

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

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

**and**

**Cases 28-CA-22605  
28-CA-22714**

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

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the Board's Rules and regulations, Counsel for the General Counsel files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge William G. Kocol, [JD(SF)-17-10] (ALJD), issued on May 21, 2010, in the above captioned cases. In all respects, other than what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.<sup>1</sup> These include findings that Respondent Aim Royal violated the Act by: (a) refusing to hire, and consider for hire, Jose Gurrola and Shawn McMillan because they engaged in activity supporting the Union; (b) interrogating an employee-applicant concerning his support for the Union; and (c) maintaining overly-broad work rules that prohibit employees from leaving the work area or jobsite without permission.

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<sup>1</sup> 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 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. All dates are in 2009, unless otherwise stated.

The ALJ also properly found that Respondent Jacobson violated the Act by: (a) telling an employee-applicant he would not be hired because of his Union status; (b) coercively interrogating an employee-applicant concerning his Union status; and (c) telling employee-applicants that they lost employment opportunities because of their support for the Union.

## **I. FACTS**

### **A. Background**

#### **1. Respondent Aim Royal's Operations**

Aim Royal operates a commercial insulation company, based in Phoenix, Arizona. Mike Gibbs (Gibbs) is the President and owner, holding this position since the company's inception in 1984. (Tr. 31) Gibbs has worked in the insulation industry for over 30 years, and before starting Aim Royal, he worked as a union insulator for 19 years. (Tr. 758, 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; ALJD at 2-3)

#### **2. Respondent Jacobson's Operations**

Respondent Jacobson is an 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 is responsible for interviewing and hiring employees to fill client needs. (Tr. 337; ALJD at 2) 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; ALJD at 16)

### **3. Respondent Aim Royal's Hiring Practices**

Over the years, Aim Royal has relied on a variety of practices to hire insulators, including newspaper advertisements, cold-call/walk-in 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)

As a defense to the unfair labor practice allegations, Aim Royal asserted that it uses an established hiring practice which precludes the acceptance of walk-in/cold-call applications. (ALJD at 4) The ALJ relied upon this defense to find that Aim Royal was able to rebut the General Counsel's prima facie case, and show it would have refused to hire/consider Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel

Speakman, Chester McClure, Pablo Equizabal, and John Rohrback, regardless of their union affiliation. (ALJD at 10)

During the hearing, much conflicting testimony was presented about Aim Royal's actual hiring practices regarding walk-in applicants. 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.<sup>2</sup> (AR.1; GC. 7) This evidence contradicts Aim Royal's claim that its hiring practice precludes hiring walk-ins, and the signs posted outside its office saying no applications were being accepted. (ALJD at 4) It is also undisputed that, after July 2008, when Aim Royal was informed that one of these unsolicited applicants, Jose Gurrola, was actually a Union organizer who then engaged in a protected strike over the lack of company-provided water and dust masks, Aim Royal stopped its practice of hiring unsolicited applicants. (GC. 7, 12; Tr. 183-84; AR. 1) Instead, Aim Royal began ignoring applications from numerous open Union job 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; ALJD at 4) Tellingly, Campos testified that Aim Royal preferred these formerly fired 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.

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<sup>2</sup> AR. 1, completed by Respondent, 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 by Respondent during the underlying investigation in the summer of 2009; there is a blank next to Granados' name on that document. (Tr. 58-59; GC. 5) The ALJ credited Campos' hearing testimony that Torres was not a walk-in, but was referred by another employee (ALJD 5). However, the as set forth in Section II (F) infra., the ALJ erred in his finding.

In April 2008, Aim Royal signed a contract with Jacobson for temporary labor. (GC. 3; ALJD at 2, 4) 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; ALJD at 2) Although these temporary employees were “officially employed” by Jacobson, they really worked for Aim Royal. They were supervised directly by Aim Royal, worked at Aim Royal projects, and Aim Royal provided them the tools of the trade, such as staple guns, hard hats, and safety glasses. (Tr. 219-225; 341-42) Moreover, nobody from Jacobson actually knew what work assignments these employees performed in the field, on a day-to-day basis, for Aim Royal. (Tr. 341) Their hours of work, including overtime, 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. (Tr. 220-25) For example, in August 2008, Campos told Chavez to replace between 10 to 20 employees because he was dissatisfied with their work, which she promptly did. (Tr. 222-224) He has also dismissed Jacobson employees after only one or two hours of work because they were incapable of performing the job correctly. (Tr. 219-220) Campos hires temporary workers on his own, and usually does not tell Gibbs the names of the temporary employees he hires. (Tr. 38)

## **B. The Union’s Attempts to Organize Aim Royal**

### **1. 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 the spring of 2008, the Union launched an organizing drive, with

a detailed, written, organizing plan, whose goal was to have Aim Royal sign a contract and its employees become members of the Union. (Tr. 576-77; AR. 3; ALJD at 5) Jose Gurrola, an organizer for the International Union, led the organizing committee, which included Local Union Organizer Angel Aizu, Local Union Business Agent Dale Medley, and Local Union Business Manager Kevin Boylan. (Tr. 577, 601, 699, 863)

## **2. Gurrola Begins Work at Aim Royal**

After consulting with Aizu, on May 16, 2008, Gurrola applied for a job with Aim Royal as a covert union applicant, walking into their offices and asking for an application. (Tr. 577-78) Despite the sign outside the office indicating that Aim Royal was not accepting applications, Gurrola was given an application, which he completed, and was told he would hear something in a couple of days. (Tr. 54-56, 193-94, 579; GC. 11; ALJD at 5) A few days later, Gurrola received a call from Campos, who asked Gurrola some questions concerning his background and whether he was still unemployed; Campos told Gurrola to report to the Aim Royal Office to complete the rest of his 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) Gurrola was hired as a walk-in, despite the fact that he had not previously worked at Aim Royal, and was not referred by any current or former employee. (ALJD at 5)

After Gurrola was hired, the Union started 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; ALJD at. 5)

### 3. Gurrola's Concerns About Working Conditions and Strike

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 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; ALJD at 5)

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; ALJD at 6) 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; ALJD at 6) 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, Arizona, 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.<sup>3</sup> (Tr. 698)

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<sup>3</sup> The ALJ found that J. Campos told Gurrola that he had the Aim Royal water jug with him and would bring it to the jobsite later. (ALJD at 6) Gurrola denies the two discussed the water. As discussed in footnote 16, the ALJ erred in making this finding.

