

**Lindenmeyr/Munroe, a Division of Central National Gottesman, Inc. and Thomas Toegemann and General Warehousemen, Shippers, Packers, Receivers, Stockmen, Chauffeurs & Helpers, Local Union No. 504, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.**  
Cases 1-CA-26432 and 1-RC-19245

May 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On January 22, 1991, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The Petitioner filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

IT IS FURTHER ORDERED that Case 1-RC-19245 is severed from Case 1-CA-26432 and is remanded to the Regional Director for Region 1 for further proceedings consistent with this Decision and Order.

<sup>1</sup> In the absence of exceptions, we adopt pro forma the judge's recommendation that the Employer's Objection 3 be overruled. The Employer offered no evidence on Objections 2, 4, and 5.

The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find it unnecessary to rely on the judge's alternative rationale that the remark allegedly made by Supervisor Michael Capalupo to employee Thomas Toegemann would not violate the Act as it would have been mere speculation.

*Thomas Morrison, Esq.*, for the General Counsel.  
*Mark Stern, Esq.*, of Somerville, Massachusetts, for Thomas Toegemann and for Teamsters Local 504.  
*Nathan Kaitz, Esq. (Morgan, Brown & Joy)*, of Boston, Massachusetts, for Lindenmeyr/Munroe.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. At issue here are:

(1) Did the Employer/Respondent, Lindenmeyr/Munroe, terminate the employment of its employee Thomas Toegemann because Toegemann supported Teamsters Local Union No. 504 (the Union);<sup>1</sup> did Lindenmeyr/Munroe, for the same reason, refuse to rehire Toegemann.

(2) Prior to Toegemann's termination, did a Lindenmeyr/Munroe supervisor warn Toegemann against voicing his support for the Union.

(3) Has Lindenmeyr/Munroe raised valid objections to the election held on June 8, 1989, at one of the Company's facilities.

(4) How should Lindenmeyr/Munroe's challenges to two ballots cast in that election be resolved.

I. PROCEDURAL HISTORY

This proceeding had been consolidated with Case 1-CA-26036. The Union filed an unfair labor practice charge in that case on December 23, 1988, and amended that charge on February 1, 1989. (All events this decision refers to occurred in 1989, unless otherwise specified.) A complaint issued on February 13. Toegemann filed his unfair labor practice charge, in Case 1-CA-26432 on June 7 and amended it on July 19.

In the meantime, on June 8, in Case 1-RC-19245, the Board conducted an election at Respondent's facility on Forbes Boulevard in Mansfield, Massachusetts. The bargaining unit:

All full-time and regular part-time warehouse employees, including drivers, warehousemen, driver-helpers, cutters and wrappers, but excluding office clerical employees, sales employees, guards and supervisors as defined in the Act.

Eight votes were cast for the Union, seven against. There were three challenged ballots (with all challenges by Lindenmeyr/Munroe). And Lindenmeyr/Munroe objected on several grounds to the conduct of the election by the Board and to the Union's conduct during the course of the election campaign.

On July 19, the Regional Director for Region 1 issued a Supplemental Decision in which she concluded that the challenged ballots and Lindenmeyr/Munroe's objections should be consolidated with Case 1-CA-26432 for hearing.

Then, on August 18, the Regional Director issued an "Order Consolidating Cases, Consolidated Complaint and Notice of Hearing" in Cases 1-CA-26036, 1-CA-26432, and 1-RC-19245.

Lastly, a settlement agreement was reached in Case 1-CA-26036. On November 19 that led to an order severing that proceeding from Cases 1-CA-26432 and 1-RC-19245. I held a hearing in this matter in Boston on August 1 through 3, 1990.

<sup>1</sup>Lindenmeyr/Munroe admits that it is an employer engaged in commerce and that the Union is a labor organization.

II. THE ALLEGATIONS CONCERNING THOMAS  
TOEGEMANN

A. *The Merger Between Lindenmeyr Paper Co. and  
D. F. Munroe*

Lindenmeyr Paper Co. (Lindenmeyr) merged with D. F. Munroe on October 1, 1988. D. F. Munroe's executives dominated the management of the merged company. Thus all the management decisions at issue here—including the decision to terminate Toegemann's employment, were made by persons who had been D. F. Munroe supervisors prior to the merger.

Both companies had a number of facilities. But the only facilities we need concern ourselves with here are Lindenmeyr's Canton warehouse (where Toegemann worked) and three D. F. Munroe facilities: a warehouse in Mansfield, Massachusetts, that was in operation at the time of the merger (the "old Mansfield" facility); a newly constructed facility in Mansfield (the "new Mansfield" facility); and a warehouse in Peabody, Massachusetts.

