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UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum A.D.

TO Roger W. Goubeaux, Regional Director
Region 31

DATE July 31, 1987

FROM Harold J. Datz, Associate General Counsel
Division of Advice

240-3367-0460
240-3367-0480
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SUBJECT Douglas Aircraft Co., A component of
McDonnell Douglas Corp.
31-CA-16512

The instant case was submitted for advice as whether a walkout by unit employees on February 16, 1987 constituted intermittent strike activity so as to privilege the Employer to discipline the employees involved.

The Union's contract with the Employer expired on October 19, 1986. Thereafter, the Employer and the Union engaged in negotiations for a new agreement. They reached impasse with respect to non-economic and some economic provisions and the Employer implemented the portions of its offer pertaining to those issues. On December 15, 1986, the Union engaged in a one-half day walkout in protest of the Employer's implementation as to those provisions. The next day, an article appeared in the Long Beach Press Telegram which quoted the president of the Union as stating that, "in order to get a good contract, this may have [illegible] again." Negotiations resumed with respect to the remaining economic provisions of contract. On February 15, 1987, 1/ the Employer presented its final offer with respect to the remaining terms of the contract and indicated that if the Union did not accept that offer, the Employer would implement it. The Union found the proposal unacceptable. On February 16, the Union's members engaged in a one-day walkout in protest of the Employer's announcement that it intended to implement its final offer regarding the remaining economic provisions of the contract. On February 17 and 18, the Employer imposed discipline on the employees who had participated in the February 16 walkout. The discipline ranged from "red marks" 2/ to the discharge of one employee (who has since been reinstated with backpay).

We concluded that the February 16 walkout was not unprotected intermittent strike activity. A refusal to work will be considered unprotected intermittent strike activity "when the evidence demonstrates that the stoppage is part of a plan or

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1/ All dates hereinafter are in 1987.

2/ An employee who receives three "red marks" in a 90-day period may receive a verbal warning.

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pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." 3/ Although the strike of February 16 was a second strike and was of short duration like the earlier one, the evidence does not show that this was part of a pattern or plan to use intermittent strikes to harrass the Employer. Rather, the Union struck the first time to protest unilateral action and struck a second time to protest the announcement of a second unilateral action. Thus, the Union's two walkouts here were separate and distinct protests of separate and distinct implementations by the Employer of different terms and conditions of employment. Nor was the statement attributed to the president of the Union deemed to be evidence of a "plan or pattern of intermittent action." 4/ Rather, it was merely a statement that, depending on future events, the Union might have to strike again. As it turned out, future events, viz. the second unilateral action, did result in another strike. 5/ In these circumstances, the evidence falls short of establishing that the February 16 walkout was part of a pattern or plan of intermittent and recurring work stoppages. 6/

We further concluded that the instant case should not be deferred to arbitration. All of the relevant events occurred after the expiration of the parties' former contract, and there are no contractual grievance-arbitration procedures in effect. 7/

3/ See Polytech Incorporated, 195 NLRB 695, 696 (1972).

4/ See Polytech Incorporated, supra.

5/ See Robertson Industries, 216 NLRB 361 (1975), enf'd. 560 F.2d 398 (9th Cir. 1976).

7/ Even if the Employer included grievance-arbitration in its implementations, there is no evidence that the Union ever accepted such implementations. See "Cases Involving the Obligation to Arbitrate Under a Lawfully Implemented Offer," GC Memorandum 87-3, dated 8 May 1987.

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by disciplining the employees who participated in the second walkout.

H.J.D.