JD–47–06
Burnsville, MN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MV TRANSPORTATION, INC.

and

Cases 18–CA–17841
18–CA–17959

AMALGAMATED TRANSIT UNION,
LOCAL 1005

David M. Biggar, Esq., for the General Counsel.
Raymond J. Ramsey, Esq., of Fairfield, California,
for the Respondent.
Meg Luger-Nikolai, Esq., of Minneapolis, Minnesota,
for the Charging Party/Union.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. These cases were tried in Minneapolis, Minnesota on May 2 and 3, 2006, based on charges[1] filed on November 9, 2005,[2] and March 7, 2006, by Amalgamated Transit Union, Local 1005 (Charging Party or Union), against MV Transportation, Inc. (the Respondent).

The Regional Director's consolidated complaint, dated April 6, 2006, alleges, in pertinent part,[3] that the Respondent violated Section 8(a)(1) of the Act by the following actions related to

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[1] During the trial, the Union and the Respondent reached agreement on a non-Board settlement in Case 18–CA–17841. Pursuant to the agreement, the Union requested withdrawal of said charge, and I took the request under advisement. Inasmuch as counsel for the General Counsel, and the alleged discriminatee involved in said case, have reviewed the settlement and have affirmatively stated that they have no objection either to the settlement or withdrawal request, and as I have been advised that Respondent has now carried out the undertakings set forth in the settlement including the payment of backpay, I hereby approve the withdrawal request in Case 18–CA–17841 and counsel for the General Counsel's unopposed motion to sever Case 18–CA–17959 from the withdrawn Case 18–CA–17841, and remand Case 18–CA–17841 to the Regional Director for closing. Further, in conformance to the withdrawal of Case 18–CA–17841, I granted, at the trial, counsel for the General Counsel's motion to amend the complaint to withdraw paragraphs 5(m), 6(a), and 6(b) and I now grant counsel for the General Counsel's motion to withdraw complaint paragraph 5(n). The trial, thus, exclusively involved litigation of the allegations pertaining to case 18–CA–17959.

[2] And amended on December 2, 2005.

[3] See fn. 1.

its employees' union activity: threatening employees, interrogating employees, asserting futility, creating the impression of surveillance, promising benefits, and assaulting an employee. The complaint further alleges that the alleged assault of an employee also violated Section 8(a)(3). The Respondent defends by denying it engaged in the actions alleged. So, the issues presented are largely factual, and consist of whether or not Respondent engaged in the alleged actions.

At the trial, the parties were afforded a full opportunity to examine and to cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file posttrial briefs. Based on the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs of the Respondent and the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, maintains an office and place of business in Burnsville, Minnesota, the only facility involved herein, where it has been engaged in the operation of a fixed route bus transit service. During the calendar year ending December 31, 2005, in operating its Burnsville transit service, the Respondent purchased and received at its Burnsville facility goods and services valued in excess of $50,000 directly from points located outside the State of Minnesota, and derived gross revenues from said business operations of in excess of $500,000. It is admitted, and I find, that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

It is admitted, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

Background

Respondent operates a scheduled passenger bus service from its terminal/office (the base) located in Burnsville, Minnesota, carrying passengers on routes connecting the Mall of America, Southdale Mall, and the headquarters of Best Buy. Drivers report to the base, sign in, are assigned a bus to drive, leave to drive their routes, and return to the base at the end of their shift. The Respondent also operates bus service in other locations, not involved in this proceeding.

In early September 2005, some of the Respondent's drivers and maintenance employees began talking about the possibility of obtaining union representation. About September 5, 2005, some of these employees attended a meeting at employee Bonnie Bobo's residence, where they discussed organizing and signed union authorization cards. All of the employees who were targets of Respondent's actions alleged in the complaint attended this meeting. Subsequent to the Union's filing of a representation petition with the Board on September 23, 2005, the parties agreed to a card check by a neutral third party. In October,

following certification of majority status by the neutral, the Respondent signed a recognition agreement and, on October 12, the Union withdrew its representation petition.

Joseph Mitchell is the general manager of the Respondent's Burnsville operations, and is the supervisor alleged to have committed all of the substantive allegations in the complaint. Harry P. Vercoe, III, with an office apparently in Maryland, is Respondent's director of labor relations and is in charge of all aspects of labor relations and dealings with unions in Respondent's 47 divisions throughout the east coast and midwest, including the Burnsville operation. Vercoe has occupied his position since January 4, 2004, and in that time has hired or appointed four different general managers at Burnsville, Mitchell being the fourth. Mitchell has occupied his position since April 2005.

