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"Substantial" Evidence in Reviewing the Orders of the National Labor Relations Board

RECENT CASE NOTES

ADMINISTRATIVE LAW—"SUBSTANTIAL" EVIDENCE IN REVIEWING THE ORDERS OF THE NATIONAL LABOR RELATIONS BOARD.—The International Association of Machinists, an A. F. of L. union, brought a petition to review an order of the National Labor Relations Board[1] which ousted them and established the United Auto Workers of America, a C. I. O. union, as the sole bargaining agent of the Serrick Corporation.[2] Held, Affirmed: The order of the Board was supported by substantial evidence. In determining what is substantial evidence all evidence received by the Board must be examined, and if reasonable minds, unhampered by the technical law of evidence, would differ as to conclusions to be drawn from such evidence, the findings of the Board must be affirmed. *International Association of Machinists, etc. v. National Labor Relations Board* (C. C. A. D. C. Nov. 20, 1939, No. 7258), — F. (2d) —.

Section 10 (e) of the National Labor Relations Act,[3] provides that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." The courts have usually held the word "evidence" to mean "substantial evidence,"[4] but there has been no uniformity as to just what constitutes "substantial evidence." Two questions, in general, arise when the courts review an order of the Board: (1) What type of evidence in the Board's record may be considered? (2) To what extent may the Board's inference and findings be questioned by the reviewing court.

As to the type of evidence to be considered, it has been held prior to this decision that the reviewing court need consider only that evidence which is admissible in court.[5] Evidence not admissible in court yet having a certain degree of probative force has been considered on judicial review.[6] Under the statute the Board itself is not bound by common-law rules of evidence.[7] This means, therefore, that though the Board is at liberty to consider hearsay

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[1] Hereinafter referred to as the Board.

[2] In the Matter of The Serrick Corporation and International Union, United Automobile Workers of America, Local No. 459 (1938), 8 N. L. R. B. 621.

[3] Act of July 5, 1935; 49 Stat. L. 449 § 10 (e); 29 U. S. C. (Supp. 1937), § 160 (e).

[4] Swayne & Hoyt, Ltd. v. United States (1937), 300 U. S. 297, 57 S. Ct. 478; Consolidated Edison Co. v. National Labor Relations Board (1938), 305 U. S. 197, 59 S. Ct. 206.

[5] National Labor Relations Board v. Bell Oil & Gas Company (C. C. A. 5th, 1938), 98 F. (2d) 406 at 410: "Upon petition to the court, and the filing therein of a transcript of the record, the nature of the proceedings is changed and becomes wholly judicial. There is nothing in the statute to indicate that this court should consider irrelevant, immaterial or incompetent evidence." And on page 407: "The rules of evidence prevailing in courts of law or equity are controlling in a suit to enforce an order of the National Labor Relations Board."

[6] National Labor Relations Board v. Union Pacific Stages, Inc., (C. C. A. 9th, 1938), 99 F. (2d) 153. The court held that they would not consider as having any value the part of the record concerning "background". But the principal case declares that: "We are unable to separate events from their background. To do so would be not only to ignore the most significant evidence in the record, but also to go against the plain mandate of the statute.

[7] 49 Stat. L. 449, § 10 (b), 29 U. S. C. (Supp. 1937), § 160 (b).

or irrelevant evidence; yet it must have in addition evidence which the courts will consider sufficient in order to secure inforcement of its order. An administrative order is only of value in so far as it can be enforced. It therefore would seem that the courts have nullified the statutory provisions as to the admissibility of evidence by refusing to consider the evidence presented in the record. It is suggested that were the principal case to be followed in the other federal circuit courts this self-assumed judicial veto would be abolished; for the decision rules that, "The statutory mandate dispensing with judicial technicalities in procedure binds the reviewing court to the same extent as it does the Board . . . The reviewing court cannot exclude from consideration on review evidence which the Board was entitled to take into account."[8]

The second question: To what extent is the reviewing court bound by the Board's inferences and finding of fact made from the evidence? This question arises out of the reluctance of the courts to be bound by an administrative conclusion. It is the expressed intent of the statute to give the Board power to draw inferences and make findings of fact.[9] The courts, therefore, should not take it upon themselves to weigh the evidence and determine the credibility of witnesses after the Board, an expert body, has already performed these duties in accordance with its statutory powers. The courts have generally acknowledged this contention,[10] but their acknowledgment prior to this decision has amounted to little more than lip-service because of the elusive qualifications, generally called "substantial," that they have placed on the word "evidence." There are numerous tests applied by the courts to determine if the evidence is sufficient to support the inferences and findings of the Board. For example: "The test is not satisfied by evidence which gives equal support to inconsistent inferences."[11] Another: "The test of substantiality is the same as that presented on a motion for a directed verdict in a trial at law."[12] And: "Hearsay and non-expert-opinion evidence may not be used to support the findings of the Board."[13] From the decisions of these and other similar cases,[14] it is obvious that although the courts have acknowledged the finality of the Board's findings if supported by evidence they have added a decorative adjective or two to the unadorned "evidence" of the original provision. It is submitted that this addition has, to say the least, created a presumption against the Board, and that the principal case is a more accurate interpretation of

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8 International Association of Machinists, etc. v. National Labor Relations Board (C. C. A. D. C. Nov. 20, 1939. No. 7258), — F. (2d) —

9 49 Stat. L. 449, § 10 (e), 29 U S. C. (Supp. 1937), § 160 (c).

