

Douglas Aircraft Company, a component of McDonnell Douglas and Robert H. Mourning. Case 31-CA-1435

March 8, 1973

ORDER GRANTING APPEAL AND GRANTING MOTION TO DISMISS COMPLAINT AND NOTICE OF HEARING

BY CHAIRMAN MILLER AND MEMBERS KENNEDY AND PENELLO

On November 16, 1972, the Regional Director for Region 31 of the National Labor Relations Board issued his complaint and notice of hearing in the above-entitled proceeding pursuant to a charge filed by the Charging Party on May 9, 1969. Thereafter, on November 22, 1972, Respondent filed a motion to dismiss said complaint with the Chief Associate Administrative Law Judge, which was denied on November 30, 1972. On December 14, 1972, Respondent filed with the Board a Request for Special Permission to Appeal from Ruling of the Associate Chief Administrative Law Judge, with memorandum in support thereof, contending, *inter alia*, that the General Counsel, on June 5, 1970, after dismissal of the charge on August 7, 1969, by the Regional Director, denied a second request for reconsideration from the Regional Director's dismissal of the charge, and closed the case. He therefore requests that this complaint be dismissed and the notice of hearing canceled. On January 10, 1973, counsel for the General Counsel (hereinafter simply the General Counsel), filed opposition to Respondent's request.

The Board, having duly considered the matter, has decided to grant the Request for Special Permission to Appeal in view of the policy nature of the issue involved.

In support of its motion to dismiss, Respondent recites the chronological history of this case, emphasizing that the second request for reconsideration was denied by the General Counsel's Office of Appeals on June 5, 1970, upholding the Regional Director's refusal to issue a complaint, and relying on the Board's decision in *Forrest Industries, Inc.*, 168 NLRB 732, which dismissed an unfair labor practice case without passing on the merits. In that decision, a panel of the Board found that the General Counsel's rejection of the first motion for reconsideration was

dispositive of the case and concluded that it would not effectuate the purposes of the Act to proceed further. In essence, Respondent contends that the present complaint is barred by Section 10(b) of the Act because there is no valid charge pending in light of the prior denials of the appeals on the refusal of the Regional Director to issue a complaint.

The General Counsel urges rejection of Respondent's motion to dismiss complaint, contending that the action of the General Counsel's Office of Appeals on October 4, 1972, in vacating its second refusal to reconsider and remanding the case to the Regional Director for issuance of a complaint, was proper in light of the Board's amendment of Section 102.19(c) of the Board's Rules and Regulations on March 8, 1972. He further urges the retroactive application to this case is warranted since the Board has made retroactive application of substantive and procedural changes in other areas.¹ The General Counsel further contends that the issuance of the complaint at this late date is not barred by Section 10(b) of the Act and asserts that in any event the procedural question of whether the complaint is now properly issued can be determined in the context of the substantive issues to be developed at a hearing.

This case, however, does not involve the usual interpretations of Section 10(b) since the initial charge was timely filed, nor does it involve authority of the General Counsel since concededly, under Section 3(d) of the Act, he is the final authority on the issuance of the complaint. However, once the complaint has issued, the disposition of such complaint, as well as the interpretation of both the law and the pertinent Rules and Regulations, rests with the Board.

It is true as the General Counsel points out that the Board's amendment of the Rules explicitly authorizes entertaining motions for reconsideration if the moving party establishes that the new evidence which has been discovered could not have been discovered by diligent inquiry prior to the first reconsideration, and that no time limitation is imposed.²

The issue thus posed to the Board is whether the policy of administrative finality enunciated in *Forrest Industries, supra*, has been substantially modified by our amendment of Section 102.19(c), and whether, if such modification occurred, it should be applied retroactively.

To the extent that *Forrest Industries* appears to

¹ Citing, *inter alia*, such cases as *Laidlaw Corporation*, 171 NLRB 1366, *Fibreboard Paper Products Corporation*, 138 NLRB 550, *The Great Atlantic & Pacific Tea Company*, 101 NLRB 1118, *Parkview Gardens*, 166 NLRB 697; *Collyer Insulated Wire*, 192 NLRB No. 150, *Bryant Chucking Grinder Co.*, 160 NLRB 1526. Except for the *Bryant Chucking* case, all of the cited cases involved a substantive change in the law applied to a case currently pending before the Board, and did not involve an administrative revival of a

dismissed charge and issuance of a complaint due to a change in rules.

² The language added to Section 102.19(c) on March 8, 1972, stated. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration

preclude consideration of a second motion for reconsideration, the amendment of the rules permitting such consideration on the limited basis noted constitutes a modification of the holding in that case.

As to retroactivity, the Board, in amending Section 102.19(c) on March 8, 1972, intended such amendment to be applied prospectively, to cases then either actively pending on appeal or to future cases. It did not contemplate nor intend that it be applied retroactively to cases dismissed under rules in effect at a prior time, and certainly not to a case whose appeal had been denied for a second time on June 5, 1970. Applying such rule change retroactively would amount to a repudiation of any concept of administrative finality, restrict the expeditious handling of current cases, and substantially undermine the

objective of Section 10(b), which was to preclude the litigation of stale charges.

Therefore, and without passing on the merits of the case, the Board concludes that Respondent's motion to dismiss complaint should be granted.

ORDER

It is hereby ordered that the Respondent's Request for Special Permission to Appeal from Ruling of the Associate Chief Administrative Law Judge be, and it hereby is, granted.

IT IS FURTHER ORDERED that Respondent's motion to dismiss complaint and notice of hearing be, and it hereby is, granted.