Prior to the merger, Lindenmeyr's Canton employees were represented by the Union. No D. F. Munroe employees were unionized.

One of the outcomes of the merger was that the Canton facility was to close. Twelve warehousemen and truck drivers worked in Canton. Ten were regular, full-time employees with seniority rights under Lindenmeyr's collective-bargaining contract with the Union. Two were "casual" employees who, under that contract, had no seniority rights. (Toegemann was one of the two casual employees.) After the merger representatives of Lindenmeyr/Munroe and the Union entered into a "closing agreement" covering the Canton bargaining unit employees. The agreement was executed on October 20, 1988. Under the closing agreement, Lindenmeyr/Munroe agreed to place 9 of the 10 regular Canton employees in either its Mansfield or Peabody locations. The 10th regular Canton employee was placed on a preferential hiring list.

That was the extent of Lindenmeyr/Munroe's contractual obligations to the Canton employees. Lindenmeyr/Munroe made no promises about employing Canton's two casual employees—Toegemann and Chris Selway. In fact during the negotiations company representatives said that Lindenmeyr/Munroe did not plan to use casual employees, that it would instead use the services of a temporary-employment agency.

The Union's representatives nonetheless asked if Lindenmeyr/Munroe had any openings for Toegemann and Selway. Toegemann, the union representatives said, would prefer working at Mansfield, Selway at Peabody. Lindenmeyr/Munroe's representatives promised nothing. But at a meeting with the Canton employees, one of Lindenmeyr/Munroe's representatives said that "if something came up," Toegemann and Selway would "be considered." In addition the Company advised that the Canton warehouse would continue in operation for a while with a skeleton workforce of two employees and a supervisor, and that the Company would use Selway as one of those employees at Canton. (No one claims that Lindenmeyr/Munroe's decision to employ Selway at the Canton facility, instead of Toegemann, was unlawful in any respect.)

B. *Toegemann's Career with Lindenmeyr/Munroe*

Lindenmeyr hired Toegemann in June 1988 as a casual employee to fill in for regular employees going on vacation. His work: truck driving, picking orders in the warehouse, and—when there was no other work to do—sweeping and other cleaning chores. Toegemann had worked for unionized companies in the past and was a member of a Teamsters local, but not the Union (Local 504). And as a casual employee, he was not eligible to become a member of the Union.

In early November 1988 Lindenmeyr/Munroe shifted almost all of Canton's operations to the old Mansfield facility. All but one of the regular Canton employees began reporting to Mansfield or to Peabody. The one exception was employee Bruce Ponder, whom Lindenmeyr/Munroe kept at Canton. And, as touched on earlier, Selway and a supervisor, Michael Capalupo, also continued to report to Canton. Toegemann was laid off.

Happily for Toegemann, on about November 24, 1988, a regular Peabody employee quit. Lindenmeyr/Munroe brought Selway to Peabody (as a regular employee), then brought Toegemann back to fill the empty slot (for a casual employee) at Canton.

The task of the three Canton workers—Capalupo, Toegemann and Ponder—was to prepare the facility for complete shutdown. That involved moving most of the remaining salable stock to Mansfield, making an occasional delivery to a customer, and designating what stock should be sold off for salvage. For the remainder of Toegemann's career with Lindenmeyr/Munroe, Toegemann was the Canton facility's truck driver, although he sometimes worked in the warehouse doing "a little bit of everything," as Capalupo put it. (Beginning in March, Toegemann started his workday by picking up a truck at Mansfield, which he then drove to Canton, and he ended his day by returning the vehicle to Mansfield. But the company continued to consider Toegemann to be a Canton employee.)

The task of completing the shutdown of Canton took longer than Lindenmeyr/Munroe had expected. But by mid-April the job was done. On April 18 the Company closed the Canton facility. And on that same day the Company terminated its employment of Toegemann. A supervisor told Toegemann that that was the last day the Company needed him. When Toegemann asked why, the supervisor said that the work at the Canton facility was completed.

In September 1989 Lindenmeyr/Munroe offered Toegemann temporary employment with the Company. Toegemann turned the offer down.

C. *Evidence that Lindenmeyr/Munroe's Termination of  
Toegemann was Discriminatory*

*The salesman's remarks.* Bill Meany was a sales manager with Lindenmeyr and he continued in that position after the merger. He had no responsibility for drivers or warehousemen. At some point after the merger, Toegemann asked Meany what Meany thought about Toegemann's chances of a permanent job with the Company. Meany responded that the Company liked Toegemann and the work that Toegemann did, that he (Meany) thought that it was "a good bet that they'd need people" at Mansfield, and that he saw no

reason why Toegemann “would not be working down there in Mansfield when everything got settled.”