10 National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc. (1938), 303 U. S. 261, 58 S. Ct. 571. And National Labor Relations Board v. Pacific Greyhound Lines, Inc. (1938), 303 U. S. 272, 58 S. Ct. 577. "The inferences to be drawn from the evidence were for the Board not the court."

11 National Labor Relations Board v. Wallace Mfg. Co., Inc. (C. C. A. 4th, 1938), 95 F. (2d) 818.

12 National Labor Relations Board v. A. S. Abell Co. (C. C. A. 4th, 1938), 97 F. (2d) 951.

13 National Labor Relations Board v. Bell Oil & Gas Company (C. C. A. 5th, 1938), 98 F. (2d) 406.

14 Remington Rand, Inc. v. National Labor Relations Board (C. C. A. 2d, 1938), 94 F. (2d) 862; National Labor Relations Board v. Thompson Products (C. C. A. 6th, 1938), 97 F. (2d) 13; Jefferson Electric Co. v. National Labor Relations Board (C. C. A. 7th, 1939), 102 F. (2d) 949.

the protection originally intended to be given to the Board by the Act.[15] The Board's finding as to the facts is final if the evidence, unhampered by technical rules of admissibility, would cause reasonable minds to differ. If this case is followed in other circuits, the present presumption against the Board will be changed to one in favor of the Board. P. T. M.

CONTRACTS—CONTINGENT FEES FOR INFLUENCING LEGISLATION.—Property of the defendant, an alien corporation, was seized during the World War, and held for some time thereafter by the Alien Property Custodian. Defendant contracted with plaintiff to obtain legislation to facilitate the return of the property, compensation to be on a contingent fee basis. Plaintiff was successful in getting such legislation providing for a hearing before a proper tribunal to determine the right of the company to such property. Before recovery of the property, plaintiff was discharged. He sues on the contract. Held, he may not recover. *Brown v. Gesellschaft fur Drahtlose Telegraphie, M. B. H.* (C. C. A. D. C., 1939), 104 F. (2d) 227.[1]

Attorneys generally have been unable to recover on contracts to influence legislation whether improper means were shown to have been used or not.[2] Some courts, however, have made a distinction between "lobbying" contracts, in which improper means are used, and contracts whereby the attorney merely assists in drafting legislation and appears in favor of the bill before committees.[3] Every citizen should be allowed to employ agents to draft bills and explain the bill to committees in hearing; and when the contract contemplates nothing further it should not be considered illegal.[4]

No matter how courts may rule on contracts for influencing legislation where the compensation is fixed, they have been very chary of allowing recovery for such a contract where the compensation is contingent upon success in obtaining passage of the bill, on the grounds that such a contract tends to encourage the use of improper means, whether openly or surreptitiously.[5] Nevertheless, there has been a recent tendency toward allowing recovery on contingent fee contracts for influencing legislation where there has been no

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[15] 49 Stat L. 449, 29 U. S. C. (Supp. 1937), § 150.

[1] See also Gesellschaft fur Drahtlose Telegraphie M. B. H. v. Brown (1935), 78 F. (2d) 410.

[2] Adams v. E. Boston Co. (1920), 236 Mass. 121, 127 N. E. 628; Hardesty v. Dodge Manufacturing Co. (1927), 89 Ind. App. 184, 154 N. E 697; Hayward v Nordberg Manufacturing Co. (1898), 85 F. 4; Marshall v. Baltimore and Ohio R. R. Co. (1853), 16 How. (57 U. S.) 314; Sussman v. Porter (1905), 137 F. 161. See also Tool Co. v. Norris (1864), 2 Wall. (69 U. S.) 45, 17 L. Ed. 868, where the court says: ". . . all agreements for pecuniary considerations to control the business operations of the government, or regular administration of justice, or appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution." p. 56.

[3] Stanton v. Embrey (1876), 93 U. S. 548; West v. Coos County (1925), 115 Ore. 409, 237 P. 961; Chesebrough v. Conover (1893), 140 N. Y. 382, 35 N. E. 633.

[4] Chesebrough v. Conover (1893), 140 N. Y. 382, 35 N. E. 633.

[5] Hazelton v. Sheckells (1905), 202 U. S. 71, 26 S. Ct. 567; Noonan v. Gilbert (1934), 68 F (2d) 775.