During the process of the union organizing, Vercoe receive a call from an international representative of the Union,[4] whom Vercoe knew from previous contract negotiations at other locations, informing Vercoe that the Union held authorization cards from a majority of unit employees and asking for voluntary recognition. Vercoe conferred with his superiors and reached a decision to recognize the Union, upon a card check.[5] There is no evidence that Mitchell was involved in this decision. Vercoe based his decision on his perception that Mitchell (and the three previous Burnsville general managers) was not being helpful to the employees," and that "It was worth giving it a shot to save the division. Put some structure in it." Vercoe further testified that, in his experience, when employees choose a union to represent them, it represents a failure of management's exercise of authority to some extent, and that Mitchell had expressed to him that Mitchell was frustrated, to some extent, that his authority was being challenged.

The Substantive Allegations

Hassan Musse, employed by the Respondent as a busdriver since 2003, attended the union organizational meeting at Bonnie Bobo's residence about September 5, 2005, where he, along with other employee attendees, signed an authorization card for the Union. After the meeting, later in September, Mitchell called Musse into his office, where just the two of them were present. Mitchell began the conversation by saying, "I heard you signed the union and then you pushing other people to sign the union."[6] Musse answered, "We need union . . . for protection and for . . . justice and fair." Mitchell responded, "A union will not help you." Mitchell added, "You will lose one dollars bonus." (Employees received a $1-per-hour bonus if they missed no days and have no problems driving their routes.) Mitchell also said as to unions, "all they need [is] money."

Asli Awad, employed by the Respondent as a busdriver since November 2004, also attended the September 5 union organizational meeting at Bobo's house. About a week after this meeting, Mitchell initiated a conversation with Awad at the bus facility. Mitchell said, "Asli, I hear you guys had a meeting at Bonnie's house." Awad answered, "Yes." Mitchell asked how long ago the meeting was and, before Awad could respond, added "I hear it was three days

[4] Vercoe testified that he did not know "the specifics" of the date of the phone call. "I want to say sometime towards the end of September, middle of September . . . ."

[5] There is no direct evidence as to on what date this occurred.

[6] Many of the witnesses were originally from Somalia, and English is not their first language. Some of the quoted testimony appears uncorrected for wording or grammar, and simply reflects the best, and largely successful, attempts of the witnesses to communicate in English. A translator was always present during the trial, but the witnesses declined such assistance.

ago." Awad said, "Yeah, but it was a week ago." Mitchell repeated, "I hear it was three days ago." Mitchell asked why they had a meeting. Awad responded, "We need a union because two of our coworkers . . . got fired and we want a union to keep our jobs." Mitchell said, "I hear you guys . . . want to have a union because you don't . . . like me." Mitchell concluded, "I saw unions in the past . . . they don't help employees. They gonna just take your money and do nothing."

Mohamed Ali, employed by the Respondent as a busdriver since November 2004, also attended the September 5 meeting at Bobo's house. About a week after this meeting, Mitchell spoke to Ali at the bus facility. Mitchell asked Ali if he was one of the people who signed a card and attended the meeting. After Ali responded in the affirmative, Mitchell asked Ali if he knew what the union does. Ali asked Mitchell what he meant. Mitchell responded, "Unions will take your money away and they won't do any different than what we have already right now." Mitchell added that if a union comes in the employees would lose their dollar-an-hour bonus.

Musse had a second conversation with Mitchell in his office in late September or early October 2005. Mitchell began the one-to-one conversation by telling Musse that he had heard that Musse had signed for the Union and that he (Musse) was the leader of the Union; a group of Somali people. Mitchell told Musse that he would pay Musse $1000 "and then I will pay the rest whatever they need or overtime if you stop talking about the union." Musse told Mitchell he would not stop, and Mitchell responded that the "company will show you." Musse asked what he meant. Mitchell responded, "You will not have a job before you'll have a union."

Musse had a third conversation with Mitchell in November 2005. Mitchell called Musse into his office. Mitchell talked about a problem with driver Seham Nabry. Mitchell threatened to fire Nabry, and showed Musse employee identification photos of former drivers he had fired. Mitchell told Musse that he could do whatever he wanted to, and that he could fire Nabry. When Mitchell showed Nabry the identification photos of past employees, he asked Musse if he recognized their faces, and Musse responded that he did. Mitchell responded, "I fired them. They never came back. And then I will fire Seham [Nabry]. I will fire you, too." Mitchell added. ". . . the union will not help them, no matter what." Mitchell concluded by telling Musse that he didn't understand anything and that he didn't deserve the job he had. At some point during the conversation, Mitchell told Musse that he would lie if he had to; that no one would believe Musse, instead they would believe Mitchell.