The quotations are from Toegemann’s testimony. I credit that testimony. But Meany’s remarks say nothing about whether Lindenmeyr/Munroe in fact needed Toegemann’s services on or after April 18. Indeed, given Meany’s position on the sales rather than on the warehouse side of the Company’s operations, those remarks do not indicate that, even when Meany uttered them, it actually “was a good bet they’d need people” at Mansfield.

*Did Capalupo warn Toegemann not to “wave a union flag.”* By mid-March the Union’s organizing campaign at Mansfield was well underway. According to Toegemann’s testimony, he referred to the Union’s Mansfield campaign in the course of a conversation with Capalupo (the supervisor at Canton) and expressed his support for the Union’s efforts. Toegemann testified that Capalupo responded by warning Toegemann about the antiunion views of William Thirkell, Lindenmeyr/Munroe’s vice president of operations. According to Toegemann, Capalupo said

once you get down to Mansfield you shouldn’t be waving any union flag . . . supporting the Union in [its] drive to organize the Mansfield employees because Bill Thirkell is the boss and . . . it is . . . Thirkell that is going to give you a job in Mansfield and he doesn’t want the Union in . . . .

Capalupo denied having any conversation with Toegemann even remotely like that.

Capalupo seemed to me to be a friendly kind of person. Toegemann had been doing a good job for him. Capalupo’s background was with Lindenmeyr and thus with a unionized operation. And Capalupo knew that D. F. Munroe had been nonunion. I can therefore easily imagine Capalupo uttering the kind of remark that Toegemann’s testimony portrays.

But Capalupo’s denial was equally as credible as Toegemann’s testimony. And since it is the General Counsel who must shoulder the burden of proof, I conclude that the record fails to support the contention that Capalupo warned Toegemann against voicing his support for the Union.

I should note that even were I to conclude that Capalupo did make the statement described by Toegemann, I would not find that it was evidence of how Thirkell would respond to an employee’s manifest support for the Union. Capalupo was at the bottom of the supervisory hierarchy, and his background was with Lindenmeyr, not with D. F. Munroe. And there is no evidence that Capalupo was privy to utterances by Thirkell or by any other member of management about how the ex-D. F. Munroe managers would treat union activists. Accordingly even had Capalupo uttered the alleged remark, the probability is that it would have been mere speculation on his part.

*Toegemann’s vocal support for the Union, and Lindenmeyr/Munroe’s response to it.* Lindenmeyr/Munroe opposed the Union’s organizing efforts at the Mansfield warehouse. In early April the Company called a meeting of the facility’s 15 or so day-shift warehouseman and drivers. Lindenmeyr/Munroe’s purpose in holding the meeting was to try to convince the employees that they would be better off without a union. Several supervisors, including Thirkell, ad-

ressed the employees. Toegemann happened to be in the warehouse at the time and attended the meeting.

Two employees spoke out at the meeting in favor of unionization. Toegemann was one of them. No one from management responded to the pronoun comments.

*If Lindenmeyr had not laid off Toegemann, would there have been work for him to do.* For about 6 weeks, beginning in late April, Lindenmeyr/Munroe’s overtime costs at the Mansfield facility skyrocketed because of the tremendous amount of work associated with moving on May 1 from the old Mansfield facility into the new Mansfield facility. Moreover throughout the summer of 1989 Lindenmeyr/Munroe used employees from a temporary-employment agency to fill in for employees on vacation as D. F. Munroe had in previous summers.

Clearly Lindenmeyr/Munroe could have found useful work for Toegemann to do had the Company chosen to retain Toegemann. In fact Lindenmeyr/Munroe does not argue otherwise. But that does not necessarily suggest that there was anything improper about the Company’s decision to end its employment of Toegemann.

From the start, Lindenmeyr/Munroe planned to retain the services of one of Lindenmeyr’s casual employees until, and only until, the closing of the Lindenmeyr warehouse in Canton. The Company’s actions exactly matched those plans. Many business concerns in Lindenmeyr/Munroe’s position might have planned and done things differently. For instance, it must have been apparent early on that the switch to the new Mansfield warehouse from the old would take a lot of extra work and that employing an additional worker during that period would reduce overtime work and, therefore, total payroll expense.