Gurrola drove to the Sacaton project, arriving at around 6:00 a.m. (Tr. 638; ALJD at 6) He unlocked the ladders and set everything up for the workday. (Tr. 641) As it was the middle of summer, in Phoenix, it was a hot day, and Gurrola was sweating and thirsty. (Tr. 641; ALJD at 5) He looked for the Aim Royal water jug, but it was not there; he also noticed that there were no dust masks available. (Tr. 582, 641; ALJD at 6) Gurrola then called Aizu, told him that he was going to strike because of these deficiencies, and asked that Aizu come to the Sacaton project to assist with the picketing and take pictures. (Tr. 582, 641, 649, 701-02; ALJD at 6) Gurrola went back to work, and when Aizu arrived, Gurrola put away his materials, got a piece of cardboard from the dumpster, and using a black marker from his tool belt, made a sign reading “Strike. Aim Royal Insulation.” (Tr. 582, 650, 702; GC. 31; ALJD at 6)

At 8:12 a.m., Gurrola called Campos and told him that he was on strike because there was no water or dust masks at the jobsite. (ALJD at 6) Gurrola stopped working and started picketing between 8:15 and 8:30 a.m. He went to the project entrance and started patrolling with Aizu until around 10:00 a.m. (Tr. 583; 640, 647-48, 660; GC. 31, 38-39) 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 his brother Lazaro Campos, telling him that he had the Aim Royal water jug with him in Mesa. (Tr. 843) At some point, Lazaro Campos then called Gibbs, informing him about the strike and telling him that Aim Royal did not, in fact, have water at the site for its employees that morning. (ALJD at 6)

#### **4. Gurrola's Post-Strike Meeting with Aim Royal**

On July 18, 2008, Gibbs sent Gurrola a letter about his strike, asserting that, had Gurrola asked, he would have been told that the water was going to be a half-hour late that day. The letter instructed Gurrola to contact Aim Royal by July 23 for assignment and that, if he did not, he faced termination. (GC. 14; ALJD at 6) This letter did not reach Gurrola until August, because it was sent to his father's address. (Tr. 587-88, 673-76)

On July 24, 2008, Gurrola went to Aim Royal's office with a list of demands. He asked that Aim Royal provide proper safety equipment and water to their employees at all jobsites, and said that he would end his strike and return to work if Aim Royal agreed to these demands. (Tr. 585, 668; ALJD at 6) When he tried to present this document, Aim Royal refused to accept it.<sup>4</sup> (Tr. 72) Instead, Gurrola was told that he was fired for going on strike. (Tr. 70; GC. 18; ALJD at 6) Gurrola replied that he was on strike, and would return to work only if Aim Royal provided proper safety equipment and water to all employees, at all jobsites. Gurrola was then asked to leave, and Gurrola asked for a raise on behalf of all employees, stating that he would be on an economic strike if Aim Royal refused. Gibbs then told Gurrola that he no longer worked for Aim Royal. About a week after this meeting, Gurrola and other Union members picketed various Aim Royal jobsites. (Tr. 589; GC. 33)

#### **C. Employees Apply for Work at Aim Royal**

##### **1. 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 they were not. However, despite the sign on the

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<sup>4</sup> Unless otherwise cited, the facts supporting this meeting at Aim Royal are also found in GC. 40 and GC. 41.

door that Aim Royal was not accepting applications, she gave Aizu an employment application along with 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 told Gurrola that he no longer worked for Aim Royal. (Tr. 257-59; ALJD at 7) 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.<sup>5</sup> (Tr. 591) When they arrived, Aizu gave his completed employment application to the secretary, who accepted it, and told him that she would give it to Campos. (Tr. 706) 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, and things were slow. Gurrola then told Herron that Aizu had submitted an application, Herron asked Aizu his name, and the two exchanged greetings. Aizu and Gurrola then left. (ALJD at 7)

Later that same day, Gurrola called Campos and made an unconditional offer to return to work, but Campos told him that Aim Royal was not hiring. (Tr. 595, GC. 42, 43; ALJD at 7) At hearing, the evidence demonstrated that this was not true. Aim Royal actually hired 12 insulators between May 27 and October 12, and even hired one person on May 27.<sup>6</sup> (AR. 1, GC. 6; ALJD at 4) In fact, Campos testified that, in July 2009 Aim Royal was in a "tight

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<sup>5</sup> Unless otherwise cited, the facts supporting this meeting at Aim Royal are also found in GC. 34 and GC. 35.

<sup>6</sup> The ALJ noted that nine people were hired from May 27 through August 10, and concluded that this was appropriate time period considered by the complaint allegations. (ALJD at 8) The ALJ's count does not include the one person hired in September, and the two hired in October. (GC. 6; AR. 1) For purposes of determining the number of job openings that existed at Aim Royal, Counsel for the General Counsel asserts that the relevant time period is from May 27, 2009, through October 2009. See, *Zarcon, Inc.*, 340 NLRB 1222, 1228-29 (2003) (appropriate job openings existed to support a refusal to hire violation, where the employer hired two and three months after the applicants applied for work).

situation” and needed to hire employees. (Tr. 995, 1012) Despite the need for workers, Campos never called any of the Union affiliated applicants for employment. (Tr. 595)

On June 1, and again on June 9, Aizu called Aim Royal’s office to check on his employment application. Both times he gave his name, and said that he had filled out a job application. Both times he was told that things were slow which, of course, was not true. (Tr. 708; ALJD at 7)

Gurrola and Aizu again returned to Aim Royal’s offices on July 7, where they had a conversation with Herron and Gibbs.<sup>7</sup> Gurrola asked if Aim Royal was hiring or accepting applications, but was told they were not, as 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 applications and had not been accepting them 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 was 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

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<sup>7</sup> Unless otherwise cited, the facts supporting this meeting are also found in GC. 36 and GC. 37. In his decision, the ALJ does not recount this meeting.

was “ineligible” for reemployment with Aim Royal because of his strike. (Tr. 163; ALJD at 9)

## **2. 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; ALJD at 7) 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.<sup>8</sup> (ALJD at 8) Gibbs admits that he received the applications, assumed that they came from the Union, and never considered hiring any of the applicants. (Tr. 85; ALJD at 7)

## **3. Luis Bolaños and Gustavo Gonzalez Apply for Work at Aim Royal Through Jacobson**

Luis Bolaños and Gustavo Gonzalez are both experienced insulators, Union members, and were out of work in mid-July 2009. (Tr. 462, 469, 488-90) On July 14, at Aizu’s request, both went to Jacobson’s office, arriving sometime between 11:00 a.m. and 11:30 a.m. (Tr. 366-67, 463, 475, 490, 507, 717; ALJD at 13) Both Bolaños and Gonzalez would have accepted work with Aim Royal if it was offered. (ALJD at 14)

Gonzalez arrived first. Chavez told him that she had an opening for insulation work and gave him an application. (Tr. 366-67) Chavez told Gonzalez that Aim Royal was hiring

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<sup>8</sup>See Tr. 484, 489, 512, 518, 526, 566, 570, 714-15, 943 (showing that each applicant knew that Aizu was submitting the applications to Aim Royal on his behalf); *Toering Electric Co.*, 351 NLRB 225, 233 n. 51 (2007) (fact that applications are submitted in a batch does not destroy the genuine applicant status if the submitter of the applications had the requisite authorization from the individual applicants).

