JD(SF)–17–10
(Phoenix, Arizona)

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

John Giannopolis, Esq., for the General Counsel.

Gerald Barrett, Esq., (Ward, Keenan, & Barrett, P.C.)
of Phoenix, Arizona, for the Union.

Thomas M. Rogers and *Kristin M. Mackin, Esqs.*
(LaSota & Peters PLC) of Phoenix, Arizona,
for Respondent AIM.

Kevin J. Kinney, Esq., (Krukowski & Costello, S.C.)
of Milwaukee, Wisconsin, for Respondent Jacobson.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Phoenix, Arizona, on February 8-12 and February 17, 2010. The charges and amended charge were filed by the International Association of Heat & Frost Insulators & Allied Workers, AFL-CIO, Local No. 73 (herein the Union) on July 17, September 28, and October 30, 2009[1] and the order consolidating cases, consolidated complaint and notice of hearing (herein the complaint) was issued October 30. The complaint alleges that Aim Royal Insulation, Inc. (herein Aim) and Jacobson Staffing, L.C. (herein Jacobson) are joint employers and, as clarified by the General Counsel, alleges that Aim violated Section 8(a)(1) by interrogating employees concerning their union activities and creating the impression that those activities were under surveillance and violated Section 8(a)(3) and (1) by failing to reinstate striking employee Jose Gurrola to his former position or to a substantially equivalent position and failing to consider for hire or hiring Gurrola, Angel Aizu, Shawn McMillan and nine other named employee-applicants. The complaint also alleges that Aim maintained several provisions in its employee handbook that required employees to obtain permission before leaving a jobsite before the designated quitting

[1] All dates are in 2009 unless otherwise indicated.

time and indicated that leaving the jobsite without the requisite permission may be lead to automatic termination. The complaint alleges that Jacobson violated Section 8(a)(1) by threatening employee-applicants with loss of employment opportunities because of their union activities and interrogating employee-applicants concerning those activities, and violated Section 8(a)(3) and (1) by failing to consider for hire or hiring Shawn McMillan, Luis Bolaños, Gustavo Gonzalez, and Aizu. Aim and Jacobson filed timely answers that, as clarified at hearing, admitted the allegations in the complaint concerning filing and service of the charges, jurisdiction, labor organization status, joint employer status as it pertains to employees referred by Jacobson to Aim, and relevant agency status; both denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel[2], Aim and Jacobson, I make the following

Findings of Fact

I. Jurisdiction

Aim, a corporation, is engaged in the business of construction and repair of commercial insulation systems out of its facility in Phoenix, Arizona, where it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Arizona. Aim admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Jacobson, a corporation, is engaged in the operation of an employment agency, including providing "temporary to permanent" labor, with facilities in several States including an office located in Phoenix, Arizona, where it annually provides services to enterprises located within the State of Arizona, including Aim, which in turn are engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. Jacobson admits and I find that that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Aim and Jacobson admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

A. Background

Michael J. Gibbs is owner and president of Aim and Jeff Herron is vice president and part owner. Lazaro Campos is Aim's superintendent; he is in charge of the daily operations and made decisions concerning hiring of insulators subject to Gibbs' final approval. During the relevant time period Aim employed about 15 -20 full time insulators.

Sandy Chavez is Jacobson's account manager and its only employee at its Phoenix office. She is responsible for recruiting, interviewing and hiring employees to satisfy the needs of its clients. Since 2008 Aim and Jacobson have been parties to a contract that provides that Aim will use the services of Jacobson for temporary and temporary to permanent employees at Aim's Phoenix location. Under this contract Aim pays Jacobson an hourly rate for each employee used by Aim. Jacobson, in turn, pays and provides benefits to the employees.

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[2] I grant the General Counsel's unopposed motion to correct transcript that is attached to his brief.

Lazaro Campos notifies Chavez when Aim is looking to employ additional temporary workers. Chavez then initially interviews applicants to determine whether they would satisfy Aim's needs and then sends them to Aim. Campos then also interviews the applicants and decides whether or not to hire them. Aim and Jacobson admit that they are joint employers of the employees referred by Jacobson and used by Aim.

B. Aim's Employee Handbook

Aim's Employee Handbook contains the following provisions:

> Employees shall not leave the project other than at designated quitting times, unless authorization is obtained from the foreman or supervisor.
>
> 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.
>
> Leaving Job Site. Any employee leaving the job site without the approval of the office or the supervisor may be automatically terminated.

Employees sign a form indicating that they have read and understood the Employee Handbook and that failure to abide by its rules could result in termination.

Analysis

Aim's employee handbook forbids employees from leaving the jobsite without permission and provides that employees who do so without permission may be automatically terminated. The General Counsel contends that these rules impinge upon the right of employee to strike, a right that does not require an employer's permission. In *Labor Ready, Inc.,* 331 NLRB 1656, n.2 (2000), the Board held that a rule that forbids employees from walking off a job under penalty of discharge violated Section 8(a)(1). More recently, in *Crowne Plaza Hotel,* 352 NLRB 382, 386-87 (2008), the Board held that work rules that forbid employees from leaving their work area without authorization before completion of their shift and from walking off the job violated Section 8(a)(1). The Board reasoned that:

> {T}hese rules unlawfully overbroad because an employee would reasonably read these rules as, respectively, requiring management's permission before engaging in such protected concerted activity, thereby allowing management to abrogate the Section 7 right to engage in such activity, or altogether prohibiting employees from exercising their Section 7 right to engage in such protected concerted activities.

Id. (footnotes omitted). Applying this case law, it follows that Aim's rules forbidding employees from leaving the jobsite without permission under penalty of termination likewise impinge upon employees' rights under Section 7 to concertedly engage in a work stoppage. In its brief Aim cites *Bechtel Power Corp.,* 239 NLRB 1139 (1979). That case is inapposite because it dealt with a situation involving raising complaints on company time. By maintaining work rules that prohibit employees from leaving the work area or jobsite without permission, Aim violated Section 8(a)(1).

8(a)(1) RULES

C. Aim's Hiring Practices

Regarding hiring of insulators, Aim's general practice is not to accept applications for employment from persons who walk in its office. To this end Aim has signs posted both on a window and on a door at its facility indicating that it is not accepting applications. Instead, Aim relies on rehiring former employees, including those fired for cause, and recommendations from current employees and supervisors to fill its hiring needs. Applications for these persons are then completed after the hiring process is started. In addition, Aim began using Jacobson's services to find insulators to work temporarily for Aim.