But D. F. Munroe’s employment philosophy, and, therefore, Lindenmeyr/Munroe’s, was, generally, to hire only workers that it intended to keep on its payroll permanently.<sup>2</sup> There’s nothing suspicious about that way of doing things. And it explains the high levels of overtime in April and May and the use of a temporary-employment agency during the summer. I accordingly conclude that the juxtaposition of, on the one hand, Lindenmeyr/Munroe’s termination of Toegemann in April, and, on the other, the Company’s use at Mansfield in April and May of employees on overtime and its use of a temporary-employment agency during the summer of 1989, does not suggest that the Company terminated Toegemann’s employment for unlawful reasons.<sup>3</sup>

Lindenmeyr/Munroe’s hiring of a papercutter. Sometime in April the Company decided that it wanted to have a paper-cutting machine in the new Mansfield warehouse, together with an employee whose full-time job would be to operate it. And on, or just prior to, May 1, Lindenmeyr/Munroe did move such a machine into the facility. The Company did not

<sup>2</sup>In March one of the Company’s warehousemen asked Supervisor Bill Sypher to consider hiring the warehouseman’s son, a high school student, in some temporary capacity. In April about the time the Company terminated Toegemann’s employment—the Company hired the teenager and one of his friends, at \$5 an hour, to help in the final cleaning chores at the old Mansfield warehouse. (Toegemann had been earning about \$12.50 an hour.) I conclude that Lindenmeyr/Munroe’s hiring of those students says nothing about whether the company’s termination of Toegemann’s employment was, or was not, a violation of the Act.

<sup>3</sup>I reach that conclusion notwithstanding Lindenmeyr/Munroe’s offer of temporary employment to Toegemann in September 1989 and, when Toegemann refused the position, to a newcomer.

put anyone to work as the operator of the machine until July. Its choice of an operator was one Tom Stanwood. Stanwood had previously run a print shop. He had never before worked for the Company or its predecessors.

Stanwood left that job in June 1990. Lindenmeyr/Munroe employee Bruce Ponder (with whom Toegemann worked in the Canton facility) replaced Stanwood.

The question is whether all of that has implications regarding the company's employment of Toegemann. The argument goes this way: Back in October 1988 Lindenmeyr/Munroe had indicated that if an opening arose at the Mansfield warehouse, it would give Toegemann first crack at the job. Ponder obviously was qualified for the papercutting job since the Company subsequently employed him in it.<sup>4</sup> Had the Company initially employed Ponder as the papercutter, rather than Stanwood, an opening would have been created for a warehouseman—Toegemann—in the Mansfield facility. The natural thing for Lindenmeyr/Munroe to have done (so the argument continues) would have been to offer the job to one of its own employees (since the job was higher paying than most others in the warehouse) rather than to an outsider. Since the Company did not do that, it must have had a covert, ulterior motive for hiring an outsider. That, in turn, indicates that Lindenmeyr/Munroe chose an outsider for its papercutting job in order to avoid hiring Toegemann as a warehouseman.

I have a number of problems with the argument. The first is that I do not agree that there is anything suspicious about the Company hiring an ex-print shop head as the papercutter rather than transferring one of its warehouse employees into the job. Another is that inherent in it is the proposition that amidst the turmoil of the post-merger integration of facilities and work forces, and in circumstances in which D. F. Munroe chose to merge with a unionized company, management spent appreciable time and effort contriving to avoid hiring (or retaining) one prounion ex-Lindenmeyr warehouse employee. It could be that that was the case. But in my view, the odds are very much against it.

I conclude that Lindenmeyr/Munroe's hiring of Stanwood as the operator of Mansfield's papercutting machine does not constitute evidence of any antiunion hostility toward Toegemann.

There is one last facet to the papercutter issue. Toegemann spoke to a Lindenmeyr/Munroe supervisor in mid-May 1989 (about a month after his employment was terminated) about the papercutter position. He asked to be considered for it. The supervisor, Bill Sypher, responded by giving Toegemann an employment application form to fill out, saying that the Mansfield facility did not have any application from Toegemann on file. Toegemann filled out the application form and mailed it to the Company, but not until August, which was after the Company had hired Stanwood. Since Toegemann had worked for 10 months for Lindenmeyr and Lindenmeyr/Munroe, there is something a bit strange about Sypher's demand for an application form. But I credit Sypher's testimony on the matter and conclude that that de-

<sup>4</sup>Counsel for Toegemann and the Union sought to elicit rebuttal testimony to the effect that Ponder and another employee (Hayward) were qualified to operate the cutting machine at the time the machine was first brought to the warehouse. I disallowed that testimony on the ground that it should have been presented prior to Lindenmeyr/Munroe's presentation of its case.

mand did not stem from any effort by the Company to avoid employing Toegemann.

#### D. Toegemann—Conclusion

The record is insufficient for me to find that any agent of Lindenmeyr/Munroe uttered any unlawful threat in Toegemann's presence.

As for Lindenmeyr/Munroe's termination of Toegemann's employment in April 1989, the Company wanted to avoid the unionization of its work force. And one can assume that, particularly with an election coming up, the Company preferred not hiring (or retaining) any prounion employees. Finally, the Company's management knew that Toegemann was prounion. In that situation, if the Company's termination of Toegemann occurred in circumstances that indicated that the Company had unstated reasons for its action, I would conclude that Lindenmeyr/Munroe's termination of Toegemann violated the Act.

