.N.Y. 1994). Thus, compounding interest using the interest rate set forth in *New Horizons* cannot be considered a penalty on a penalty.

Third, there is no merit to the argument that compounding interest is inappropriate in cases where the Board's own processes, rather than anything within a respondent's control, arguably cause the delay in an adjudged discriminatee receiving backpay. Delay is inherent in any administrative process. Since the purpose of compounding interest is to make adjudged discriminatees whole for losses incurred as a result of unfair labor practices directed at them, it would be inappropriate not to make discriminatees whole for the entire period in which they incurred losses.

Fourth, compound interest will not dissuade respondents from fully litigating their positions before the Board and the reviewing federal courts, as is appropriate under the legal process established by the Act. As stated above, compound interest serves the same make-whole purpose, just on a more appropriate basis, as simple interest. Simple interest has not had the effect of inhibiting respondents from fully litigating their positions, and neither will compound interest. Respondents can also address this concern by creating a litigation reserve account in which to deposit funds to be used in satisfying a monetary remedy. Pursuant to commercial practice, that account will accrue compound interest.

Finally, opponents have argued that the Board should proceed on a case-by-case basis rather than adopt a blanket rule of compounding interest. This argument is sometimes based on *Cherokee Marine Terminal*, 287 NLRB 1080, 1081 (1988), where the Board refused to adopt a blanket rule requiring visitatorial clauses in all cases because "hardship could result

from the routine inclusion of a standard provision.” Any reliance on *Cherokee Marine Terminal* is misplaced. The Board there concluded that the routine grant of the proposed visitatorial clause could create “hardship” because of “practical concerns regarding the administration of the model clause and by the potential for abuse inherent in its lack of limits, specificity, and procedural safeguards.” 287 NLRB at 1081. For example, the proposed clause did not specify time limits on Board access to respondents’ statements and records, failed to specify the third parties who would be included in the order, and failed to specify that respondents could have counsel present or had reciprocal discovery rights. *Id.* at 1081-82 & fn.12. No similar concerns are present here because there is no potential for the General Counsel to manipulate a method for computing interest, which is a standard mathematical formula.

2. The Board Should Compound Interest on a Quarterly Basis.

Interest on monetary remedies can be compounded annually, quarterly, or daily and each different method has some legal support.⁴⁰ The IRS’s practice is to assess daily compounded interest with regard to the overpayment or underpayment of federal income taxes. See 26 U.S.C. § 6622(a) (“In computing the amount of any interest required to be paid under this title such interest shall be compounded daily.”); accord *Russo v. Unger*, 845 F. Supp. at 128-129 (awarding daily compound interest in ERISA breach of fiduciary duty

⁴⁰ The chart below shows the different amounts of interest due under each method of computing interest mentioned above, assuming a 10% interest rate on a \$10,000 backpay award.

Type of Interest	Year 1	Year 5	6 th Year Alone	Total for 6 Years
Simple	\$1,000	\$5,000	\$1,000	\$6,000
Annual Comp.	\$1,000	\$6,105.10	\$1,610.51	\$7,715.61
Quarterly Comp.	\$1,038.13	\$6,386.16	\$1,701.10	\$8,087.26
Daily Comp.	\$1,051.56	\$6,486.08	\$1,733.61	\$8,219.69

case because defendants had engaged in self-dealing and, as trustees, had duty to reinvest interest earned on funds). Indeed, Congress explicitly recognized that daily compounding would bring the IRS's practices in line with commercial practice. See S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047 (compounding interest on a daily basis "will conform computation of interest under the internal revenue laws to commercial practice").

However, in the Title VII context, which is more closely analogous to that of the NLRA, interest on monetary remedies is compounded annually or quarterly. See, e.g., *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 817, 819-820 (7th Cir. 1990) (annually); *Rush v. Scott Specialty Gases, Inc.*, 940 F. Supp. at 818 (quarterly); *O'Quinn v. New York Univ. Med. Ctr.*, 933 F. Supp. at 345-346 (annually); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 613 (S.D.N.Y. 1981) (quarterly). In 2000, the DOL's Administrative Review Board also adopted a policy of compounding interest quarterly on monetary awards owed to discriminatees in employee protection cases. See, e.g., *Amtel Group of Florida, Inc. v. Yongmahapakorn*, 2006 WL 2821406, at *9; *Doyle v. Hydro Nuclear Services*, 2000 WL 694384 at *15.

CGC requests that the Administrative Law Judge recommend that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent. See *New Horizons for the Retarded, Inc.*, 283 NLRB at 1173. Because the short-term federal rate is updated on a quarterly basis, *id.* at 1173, 1174, it would make administrative sense to also compound interest on the same basis. In addition, compounding interest on a quarterly basis is more moderate than daily compounding, which has not been applied in the analogous Title VII context, but is more reflective of market realities than

annual compounding, which is inadequate because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

The Board has recently issued several decisions denying a request for compound interest. See e.g., *National Fabco Mfg.*, 352 NLRB No. 37, slip op. at fn. 4 (March 17, 2008) (“Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.”) The General Counsel does not consider these decisions to be an authoritative resolution of this issue. Rather, these decisions are simply a rejection of the relief sought in these specific cases and an acknowledgement that the issue will be considered in other cases once a full Board is constituted.