Aim hired the following insulators beginning May 27; this date is important because, as explained below, beginning on that date and continuing through July a number of union applicants sought employment with Aim:

1. Manuel Murrieta - July 17 (previously employed by AIM).
2. Mario Chavez – July 8 (previously employed by AIM).
3. Anthony Sandoval – June 10 (previously worked for AIM).
4. Luis Jaime – July 15
5. George Campos – June 16 (previously employed by AIM).
6. Sean Herron – May 27
7. Jacob Ollarsava – July 24
8. William Loy – June 26 (previously employed by AIM).
9. Victor Hernandez – August 10

Aim's workload was increasing substantially in July and employees were working a lot of overtime. Lazaro Campos found it necessary to perform insulation work himself; this was unusual.

Number 1 above, Murietta, was rehired after he had been fired for cause when he did not appear for work; Murrieta otherwise was a good worker. Murrieta filed a claim for unemployment insurance with the State of Arizona and Aim indicated that Murrieta had been fired on May 19, 2008 for:

> [C]onsistently being late to work, leaving work early and deficient work performance. He was warned in writing two times before he was fired. After we fired him he joined Asbestos Workers Union (Local 73) and has been employed with other insulation contractors since. For these reasons we protest this claim.

In fact, Aim lost the customer on which Murrieta had been working. Before Murietta was rehired he told Lazaro Campos "bad things" about the Union. Number 2 above, Chavez, was also rehired after having been fired for cause. Aim's records indicate the Chavez was fired on October 24, 2008, for:

> To[o} many customer complaints & employee complaints. Would not do as told, he would not order material accordingly was always running out of material & was not working when his title is workin[g] foreman.

Lazaro Campos also knew that Chavez had been in the Union before Aim rehired him, but he too complained to Campos about the Union before Aim agreed to rehire him. Number 3, Sandoval, has previously been fired by Aim because he was failing to show up for work. Number 4, Jaime, was recommended for employment by employee Murietta. Number 5, George Campos, is the brother of Lazaro Campos, Aim's superintendent. George Campos had

been fired earlier by Lazaro because George was not sufficiently productive. Number 6, Sean Herron, is Jeff Herron's son and Gibbs' grandson and works during the summer when he is not in school. He worked in the warehouse where, among other things, he helped with prefab work that it typically part on work performed by insulators. Employee Joseph Campos, recommended number 7, Ollarsava, for employment. Loy, number 8, had earlier been terminated by Aim after Lazaro Campos discovered that Loy did not appear at a jobsite as scheduled. Lazaro Campos recommended number 9, Hernandez, for employment.

Armando Torres was originally listed by Aim as a "walk-in" but Lazaro Campos credibly explained that this was an error and instead Torres was recommended for hire by employee Juan Torres.

D. Organizing Effort

The Union had a detailed, written organizing plan for Aim. The goal, unsurprisingly, was to get Aim to sign a contract. The plan included the use of "salts" and "peppers" and described efforts to get the 30 per cent of employees to sign authorization cards that are needed to trigger an NLRB election. The plan included the following:

> If we don't have enough support to win an election we should file Unfair Labor Practice's to buy time to gain support.

Dale Medley, a business agent for the Union, credibly testified that this meant the Union would file charges only when there was evidence to support them. In fact, apart from the charges involved in this proceeding, the Union filed one other charge. That charge was filed on June 27, 2008, and withdrawn on July 8, 2008. Aim contended at trial and argues in its brief that the Union's organizing plan served to remove the Union organizing activity, in particular that of Jose Gurrola described below, from the protection of the Act. However, I have examined plan and find nothing in it worthy of mention that supports such a conclusion. Also, I reject Aim's assertion that I should draw an adverse inference from the Union's alleged failure to produce certain minutes that Aim had subpoenaed. Although there was some initial lack of clarity in the Union's response, the matter was finally resolved to my satisfaction and I conclude that the Union has provided Aim with all the requested documents.

Jose Gurrola is an organizer for the International Association of Heat and Frost Insulators and Allied Workers Union; he has also worked as an insulator. He was assigned to seek work at Aim and then organize its employees. On May 16, 2008, Gurrola went to Aim's office and asked for, was given, and completed an application for employment. This is notwithstanding the sign posted by Aim indicating that it was not accepting employment applications. After speaking with Lazaro Campos by telephone Gurrola was hired. At that time he was neither a former employee nor was he referred for employment by any Aim employee thereby contradicting Aim's general hiring practice. Campos did not know that Gurrola was an organizer for the Union at the time he hired Gurrola. In mid June 2008 Gurrola began wearing union "paraphernalia" at work. On July 2, 2008, the Union notified Aim by letter that Gurrola had signed an authorization card and would be soliciting other employees to do so also. At times during 2008 the Union distributed handbills to employees criticizing Aim's employment policies and encouraging employees to join the Union.

Gurrola and the Union planned that Gurrola would go on strike at some point. Gurrola observed that at times Aim did not provide water for its employees at jobsites where they were working; he discussed this issue with other employees. Remember that these jobsites are in the Phoenix area and that this occurred during the summer. On July 17, 2008, the employees

working for Aim at the Gila River Indian Project, including Gurrola, ran out of water. There were other contractors working on the site and these contractors provided water for their employees. These contractors would certainly allow a thirsty employee from another contractor to have some water if the employee's own employer had failed to provide water, but it was understood that each contractor should supply water for its own employees. On July 18 Gurrola met Joseph Campos, the lead person for Aim at the Gila River Indian Project, at Aim's office before starting work. Gurrola picked up some keys to the project because Campos was going to be late arriving at the project. Joseph Campos told Gurrola that he would fill the jug with water and bring it to the jobsite later. When Gurrola arrived at the project at around 6 a.m. it was hot outside and of course Aim had still not placed water on the jobsite for its employees; Gurrola was also unable to find any dust masks. He called Angel Aizu, organizer for the Union, reported these observations to him, and indicated that this would be the day he went on strike. They had previously planned that when Gurrola went on strike Aizu would come to assist Gurrola. Gurrola then also called Lazaro Campos at about 8:12 a.m. and told him he was on strike because there was no water and no dust masks at the site. Campos then called Gibbs and informed Gibbs of the matter and indicated that Aim did not, in fact, have water at the site for its employees that morning. Gurrola stopped work and began his strike. He and Aizu picketed outside the jobsite with signs reading "Strike. AIM Royal Insulation."