But because I conclude that there has been no indication that the termination was for reasons other than those stated by Lindenmeyr/Munroe, I further conclude that the termination did not violate the Act.

Toegemann voted in the June 8 election that the Board conducted among the employees in the Mansfield facility's bargaining unit. Lindenmeyr/Munroe challenged his ballot. Since I have concluded that the Company had lawfully terminated his employment prior to the election, I also conclude that the Company's challenge of his ballot should be sustained.<sup>5</sup>

### III. WAS DONALD DOOLEY A SUPERVISOR OR AN EMPLOYEE

Donald Dooley has worked in Lindenmeyr/Munroe's Mansfield facility since 1986. Dooley voted in the Board-conducted election. Lindenmeyr/Munroe challenged Dooley's ballot, contending that he was a supervisor within the meaning of Section 2(11). The Company has also raised an objection to the conduct of the election on the ground that Dooley campaigned on behalf of the Union. The Union, of course, contends that Dooley is an employee, not a supervisor.

#### A. *The Situation in the Warehouse, Generally*

Dooley, along with three warehousemen and a truckdriver, works on the second shift in the Mansfield warehouse. Dooley is (and has been since he began working for D. F. Munroe in 1986) the "shift foreman."

Notwithstanding Dooley's title, his work day is almost entirely indistinguishable from that of the three warehousemen: He parks in the same lot they do; is due at work at the same time (3:30 p.m.);<sup>6</sup> punches in on the same timeclock; wears the same uniform; spends his time almost entirely the same way—picking orders in the warehouse; and then clocks out at the same time (midnight, generally).

Dooley has no office of his own. In fact he has no desk of his own. For that matter he does not handle any more pa-

<sup>5</sup>Lindenmeyr/Munroe argues that even had I concluded that Toegemann's termination was unlawful, I should still uphold the challenge on the ground that, had he been employed, it would have been only as a part-time, intermittent employee. Since I have concluded that Toegemann's termination was lawful, I need not deal with that contention.

<sup>6</sup>That was second shift's starting time on and prior to June 8. Sometime after the election the Company changed the second shift's hours.

perwork than do the other warehousemen. He does not attend meetings of Lindenmeyr/Munroe's management. He has no authority to fire, reward, promote, or lay off an employee or effectively to recommend such actions. He has never been asked to evaluate an employee. He plays no role in the processing of grievances. He is paid on an hourly, not salaried, basis.

Nonetheless, the question of whether Dooley is a supervisor is a serious one.

#### B. *Hierarchy at the Mansfield Facility*

Bill Sypher is the operations and administrative manager for Lindenmeyr/Munroe's Mansfield facility. It is Sypher who hires and fires the Mansfield employees, including the 18 or so bargaining unit employees. The Mansfield warehouse manager, Jeff Nichols, reports to Sypher. Dooley is subordinate to Nichols.

As shift foreman, Dooley's rate of pay is higher than that of anyone else on his shift (65 cents an hour more than the next highest paid worker).

By about 5 p.m. both Sypher and Nichols have generally left work. That means that for the 7 hours from 5 to midnight Dooley is "in charge" of the Mansfield facility, although the record suggests that Dooley understands that he is to call Sypher if something extraordinary arises.

#### C. *Assigning and Directing Employees*

When Dooley was hired as second-shift foreman, Sypher spoke to Dooley about his (Sypher's) dissatisfaction with the way things had been going in the warehouse. Sypher told Dooley that the Company expected Dooley "to exercise control over" the workers on his shift and that it was Dooley's job "to see that all orders [were] picked and the warehouse straightened up" before the employees left for the day. The record is silent, however, about whether management told any of the other second shift workers what Dooley's responsibilities and authority were.

Dooley understood that his seniors expected him to make sure that the employees on his shift kept at their jobs and that they did their jobs properly. But Dooley is the kind of person who is uncomfortable about giving commands. The result is that most of the decisions on his shift are made by consensus. And when that is not convenient, Dooley makes "requests." He does not issue orders.

For example:

Dooley does not generally assign work to the employees. The work is routine, the employees know their jobs, and they can and do get started at the beginning of each shift without any direction from Dooley at all.

Two of the warehousemen are qualified to fill in for the shift's truckdriver. On those occasions when the truckdriver does not report to work, those two warehousemen decide among themselves who will do the driving.

Times for meals and for work breaks are set by "democratic" decision; that is, by agreement among everyone on the shift.

Dooley routinely shows temporary employees what to do and how to do it. As for the permanent employees, Dooley recognizes that he is empowered to correct employees who do their work improperly. But on the witness stand, Dooley was unable to recall ever having done so.

