

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

December 16, 1975

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS
JENKINS AND WALTHER

On May 6, 1975, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party¹ filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The Charging Party's request for oral argument is hereby denied as the record, the exceptions, and briefs adequately present the issues and positions of the parties

DECISION

I. STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This case was heard in Los Angeles, California, on March 18-20, 1975. The charge was filed on May 9, 1969, by Robert H. Mourning, an individual. The complaint issued November 16, 1972, alleging that Douglas Aircraft Company, a Component of McDonnell Douglas Corporation (herein called Respondent) had violated Section 8(a)(1) and (3) of the National Labor Relations Act.

The Board, by decision reported at 202 NLRB 305 (1973), dismissed the complaint on procedural grounds. That dismissal was reversed in *Mourning v. N.L.R.B.*, 505 F.2d 421 (C.A.D.C., 1974), after which the Board, by order dated January 14, 1975, remanded the case to the Regional Director for Region 31 "for a hearing on the matters raised by the complaint." A notice of hearing dated February 3, 1975, thereupon issued, and the hearing ensued.

¹ Transport pilots were called "reserve pilots" until January 1967.

² The chase plane served as extra "eyes" to see that the plane being

The parties were permitted at the hearing to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Briefs were filed for the General Counsel, the Charging Party, and Respondent.

II. ISSUES

The issues are whether Respondent:

(a) By its discharge of Mourning on November 15, 1968, violated Section 8(a)(3) and (1) of the Act.

(b) Through its admitted agent and supervisor, Orion Quinn, beginning on or about November 18, 1968, threatened and interrogated employees regarding their union sympathies and activities, violating Section 8(a)(1) of the Act.

Underlying both of these issues is that of whether Mourning, as a transport pilot, and the pilot to whom Quinn allegedly made 8(a)(1) remarks, at relevant times were employees rather than supervisors under the Act.

III. JURISDICTION

Respondent is a Maryland corporation engaged at various locations in the United States, including Long Beach, California, in the manufacture of aircraft and related items. It annually sells and ships from its Long Beach facility, directly to customers outside California, products valued in excess of \$50,000.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

IV. LABOR ORGANIZATION

Air Line Pilots Association (herein called the Union) is a labor organization within Section 2(5) of the Act.

V. THE SUPERVISORY ISSUE

A. Facts

Respondent, at the times in question, had approximately 25 pilots and 10 flight engineers at its Long Beach facility. Included among the pilots were about five transport pilots, plus a number of production test pilots and engineering test pilots.

Mourning was a transport pilot at the Long Beach facility from December 1965 until the discharge in question.¹ As such, his primary duty was to operate airplanes among Respondent's various facilities, transporting company executives and flight crews, representatives of customers, government officials, and cargo. Most of his flights were less than an hour in duration, between points in southern California; some were interstate. He also flew occasional "chase" planes in accompaniment of experimental planes being tested;² sometimes himself took planes on test flights after they had undergone periodic ground inspection; sometimes was assigned as "check pilot" in the indoctrination of newly hired pilots; and sometimes flew on photography missions, in which the plane he occupied was a camera platform for the taking of promotional pictures of DC8's and DC9's.

tested did not proceed into areas of congestion, and to establish a fix should a test plane go down

Mourning, as pilot, was the sole crew member on most of his transport flights. He sometimes had a copilot, however, and he sometimes was copilot on these flights. The same was true of the chase missions.³ Specific evidence is lacking that Mourning ever had a crew when he flew post-inspection test flights, although Walter Kent, Respondent's then director of test administration and support, credibly testified that a copilot, a mechanic, and an engineer sometimes crewed this kind of flight. As check pilot for new hires, Mourning and others in that role reported to their superiors on the competence and progress of new pilots, and recommended ways to improve their performance. Regarding the photography missions, Mourning generally flew as copilot because of a lack of qualifications for flying of that highly precise nature, occupying the "left chair"—i.e., the seat of the pilot in command—only in controlled situations to enhance his qualifications.

Mourning, as pilot in command, and all other of Respondent's pilots in that role, had ultimate nondelegable responsibility for the success of the mission. This included responsibility for the safety of passengers and crew, if any, and for the preservation of the equipment. Thus, the pilot in command had authority to direct the copilot in the way he performed his duties, overriding the copilot's judgment and actions if necessary. Similarly, if conduct of others aboard created a safety hazard or otherwise imperiled the success of a mission, the pilot in command was empowered to take appropriate action.