On July 18, 2008, Gibbs sent Gurrola a letter regarding the work stoppage that read:

> It has come to my attention that you informed the labor superintendent that you were going on strike because of your allegation that Aim Royal Insulation would not provide you with drinking water at the jobsite. This is not a true statement. Drinking water has been provided on site for you. Had you asked the superintendent he would have advised you that the foreman that brings the water was going to be a half hour late today. This is your notice that you must contact the superintendent for assignment for Monday, July 23, 2008. If you do not it may be grounds for dismissal from Aim Royal Insulation.

Aim terminated Gurrola on July 24, 2008. That same day, July 24, Gurrola went to Aim's office with a handwritten note that read "Aim Royal Insulation will provide proper safety equipment and will also provide water to all their employees to all jobsites being performed." Gurrola announced that he would end his strike and return to work if Aim agreed to those demands. Aim refused to accept the handwritten note. Instead, Gurrola was told that he had been terminated. Gurrola made a recording of the conversations, and from the transcript of the recording it is clear that the reason Gurrola was fired was because he went and remained on strike. Indeed, according to notes made by Gibbs shortly after this event:

Gurrola fired b/c he went on and remained on strike

> [I] said that his actions on the job and the fact that he did not contact Lazaro [Campos] for placement for employment was (sic) considered abandonment of his position at this company. He said he didn't quit and that we were firing him for union activities. He was told that the union did not matter to us but that we cannot allow employee to arbitrarily walk of[f] jobs and jeopardize relationships with contractors or employees.

Gurrola then explained to Gibbs that he was on an economic strike for the benefit on Aim's employees over the issues of lack of water and masks at the jobsite.

As part of the organizing effort, in 2009 the Union sent letters to governmental agencies concerning Aim.

E. Complaint Allegations against Aim

In April 2009 Gurrola called Aim and spoke with Lazaro Campos, Gurrola unconditionally offered to return to work, but Campos told Gurrola that he no longer worked for Aim. As noted above, Aim hired a number of insulators over the period of time beginning May 27 through August 10. On May 27, 2009, Gurrola and Aizu went to Aim's office; Gurrola made a tape recording of the conversation that occurred. Gurrola asked for work so he could end his strike and return to work unconditionally. Aizu also sought employment and left an employment application. They were told that things were slow and no work was available. Aizu credibly testified that he would have accepted employment if it were offered. That same day Gurrola contacted Lazaro Campos by telephone and made an unconditional offer to return to work. On June 1 and June 9 Aizu called Aim's office and indicated that he had left an employment application and asked if Aim was hiring; in both instances he was told that things were slow.

On June 23 the Union faxed applications for employment for Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal and John Rohrback to Aim. Earlier, on June 12 Speakman, a member of the Union, filled out an application for Aim after a layoff and being informed that he would be out of work for quite a while. He received the application from Aizu who informed him that he would send it Aim upon completion. Aizu placed the word "organizer" on the top of the application as well as on the remaining eight applications. Bolaños likewise filled out an application for Aim at Aizu's urging. Aizu told him that he would send the application to Aim. Bolaños, who was unemployed at the time he filled out the application, credibly testified that he would accepted employment there if it had been offered. Jose Flores, Adrian Anaya, John Rohrback, Pablo Equizabal, Chester McClure, Nathan Cullison, Ezequiel Macias, all also completed applications, gave them to Aizu, and credibly testified that they would have accepted employment with Aim if they had been offered positions. It was apparent to Gibbs from the content of the applications that the Union had sent them. Gibbs admitted that Aim never considered hiring those applicants, explaining that Aim continued to be able to fulfill its needs under the process that excluded walk-in applicants. Gibbs retained those applications and kept them on his desk.

Never considered

Analysis

The complaint alleges that Aim refused to reinstate Gurrola to his former position or to a substantially equivalent position or to place him on a preferential hiring list after he terminated his strike and made an unconditional offer to return to work. However, I have concluded that Aim terminated Gurrola's employment on July 24, 2008. No charge was filed to challenge the legality of that termination and the Section 10(b) period has long expired. I may not make a finding concerning its legality. The rights under *Laidlaw Corp.,* 177 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), flow to former strikers who remain employees and not to former employees. The General Counsel cites *Lee A. Consaul Co.*, 192 NLRB 1130 (1979). In that case the Board adopted the judge's finding that strikers who were fired outside the Section 10(b) period but who later made unconditional offers to return to work were nonetheless entitled to the *Laidlaw* rights. But this finding is contrary to countless other Board cases that hold that *Laidlaw* rights end when a striker has been lawfully fired and here Section 10(b) precludes me from finding otherwise. It appears, however that the Board later found it significant that in *Lee Consaul* there was an "agreement acknowledging the possibility of reinstatement of discharged strikers constituted "changed circumstances," amounting, in effect, to rescission of the discharges and restoration of the status of striking employees. (footnote omitted)" *Woodlawn Hospital,* 233 NLRB 782, 790 (1977). There is no such agreement in this case. I agree with Aim's observation in its brief that:

> If an employee after an unchallenged termination can receive the right to reinstatement by simply walking in and offering unconditionally to return to work, Section 10(b) is nullified.

I dismiss this allegation.

The complaint alleges that Aim violated the Act when in about April after Gurrola made his unconditional offer to return to work Lazaro Campos told him that he no longer worked for Aim. The General Counsel cites *H.B. Zachary Co.,* 319 NLRB 967, 969, enforced in part sub nom. *International Brotherhood of Boilermakers v. NLRB,* 127 F. 3d 1300 (11th cir. 1997). But that case involved a typical Section 8(a)(1) threat that connected discharge with protected concerted activity. Here, Campos told Gurrola that Gurrola no longer worked for Aim, that statement was not connected to any activity protected by Section 7. Moreover, as more fully described above, Gurrola in fact had been terminated by Aim outside the 10(b) period that is applicable to this case and thus the legality of that discharge cannot be challenged in this proceeding. Under these circumstances I dismiss this allegation of the complaint.