four workers, but had already hired two.<sup>9</sup> (Tr. 480; ALJD at 13-14) As Gonzalez started filling out his application, Bolaños walked in. (Tr. 463, 492) Chavez told Bolaños that she was looking to hire two people to work as insulators. (Tr. 491; ALJD at 13-14) Bolaños finished his application first, walked back to Chavez’ office, and gave it to her. (Tr. 492) Chavez reviewed the document and told Bolaños that she wanted him for the job opening. (Tr. 492; GC. 23) Gonzalez then walked back to Chavez’ office and gave her his 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.<sup>10</sup> (GC. 29, 30) Instead, Campos’ phone records show that, during the morning of July 14, there were three calls between Campos and Chavez, all occurring while Bolaños and Gonzalez were in Chavez’ office, at 11:40, 11:49, and 11:53 a.m.<sup>11</sup> (ALJD at 14) During one of the calls, Chavez told Campos that she had applicants with insulation experience, and arranged for Gonzalez to have an interview with Aim Royal at 1:30 p.m. She then wrote “1:30” on Gonzalez’ application. (Tr. 471, 474, 494, GC. 22; ALJD at 14)

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<sup>9</sup> In fact, Aim Royal had already hired through Jacobson two workers, Imuris Garcia and Marcellino Trujillo, a few weeks earlier. (GC. 20)

<sup>10</sup> 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)

<sup>11</sup> These calls appear as call #600, #602, and #603 to telephone number 602-233-9300. (GC. 30) There was also a fourth call, occurring at 1:56 p.m., well after Bolaños and Gonzalez had left Chavez’ office. (GC. 30)

Chavez then received a call from Campos, asking her who had referred Bolaños and Gonzalez for work. (Tr. 464, 494, 497; ALJD at 14) Gonzalez replied “Angel,” but neither could remember his last name, so Gonzalez gave Chavez Aizu’s business card, which he had in his wallet. (Tr. 466, 494, 502, 507; GC. 25; ALJD at 14) Chavez wrote the word “Union” on both applications, and she then told Campos, over the phone, that it was Angel Aizu from the Union who referred them. (Tr. 494, 475, 502; GC. 22, GC. 23; ALJD at 14) After this call ended, Chavez told Bolaños and Gonzalez that Aim Royal was no longer interested in either one of them. (Tr. 467, 494, 496; ALJD at 14) Bolaños commented that maybe Aim Royal did not want them because they were with the Union. (Tr. 410-11, 500) Chavez said that she was upset because she had to look to find two more people for the job openings. (Tr. 500-01; ALJD at 14) Chavez told both that she would keep their applications on file, but she never contacted either of them again for a potential Aim Royal job. (Tr. 370)

#### **4. 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) Because he was applying covertly, he used his mother’s maiden name, Garcia.<sup>12</sup> (Tr. 742; GC. 24) Chavez gave him the application, told him that she was busy, and asked that he return the application the next day. (Tr. 721) Aizu completed the application and returned on July 15. (Tr. 721; ALJD at 16) When Aizu gave his completed 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 if he belonged to the Union. (Tr. 721; ALJD at 16) Aizu, who was trying to get employment as a covert union member (Tr. 742), replied that he did not, and asked if his union membership mattered. Chavez replied “no” and said that union members

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<sup>12</sup> Aizu official name is “Angel Aizu Garcia,” but he goes by Angel Aizu. He applied for work with Jacobson as “Angel A. Garcia.” (Tr. 699, 742; GC. 24)

had more experience. (Tr. 721; ALJD at 16) At some point, Chavez wrote “not with Union” on Aizu’s application. (GC. 24, p.2; ALJD at 16) Chavez also asked Aizu some questions about his background and experience, and told him to call her three times a week, but Aizu did not. (Tr. 721, 725; ALJD at 16)

Although Aizu did not call back, he did return July 31, with a group of about seven Union members, all of whom were wearing Union t-shirts. (Tr. 722, 383, 390-91) Chavez recognized Aizu. (Tr. 391) She asked him why he was filling out another application, since he had already completed one a few weeks earlier. (Tr. 391; ALJD at 16) 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.<sup>13</sup> (Tr. 232, 278, 722)

#### **5. Shawn McMillan Applied for Work at Jacobson and Aim Royal on His Own Accord**

Shawn McMillan had previously worked for Aim Royal as an insulator; he was laid off in April 2007, along with other employees, as part of a reduction in force, due to the completion of a project. (Tr. 90, 445; AR. 1; GC. 10) At the time, Gibbs told McMillan he was being laid off due to a work shortage, and would call if worked picked up. (Tr. 427) McMillan, who was upset about the layoff, told Gibbs to “lose my number.” (Tr. 427, 440; ALJD at 10-11) McMillan then became a Union member, and is a third-year apprentice. (Tr. 423, 449-50)

On June 30, Chavez spoke with McMillan’s friend, Imuris Garcia, who told her that McMillan was an insulator and looking for work. (Tr. 344) On July 1, Chavez telephoned McMillan, asked him if he had insulation experience and was looking for a job. (Tr. 344) McMillan replied that he was looking for work, but was unsure if he could work at Jacobson

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<sup>13</sup> 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).

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; ALJD at 12)

McMillan then called Chavez, renounced his connection with the Union, and again sought employment. (ALJD at 13). Because Aim Royal needed more workers, on July 14, Chavez called McMillan and asked him to come into the office to fill out some paperwork. (ALJD at 13). As he was completing the application paperwork, Chavez asked McMillan how his applying for a job 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 she needed his social security card. McMillan went home and returned with the card. (Tr. 429; ALJD at 13) After completing the application process, Chavez told McMillan to go home, and that Aim Royal would call him because there was an interview arranged for him at about 1:00 p.m. (ALJD at 13)

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 [McMillan]," and Campos then told her that he had already filled the positions.<sup>14</sup> (Tr. 404) Chavez then called McMillan and told him that Aim Royal had backed out and there was no work for him.<sup>15</sup> (ALJD at 13) Chavez admitted knowing that McMillan was affiliated with the Union by July 1. (Tr. 350) Chavez further admitted that she never again contacted McMillan for any other jobs that became available at Aim Royal. (Tr. 364, 405)

## **6. 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

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<sup>14</sup> At other times during her testimony, Chavez denied telling Campos McMillan's actual name. (Tr. 347, 405)

<sup>15</sup> McMillan's phone records show that he received this call from Chavez at 12:05 p.m. (GC. 28, p. 17, call from: 602-233-9300). See also footnote 10 supra, showing the Jacobson telephone numbers used by Chavez.

about job availability, but 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; ALJD at 10)

McMillan told Gibbs 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 Union member, and asked how it was going. (Tr. 426) McMillan replied that it wasn't "going," because he did not have any work, and 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 whether they needed additional workers. (Tr. 90; ALJD at 10) 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) Campos also testified that, when McMillan called him on July 15, Campos 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; ALJD at 10) It is undisputed that Aim Royal never considered McMillan for any of these openings. (Tr. 94, 236; ALJD at 10-11)