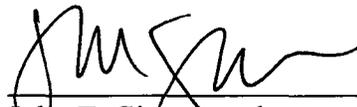
VII. CONCLUSION

Based on the foregoing, the General Counsel requests that the Administrative Law Judge find that Respondents violated Section 8(a)(1) and (3) of the Act as alleged in the complaint, as amended. The General Counsel requests that the Administrative Law Judge order that Respondent Aim Royal and Respondent Jacobson cease and desist from such conduct. The General Counsel further asks that Respondent Aim Royal be ordered to rescind its unlawful handbook rules; reinstate Jose Gurrola to his former or substantially equivalent positions, and make him whole for lost employment; hire and consider for hire Jose Gurrola, Angel Aizu, Shawn McMillan, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback, and make them whole for lost employment. The General Counsel also asks that Respondent Jacobson be ordered to hire and consider for hire Shawn McMillan, Luis Bolaños, Gustavo Gonzales, and Angel Aizu, and make them whole for lost employment. Finally, the General

Counsel asks that the Administrative Law Judge order Respondents to post an appropriate Notice to Employees, in English and Spanish, a proposed copy of which is attached, and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Dated at Phoenix, Arizona, this 25th day of March 2010.

Respectfully submitted,



John T. Giannopoulos
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FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT ask employee-applicants about their union membership, activities, and sympathies.

WE WILL NOT threaten employee-applicants with loss of employment opportunities because of their union membership, activities, and sympathies.

WE WILL NOT give you the impression that we are watching your union activities

WE WILL NOT maintain in employee handbooks, or anywhere else, rules that: prohibit you from leaving the project other than at designated quitting times, unless authorization is obtained; require you to be at your assigned work areas and prohibit you from leaving without obtaining authorization; say you may be terminated if you leave the job site without the approval of the office or the supervisor.

WE WILL NOT refuse to hire or refuse to consider you for hire because you support the **International Association of Heat & Frost Insulators & Allied Workers, Local 73**, or any other labor organization.

WE WILL NOT refuse to recall employees to their prior positions, or place them on a preferential hiring list, because they engaged in a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days, offer **Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, John Rohrbach, Shawn McMillan, and Gustavo Gonzalez** the positions for which they applied, along with their seniority and all other rights or privileges, and **WE WILL** pay each of them for the wages and other benefits they lost because we refused to hire and/or consider them for hire.

WE WILL within 14 days, offer **Jose Gurrola** his job back along with his seniority and all rights and privileges, to the extent we haven't already done so, or, if we have no current openings for his position or a substantially equivalent position, place him on a preferential hiring list, and **WE WILL** pay **Jose Gurrola** for the wages and benefits he lost, plus interest, as a result of our unlawful refusal to recall him.

WE WILL within 14 days, remove from our files, any and all records of the refusal to recall, refusal to hire or consider for hire and/or refusal to recall employees **Jose Gurrola, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores; Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, John Rohrback, Shawn McMillan, and Gustavo Gonzalez** and **WE WILL** notify them in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against them, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

WE WILL remove from the employee handbook those rules that: prohibit you from leaving the project other than at designated quitting times, unless authorization is obtained; require you to be at your assigned work areas and prohibit you from leaving without obtaining authorization; say you may be terminated if you leave the job site without the approval of the office or the supervisor, and inform employees in writing that the unlawful portions of the rules are no longer in force or effect.

AIM ROYAL INSULATION, INC.

Dated: _____

By: _____
(Representative)

JACOBSON STAFFING, L.C.

Dated: _____

By: _____
(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Phoenix Regional Office set forth below. You may also obtain information from the Board's website: www.NLRB.gov

**2600 North Central Ave, Suite 1800
Phoenix, AZ 85004 – Telephone: (602) 640-2160
Hours of Operation: Monday through Friday, 8:15 a.m. to 4:45 p.m**

CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in AIM ROYAL INSULATION, INC. and JACOBSON STAFFING, L.C., JOINT EMPLOYERS, Case 28-CA-22605 et al., was served by E-Gov, E-Filing, E-Mail and overnight delivery via Federal Express on this 25th day of March 2010, on the following:

Via E-Gov, E-Filing:

Honorable Mary M. Cracraft
Associate Chief Administrative Law Judge
National Labor Relations Board
Administrative Law Judge Division
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San Francisco, CA 94103-1779

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Phoenix, AZ 85009

Aim Royal Insulation, Inc.
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Phoenix, AZ 85009

International Association of Heat & Frost
Insulators & Allied Workers, affiliated with
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