Bonnie Bobo, employed by the Respondent as a busdriver since May 15, 2005, was selected as one of two union stewards, along with Musse, in late October or early November 2005. On December 1, 2005, Bobo utilized a toll-free phone number, maintained by the Respondent for the explicit purpose of employee complaints, to leave a message for the Respondent's owner in which she stated that there were "things going on" which she wanted to share with him, and "I was tired of being threatened and disrespected."

About December 8, 2005, Bobo called Mitchell to report she was ill and would not report to work that day. A few minutes later, Bobo received a return phone call from Mitchell. Mitchell told Bobo that he had two items to discuss with her. Mitchell said, "First off, I never want you to call me on my personal cell phone again." Bobo responded, "Not a problem." Mitchell then told Bobo that the Respondent's owner, Alex Lodde, mentioned to Mitchell that Bobo had called him. Mitchell told Bobo that she was never to call Lodde again. Bobo responded that until Lodde personally gave her that instruction, she would continue to call. Mitchell responded that Seham (Nabry) and Bobo "got our nose where it doesn't belong and we're going to be in big trouble." After a further exchange, Mitchell told Bobo, "I don't give a damn if you're steward or what you are, I will do as I damn please."

About February 5, 2006, Musse, at the bus facility, spoke to "Luis,"[7] a fellow driver, about another employee, "Liban," who had been suspended by the Respondent. Musse commented to Luis, that the Union would assist Liban, and solve the problem. A nearby third driver, John Rockmore, interjected that the Union would not help and would just take money. John said that the Union wasn't needed and that, in effect, it was only the "immigrants" who wanted the union.

About 15 minutes later, Mitchell called Musse while Musse was driving his bus route. Mitchell told Musse not to talk to "John" about the Union, that nobody wants the Union, and John doesn't want the Union. Mitchell further told Musse that he could lose his credibility and his job "if you talk about union." Mitchell directed Musse to see him when he finished his route. Musse then called Bobo and asked her to accompany him to see Mitchell at the conclusion of his route. When, at the conclusion of his route, Musse, accompanied by Bobo, approached Mitchell at the bus facility, Mitchell told him, "I don't want to see you. Go."

Asli Awad attended a meeting of unit employees at Seham Nabry's residence on February 19, 2006. The employees met to discuss ideas for a union contract. The next day, at work, Awad entered Mitchell's office to obtain her "fuel card" so she could refuel her bus. When Awad asked Mitchell for the fuel card, Mitchell said, "Asli, I hear . . . you guys had a meeting at Seham's house yesterday." Awad responded, "Yes." Mitchell asked, "What did you talk about?" Awad mentioned the union contract coming up and that the employees wanted vacation and sick days. Mitchell asked if Musse and employees Mustafa Mohammed and "Admesse" were present at the meeting. Awad answered that she wouldn't give him names, but all the employees were there.

The Seham Nabry Incident

Nabry is a busdriver for the Respondent, and was actively involved in the union organizational campaign. She attended the organizational meeting at Bobo's house, signed an authorization card, and distributed cards to drivers who did not attend the meeting. Nabry also hosted at her residence a union meeting on February 19, 2006, at which employees discussed what they desired in a union contract. As noted, Mitchell questioned Awad as to which employees were present at this meeting.

The day after the meeting, at work, Nabry received and read her paycheck, and believed that 2 hours were missing. She entered Mitchell's office, which was open, and told him that the 2 hours she spent undergoing a medical test were not included. Mitchell took the check, threw it down, and, in a raised voice, told Nabry, "You know what, you can call the union or whoever you call. You can call corporate. I have nothing to do with that."[8]

[7] Certain employees of Respondent were identified by witnesses only by their first names.

[8] I conclude that this is what Mitchell said to her. Nabry, on direct examination, testified twice as to the words used by Mitchell. The first time she did not quote Mitchell as using the word "union," the second time she did. Neither question asked of her as to this conversation was leading in respect to the word "union." Inasmuch as these answers were spontaneous and not generated by the questions, I concluded that the all of the information encompassed by both answers was accurate, and such included Mitchell's reference to the union. Further, Mitchell testified as to this incident, and did not deny using the word "union."