8(a)(1) "no longer work here"

The complaint next alleges a number of violations concerning employee-applicants. In *Toering Electric Co.,* 351 NLRB 225 (2007), the Board criticized the practice of labor organizations in some salting campaigns of submitting batched applications on behalf of workers who were neither aware of the applications nor interested in employment with the employer. The Board also criticized applicants for employment that engage in conduct clearly inconsistent with an intent to gain employment. The Board condemned employment application practices designed solely to create a basis for unfair labor practice charges and thereby inflict substantial litigation costs on employers. To remedy these described abuses, the Board placed an additional burden on the General Counsel to establish that applicants for employment have a "genuine interest in seeking employment." In this case I conclude that all the applicants for employment genuinely sought employment at Aim or, as described below, Jacobson. All credibly testified that they intended to accept employment from these employers; all were in personal circumstances where accepting employment seemed entirely reasonable, and none of the applicants engaged in any conduct that could be considered as inconsistent with accepting and remaining employees.

genuine applicants for employment →

In addressing these allegations I next apply *FES,* 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3rd Cir. 2002). Here, the General Counsel has established that all the applicants had the experience necessary to perform the work for Aim and Jacobson. The evidence also shows that Aim was hiring and had concrete plans to hire during the period May 27 through July 15, the time period specifically covered by the allegations in the complaint. I have described above how during the time period May 27 through August 10, a time period that I conclude may be appropriately considered by the complaint allegations, see *Zarcon, Inc.,* 340 NLRB 1222, 1228-29 (2003), Aim hired about 8-9 insulators.

all applicants had experience 2 perform work

I now specifically address the allegations to determine whether antiunion animus played a role in Aim's failure to hire the applicants for employment. The first complaint allegations pertain to the May 27 and July 7, 2009, applications for employment to Aim made by Gurrola and Aizu. As to Gurrola, I again note that he had been employed by Aim previously and had been fired on July 24, 2008. Under most circumstances my analysis would quickly end because many employers do not rehire employees that they have fired. But Aim specifically relies on its practice of doing so as a means of supplying its hiring needs so as to avoid hiring unknown applicants, including those who might be supporting a union. I have described above the more specific circumstances of how Aim rehired workers it had earlier discharged for cause during the very time period it had refused to rehire Gurrola. Because Gurrola was a previous employee

Westlar – "Bad Attitude."

and because Aim hires workers that have worked for it in the past, even if fired for cause, the more precise question becomes why did Aim not rehire Gurrola. Gibbs admitted that he never considered rehiring Gurrola for any of the positions that were filled in the weeks following Gurrola's attempt to be rehired. Gibbs explained that "Gurrola has never expressed to this company a remorse for his actions when he was terminated." Gibbs later expanded that he did not consider rehiring Gurrola because:

Gurrola – Attitude; same reason they didn't hire McMillan

> Attitude. When you have an organization you can't have people on their own being disruptive to this organization. With the fact of what was done, what transpired during that period of time, we determined that we did not want him to be an employee at AIM Royal.

In context I conclude that Gibbs was referring to the fact that Gurrola had engaged in a strike against Aim and that was the reason Aim failed to rehire him. I further conclude that the strike was part of Gurrola's union activity. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 95–96 (1995) ("the employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity").

strike part of u-activity

Aim argues that Gurrola's strike was unprotected for a number of reasons. First, Aim argues that Gurrola's activities were not concerted. But the strike and ensuing picketing were by their very nature designed to induce other workers to join in. This is especially so because the reasons for the strike quickly spread across the jobsite that day. This distinguishes the cases cited by Aim in its brief; they involved safety complaints and did not involve a strike and picketing. Next, Aim argues that Gurrola's strike was unprotected because he failed to first inform Aim of the reason behind the strike. But neither the facts nor the law support this argument. As a matter of fact I have described above how Gurrola called Lazaro Campos at 8:12 a.m. and informed him of the reason for the strike; this was before Aizu arrived and before they began picketing at the jobsite. As a matter of law, there is no requirement that employees first give notice to an employer before engaging in a strike. Aim cites *House of Raeford Farms, Inc.,* 325 NLRB 463, 467-68 (1998). But there the Board stated:

> [W}e do not agree with the judge's suggestion that an explicit demand made upon the employer is a necessary prerequisite to a finding of protected activity. See, e.g., *McEver Engineering, Inc.*, 275 NLRB 921, 925–926 (1985).

Id. at 463, n. 2. Aim also implies that Gurrola's strike was unprotected because there was water on the jobsite, albeit not Aim's water, that was available to Gurrola and because Aim would have eventually supplied its own water at the site later that day. The fact remains, however, that the failure of Aim to provide water for its employees at the jobsite, especially in Phoenix during the summer, is a condition of employee over which employees are entitled to strike. The Board does not second guess employees to assess whether the matter at issue was really worthy of complaint. *Al Monzo Construction Co., Inc.,* 198 NLRB 1212, 1214 (1972), enfd. 485 F.2d 680 (3d. Cir. 1973). In summary, I conclude that Gurrola's strike was protected under the Act. By failing to hire and to consider hiring Gurrola because he engaged in union activity, Aim violated Section 8(a)(3) and (1).

STRIKE PROTECTED!

I now address the complaint allegations concerning Aizu. In doing so I apply *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management,* 462 U.S. 393 (1983). The facts show that Aizu was a union organizer and Aim knew this. Aim hostility towards the Union is shown by the unfair labor practices it committed as described above. I conclude the General Counsel has met his initial burden under *Wright Line.* I now assess whether Aim has shown

AIM'S HOSTILITY TOWARDS UNION

that it would not have hired Aizu even if he had not been a union supporter. In support of this defense Aim points to its hiring practice. That practice, as described above, relies on rehiring former employees, including those fired for cause, and recommendations from current employees and supervisors to fill its hiring needs. The facial validity of this practice is not challenged by the General Counsel and appears to be consistent with similar policies that the Board has found to be lawful. *See e.g., T.E. Briggs Construction Co.,* 349 NLRB 671, n.3 (2007). The General Counsel argues that Aim's support for this practice is based on Gibbs' testimony and that his testimony is not credible. While indeed I question Gibbs' testimony in other parts of this decision, I do credit Gibbs' testimony concerning Aim's hiring practice. This testimony is corroborated by Lazaro Campos and to some degree by business records. The General Counsel argues that Gurrola and one other employee were hired in contradiction of this practice in that they were hired as new employees "off the street." But these occasional and sporadic deviations are insufficient to undermine the existence of the general practice. Next, the General Counsel argues that the result of Aim's hiring practice is that Aim was able to reject competent union applicants by hiring back employees that it had fired for cause. But there is no contention that this policy is facially unlawful and there is no allegation in the complaint that this practice was adopted for an unlawful purpose. As I understand the law, it does not matter that the policy, as here, results in the exclusion of qualified union applicants from the hiring process.

AIZU DISMISS →

DISMISS 9 FAX APPLICANTS

Having resolved the issues concerning Aim's hiring practice, I now use that practice to determine whether Aim would have excluded Aizu from consideration for hire even if he were not a union supporter. Because Aizu was neither a former employee nor was he recommended by a current employee he did not qualify for consideration under Aim's practice. It follows that Aim has shown that it would not have hired Aizu or consider hiring him even if he were not a union supporter. I dismiss these allegations. Similarly, none of the nine employees whose applications were faxed to Aim by the Union on June 23 fit into Aim's hiring practice; I dismiss that allegation in the complaint. The same analysis dictates the dismissal of the complaint allegations that Aim refused to hire or consider Aizu for hire on about June 1 and June 10.