If there are still orders to pick at the end of the shift, Dooley and the other employees discuss the situation. Those employees who want to work overtime stay, the others leave. Dooley sometimes asks an employee to stay late. But he does not insist if the employee wants to leave.

Dooley can not altogether avoid making decisions, of course. Here are some examples of decisionmaking by Dooley:

Dooley and the other second-shift employees operated out of the new Mansfield facility as soon as it became operational. But there was a relatively brief period in which the Company stored goods at both Mansfield warehouses. During that period, if there was work to do in the old warehouse, Dooley would decide, in the first instance, whether or not that work had to be done immediately. Then, when it did become necessary for work to be done in the old warehouse, Dooley would decide which warehouseman should handle it.

Whenever a warehouseman finds that the warehouse has insufficient supplies of a given product to wholly fill a customer's order, the warehouseman asks Dooley what to do about it. It is up to Dooley to decide whether to ship what is available, or to ship a substitute product, or to ship nothing at all.

Whenever more goods are supposed to be trucked out of the warehouse than the facility's truck can handle, the driver asks Dooley what should be left behind.

#### D. *Disciplining Employees*

When a temporary employee came to work drunk, Dooley sent him home. Dooley, on the witness stand, was asked what he would do if two permanent employees got into a fight. His answer: "before I did anything, I think I probably would call Bill Sypher."

Lindenmeyr/Munroe contends that since management hired Dooley to exercise control over the shift's employees, he necessarily must have had the authority to discipline those employees. But according to Dooley: (1) he has never disciplined anyone; (2) he has never even reported any misbehavior to his superiors; and (3) while he could report misbehavior and recommend what management should do about it, "anybody else could" too.

#### E. *Hiring Employees*

When Dooley first became shift foreman, the shift had one less employee than it does now. Dooley told his superiors that he thought that the Company should assign an additional employee to the shift. Soon after he made that recommendation the Company did assign an additional employee to the shift. Except for that chronological relationship, however, the record does not tell us whether there was any causal connection between Dooley's recommendation and management's action. And apart from that one instance, there is no indication that Dooley had the authority to effectively recommend hiring employees, much less to do the hiring himself.

#### F. *Dooley—Conclusion*

When Lindenmeyr/Munroe hired Dooley, his superiors described his authority to him in broad terms. As described, Dooley surely had the authority to, say, effectively recommend discipline.

But as touched on earlier, nothing in the record tells us that the Company's management ever told the other workers on Dooley's shift that Dooley had significant supervisory authority. More importantly, for the 3 years or so between the time that Dooley had that conversation with his superiors and the election in June 1989, Dooley did not exercise the authority management delegated to him. At this juncture, therefore, and because it is Lindenmeyr/Munroe's burden to prove that Dooley is a supervisor, I consider it appropriate to look at how Dooley has acted in his position of shift foreman, not how management, once upon a time, indicated that it expected him to act.

And as Dooley has filled the shift foreman role, he plainly is a warehouse employee who also serves as the shift's leadman. For virtually his entire workday Dooley does what the other warehousemen do. The only difference between Dooley and the others on his shift is that he is the person the others turn to to resolve commonplace problems. Mostly Dooley plays no role at all in the actions that are the indicia of supervisory authority (hiring, transferring, suspending, laying off, recalling, promoting, rewarding, disciplining, assigning, or directing employees, or adjusting their grievances). And where he does exert such authority, it is "of a merely routine or clerical nature." See generally *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

It is true that for 6 or 7 of the shift's 8 hours, Dooley is the senior person at the warehouse. And there are numerous cases that point to that kind of situation as an important indicator of supervisory authority. *Clinton Food 4 Less*, 288 NLRB 597 (1988); *Minnesota Boxed Meat*, 282 NLRB 1208, 1214 (1987); *Zartic, Inc.*, 277 NLRB 1478 (1986); *Northwoods Manor*, 260 NLRB 854 (1982); *Emory Convalescent Home*, 260 NLRB 540, 552 (1982); *Best Distributing Co.*, 255 NLRB 165 (1981); *Greyhound Exposition Services*, 244 NLRB 206 (1979).

But in all of those cases the individual at issue was shown to have considerably more authority than Lindenmeyr/Munroe has shown of Dooley. And, of course, there is precedent to the effect that being the senior worker on an evening or night shift does not, "ipso facto," categorize that person as a "supervisor." *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983). See also *NLRB v. Orr Iron, Inc.*, 508 F.2d 1305 (7th Cir. 1975) (per curiam), enfg. 207 NLRB 863 (1973); *Waverly-Cedar Falls Health Care*, 297 NLRB 390 (1989); *Phelps Community Medical Center*, 295 NLRB 486 (1989); *Central Freight Lines*, 250 F.2d 435 (1980), enf. 653 F.2d 1023 (5th Cir. 1981); cf. *Injected Rubber Products*, 258 NLRB 687 (1981).