Nabry reported to work the following morning and noticed, from paperwork, that one of the roads on her route was closed, and the detour noted appeared to be incorrect. Nabry went to Mitchell's office to ask about the detour. The door to Mitchell's office was open. Mitchell, who was counting money, glanced at Nabry, and Nabry stepped into the office by the door. Nabry began to ask about the detour, and told Mitchell that she didn't "get it." Mitchell responded, "Simply because you are stupid," and then added that the detour was not on her route. Nabry told Mitchell that the detour was, in fact, on her route, and showed him the paperwork. Mitchell responded, "You know what, I got tired of you and your questions." At this point, Mitchell came out from behind his desk to where Nabry was in front of the desk, pushed Nabry, and said in a loud voice, "Get the hell out of my office." Mitchell, a much larger person than Nabry, used one hand to push Nabry, a few inches below her neck, causing Nabry to stumble a few steps backward and hit the wall with her shoulder and hip.[9] Mitchell grabbed and slammed the office door, while Nabry jumped back into the hallway outside the office. Nabry said out loud, "What's going on?" Mitchell opened his office door and told Nabry, "Do not ever come to my office and do not ask me those kinds of questions. If you get to my office again you will not be here."

After the incident, Nabry left the terminal to drive her route. When Nabry attempted to start her route from a mall, she concluded that she was too "upset" to drive; that it was not safe for her or passengers. Nabry called Union Representative Michelle Sommers who, in turn, called Mitchell. Eventually, other employees communicated to Nabry that Mitchell would provide a relief driver for her. About 11:42 a.m., Nabry parked the bus at Mall of America, was relieved by another driver, and returned to the terminal. Nabry's husband picked her up at the terminal and took her to a Dr. Leah Hogan, a psychiatrist she had been seeing, because Nabry "was so scared and shaky." The psychiatrist told Nabry that she should not drive for 2 weeks, and provided medication. Later that same day, Nabry experienced pain in her neck and shoulders, and visited a hospital emergency clinic where a doctor provided medication and told Nabry she would need occupational therapy. On March 6, 2006, Dr. Hogan gave Nabry a note permitting a return to work, with the following restrictions: 3 days for 3 hours a day for the first week; 5 days for 5 hours a day the second week; and then a return to full-time work. After missing some time, Nabry returned to work for the Respondent about March 13.

Credibility Findings

I agree with the Respondent's counsel that the essence of this case is a credibility contest between the General Counsel's witnesses and Mitchell. The facts found above reflect my findings in respect to the credibility of the witnesses. The General Counsel's witnesses, Nabry, Musse, Ali, Awad, and Bobo were all impressive, had good recollection, and clearly made earnest attempts to fully answer questions, no matter whether asked by counsel for the General Counsel or the Respondent. Occasionally Nabry, Musse, Ali, and Awad stumbled over answers but, in my judgment and from my observation of their demeanor, this simply reflected the fact that English was not their first language, rather than any attempt to deceive. The emotion on the witness stand displayed by Nabry, Musse, Ali, and Awad suggests the vividness of their recollections of the incidents they testified about, and the resulting impact on them; it does not suggest any attempt to deceive. Further, they are all current employees of the Respondent and, with the exception of Nabry, they have no direct pecuniary interest in the outcome of this case. As the Board recently restated in *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117, fn. 2 (2004), enfd. 2006 WL 898084 (2d Cir. 2006), "the testimony

[9] Mitchell admitted using the word "hell" and raising his voice. As discussed, I reject his denial that he pushed Nabry, as not credible.

of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." (Citing, *Flexsteel Industries,* 316 NLRB 745 (1995).)

On the other hand, Respondent's Burnsville general manager, Joseph Mitchell, was not as impressive. First, Mitchell was present in the courtroom and listened to his direct superior, Vercoe, testify that Mitchell would be fired if the Respondent believed that Mitchell pushed Nabry. Thus, Mitchell, when he testified, absolutely knew it was in his own pecuniary interest to deny Nabry's version of the alleged pushing incident.

Second, Mitchell's repeated usage of the qualifying phrase "pretty much" when asked significant questions (on direct and cross-examination) requiring direct and specific answers, was striking. Some examples: "it was pretty much what I said." "She had pretty much come in [to my office]." "At that point in time I had pretty much talked about the rules of the office are not just, you know, walking in [to my office]." "She was, you know, addressing me, you know, so to speak first, you know, pretty much about the detour, you know." ". . . and I asked her [Nabry], you know, at this point pretty much, you know, why are you still here . . . ." "I pretty much remained seated up until the time she actually crossed back over the threshold pretty much so I can go close my door…" "He pretty much volunteered information to me…" "I pretty much said that, you know, you pretty much need to have permission to go beyond this point here. Pretty much not to go behind the counter…" Certainly, it's not unusual for witnesses to display nervous tics or tendencies on the witness stand. However, from my observation of Mitchell's demeanor, it appeared that his repeated usage of "pretty much" indicated more a desire to avoid direct specific definite answers, rather than nervousness. I do not primarily rely on Mitchell's "pretty much" testimony for my credibility resolutions, but considered it as simply one factor among the many discussed here.