## **II. ARGUMENT**

### **A. The ALJ Erred in Refusing to Find that Respondent Aim Royal Violated the Act by Refusing to Recall Gurrola or Place Him on a Preferential Hiring List [Exception No. 1]**

The General Counsel alleged, and the ALJ found properly, that Gurrola engaged in a protected strike in July 2008 over safety issues, including Aim Royal's failure to provide

drinking water or dust masks to its employees.<sup>16</sup> (ALJD at 5-6, 9) It undisputed that Aim Royal fired Gurrola on July 24, 2008, because of the strike. (ALJD at 6) It is also undisputed that, at various times, starting in April 2009, Gurrola made unconditional offers to return to work, and that Aim Royal never recalled Gurrola nor placed him on a preferential recall list. (ALJD at 7)

The ALJ properly found that Aim Royal refused to hire, or consider for hire, Gurrola in violation of Section 8(a)(1) and (3). However, the ALJ dismissed the General Counsel's claim that, because Gurrola was an economic striker, Aim Royal had the obligation to reinstate Gurrola upon his unconditional offer to return to work, or place him on a preferential hiring list if no openings existed. In doing so, the ALJ found this allegation was time-barred, because no charge was filed within six months after Gurrola's July 24, 2008 termination. (ALJD at 7)

While it is true that no charge was filed over Gurrola's termination, a timely charge was filed over Aim Royal's refusal to reinstate Gurrola. (GC. 1(c)) Therefore, the ALJ's finding is contrary to the Board's holding in *Lee A. Consaul Co.*, 192 NLRB 1130 (1979),

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<sup>16</sup> Although the ALJ found that Gurrola engaged in a protected strike, he also specifically found that during their July 18 morning meeting, Joseph Campos told Gurrola that he would fill the water jug with water and bring it to the jobsite later that day. (ALJD at 6) The General Counsel has excepted to this finding because Respondent has argued that Gurrola's conduct was somehow not protected because he knew water would be brought to the site later in the day. See Exception No. 6. The record does not support the ALJ's finding because Gurrola, who was not discredited, testified that J. Campos did not say anything to him about a water jug on the day in question. (Tr. 698) Moreover, the record establishes that the evidence the ALJ relied upon, J. Campos' testimony, is insufficient to overcome Gurrola's unequivocal testimony. Specifically, 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 by the General Counsel how it was possible for him to 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)

enf. denied on other grounds 469 F.2d 84 (9th Cir. Oct 24, 1972), and the Board should find a violation as alleged.

In *Lee A. Consaul Co.*, a group of strikers were fired for striking, and later made unconditional offers to return to work. *Id.* at 1158-59. The terminations occurred outside the 10(b) period, but the offers to return to work were made within the 10(b) period. *Id.* at 1158. The *Lee A. Consaul* Board adopted, in full, the ALJ's analysis, which draws a distinction between employees who are discharged for non-strike related protected union activity and 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 category A employees, the *Lee A. Consaul* Board 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). Regarding employees in category B, 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, as for category C employees, the *Lee A. Consaul* Board found that they had the status, and rights, of employees in both categories:

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 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 Board adopted a theory that makes clear an employer cannot unilaterally extinguish the recall rights of striking employees by firing them after they engage in a work stoppage, because they had engaged in a strike.

Here, Gurrola is a category C employee as described in *Lee A. Consaul*. Therefore, even though his discharge occurred outside the 10(b) period, he still had the right to reinstatement upon his making an unconditional offer to return to work, which he did in April, May, and July, all within the 10(b) period.<sup>17</sup> Respondent refused to reinstate Gurrola or place him on a preferential rehire list, as was his right under *Laidlaw Corp.*, 171 NLRB 1366, 1368-69 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969). This refusal constituted “a distinct and distinguishable unfair labor practice” in violation of Section 8(a)(1) and (3), and the ALJ erred in refusing to find a violation.

The ALJ tried to distinguish *Lee A. Consaul*, by noting that in *Woodlawn Hospital*, 233 NLRB 782, 789 (1977), the Board found significant that, in *Lee A. Consaul*, there were “changed circumstances,” in that the parties had reached an agreement acknowledging the possibility of reinstatement for some of the strikers. (ALJD at 7) However, the *Lee A. Consaul* Board did not limit its decision in this manner. As to the discussion of “changed

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<sup>17</sup> Gurrola did not abandon interest in returning to work by waiting nine months after the end of his strike to make an unconditional offer to return to work. *Teledyne Industries, Inc.*, 298 NLRB 982, 985-86 (1990), *enfd.* 938 F.2d 627 (6th Cir. 1991) (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).

circumstances” and the parties’ acknowledgment of the possibility of reinstatement, the Board in *Lee A. Consaul* found that this constituted “another ground peculiar to the facts” supporting a violation, which was “*separate and distinct*” from the finding that the discharged workers still retained their reinstatement rights as strikers, and that the employer violated the Act by denying their reinstatement. *Id.* at 1159-60 (emphasis added). Moreover, the underlying logic of the analysis of *Lee A. Consaul* persists – that is, the right to reinstatement after a protected strike is a separate and distinct right accorded to employees under Board law, and employer should not be able to unilaterally terminate or limit that right by engaging in additional unfair labor practices. Accordingly, Counsel for the General Counsel asks that the Board find that Aim Royal violated Section 8(a)(1) and (3) of the Act by refusing to reinstate Gurrola upon his unconditional offer to return to work, and that this finding is not time barred by Section 10(b) of the Act.

**B. The ALJ Erred in Dismissing the Allegation that Aim Royal Violated the Act by Refusing to Hire or Consider for Hire Angel Aizu,<sup>1</sup> Luis Bolaños,<sup>2</sup> Ezequiel Macias,<sup>3</sup> Jose Flores,<sup>4</sup> Adrian Anaya,<sup>5</sup> Nathan Collison,<sup>6</sup> Darrel Speakman,<sup>7</sup> Chester McClure,<sup>8</sup> Pablo Equizabal, and John Rohrback [Exception No. 2]**

The ALJ properly found that Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback all genuinely sought employment at Aim Royal, had the necessary experience and skill to perform the work at Aim Royal, and that Aim Royal had concrete plans to hire, and did in fact hire workers, during the relevant period. (ALJD at 4, 8) He all also properly found that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083

(1980).<sup>18</sup> However, the ALJ erred in finding that Aim Royal was able to use its purported hiring practice, precluding applications from walk-in employees and instead relying upon former employees and workers recommended by current/former employees, as a shield against its unfair labor practices.

The clear preponderance of all relevant evidence shows that Aim Royal's purported hiring practice was a fiction concocted for the hearing. But even if such a neutral hiring practice existed, the evidence shows that Aim Royal applied this policy disparately, to screen out applicants it believed would try to organize its workforce. Accordingly, Counsel for the General Counsel asks the Board to find a violation as alleged.