McMILLAN →

Returning to the facts of the case, on about July 15 Shawn McMillan called Aim and spoke with Campos. McMillan said that he wanted to come back to work for Aim. McMillan had worked for Aim two or three years earlier but had been laid off due to a reduction in force after a project was completed. Campos told McMillan that he had to talk to Gibbs who was not available at that time. On about July 16 Gibbs met with McMillan at Aim's office. McMillan asked Gibbs if there was any work. Gibbs answered there was none at that time, but he would talk to Campos and look into getting some work for McMillan. During the course of the conversation Gibbs said:

> I kind of heard that you were part of the union and how is that going for you, and I (McMillan) told him it's not really going for me at all because I didn't have no work at the time, and I was just trying to get some work any way I could honestly.

GIBBS INTERROGATES McMILLAN →

The facts in the preceding paragraph are based on McMillan's credible testimony. According to Gibbs, after McMillan indicated he wanted to work again for Aim, Gibbs explained that he did not know what his present labor needs would be, but that he had been told by Lazaro Campos that Aim needed additional workers. Gibbs said that he would check with Campos and see if they needed workers. According to Gibbs, during the course of the meeting McMillan indicated that the Union had approached him and offered him a third year apprenticeship if he would work for the Union. Gibbs denied there was any quizzing. Based on my observation of the relative demeanors of Gibbs and McMillan, I do not credit Gibbs' testimony that there was no quizzing. Gibbs testified that he consulted with Campos and decided not to respond to McMillan's request to return to work for Aim. According to Gibbs, this

was because when McMillan came to the office to pick up his check after being laid off several years ago McMillan said in "a very dramatic tone" "Do me a favor, lose my phone number." Gibbs went on to describe how "[T]here's no reason for me to have to put up with belligerence. It was in the normal course of business and I was being subjected to his disdain for being discharged." This obvious exaggeration supports my conclusion to discredit Gibbs testimony. Lazaro Campos testified that McMillan stormed out of the office on that occasion and in a rude way as he said "lose my number." McMillan's version of this is that he was disappointed about having been laid off and simply stated to Gibbs to "lose his number" after Gibbs told him that Gibbs would call him if worked picked up. I conclude McMillan's testimony is again the most credible. As described above, Aim hired insulators on July 15, July 17, and July 24.

CREDITS McMILLAN

Analysis

The complaint contends that in about mid July Gibbs interrogated employees concerning their union activities and created an impression among employees-applicants that their union activities were under surveillance. I have concluded above that Gibbs stated to McMillan that he had heard that McMillan was part of the union and asked how it was going for him. Questions concerning union status are not per se violation of the Act. Rather, accompanying circumstances must be assessed to determine whether the questioning is coercive. *Rossmore House,* 269 NLRB 1176 (1984), enfd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (1985). In analyzing these allegations I take into account McMillan's status as an employee-applicant. The Board has held that employee-applicants, like McMillan, are particularly susceptible to the coercive effects of interrogations concerning their union support. *Gilberton Coal Co.*, 291 NLRB 344 (1988). I note that Gibbs was the highest ranking official for Aim and had ultimate control over hiring. I also note that the subject matter was raised by Gibbs and was not part of a general conversation initiated by McMillan. I conclude that Aim violated Section 8(a)(1) by coercively interrogating an employee-applicant concerning his support for the union. I dismiss, however, the allegation concerning the impression of surveillance. I note the circumstances here that McMillan was openly a member of the Union and had worked on union projects. It strikes me as unlikely that an employee would then reasonably believe that his union activity was under surveillance. Rather, it is more a prelude to the interrogation that I have concluded was unlawful.

IMPRESSION OF SURVEILLANCE

8(a)(1) interrogation of McMillan

SHAWN McMILLAN

I now address the allegations in the complaint that Aim unlawful refused to hire or consider for hire Shawn McMillan. I have described above how on about July 15 McMillan sought re-employment with Aim and how Aim was hiring during that time period. McMillan supported the Union, Aim knew this, and Aim was hostile to the Union. Moreover, the reason given by Aim to McMillan as to why he was not rehired was false and the reason given at trial, as explained above, was patently exaggerated. I conclude that the General Counsel has established his burdens under *FES* and *Wright Line.* As a former employee McMillan was eligible for rehire under Aim's hiring practice, even if he had been fired for cause. At the trial and in its brief Aim sought to explain why it nonetheless failed to hire or consider hiring McMillan. Relying on Gibbs' testimony, Aim argues that McMillan unlike other former employees that were rehired despite having been fired for cause, McMillan never expressed remorse for having told Aim to "lose my number." But as the General Counsel pointed out, unlike those other employees Aim never broached the matter with McMillan. In any event, Gibbs' testimony in this regard is again wholly incredible. I conclude that by failing to hire and to consider hiring McMillan because he engaged in union activity, Aim violated Section 8(a)(3) and (1).

McMillan refusal to hire

F. Complaint Allegations against Jacobson

Returning to the facts of the case, on about June 30 Lazaro Campos called Chavez, Jacobson's contact person, and requested that insulators be sent to Aim. That same day as Chavez attempted to fill Aim's request she spoke to Imuris Garcia. Garcia, a friend of Shawn McMillan, told Chavez that McMillan was also looking for work as an insulator. [3] On about July 1 Chavez interviewed Garcia and Marcellino Trujillo and sent them to Aim. Campos interviewed Garcia and Trujillo, hired them and they started work at Aim the next day.

After referring Garcia and Trujillo, Chavez then called McMillan. At the time Chavez called McMillan he was with a friend, Mark Waters; McMillan put the call from Chavez on the speaker phone and Waters was able to hear the conversation. Chavez asked McMillan if he was looking for insulation work that paid $11 per hour and he replied that he was. At this point the evidence becomes contradictory. Initially in his testimony, according to McMillan, after asking about his experience, Chavez asked if he was part of the union; McMillan replied that he was. Chavez said that was all she could do for him right then and the conversation ended. Later in his testimony, in response to my question, McMillan stated that;

> [Chavez] told me that she would look for work and she'll call me back because I told her at the time that I wasn't really sure if I could join Jacobson Staffing Company or go through Aim Royal because of my union status, and she, oh, you're part of the union, and then she kind of said I can't really help you then, and hung up on me.