I accordingly conclude that Lindenmeyr/Munroe has failed to prove that Dooley is a "supervisor" as defined by Section 2(11), that Dooley's ballot should be counted, and that the Company's Objection 2 to conduct affecting the results of the election—Dooley's campaigning on behalf of the Union—should be overruled.<sup>7</sup>

<sup>7</sup>Lindenmeyr/Munroe initially made the same claims about Harry Hayward as it did about Dooley—that Hayward was a supervisor, that he accordingly should not have voted in the election, and that the outcome of the election was objectionable because Hayward campaigned on behalf of the Union. But the Company subsequently withdrew its claim that Hayward was a supervisor, and at the parties' request, I opened and examined Hayward's ballot and advised the Regional Director of Hayward's vote. See tr. 487.

#### IV. DID THE UNION WRONGFULLY PROMISE PENSION BENEFITS

The Lindenmeyr bargaining unit employees had been covered by a collective-bargaining contract that provided for pension benefits through the New England Teamster Trucking Industry Pension Fund (the Pension Fund). Once the merger between Lindenmeyr and D. F. Munroe took effect, however, the employees received no such benefits. Lindenmeyr/Munroe, that is, made no payments on any employee's behalf to the Pension Fund.

On about April 10, the Union's business secretary-treasurer, James P. McGrath, sent a "Dear Mansfield Worker" letter to numerous bargaining unit members. The letter stated, in part:

The Union had a meeting with the employees of Mansfield on Sunday March 5, 1989, at that meeting I pointed out . . . that those who had prior membership in the Teamsters and who were covered under the New England Teamster Trucking Industry Pension Fund and who had a break in service could upon reactivating their membership under another Teamster Union Contract . . . regain their lost prior time of accrual in the Pension. I further checked this out with the Pension Fund and the answer is as I had said to the Mansfield workers. The lost time could be regained by the amount lost, if the returning member worked for a year of future credited service he would regain two (2) lost years of prior service, and each subsequent year of future service he would regain two years of prior lost service up to the amount of time the individual had lost.

That discussion about regaining "lost prior time of accrual" was irrelevant to all but two of the bargaining unit members. That's because the discussion of "lost prior time of accrual" clearly did *not* apply to any individual:

- (1) whose right to a pension from the Pension Fund had already vested (most of the ex-Lindenmeyr employees working at Mansfield fell into this category); or
- (3) who had not previously had any connection with the Pension Fund.

But one employee, Ronald White, had "eight years of vesting service." That is, he worked for 8 years for one or more employers who made payments to the Pension Fund on his behalf. As things stood in 1989, if White never again worked for an employer who made payments to the Pension Fund on his behalf, he would lose those years of "vesting service." On the other hand, if in the foreseeable future Lindenmeyr/Munroe entered into a collective-bargaining contract with the Union that provided for payments to the Pension Fund, and if White continued to work for Lindenmeyr/Munroe, the Pension Fund would fully credit White for those prior years of vesting service.<sup>8</sup> In a manner of speaking, therefore, a pronoun vote by the employees might well result in White regaining his "lost prior time of accrual in the Pension" notwithstanding White's "break in

<sup>8</sup>That's because of the Pension Fund's two-for-one rule that McGrath's letter refers to.

service,” in the words of McGrath’s letter. (The Pension Fund’s rules do not in fact use those terms.)

The other Mansfield employee who may have thought that McGrath’s letter affected him was William Simmonds. (Simmonds did not testify.) During the years 1983 through 1988 Simmonds had worked for a company (not Lindenmeyr) that did make payments on its employees’ behalf to the Pension Fund. In fact, however, Simmonds’ pension credits were gone forever long prior to the election campaign at Mansfield.

Simmonds’ periods of employment with that prior employer had been sporadic.<sup>9</sup> So sporadic that, under the Pension Fund’s rules, it was as though Simmonds had never earned any credits at all. Contrary to the letter, therefore, Simmonds’ “lost time” could not “be regained by the amount lost” even assuming that Lindenmeyr/Munroe did promptly enter into a collective-bargaining contract with the Union providing for payments to the Pension Fund.

The question is whether that misstatement in the Union’s letter constitutes objectionable conduct, as Lindenmeyr/Munroe’s Objection 3 contends that it is.