Third, as noted above, Musse, in Mitchell's presence, testified that Mitchell told him that "I will lie if I have to. If [I] want to, I will lie. Then no one will believe you, and everybody will believe me." Despite being present for Musse's testimony and testifying at the trial, Mitchell did not specifically deny telling Musse this. Similarly, while Mitchell denied telling employees his opinion of unions, he never specifically denied the alleged 8(a)(1) statements attributed to him by the five witnesses for the General Counsel.[10]

The Respondent, in its brief, argues that the testimony of the General Counsel's witnesses simply evidences the Somali employees' dislike of African-Americans, dislike of Mitchell's management style and enforcement of the employee rulebook, or a history of friction between Somali employees and the Respondent's general managers. In support of this argument, in its brief Respondent points to the testimony of its Burnsville division operations

[10] At the trial, counsel for the General Counsel moved that Mitchell's testimony be stricken for a violation by Respondent of a sequestration order which I issued. Counsel for the General Counsel conceded that the violation was inadvertent. (Mitchell was present at Respondent counsel's table during the entire trial, other than during his own testimony. Vercoe was present at Respondent counsel's table until his own testimony.) In his brief, counsel for the General Counsel withdrew his motion, but asked I apply a stricter scrutiny to the testimony of both Vercoe and Mitchell. I deny the request. From my own close observation of the subject witnesses, I observed no evidence of prejudice from the inadvertent violation of the sequestration order. Further, Mitchell's presence throughout the trial underlines his failure to specifically deny the alleged 8(a)(1) statements attributed to him by the General Counsel's witnesses.

manager, Darrell Dixon, that he overheard Seham Nabry, sometime in June 2005, say that Mitchell is another "black manager," that he wouldn't be there long, and that "he will be gotten rid of too," and the testimony of bus driver John Rockmore that he overheard a lot of his fellow employees complain that they didn't like the rules Mitchell set in place, and that he overheard Nabry complain "About the work schedules being placed and how things was [sic] basically run around the company." From these and similar comments, Respondent, in its brief, posits that the testimony of Nabry, Musse, Ali, Bobo, and Awad is made up and part of a cabal against Mitchell because he is African-American and because he enforces the employee rulebook.

I reject this argument of the Respondent. The cited and similar testimony is a far cry from establishing the Respondent's theory of a cabal which involves all five General Counsel witnesses engaging in perjury. Even if Nabry speculated as to Mitchell's job tenure, or Nabry or other employees carped about Mitchell's enforcement of the employee handbook or his management style, the fact that some employees may have been unhappy with their working conditions or supervisor, is not unique at workplaces and is not a basis for me to conclude that all five witnesses lied on the witness stand, particularly where, as here, all five witnesses demonstrated the demeanor of witnesses telling the truth.

Thus, based on my close observation of all of the witnesses, and for the reasons set forth above including the demeanor of the witnesses, I conclude that Mitchell is not as reliable a witness as the five witnesses who testified for the General Counsel. I, thus, specifically have credited the testimony of Musse, Ali, Awad, Bobo, and Nabry as to the alleged 8(a)(1) statements attributed to Mitchell, and Nabry as to the alleged pushing incident. Likewise, I have rejected Mitchell's version of the alleged pushing incident, his testimony that he was in favor of the Union and, to the extent he denied the alleged 8(a)(1) statements, I reject said testimony as not credible.

ANALYSIS AND CONCLUSIONS

The Board's test for interference, restraint, and coercion under Section 8(a)(1) is an objective one, and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co*., 124 NLRB 146, 147 (1959). As is discussed below, I find that each of the alleged actions violates Section 8(a)(1) of the Act, including the pushing incident involving Nabry. However, I agree with Respondent that the pushing incident does not also violate Section 8(a)(3).

Interrogation[11]

As to interrogation, the Board has held that a violation will be found when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employees in the exercise of the rights guaranteed them by the Act. *Rossmore House*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); and *Liquitane Corp*., 298 NLRB 292 (1990). Further, if the interrogations are coercive, the fact that the perpetrating supervisor may have been in sympathy with union organization efforts does not diminish the impact of the coerciveness. See *Acme Bus Corp*., 320 NLRB 458 (1995).

[11] Respondent argues in its brief that the various incidents alleged as interrogation never occurred. Respondent did not argue that if the incidents occurred they did not violate Section 8(a)(1).

Here, about September 12, 2005, Mitchell questioned Awad, in a one-to-one conversation as to a union organizational meeting that occurred 1 week earlier. Mitchell asked when the meeting occurred and after Awad answered, corrected the answer, thus indicating to Awad that the Respondent had the organizational activities under surveillance. During the conversation, Mitchell suggested a reason for the union activity, thus soliciting a response from Awad. Finally, during the conversation Mitchell suggested to Awad the futility of choosing a union. Mitchell's questioning of Awad occurred just 1 week after the first union organizational meeting. Under all of these circumstances, Mitchell's interrogation of Awad is coercive and violates Section 8(a)(1).