**1. The ALJ Erred In Finding that Aim Royal Did Not Accept Walk-In Applications Based Solely on Gibbs' Testimony**

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence shows that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) enf'd. 188 F.2d 362 (3rd Cir. 1951). That is the case here. Although the ALJ properly discredited Gibbs throughout his decision, he erred in finding that Aim Royal did not accept walk-in applications based

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<sup>18</sup> While the ALJ only conducted a specific *Wright Line* analysis regarding Respondent's actions towards Aizu, the facts support a similar finding regarding the remaining nine other discriminatees, whose applications were faxed to Aim Royal on June 23, 2009. Each application had the word "organizer" written on the top, Gibbs knew from the content of these applications that they had come from the Union, and he admitted that Aim Royal never considered hiring any of these applicants. Whether these ALJ properly analyzed these discharges under *Wright Line*, 251 NLRB 1083 (1980), or *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000), is immaterial to these facts, as the *FES* framework is consistent with the allocation of burden of proof set forth in *Wright Line*. See *Air Management Services, Inc.*, 352 NLRB 1280, 1287 n. 10 (2008).

solely on Gibbs' testimony.<sup>19</sup> (ALJD 10) The clear preponderance of all relevant evidence shows that the ALJ erred in crediting Gibbs' testimony, as there is no credible evidence in the record that any such a hiring policy existed at Aim Royal. Instead, the record conclusively shows that Respondent manufactured this excuse in order to avoid hiring applicants who were interested in organizing its workforce.

a. Gibbs' Testimony About Aim Royal's Hiring Practices

Aim Royal has no written hiring policy. Instead, based upon Gibbs' testimony, the company claims that the reason none of the Union applicants were hired was because it maintained a hiring policy precluding walk-in applicants, and giving preference to former employees and those who were referred by current/former employees. However, Gibbs' testimony on this issue 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

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<sup>19</sup> As a witness, 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 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. (GC. 36, 37)

Similarly, Gibbs' testimony regarding Aizu's application for work with Aim Royal was also 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 had no direct knowledge of Aizu "showing up and asking or stating that he had an application in" for employment. (Tr. 183) Again, Gibbs' testimony is demonstrably false. On July 7, Aizu told Gibbs that "I put in my application too, I'm Angel OK," to which Gibbs replied "OK." (GC. 36, 37) Gibbs simply was not concerned about telling the truth, either during the taking of his affidavit or his testimony.

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)

Additionally, in his August 22, 2009 affidavit to the Board, Gibbs stated that Aim Royal has not accepted employment applications "for approximately two years" because they had been able to find "good workers through former employees who reapply or through referrals from existing employees." (Tr. 56) This statement was clearly false, aimed at avoiding the issuance of a complaint, as Aim Royal accepted unsolicited applications from Jose Gurrola in May 2008, and Armando Torres in June 2008, and hired both despite the fact neither had been recommended by anyone, nor had they previously worked at Aim Royal.<sup>20</sup> (AR. 1; GC. 7, 11) Aim Royal accepted their unsolicited applications, and hired both, despite Gibbs' testimony that, since August 2007, the company has had signs outside its office saying that Aim Royal is "currently not accepting applications." (Tr. 43, 193-94)

b. Aim Royal's Actual Hires During the Relevant Period

The record shows that, after Gurrola, Aizu, and the nine other voluntary Union organizers applied for employment with Aim Royal in the Spring and Summer of 2009, for the first time, Aim Royal started rehiring former employees who had been previously terminated for cause. Incredibly, Aim Royal preferred to hire employees it had previously fired for cause rather than hire the qualified union employees. Specifically, the record shows that, in June and July 2009, rather than hire any of the Union organizers, Aim Royal rehired Anthony Sandoval, Manuel Murrieta, William Loy, Mario Chavez, George Campos, and Jacob Ollarsaba, all of whom were previously fired for cause. (AR. 1; GC. 6) Sandoval was fired in February 2008, for not showing up to work. (Tr. 328) Murrieta was fired in May

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<sup>20</sup> As set forth in Section II (F) infra, the ALJ erred in finding that Torres was not a walk-in applicant.

2008, for not showing up to work, coming late, leaving early, and for other “deficient work performance.”<sup>21</sup> (Tr. 241; GC. 8) Loy was fired in July 2008, because of a drug problem. (Tr. 326-27) Mario Chavez was fired in October 2008, because he was lazy, and Aim Royal had received customer complaints about him. (Tr. 238; GC. 9) In fact, Gibbs testified that Chavez had caused Aim Royal a deep “loss of revenue” and “hurt to the company by his actions.” (Tr. 1037) George Campos was fired in December 2008, because he was not 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 Gurrola, Aizu, and the nine other volunteer 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.<sup>22</sup> (Tr. 243-45, 327, 329) This explanation is simply pretext. As found by the ALJ, Aim Royal never extended this same courtesy to former 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. (ALJD at 9, 11)

Accordingly, the clear preponderance of all relevant evidence shows that the ALJ erred in finding that, during the relevant period, Aim Royal had a hiring practice of not accepting walk-in applications for employment, based solely on Gibbs’ testimony. Instead, the record shows that Respondent manufactured this excuse in order to avoid hiring applicants who were interested in organizing its workforce.

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<sup>21</sup> After being rehired in July 2009, instead of the Union applicants, Murrieta was fired again for cause in October 2009. (Tr. 1022-23)

<sup>22</sup> During this time Campos even hired one employee, Anthony Hernandez, who never previously worked as an insulator. (GC. 10)

**2. Even if a Facially Neutral Hiring Practice Existed, it was Applied Disparately, to Discriminate Against Union Organizers**

If the Board finds that Aim Royal did, in fact, have a facially neutral hiring practice which precluded accepting applications from walk-in applicants, the record evidence shows that this policy was applied disparately, and to discriminate against the hiring of Union organizers. The record evidence shows that, since August 2007, the time period Gibbs claimed Aim Royal's preferential hiring practice started, Aim Royal did, in fact, hire walk-in applicants, in contravention of this policy. Moreover, Aim Royal also gave employment applications to walk-in applicants, and accepted applications from walk-in applicants, despite its supposed hiring policy.