I will assume that: (1) Simmonds saw the letter, or was told of it, even though there is no proof that that is so; and (2) the misstatement was nontrivial even though it applied only to Simmonds and even though Simmonds’ could hardly have been overwhelmed by the financial implications of the Union’s letter (given Simmonds’ relatively few pension credits and the fact that he could not in any event draw a pension for many years). Nonetheless, my conclusion is that the Company’s objection should be overruled.

McGrath’s letter was self-evidently (1) from the Union, and (2) intended to convince employees to vote in favor of union representation. Moreover it was sent to the employees early in the election campaign, so that the Company had ample time to respond to it. Misstatements in the letter accordingly do not constitute objectionable conduct. *Shopping Kart Food Market*, 228 NLRB 1311 (1977). Accord: *Midland National Life Ins. Co.*, 263 NLRB 127 (1982).

Lindenmeyr/Munroe recognizes that a misrepresentation by a participant in an election ordinarily is insufficient to cause the Board to overturn the results of the election. But the Company focuses on the letter’s statement that McGrath “checked this out with the Pension Fund” and argues that the letter thereby “was telling employees that the Plan administrators would, indeed, confer upon them the benefit set forth in the letter.” (Br. at 44.) In view of the Company’s argument I will make yet another assumption. That is, that the Company’s objection would be sustainable if the letter had been from the Pension Fund’s administrators, or if the letter had appeared to be from them (i.e., had been a forgery), and if it had promised the bargaining unit employees benefits to which they would not ordinarily be entitled.

But, again, the letter was self-evidently from an official of the Union, not from the Pension Fund. That is to say, the letter’s indication that the Pension Fund’s administrators

agree with the letter’s description of the Pension Fund’s rules was, at worst, just another bit of campaign puffery.

As a last matter I note that: McGrath’s letter almost surely was an honest attempt to explain to the bargaining unit members the workings of the Pension Fund’s rules – the misstatement was not deliberate; and there is no evidence whatever that the Pension Fund’s administrators ever agreed to confer special benefits on the Lindenmeyr/Munroe employees in the event the employees voted in favor of union representation, or that the Union ever asked the administrators to do so.

V. LINDENMEYR/MUNROE’S OBJECTION 1 TO THE CONDUCT OF THE ELECTION

The Company’s Objection 1 reads:

The Employer objects to the conduct of the election by virtue of the National Labor Relations Board’s failure and or refusal to make a determination of the supervisory status of Harry Hayward and Donald Dooley before conducting and/or scheduling an election in this matter.

The Regional Director held a pre-election hearing in Case 1–RC–19245. Dooley’s and Hayward’s status—supervisors or employees—was contested in that hearing. As indicated earlier, the Regional Director did not resolve Dooley’s or Hayward’s status, leaving that for resolution at the hearing I held. Lindenmeyr/Munroe argues that that procedure was unfair to the Company and unlawful; that if the Regional Director was not in a position to determine the status of Dooley and Hayward after the preelection hearing, she should have reopened that hearing. (Br. at 38.)

I know of nothing that prohibits the Regional Director from adopting the procedure she did, Lindenmeyr/Munroe cites me to none, and I accordingly dismiss Objection 1.

CONCLUSIONS OF LAW

Lindenmeyr/Munroe is an employer engaged in commerce within the meaning the Act, and the Union is a labor organization within the meaning of the Act.

The evidence fails to show that Lindenmeyr/Munroe violated in Act in any respect.

The evidence fails to sustain any objection by Lindenmeyr/Munroe to the conduct of the June 8 Board election among the Company’s employees in the bargaining unit earlier described or to conduct affecting the results of that election.

Because Thomas Toegemann was not then an employee of Lindenmeyr/Munroe and thus not eligible to vote in the election, the challenge to Toegemann’s ballot should be sustained.

As an employee in the appropriate bargaining unit, Donald Dooley was eligible to vote in the election and the challenge to his ballot should be overruled.<sup>10</sup>

By agreement among the parties, the challenge to the ballot of Harry Hayward was resolved at the hearing herein (as discussed in fn. 7, above); no issues concerning that ballot remain outstanding.

<sup>9</sup>Amount of Simmonds’ pension credit

1983	3 months
1984	17 hours
1985	7 months
1986	209 hours
1987	none
1988	90 hours

<sup>10</sup>Because the tally at this point is eight votes for the Union and eight votes against, Dooley’s ballot is determinative.

ORDER<sup>11</sup>

The complaint is dismissed.

It is hereby directed that the Regional Director for Region 1 shall, within 10 days from the date of this decision, open

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<sup>11</sup> 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.

and count the ballot of employee Donald Dooley and prepare and serve on the parties a revised tally in Case 1-RC-19245. If the revised tally reveals that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. However, if the revised tally shows that the Union has not received a majority of the valid ballots cast, the Regional Director shall certify that a majority of the valid ballots has not been cast for the Union.