Also about a week after the September 5 union organizational meeting, Mitchell questioned Ali at the bus terminal. During this one-to-one conversation, Mitchell asked Ali if he was one of the people who signed a card and attended the meeting. When Ali answered in the affirmative, Mitchell told him that the union would take his money away and wouldn't make any difference, and that if a union came in the employees would lose their dollar-an-hour bonus. Under all of these circumstances, Mitchell's interrogation of Ali is coercive and violates Section 8(a)(1).

On February 20, 2006, the day after attending a union meeting, Mitchell, after telling Awad that he heard that there was a union meeting at Nabry's house, asked Awad what was discussed at the meeting, and further asked whether two specific employees attended the union meeting. Awad responded that all of the employees were at the meeting. These questions were asked in Mitchell's office. In these circumstances, with the conversation taking place in Mitchell's office, and in the context of the other unfair labor practices I have found Mitchell engaged in, I conclude that this interrogation of Awad was coercive and violates Section 8(a)(1).

Threats

Employer threats to discontinue current benefits or to otherwise adversely impact employees' terms and conditions of employment in retaliation for union activities, violate the Act. See, for example, *W.E. Carlson Corp*., 346 NLRB No. 43 (2006). Here, in September 2005, subsequent to the union organization meeting of September 5, Mitchell told Musse that a union would not help the employees and threatened that the employees would lose their $1-per-hour bonus. About September 12, Mitchell told Ali that unions would take his money away, wouldn't get anything different then what the employees already had, and that the employees would lose their $1-per-hour bonus. Mitchell's threats to these employees in respect to the bonus are coercive and violate Section 8(a)(1).

In a conversation in late September or early October 2005, Mitchell told Musse that he wouldn't have a job before he had a union. About February 5, 2006, Mitchell told Musse that he could lose his job if he talked about the union. These threats to Musse's job are coercive and violate Section 8(a)(1).

About December 8, 2005, Mitchell told Bobo, in response to Bobo's complaint phone call to the Respondent's owner, that Bobo and Nabry were getting their noses where they don't belong and that [you're] "going to be in big trouble." Mitchell linked this threat not only to Bobo's phone call, but also to union activity by adding the following: "I don't give a damn if you're steward or what you are, I will do as I damn please." This threat of unspecified consequences in retaliation for Bobo's protected and union activity violates Section 8(a)(1*). Ironwood Plastics, Inc.*, 345 NLRB No. 105 (2005).

Promises

Employer promises of benefits to discourage union activities violate the Act. Here, during their conversation in late September or early October 2005, Mitchell promised Musse $1,000, and money and overtime to other employees if Musse stopped talking about the Union. This explicit and unambiguous promise of a benefit in return for abstaining from union activity, is coercive and violates the Act. *Grouse Mountain Lodge,* 333 NLRB 1322, 1324 (2001).

Impression of Surveillance

About September 12, 2005, shortly after the union meeting at Bobo's house, Mitchell told Awad that he heard there had been a union meeting at Bobo's house, and asked when the meeting took place. Before Awad could answer, Mitchell added that he heard the meeting occurred 3 days earlier. About the same time as the Awad conversation, Mitchell told Musse, that he heard Musse signed a union card and that he was pushing other employees to sign cards. In late September or early October 2005, Mitchell told Musse that Mitchell had heard that Musse was the leader of the Union among a group of Somali employees. Shortly after the February 19, 2006 union meeting at Nabry's house, Mitchell told Awad that he heard that employees held a meeting at Seham's house the day before.

"The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that union activities had been placed under surveillance." *Grouse Mountain Lodge*, supra at 1322. "The idea behind finding an impression surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace and Son*, 331 NLRB 914 (2000). In all four conversations described above, Mitchell clearly implied that he was keeping the union activities of employees under close scrutiny. These employees would reasonably assume from the statements that their union activities had been placed under surveillance. Under these circumstances, Mitchell's statements were coercive and violate Section 8(a)(1). Further, the union meetings involved did not occur in open areas by the workplace or otherwise in the open. See, for example, *Impact Industries*, 285 NLRB 5, at fn. 2 (1987).