Gibbs testified that Aim Royal's practice of not accepting employment applications started sometime in about August 2007. (Tr. 54-56, 193-94) However, the evidence shows that Aim Royal hired Jose Gurrola in May 2008, and Armando Torres in June 2008, as walk-in applicants, despite the fact neither were recommended by anyone, nor had they previously work at Aim Royal.<sup>23</sup> The ALJ erred by referring to these hires as "occasional and sporadic deviations insufficient to undermine the existence of the general practice." (ALJD at 10) Instead, this evidence supports a finding that Aim Royal's purported hiring practice is pretext. See *Norman King Electric*, 334 NLRB 154, 160 (2001) (hiring of two employees in contravention of employer's "no walk-in" hiring policy shows that policy was disparately applied and was evidence of antiunion animus in refusing to hire union supporters). Also supporting a finding of pretext is the fact that Aim Royal continued handing out, and accepting, employee applications to walk-in applicants. The evidence shows that, in April 2009, Aizu walked into Aim Royal's offices and was given an employment application

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<sup>23</sup> See Section II (F) *infra*, regarding Torres.

along with Campos' business card. (Tr. 705-06) In May 2009, Aizu returned to Aim Royal and his completed employment application, which was accepted by Aim Royal. (Tr. 706; ALJD at 7) When Aizu twice called the Aim Royal offices in June 2009, inquiring as to the status of his employment application, he was not told that Aim Royal's policy was only to hire former employees, or individuals referred from current/former employees. Instead, he was falsely told "things were slow," even though Aim Royal was hiring. (ALJD at 7) Also, Pablo Equizabal credibly testified that in June 2009, he took a completed employment application to Aim Royal and gave it to the secretary, who accepted it, and told him "we'll call you if we need people for work." (Tr. 530-31)

The fact that Aim Royal's purported hiring practice did not exist in written form, and was not consistently applied, is clear evidence of pretext. See *Planned Building Services*, 347 NLRB 670, 708 (2006) (the fact that putative policy is unwritten, and not strictly adhered to, lends support to a finding that it is pretextual); *Sioux City Foundry*, 241 NLRB 481, 484 (1979) (alleged policy relied upon to reject applicants who were strikers from other employers is pretext where, in part, "this policy was not written down anywhere"); *Norman King Electric*, 334 NLRB at 161 (the fact that no-walk in policy was unwritten supports a finding of pretext). "Unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination." *Dunning v. National Industries*, 720 F.Supp. 924, 931 (M.D. Ala. 1989). Such is the case here. Through June 2008, when there was no organizing drive, Aim Royal had no problem hiring walk-in applicants. However, since July 2008, once Aim Royal learned that walk-in applicant Jose Gurrola was, in fact, a Union organizer, no more walk-in applicants were hired. Despite its purported policy, Aim Royal still distributed, and accepted, unsolicited applications, in the event suitable non-union candidates could be found. When

Aim Royal could not find any suitable non-union candidates and found itself in a “tight situation” in July 2009, Aim Royal started rehiring former employees who had been previously fired for cause. It did so even though it had on file applications from Aizu, Bolaños, Macias, Flores, Anaya, Collison, Speakman, McClure, Equizabal, and Rohrback, all of whom were qualified union applicants.

Aim Royal’s counsel stated that, by using this purported system of hiring former employees, and referrals from current/former employees, Aim Royal was looking for “capable, honest, and hardworking” employees. (Tr. 16) It is difficult to imagine how hiring employees who were previously fired for drug use, laziness, causing loss of revenue, and failing to show up to work, are the type of “capable, honest, or hardworking” employees Aim Royal was looking for. Instead, the record shows that Aim Royal’s unwritten hiring practice, which was inconsistently applied, is evidence of anti-union animus. See *Fluor Daniel*, 333 NLRB 427, 432, 455 (2001), *enfd* 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 Aim Royal’s 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.

The ALJ erred by finding that Aim Royal’s purported hiring practice excused its failure to hire, or consider for hire, Aizu, Bolaños, Macias, Flores, Anaya, Collison, Speakman, McClure, Equizabal, and Rohrback. Instead, the clear preponderance of all relevant record evidence shows that no such hiring policy existed; and even if such a policy did exist, it was applied inconsistently and in a disparate manner, to screen out the hiring of

any suspected union organizers.<sup>24</sup> Accordingly, Counsel for the General Counsel asks the Board to find that Respondent violated Section 8(a)(1) and (3) by refusing to hire, or consider for hire, Aizu, Bolaños, Macias, Flores, Anaya, Collison, Speakman, McClure, Equizabal, and Rohrbach, because of their union status.

**C. The ALJ Erred in Refusing to Find that Respondents Aim Royal and Jacobson are Joint Employers and by Dismissing the Refusal to Hire and Consider for Hire Allegations Concerning Luis Bolaños, Gustavo Gonzalez, Shawn McMillan, and Angel Aizu [Exception No. 3]**

The ALJ properly found that Jacobson violated Section 8(a)(1) by interrogating employee applicants, and by telling them they had lost employment opportunities because of their support for the Union. (ALJD at 12, 15) However, the ALJ refused to find that Jacobson violated Section 8(a)(1) and (3) of the Act, as alleged by the General Counsel, when it refused to hire, or consider for hire, Luis Bolaños, Gustavo Gonzalez, Shawn McMillan, and Angel Aizu. Instead, relying solely upon a stipulation by counsel that Aim Royal and Jacobson are joint employers as to those employees assigned to work at Aim Royal, the ALJ found that “there is no evidence that Aim and Jacobson were joint employers during the prehire stage.” (ALJD at 16) These findings are wrong.

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183-185 (1941), the Supreme Court noted that discrimination in the hiring on the basis of union status is one of the chief obstructions to collective bargaining, a “dam to self-organization at the source of supply,” and that the removal of this obstruction was a driving force behind the enactment of the Act. Here, the ALJ’s refusal to find a violation, on the premise that Aim Royal and Jacobson are joint employers only after employees are hired, and not during the hiring process, allows

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<sup>24</sup> Since Aizu applied contemporaneously with Gurrola, a former employee who introduced Aizu to Aim Royal management, Aim Royal cannot explain why it did not consider Aizu for hire as a referral. (Tr. 34-37, 995) Certainly a referral from Gurrola, a former employee, would fall into Aim Royal’s purported hiring preferences.

employers to rebuild the “dam to self-organization,” through the use of staffing agencies. The ALJ’s ruling allows recalcitrant employers and staffing agencies, as their willing accomplices, to use each other as sieves and shields, to filter out union applicants, and then serve as buffers against unfair labor practices.

Most troubling, however, is the fact that the ALJ relied only upon the stipulation by counsel for his findings, ignoring other direct and specific evidence introduced by the General Counsel during the hearing showing that Aim Royal and Jacobson are, in fact, joint employers. Accordingly, the ALJ’s findings are erroneous, must be overturned, and Counsel for the General Counsel asks that the Board find the violations as alleged.