In short, the pilot in command—Mourning included, when he served in that role—was the unquestioned captain of the ship, with all of the responsibilities and prerogatives that that implies.

B. Discussion

In a "trilogy" of representation case decisions postdating the conduct in question by about 5 years, one of which involved the pilots at Respondent's Long Beach facility,⁴ the other two involving pilots at similar facilities of other aircraft manufacturers,⁵ the Board concluded, in the words of one of the decisions, that pilots who "serve some of their time as captains, at which time they are responsible for, and in complete control of, the plane and all persons on board," are supervisors under the Act.⁶ Included in the

sweep of this conclusion were transport pilots, so called, with duties much like those of Respondent's transport pilots—Mourning included—at times relevant to this case.

If there be a factual distinction between those cases and the case at hand, it is that Mourning and his colleagues, circa 1968, perhaps spent a relatively larger proportion of their flying time without other crew members aboard. But, from a reading of those decisions and a careful study of the present record, it is not clear that this is so; and, in any event, this at best would be a distinction in degree and not kind since Mourning and his contemporaries did spend significant flight time as pilots in command with at least one subordinate crew member, a copilot, on board.

It is concluded, therefore, that the trilogy decisions are controlling of the status of Respondent's transport pilots, Mourning included, and that they were supervisors within the Act at the relevant times.⁷

VI. THE ALLEGED UNFAIR LABOR PRACTICES

A. Mourning's Discharge

Having concluded that Mourning was a statutory supervisor, it follows that his discharge, even if union-connected, did not violate the Act. It therefore is unnecessary to set forth the factual details surrounding that discharge or to reach a judgment concerning its underlying motivation.

B. The Utterances of Orion Quinn

There is evidence that Quinn made certain comments to Malcolm Campbell, one of Respondent's transport pilots, that arguably would have violated Section 8(a)(1) were Campbell an employee under the Act. Consistent with the earlier conclusion that Respondent's transport pilots were supervisors, however, it is concluded that the comments attributed to Quinn were not unlawful. Accordingly, there is no need to set forth the substance of those alleged comments or to make the credibility resolutions necessary to determine if they in fact were made.

³ Mourning testified that 95 percent of his flying time was in planes in which no copilot was required by regulations. He conceded, however, that he in fact had a copilot more often than that, and the weight of evidence reveals that the presence of a copilot sometimes was dictated by the nature of the mission, regulations aside.

⁴ *Douglas Aircraft Company, a Component of the McDonnell Douglas Corporation*, 207 NLRB 682 (1973).

⁵ *Lockheed-California Company*, 207 NLRB 686 (1973); *McDonnell Aircraft Company*, 207 NLRB 684 (1973).

⁶ *Douglas Aircraft Company, a Component of the McDonnell Douglas Corporation, supra*.

⁷ The General Counsel's brief cites four cases in which certain pilots were found to be "employees" within Sec 2(3) of the Act: *Sis-Q Flying Service*, 197 NLRB 195 (1972); *Petroleum Helicopters*, 184 NLRB 60 (1970); *Air California*, 170 NLRB 18 (1968), and *Gary Sheet Production Corporation*,

116 NLRB 1192 (1956). Other cases of the same genre include *E. W. Wiggins Airways*, 210 NLRB 996 (1974), and *Panorama Air Tour*, 204 NLRB 45 (1973). None of these cases, however, is as factually apposite to the present situation as are the trilogy decisions. Moreover, in only one of these cases, *Petroleum Helicopters*, was the supervisory issue raised as concerns pilots, the result being that 11 so-called lead pilots were found to be supervisors and 3 other pilots were found not to be inasmuch as "the record is devoid of evidence to establish their supervisory status." 184 NLRB 61.

Without conceding Mourning to be a supervisor under the trilogy standard, counsel for the Charging Party argues vigorously and at length that the trilogy decisions are "simply wrong" as a matter of law. Given the recency of those decisions and the likelihood that the Board fully weighed the considerations posed by counsel preliminary to their issuance, it would seem appropriate that any departure from them come first from the Board.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate the Act as alleged.

⁸ All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ⁸

The complaint is dismissed in its entirety.

in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.