Futility

During the September 12 conversation between Mitchell and Awad, Mitchell told Awad that he had seen unions in the past, that they did not help employees, that they were just going to take employees' money and do nothing. During his September conversation with Musse that occurred after the Union meeting at Bobo's house, Mitchell told Musse that the Union would not help them, that it just needed their money, and added that the employees would lose their $1-an-hour bonus. During his September 12 conversation with Ali, Mitchell told Ali that the Union would only take his money and not do anything more for him than the employees already had. Mitchell coupled this with also telling Ali that if the Union came in, the employees would lose their $1.00 an hour bonus. Finally, during his November 2005 conversation with Musse, Mitchell told Musse that he had given some discipline to Nabry, that he could fire her, and that the Union would not help. Mitchell added that he could do anything he wanted, fire anyone, fire Musse, and that the Union would not be able to help, "no matter what."

The implication of all of these statements by Mitchell is the same: that is, that it was futile for the employees to choose a union because the union would obtain nothing more than

the employees already had, and the Respondent would do as it chose regardless of the presence of a union. So advising employees, of the futility of selecting a union, is coercive and violates Section 8(a)(1). *Aqua Cool*, 332 NLRB 95, 96 (2000).

Nabry Pushing Incident

As set forth above, on February 21, 2006, 2 days after a union meeting at her house, Nabry entered Mitchell's open office and asked him about a detour on her route. Mitchell responded by calling her "stupid" and told her to get the "hell" out of his office. Mitchell pushed her resulting in Nabry stumbling a few steps backwards into a wall, causing injury to Nabry, and resulting in her missing some days of work. Mitchell knew of the union meeting at Awad's house, as is evidenced by his conversation with Awad on February, 20, 2006.

The General Counsel argues that Mitchell's actions in regards to Nabry violated Section 8(a)(1). I agree that there is a nexus between Mitchell's actions towards Nabry and Nabry's involvement in union activity. Mitchell was not happy about the advent of the Union, and the subsequent union activities, as is set forth above in respect to his numerous violations of the Act, and repeated demonstrations of antiunion animus. This animus reflected either Mitchell's personal views of union, and/or his view that the advent of the Union was a challenge to his managerial authority. At the time of the pushing incident Mitchell knew of the union meeting at Nabry's house, just two days earlier.[12] The day after the union meeting, Mitchell told Nabry to see the union or whoever when she complained that hours were missing from her check. Mitchell's further hostility towards Nabry's involvement with the Union is demonstrated by his comment to Bobo on December 8, 2005, to the effect that Nabry and Bobo had their noses where they didn't belong and they were going to be in big trouble. The union meeting at Nabry's house was the final straw for Mitchell, and set off the incident which ended in his pushing Nabry.

Accordingly, I find that Mitchell violated Section 8(a)(1) by pushing Nabry and causing her injury, which caused her to miss work. See, for example, *Lever Bros. Co.*, 293 NLRB 584 (1989). I reject the Respondent's argument that Nabry made up the incident or that it was a setup generated by the alleged hostility of Nabry and other Somali employees to an African-American manager or because of hostility to Mitchell's enforcement of an employee handbook. The record, simply, does not support such arguments, and I have concluded that Nabry, as opposed to Mitchell, is a fully credible witness.

Counsel for the General Counsel, conceding that his theory is novel, further argues that Mitchell's pushing of Nabry also violated Section 8(a)(3) in that it was a "constructive suspension" of Nabry. I do not agree. Counsel for the General Counsel cites *David King Center*, 328 NLRB 1141 (1999), where the Board weighed a constructive suspension allegation under its criteria for constructive discharge, found that the criteria were not met, and then stated as follows at footnote 9: "We know of no case in which the Board has found a violation of the Act on a 'constructive suspension' theory. However, we need not decide whether such a violation could ever be found, since the facts in this case do not support the General Counsel's theory in any event." As to the constructive discharge theory, the Board reiterated its criteria for violation: "In order to prove constructive discharge, the General Counsel must establish: (1) that the employer made the employee's working conditions intolerable; (2) that the employer

[12] Mitchell's concern with the union meeting is further demonstrated by a March 1, 2006 memo setting forth his version of the pushing incident he sent to Vercoe, in which he mentioned the meeting "with other disgruntled employees" at Nabry's house.

intentionally made the conditions intolerable; and (3) that the employer did so because of the employee's union activities." id. at 1144.

Under the Board's criteria for finding a constructive discharge, the essence of the violation involves a discriminatory change to an employee's terms and conditions of employment. The essence of the violation in the instant case is a single push of an employee, caused by anger over union activities, not a discriminatory change in that employee's working conditions. While it is true that the push resulted in the employee's loss of some hours of work, the loss resulted from the act of pushing the employee, not because there was a discriminatory change in the employee's working conditions or because of a discriminatory suspension or other discipline. The employee, Nabry, did not miss work because of the imposition of more onerous working conditions, she missed work because she suffered an injury as a result of a push. In any case, I have already concluded that Mitchell's actions in respect to Nabry violated Section 8(a)(1) and will impose a remedy that includes cease and desist, and remuneration for loss of wages, essentially the same remedy that I would impose if I agreed with the General Counsel's theory in respect to Section 8(a)(3). Under these circumstances, I do not find that Respondent violated Section 8(a)(3).