**1. Aim Royal and Jacobson are Joint Employers**

The Board and the courts will find two employers are “joint employers” when they “exert significant control over the same employees -- where from 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). To establish this relationship, there must be evidence that one employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer’s employees. *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007). The question of joint employer status turns on the facts of each particular case. *Id.*

Here, the evidence presented at hearing supports a finding that Aim Royal and Jacobson are joint employers. The record shows that while Jacobson pays the employees directly and provides their benefits, such as insurance and workers compensation. Jacobson does not hire any employees without Aim Royal’s explicit approval. (Tr. 341 – 342; ALJD at

2) Jacobson employees are supervised directly by Aim Royal, and are provided their work tools by Aim Royal. (Tr. 219–225, 341–342) Jacobson has no knowledge of the actual work these employees perform in the field on a day-to-day basis. (Tr. 341) Aim Royal sets the employees’ work hours, including overtime. (Tr. 220–225) Aim Royal can issue employees sent by Jacobson disciplinary warnings, can cause the Jacobson employees to be fired, and has sent incompetent employees home after only one or two hours of work. (Tr. 220–225) Under these circumstances, there is little question as to joint employer status. *Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 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).

Although the General Counsel did enter into the stipulation noted by the ALJ, the General Counsel also presented the above direct evidence regarding Aim Royal’s and Jacobson’s joint employer status. The ALJ erred by ignoring this evidence, and instead relying solely upon the stipulation. Accordingly, the General Counsel asks that the Board find that Aim Royal and Jacobson are joint employers at all times, including during the interview and hiring process.

## **2. The Unlawful Refusal to Hire or Consider for Hire**

To establish a discriminatory refusal to hire violation in the salting context, the General Counsel must show: (1) the applicant’s actual interest in employment; (2) that the employer was hiring or had concrete plans to hire; (3) that the applicants had requisite experience or training; and (4) that antiunion animus contributed to the decision to not hire the applicants. See *Air Management Services, Inc.*, 352 NLRB 1280, 1287 (2008), citing *FES (A*

*Division of Thermo Power*), 331 NLRB 9, 12 (2000). The burden then shifts to the employer to show that none of the applicants would have been hired regardless of their union activity. Id.

Here, the record demonstrates that McMillan, Bolaños, Gonzalez, and Aizu all sought employment at Aim Royal, through Jacobson; Chavez interviewed them, indicated an interest in hiring them, and scheduled an initial interview for McMillan and Gonzalez.<sup>25</sup> Chavez also tracked her belief as to whether Bolaños, Gonzalez, and Aizu were union members, noting this on their applications. (ALJD at 15-16; GC. 22, 23, 24) The ALJ properly found that all of the applicants genuinely sought employment with Aim Royal and/or Jacobson, and all had the necessary skills to perform work at Aim Royal and/or Jacobson. (ALJD at 8) None of these applicants, however, was ever hired.

a. Jacobson was Hiring, and Anti-Union Animus was Apparent

There is no question that Jacobson was hiring, and had plans to hire, employees to work for Aim Royal when McMillan, Bolaños, and Gonzalez applied for work on July 14. (ALJD at 13-14) (noting Chavez told both Bolaños and Gonzalez they were going to hire two more workers) The record evidence also shows that Jacobson hired employees to work at Aim Royal in August and October, well after Aizu had applied, but that none of the Union applicants were ever contacted or considered 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.

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

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<sup>25</sup> The record does not support a finding that Shawn McMillan was a salt as he applied for work on his own accord.

includes Chavez's questioning about their union status, and the associated 8(a)(1) violations found by the ALJ (ALJD at 12, 15); Chavez noting her conclusions as to their union status on three of the applications (ALJD at 14-15, 16); Chavez' abrupt cancellation of the earlier scheduled interviews for Gonzalez and McMillan after speaking with Aim Royal (ALJD at 13, 14); and the discredited testimony by both Chavez and Campos, who could not explain why it took them three telephone calls on July 14, within a span of 15 minutes, for Campos to tell Chavez that he no longer needed any more workers. (ALJD at 15) See *Galicks, Inc*, 354 NLRB No. 39 slip op. at 4 (2009) (unlawful motivation may be inferred from circumstantial evidence, including timing). Accordingly, the General Counsel has established a prima facie case of a violation, and Jacobson cannot show that it would not have hired these applicants absent their Union status.

b. Jacobson, as a Staffing Agency, is Liable for the Refusal to Hire

In *Capitol-EMI Music*, 311 NLRB 997, 1000 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994), the Board held that, in a joint employer relationship, where one employer supplies employees to the other, both employers will be liable for the unlawful discrimination when: (1) the non-acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons; and (2) the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it. Cf. EEOC NOTICE No. 915.002, Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, COMPLIANCE MANUAL VOLUME 2, SECTION 605 (DEC. 3, 1997) (Discriminatory Assignment Practices) (staffing firm liable if it sets discriminatory criteria for assigning workers or providing job referrals, and it is no defense for a staffing firm to claim that its discriminatory assignment practices were based on

standards set by the client company).<sup>26</sup> To prove a violation, 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 in the jointly managed work force. *Capitol-EMI Music*, 311 NLRB at 1000. The burden then shifts to the employer who seeks to escape liability 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.*

As described above, the record shows that Aim Royal and Jacobson are joint employers, and that McMillan, Bolaños, Gonzalez, and Aizu were neither hired, nor considered for hire, because of their Union status. Accordingly, the burden shifts to Jacobson to show that it neither knew, nor should have known, of the reason for Aim Royal's action, or that if it knew, it took all reasonable measures within its power to resist the unlawful action. *Id.* Jacobson cannot meet this 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 specifically screened out union supporters by failing to refer them to any other employer. The ALJ properly discredited Chavez' claim that she kept track of the union status of applicants because she thought it was a "good thing," indicating that employees have more experience. (ALJD at 15) Indeed, this claim is belied by the fact that she never contacted any of the Union members for openings at Aim Royal, or anywhere else, after July 14, despite Jacobson's policy to keep applications on file for six months, and to refer to these applications when openings occur.

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<sup>26</sup> Available at: <http://www.eeoc.gov/policy/docs/conting.html>.

Accordingly, Counsel for the General Counsel asks that the Board find that Jacobson violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire Bolaños, Gonzalez, McMillan, and Aizu, as alleged.

**D. The ALJ Erred in not Finding That Jacobson Failed to Hire or to Consider McMillan for a Job on July 2009 [Exception No. 4]**

On July 1, Chavez telephoned McMillan and asked him if he had insulation experience and was looking for a job. McMillan replied that he was looking for work, but was unsure if he could work at Jacobson because of his union status. (Tr. 432) Upon hearing this, Chavez cut off the conversation, told McMillan that she could not use him because he was part of the Union, and hung up. The ALJ properly found that Chavez' statement constituted an 8(a)(1) violation, but erred in refusing to find that Jacobson refused to hire, or consider him for hire on this date, concluding that McMillan did not apply for a job. (ALJD at 12)

The problem with the ALJ's analysis is that McMillan did not have an opportunity to further explore his employment options with Jacobson, because Chavez immediately terminated the conversation once she found out that McMillan was associated with the Union. By excluding McMillan from the hiring process because of his Union status, Jacobson violated Section 8(a)(1) and (3). See *Fluor Daniel*, 333 NLRB 427, 438, 449 (2001) (employer violated Section 8(a)(3) by refusing to allow applicants to apply for employment because of their union affiliation).