Based on my observation of McMillan's demeanor, I credit the testimony he gave in response to my question. This testimony is confirmed to some extent by Water's testimony. Waters testified that he recalled an instance when McMillan used the speaker phone feature and remembered that McMillan said he was looking for a job but the person that he was talking to said they would not hire McMillan either because he was or was not a union member, Waters could not recall which it was. According to Chavez, McMillan expressed interest in working but stated that he was in the union and he was not sure if he could work for a nonunion company. Chavez said that if he changed his mind he should call her back. But as described below I have generally not found Chavez to be a credible witness and I do not credit her testimony here either.

Analysis

The complaint alleges that on about July 1, Jacobson through Chavez threatened employee-applicants with loss of employment opportunities because of their union activities. I have described above how Chavez told McMillan that because he was part of a union she could not help him find work. This amounted to telling McMillan that he would not be hired because of his union status. Such comments violate the Act. *J & R Roofing Co, Inc.,* 350 NLRB 694, 694-95 (2007). By telling an employee-applicant that he could not be hired because of his union status, Jacobson violated Section 8(a)(1). The complaint alleges that on about July 1 Jacobson unlawfully refused to consider for hire or hire McMillan. I have described above how Chavez called McMillan and inquired whether he wanted to work for Aim but McMillan said he was not really sure if he could join Jacobson or go through Aim Royal because of his union status. I conclude that McMillan did not apply for work on this occasion and I dismiss this allegation of the complaint.

McMillan did not apply for work

[3] Recall that I have described above how later, on July 15, McMillan applied directly with Aim and Aim unlawfully refused to hire him.

McMillan @ Jacobsen

Returning to the facts, telephone records establish that McMillan called Jacobson on July 2 at 11:45 a.m. but McMillan provided no testimony concerning this second conversation. Rather, McMillan claims that despite the fact that Chavez hung up on him due to his ties with the Union she nonetheless called him back several days later and asked him to come in and fill out paperwork right away. According to Chavez, McMillan called her back and said that the f–ing union was not giving him enough hours so he did not want to be with the f–ing union anymore and that he needed a f–ing job right then, any job, no matter what it paid. In the light of the telephone records, the absence of testimony by McMillan concerning the content of the call, and the unlikelihood that Chavez would hang up on him one day because of his union ties yet call him back inviting him come in with no change in his union status, I conclude that McMillan called Chavez on July 2 and renounced his ties to the Union and sought employment.

Aim needed more workers so on July 14 Chavez sent Isidro Ortega and Claudio Rendon to Aim; both retained by Aim. On that same day, July 14, Chavez called McMillan and told him to come in and fill out some paperwork right away. Telephone records confirm that the next call between Chavez and McMillan occurred on July 14, when three calls were made; at 8:55 a.m., 9:06 a.m, and 12:05 p.m. McMillan went to Jacobson's office that day and was given paperwork to complete. After completing the paperwork, according to McMillan, Chavez said:

> [H]ow is this going to affect your union status. I asked her what did she mean, and we kind of cut off the conversation right there and simply jumped in and she said, oh, you have to watch the safety (video) and you have to do this, trying to avoid my question.

Chavez then told McMillan to go home to get his social security card and that if he did not return in 20 minutes she would give the job to someone else. McMillan left and then returned with his social security card. After completing the application process Chavez told McMillan to go home, that Aim will call him because there is an interview arranged for him there at about 1 p.m. But after McMillan returned home Chavez called and told him that Aim had backed out and there was no work for him. The foregoing facts are based on the credible portions of McMillan's testimony. In deciding to credit this testimony I have considered Chavez's testimony. According to Chavez she did call McMillan who then came to Jacobson's office and took an application form but did not complete it because he said he was very busy and had to go pick up his kids, again using foul language. McMillan returned to the office later that day and completed the application. Chavez admitted that she told McMillan that he was a good candidate for employment with Aim. According to Chavez, she then contacted Lazaro Campos and told him that she had a good candidate but Campos replied that he was only looking for two workers and he had already hired the first two applicants she had sent earlier that day, sent away another two applicants but that she should keep that employee's name on file for possible future use. According to Chavez, she did not mention McMillan's name to Campos. Chavez then told McMillan that she was sorry but Aim already had enough workers; McMillan got angry, used the f-word and slammed the door on his way out. I again do not credit Chavez's testimony. It struck me as exaggerated and conveniently contrived to suit a litigation strategy; her demeanor was not convincing. McMillan credibly denied saying that he had to pick up his children from school or that he even has a child in school and he denied slamming the door. On the other hand, McMillan also denied that he used the f-word with Chavez and denied that the word was part of his vocabulary. I do not credit this testimony to the extent that it indicates that he never uses the f-word.

Bolaños Gonzalez →

Also on July 14, Luis Bolaños and Gustavo Gonzalez appeared at Jacobson's office; they coincidentally arrived around the same time. Both were sent there by Aizu, who told them that Aim was looking for workers to hire through Jacobson. Chavez told Gonzalez, who arrived first, that the company (Aim) had already hired two workers that day and they were going to hire

two more. Chavez told Bolaños that they were looking to hire two people to work as insulators. After completing the paperwork Gonzalez and Bolaños went into Chavez's office where she examined the paperwork and asked questions. Bolaños' application indicated that he had worked for Argus, a union employer. Also recall that Bolaños' application was among those that the Union has sent to Aim on June 23 and that Gibbs had retained copies of those applications. Chavez told Bolaños that she wanted to send him for an interview for an insulator position. Bolaños testified that three telephone conversations then ensued; Campos' telephone records confirm this testimony and show that the first call that occurred between him and Jacobson on July 14 occurred at 11:40 a.m., followed by calls at 11:49 and 11:53, about the time that Gonzalez and Bolaños were in Jacobson's office. During one of the calls to Aim Chavez indicated that she had applicants there with insulation experience; she arranged for an interview for Gonzalez at 1:30 p.m., Chavez marked "1:30" on Gonzalez's application, again confirming Gonzalez's testimony. After more discussion on the telephone Chavez indicated that Aim was not really interested in Bolaños and no interview time was set for him with Aim. That telephone conversation ended, but shortly thereafter Chavez received a telephone call and she then asked Gonzalez who sent him for the job and Gonzalez replied "Angel" but he could not remember the last name. Then he retrieved a business card from his wallet and showed it to Chavez; the card bore the name of Angel Aizu and it indicated that Aizu was an organizer for the Union; Chavez then wrote the word "Union" on his application. Chavez then told the person on the telephone that Angel Aizu from the Union had sent Gonzalez. After Chavez ended the call she told Gonzalez and Bolaños that they were no longer interested in interviewing Gonzalez and the interview was cancelled. Bolaños commented that maybe it was because they worked for the union that they did not want them. Chavez did not reply to that comment but said she was upset because she had to look for more people. Bolaños asked about other work opportunities. Chavez asked if he could drive a fork lift; Bolaños said he did not but could learn. Chavez told Bolaños to call her two or three times a week if he was still looking for employment. Gonzalez then left the office and called Aizu and told him what had occurred. Aizu suggested that Gonzalez get a copy of the application he had completed. Gonzalez attempted to do so, saying that he needed it to continue to receive unemployment compensation; Chavez did not give him a copy of the application but she did assure him that she would confirm that he sought employment there. Gonzalez and Bolaños each credibly testified that they were not working at the time they sought this employment and would have accepted the position if it had been offered. Afterwards, Bolaños did call Jacobson to see if other work opportunities were available but was not referred for employment.