Finally, the Respondent argues it could not have committed the alleged violations because the evidence demonstrates that it had no antiunion animus, as is evidenced by its voluntary, card check recognition of the Union. However, the record establishes that Mitchell, the perpetrator of all of the alleged violations, played no role in the Respondent's decision to recognize the Union, and that, further, Mitchell had expressed to Director of Labor Relations Vercoe frustration that his authority was being challenged. General Manager Mitchell is, and was, the Respondent's agent, and the Respondent's highest managerial official at Burnsville. His animus and anger towards the Union and its supporters is manifest throughout the record.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. On the following dates, and by the following actions, Respondent interfered with, restrained, and coerced employees in the exercise of Section 7 rights, thereby violating Section 8(a)(1):

A. Coercively interrogating its employees about their union activities on two occasions about September 12, 2005, and on February 20, 2006;
B. Threatening employees with loss of benefits, loss of jobs, and unspecified retaliation for their union activity, on two occasions about September 12, 2005 about late September or early October 2005, and December 8, 2005;
C. Promising employees money and overtime assignments about late September or early October 2005, if they discontinued union activities;
D. Creating the impression to employees that their union activities were under surveillance on two occasions about September 12, 2005, about late September or early October 2005, and on February 20, 2006;
E. Informing employees that selecting a union to represent them would be futile on three occasions about September 12, 2005, and about November, 2005;

F. Pushing an employee so that she stumbled against a wall on February, 21, 2006.

4. The Respondent did not violate Section 8(a)(3) of the Act, as alleged.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, MV Transportation, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of jobs, loss of benefits, or unspecified consequences because of their union, or other protected concerted activities.

(b) Coercively interrogating employees about their union activities.

(c) Promising employees money or benefits if they curtail their union activities.

(d) Creating the impression that employees' union activities are under surveillance.

(e) Telling employees that it is futile for them to be represented by a union.

(f) Pushing or otherwise engaging in aggressive physical contact with employees because they engage in union or other protected concerted activities.

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

(a) Make whole Seham Nabry for any loss of earnings and other benefits suffered as a result of missing work from injury suffered because of the coercive actions described in this decision, computed in the manner set forth in *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Within 14 days after service of the Order, remove from its files any references to the February 21, 2006 incident involving Seham Nabry and the work time she missed because of that incident, and notify her in writing that we have done so and that this incident will not be used against her in the future.

(c) Within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, preserve and provide at a reasonable place designated by the

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

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 the Order.

(d) Within 14 days after service by the Region, post at its facilities in Burnsville, Minnesota, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent 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 the Respondent to ensure that notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, Respondent shall duplicate and mail, at its own expense, copies of the notice to all employees and former employees employed by Respondent at any time since November 9, 2005. Inasmuch as many of the employees involved in this proceeding speak English only as a second language, the notices shall contain a Somali translation of the English wording.

(e) 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.

Dated, Washington, D.C. July 7, 2006

Mark D. Rubin
Administrative Law Judge

[14] 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."

JD–47–06
Burnsville, MN

APPENDIX

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 GIVE YOU THE RIGHT TO

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

WE WILL NOT do anything to interfere with your exercise of any of these rights.

WE WILL NOT ask you about your union activities or the activities of other employees.

WE WILL NOT make it appear that we are watching out for your union activities.

WE WILL NOT tell you that the union cannot help as your representative.

WE WILL NOT promise you money or benefits, including more overtime, if you will cease union activities and/or encourage other employees to cease union activities.

WE WILL NOT threaten that you will lose your jobs, that we will take away benefits, or that we will take any other actions against you because you support the union or engage in union activities.

WE WILL NOT push or initiate aggressive physical contact with employees because they support the union or engage in union activity.

WE WILL make Seham Nabry whole for any loss of wages or other benefits she suffered because of our unlawful conduct against her.

WE WILL remove from our files any reference to the February 21, 2006 incident involving Seham Nabry and the time she missed work because of that incident, and notify her in writing that we have done so and that this incident will not be used against her in the future.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

JD–47–06
Burnsville, MN

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 Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

330 South Second Avenue, Towle Building, Suite 790
Minneapolis, Minnesota 55401-2221
Hours: 8 a.m. to 4:30 p.m.
612-348-1757.

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, 612-348-1770.