**E. The ALJ Erred in Failing to Find That Aim Royal Violated Section 8(a)(1) by Telling Gurrola That he no Longer Worked at Aim Royal When Gurrola was Making an Unconditional Offer to Return to Work [Exception No. 5]**

Gurrola called Campos in April 2009, to unconditionally offer to return to work.

Campos, Aim Royal's highest-ranking field official, told him that he no longer worked for the company. (ALJD at 7) The General Counsel alleged that Campos' statement violated Section 8(a)(1), because Gurrola was still an employee of Aim Royal, even though he was on strike. The ALJ refused to find a violation, because Campos' statement was unrelated to any activity protected by Section 7, and because Aim Royal had terminated Gurrola.

As set forth in Section II (A) above, Gurrola still retained rights to his reinstatement, despite having been previously terminated for engaging in a strike. Therefore, Gurrola's unconditional offer to return to work in April 2009, which prompted Campos' statement that Gurrola no longer worked at Aim Royal, was most certainly connected to a protected Section 7 right, namely, Gurrola's right to be reinstated pursuant to *Laidlaw*. Accordingly, the ALJ erred in not finding a violation. See *H.B. Zachry Co.*, 319 N.L.R.B. 967, 969 (1995) (unlawful threat where employer's statement connected employee's union activity with discharge by saying "I terminated you yesterday. Your organizing days is [sic] over, boy"), enforced in part sub nom. *Int'l Bhd. of Boilermakers v. NLRB*, 127 F.3d 1300 (11th Cir.1997).

**F. The ALJ Erred in Crediting Campos' Testimony that Armando Lopez was not a Walk-in Hire, but a Referral [Exception No. 7]**

The ALJ credited the hearing testimony of Campos that employee Armando Torres, hired on June 30, 2008, was recommended for hire by Aim Royal employee Juan Torres, and was not a walk-in applicant. (ALJD at 5; AR. 1; GC. 7) This finding is contradicted by the

clear preponderance of all the relevant evidence, which instead shows that Torres was a walk-in hire.

During the underlying investigation, Aim Royal produced records showing the names of employees, their hire dates, and whether the employee was a walk-in applicant, a former employee, or recommended by a current/former employee. (GC. 7) These records, which were produced sometime between the filing of the initial charge (July 2009) and the issuance of the Complaint (October 2009), unequivocally show that that Armando Torres was a walk-in applicant, hired on August 22, 2008. (GC. 1(a), 1(g), 7, p.2 # 24) Gibbs testified about his preparation of GC. 7 and specifically stated that he discussed with Campos who should be designated as “walk-in” hires in GC. 7.

Also, a week before the hearing started in February 2010, Respondent created a document showing similar information, and introduced the document into evidence. (AR. 1) This document 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 the document with the help of his secretary, and both he and Campos reviewed the document for accuracy, Campos doing so with counsel present. (Tr. 126-28, 320-21) This document also shows Armando Torres as a walk-in applicant. (AR. 1, p. 3) It was only during the hearing, after Gibbs’ poor and discredited testimony, that Campos inexplicably “remembered” that Torres was not a walk-in hire. The record is devoid of any explanation supporting this about face.

The ALJ erred in crediting Campos’ claim. “In assessing the credibility of witnesses, it is always helpful to have documentary evidence as a guide.” The documentary evidence here does not support Campos’ late change in memory. *Celtic General Contractors, Inc.*, 341 NLRB 862, 875 (2004) (ALJ discredits testimony where the documentary evidence does not

support the testimony of respondent's witnesses). All the documents created by Aim Royal, with the help of Campos, clearly show that Torres was a walk-in applicant. Moreover, GC. 7 was created many months before Campos' testimony, during the investigation of the charge, and at a time closer to the events in question. Doubtless, Campos' recollection as to whether Torres was a walk-in applicant was better when he helped create GC. 7, than during his hearing testimony many months later. *Id.* at 872 (worker's recollection about matters made during testimony closer in time to the events was better than his recollection made during a later hearing); *Best Western Motor Inn*, 281 NLRB 203, 206 (1986) (affidavit given at a time closer to the events in question is found to be more credible than denials made by witnesses at hearing).

Accordingly, the clear preponderance of all relevant evidence shows that the ALJ erred in crediting Campos' late-claim that Torres was referred by a current Aim Royal employee. Instead, the evidence shows that Torres was a walk-in applicant, and the Counsel for the General Counsel asks that the Board so find.

**G. The ALJ Erred by not Ordering Interest to be Compounded on a Quarterly Basis [Exception No. 8]**

In determining make whole relief for the discriminatees, the General Counsel asserts that the ALJ erred in failing to order that interest on backpay be compounded on a quarterly basis. Only the compounding of interest can make adjudged discriminatees fully whole for their losses. IRS practice, along with precedent from other areas of law, provide ample legal authority for assessing compound interest to remedy unfair labor practices.<sup>27</sup> See, 26 U.S.C. § 6622(a) (as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had

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<sup>27</sup> When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to access 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.

mandated that the IRS compound interest on the overpayment and underpayment of taxes); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) (compound interest appropriate in Title VII case); *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at \*14 (DOL Admin. Rev. Bd. May 17, 2000) (involving whistleblower protection under Energy Reorganization Act of 1974), revd. on other grounds sub nom. *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002) (Department of Labor Administrative Review Board adopts policy of compounding interest on backpay awards); *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). Indeed, the trend in recent years has been increasingly towards remedies that include compound interest, and the Act will soon be an anomaly if the Board continues with its current practice.

Accordingly, Counsel for the General Counsel asks 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 1173 (1987). Because the short-term Federal rate is updated on a quarterly basis, it would make administrative sense to also compound interest on the same basis. *Id.* at 1173-74. 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.

**H. The Board Should Make Technical Corrections to the ALJD  
[Exception No. 9]**

The Board should make certain technical corrections to the ALJD. Specifically, Paragraph 2(a) of the Order, relating to Respondent Jacobson and found on page 20 of the ALJD, inadvertently states “Respondent Aim” instead of “Respondent Jacobson.” Also, the ALJD misspells Counsel for the General Counsel’s last name. Accordingly, Counsel for the General Counsel asks that Paragraph 2(a) of the Order, as found on page 20 of the ALJD, be corrected, along with the spelling of Counsel for the General Counsel’s last name.

**III. CONCLUSION**

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board reverse the ALJ’s erroneous rulings as set forth above, and find that Respondent committed additional violations of Section 8(a)(1) and (3) of the Act as delineated herein, and to further Order that interest should be compounded on a quarterly basis.

Dated at Phoenix, Arizona, this 18<sup>th</sup> day of June 2010.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in AIM ROYAL INSULATION, INC. and JACOBSON STAFFING, L.C., Joint Employers, Cases 28-CA-22605 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 18<sup>th</sup> day of June 2010, on the following:

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

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