Bolaños & Gonzalez

The facts in the preceding paragraph are based on a composite of the testimony of Gonzalez and Bolaños. The demeanor of both struck me as witnesses trying their best to relate factual information. Their testimony was generally corroborative and consistent with telephone records. Chavez's own writing confirms that a 1:30 appointment was set for Gonzalez and that subject of the "Union" came up during the conversation. Significantly, how would Gonzalez have known that Aim had already hired two workers sent by Jacobson unless Chavez told him? There is no evidence that he could have learned this information from any other source. I have considered the testimony of Chavez and Campos. According to Chavez after examining the applications and interviewing Gonzalez and Bolaños, Chavez informed them that she would send them to Aim for an interview. At some point Chavez wrote "Union" on top of the applications, but she denied that she was presented with Aizu's business card. According to Chavez, in the presence of Bolaños and Gonzalez she then called Campos and told him she had two great candidates for him; Campos said he had hired the first two and did not need any more workers. According to Campos, Chavez called and said she had two other applicants and asked if Aim needed more workers; Campos replied that he did not need any more personnel. According to Chavez, Gonzalez and Bolaños then said to each other it was probably because they were from the union that Campos did not want to interview them; Chavez told them that

she never mentioned the union to Campos so she did not believe that was why Campos did not want to interview them. At the trial Chavez explained that she wrote "Union" on the applications before she spoke to Campos because she considered that a good thing since all applicants with the union had good work histories and the notation "Union" would remind her that these applicants had good work records. But in her pretrial affidavit Chavez stated that she wrote "Union" on the applications after she spoke to Campos and after Gonzalez and Bolaños commented that the reason that Campos did not want to interview them was because of the Union. And Chavez does not credibly explain why she wrote "1:30" on Gonzalez's application. Neither Campos nor Chavez explained why it took three telephone calls for Campos to tell her that he did not need any more workers. For these reasons, and because of their unconvincing demeanor, I do not credit the testimony of Chavez and Campos.

Analysis

The complaint alleges that on about July 14 Chavez threatened employee applicants with loss of job opportunities because of their union support. The General Counsel relies on the events above concerning Gonzalez and Bolaños where Chavez told them that Aim was no longer interested in hiring Gonzalez after he disclosed that the Union had sent them to seek employment. Here, the intimate connection of the Union with Chavez's announcement to the employees that their interviews were cancelled would reasonably tend to indicate to them the cancellation was because of the Union. By telling employee-applicants that they lost employment opportunities because of their support for the Union, Jacobson again violated Section 8(a)(1). Next the complaint alleges that on about July 14 Chavez unlawfully interrogated employee-applicants. I concluded above that Chavez did ask McMillan how applying for work with Jacobson would affect his union status but then changed the subject when McMillan asked why it mattered. I recognize that McMillan himself raised the issue of his union affiliation in earlier conversations with Chavez when he expressed concern over whether he could both maintain that affiliation and work with Jacobson and Aim. On the other hand, the Board has held that employee-applicants, like McMillan, are particularly susceptible to the coercive effects of interrogations concerning their union support. And Chavez had earlier unlawfully threatened McMillan concerning his union status. Finally, Chavez was the highest Jacobson official at the location and she had the authority to decide whether or not to refer McMillan for employment. Under these circumstance I conclude that by coercively interrogating an employee-applicant concerning his union status, Jacobson violated Section 8(a)(1). *Zarcon, Inc.,* 340 NLRB 1222 (2003). The complaint alleges that Jacobson refused to hire or consider for hire Bolaños, Gonzalez, and McMillan.[4] As to the allegation that Jacobson refused to *hire* these applicants, the General Counsel concedes in his brief that "Workers are not hired by Jacobson until they have received a commitment from the client to retain the specific employee." Because Aim never hired these workers it follows that Jacobson has shown that it would not have hired these employees even if they had not been union supporters. I dismiss this allegation. The allegation that Jacobson refused to *consider* these applicants for employment is not supported by the evidence. To the contrary, the evidence shows that Jacobson fully considered them for hire and was ready to refer them to Aim. I dismiss this allegation too. The General Counsel cites *Capitol-EMI Music,* 311 NLRB 997, 1000 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), arguing that under certain circumstances both employers in a

[4] As clarified at the hearing, the General Counsel does not allege that Aim independently violated the Act by rejecting these applicants. In his brief the General Counsel does not argue that Aim did so. Rather, he relies solely on a "joint employer" theory that I reject for reasons described below. And even initially, before the clarifications the complaint specified that the word "Respondents" referred to Aim and Jacobson only in their capacity as "joint employers."

joint-employer relationship may be liable for unfair labor practices committed by only one. That is indeed correct. But the problem here is that there is no evidence that Aim and Jacobson were joint employers during the prehire stage. The precise stipulation received into evidence here is:

> Respondent Jacobson is a joint employer with Respondent Aim Royal with respect to those individuals that were assigned to the Aim Royal workplace.

None of these individuals were ever assigned to Aim's workplace. I therefore reject the General Counsel's argument.

AIZU JULY 15 →

Returning once again to the facts of this case, on July 15 Aizu went to Jacobson with an application he had received from Chavez the day before. On the application he listed his name as Angel A. Garcia; Garcia is his mother's maiden name. Aizu did this to avoid being identified as a union agent. Aizu told Chavez that he wanted to work as an insulator. Chavez accepted the application and asked Aizu to follow him to an office area. As they were walking Chavez asked Aizu if he belonged to the Union. Aizu answered "No." He then asked Chavez if it mattered and Chavez replied "No." Chavez explained that she asked the question because the union workers had more experience. Chavez also asked Aizu some questions about his background and experience. Chavez commented that Aizu was already making good money after Aizu mentioned that he was making $22 per hour. Chavez said that she had only filled insulator jobs that were paying $11 per hour. Chavez said that she did not have jobs right then, that she liked Aizu's background and skills, and that he should call her three times a week to see if any jobs became available. After interviewing Aizu, Chavez wrote "not with union" on the second page of Aizu's application. After the interview Aizu did not call Chavez as she had requested. However, on about July 31 Aizu returned to Jacobson's office accompanied by about seven others wearing union tee shirts. Chavez told Aizu that he was already in the system and did not have to be there again and reminded him that when she spoke to him earlier she asked him to call her three times a week but he never did call. The others completed applications. There is no allegation in the complaint concerning the July 31 incident. The facts in this paragraph are based on Aizu's credible testimony, his demeanor appeared convincing and his recitation of events seemed to flow naturally and without exaggeration.

Analysis

AIZU REFUSAL TO CONSIDER →

The complaint alleges that on July 15 Chavez again interrogated employee-applicants concerning their union activity. In support of this allegation the General Counsel relies on the interview of Aizu by Chavez. As more fully described above, during that interview Chavez asked Aizu if he was in the union or part of a union and Aizu replied that he was not. Aizu asked if that mattered; Chavez replied that it did not, but that if you worked with the union you have more experience. Here, unlike other instances of coercive interrogation described above, Chavez coupled here question with the assurance that his union status did not matter to her and explained that she asked the question because she felt union workers had more experience. Under these circumstances I cannot conclude that the questioning had the tendency to be coercive. In any event any finding here is cumulative and does not alter the remedy in this case. I dismiss this allegation. Finally, the complaint alleges an unlawful failure to hire Aizu or to consider him for hire. For reasons described in the preceding "Analysis" section, I dismiss this allegation. Moreover, Chavez informed Aizu, as she had informed others, to call her three times a week to show a continuing interest. He admittedly failed to do so.

Conclusions of Law

1. Respondent Aim has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Maintaining overly broad work rules that prohibit employees from leaving the work area or jobsite without permission.

(b) Coercively interrogating an employee-applicant concerning his support for the union.

2. Respondent Aim has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2 (6) and (7) of the Act by refusing to consider for hire and by refusing to hire Jose Gurrola and Shawn McMillan because they engaged in union activity.

3. Respondent Jacobson has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) By telling an employee-applicant that he would not be hired because of his union status.

(b) By coercively interrogating an employee-applicant concerning his union status.

(c) By telling employee-applicants that they lost employment opportunities because of their support for the Union.

Remedy

Having found that Respondent Aim has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because of the significant number of employees that speak Spanish, I shall require that the "Notices to Employees" be posted both in English and Spanish. I have concluded that Respondent Aim has maintained unlawful rules in its employee handbook; to remedy this violation I apply *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005). The General Counsel argues that notices to employees correcting the rules should be in both Spanish and English, but I deny this request. First, the General Counsel cites no case authority to support this contention. I note that there is no evidence that Aim's employee handbook is provided to employees in Spanish as well as English. I further note that I require that the Notices to Employees be posted in Spanish as well as English. Under these circumstances I believe that this violation will be fully remedied.

Having found that Respondent Aim discriminatorily refused to consider for hire and hire Jose Gurrola and Shawn McMillan, Respondent Aim must offer them instatement and make them whole for any loss of earnings and other benefits. The duration of their backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007). Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The instatement of discriminatees is subject to defeasance if, at the compliance stage, the General Counsel fails to carry his burden of going forward with evidence that they would still be employed by Respondent Aim if he had not been the subject of discrimination. *Oil Capitol,* supra, slip op. at 7.

Having found that the Respondent Jacobson has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because of the number of Spanish speaking employees, I shall require that the Notices be posted both in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[5]

ORDER

The Respondent, **Aim Royal Insulation, Inc.**, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining overly broad work rules that prohibited employees from leaving the work area or jobsite without permission.

(b) Coercively interrogating employee-applicants concerning their support for the union.

(c) Refusing to hire, or to consider for hire, job applicants because of their union or other protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the employee handbook's rules that prohibit employees from leaving the work area or jobsite without permission.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(c) Within 14 days from the date of the Board's Order, offer Jose Gurrola and Shawn McMillan employment in the position in which they would have been hired in the absence of discrimination against them or, if that job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Jose Gurrola and Shawn McMillan whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusals to hire and consider for hire, and within 3 days thereafter notify the employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent Aim's authorized representative, shall be posted by Respondent Aim and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Aim to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent Aim has gone out of business or closed the facility involved in these proceedings, Respondent Aim shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent Aim at any time since January 20, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, **Jacobson Staffing, L.C.**, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employee-applicants that they will not be hired because of their union status.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Coercively interrogating employee-applicants concerning their union status.

(c) Telling employee-applicants that they lost employment opportunities because of their support for the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix B"[8] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent Aim's authorized representative, shall be posted by Respondent Aim and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Aim to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent Aim has gone out of business or closed the facility involved in these proceedings, Respondent Aim shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent Jacobson Staffing, L.C. since July 1, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., May 21, 2010.

William G. Kocol
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

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 maintain overly broad work rules that prohibit employees from leaving the work area or jobsite without permission.

WE WILL NOT coercively interrogate employee-applicants concerning their support for the union.

WE WILL NOT refuse to hire, or to consider for hire, job applicants because of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of this Order, offer Jose Gurrola and Shawn McMillan employment in the positions in which they would have been hired in the absence of discrimination against them, or, if that job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have been entitled if they had not been discriminated against.

WE WILL make Jose Gurrola and Shawn McMillan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusals to hire and to consider for hire Jose Gurrola and Shawn McMillan and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that this unlawful conduct will not be used against them in any way.

WE WILL rescind the employee handbook's rules that prohibit employees from leaving the work area or jobsite without permission and WE WILL furnish all current employees with inserts for the current employee handbook that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

JD(SF)–17–10
(Phoenix, Arizona)

Aim Royal Insulation, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies 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, Arizona Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, Arizona 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

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 tell employee-applicants that they will not be hired because of their union status,

WE WILL NOT coercively interrogate employee-applicants concerning their union status.

WE WILL NOT tell employee-applicants that they lost employment opportunities because of their support for the Union.

Jacobson Staffing, L.C.
(Employer)

Dated _____ By _____
(Representative) (Title)

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