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LABOR LAW — "SUBSTANTIAL" EVIDENCE TO SUPPORT THE FACT FINDINGS OF THE NATIONAL LABOR RELATIONS BOARD — Three employees of respondent company, members of a union, were discharged. They had attended an organization meeting of the union two days previous to their discharge. Two hundred of the company's fifteen hundred employees attended, of whom eighteen, including these three, stayed when asked to join. The alleged reasons of the company for the discharge of these men were that one took a fifty-cent lamp at a company banquet a month previously, that another destroyed raw material through faulty adjustment of his machine, and that the third openly expressed resentment because not promoted. As against this, the evidence showed that all the men had good service records, that one had been with the company for a long time, that other things had been taken at company banquets with no one being punished and that the man who operated the faulty machine was not responsible for the condition of his machine. The National Labor Relations Board ordered the men reinstated. *Held*, that there was no substantial evidence to sustain the board's finding that the men were discharged because of union activities. *National Labor Relations Board v. Thompson Products*, (C. C. A. 6th, 1938) 97 F. (2d) 13.

Section 10 (e) of the National Labor Relations Act,[1] providing that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," has its counterpart in other federal statutes.[2] The courts have usually

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

[2] The Packers and Stockyards Act, 42 Stat. L. 159 (1921); the Longshoremen and Harborworkers Act, 44 Stat. L. 1424 (1927); the Transportation Act, 41 Stat. L.

refused to be bound by the findings of administrative bodies thereunder when such findings have not been supported by *substantial* evidence.[3] In affirming the application of this principle to the decisions of the labor board, the Supreme Court in the recently decided *Consolidated Edison* case [4] said, "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In the cases which have been decided in the circuit courts of appeal, there has been no uniformity of interpretation of "evidence" as used in the National Labor Relations Act. The board is not bound by common-law rules of evidence.[5] But several questions have been raised by the courts: (1) Must the decisions of the board be supported by some evidence of the type admissible in court? (2) Must the decision be based on *all* the evidence? (3) Must inferences drawn by the board be the most reasonable, or the only reasonable, ones to be drawn? It has been said that the board decision must be supported by evidence admissible in court.[6] This means that though the board is at liberty to consider hearsay or

456 (1920); the Federal Trade Commission Act, 38 Stat. L. 717 (1914); the Shipping Act, 39 Stat. L. 728 (1916).

[3] Tagg Bros. & Morehead v. United States, 280 U. S. 420, 50 S. Ct. 220 (1930); Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1931); Interstate Commerce Commission v. Louisville & N. R. R., 227 U. S. 88, 33 S. Ct. 185 (1913); Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, 54 S. Ct. 315 (1933); Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297, 57 S. Ct. 478 (1937).

[4] Consolidated Edison Co. v. National Labor Relations Board, (U. S. 1938) 59 S. Ct. 206 at 217.

[5] 49 Stat. L. 449, § 10 (b), 29 U. S. C. (Supp. 1937), § 160 (b).

[6] National Labor Relations Board v. Bell Oil & Gas Co., (C. C. A. 5th, 1938) 98 F. (2d) 406 at 409, 410: "Hearsay and non-expert-opinion evidence may not be used in this court as a basis to support the findings of the Board upon which rests an order sought to be enforced. . . . While there is no limitation as to the character of the evidence necessary to support the findings, it is not reasonable to think that irrelevant or immaterial evidence will meet the requirements. . . . Since there is nothing in the statute indicating an intention to modify the rules of evidence prevailing in courts of law or equity, they are controlling in this case." Contrast with that the statement of the Wisconsin court in Wisconsin Labor Relations Board v. Fred Reuping Leather Co., (Wis. 1938) 279 N. W. 673 at 682: "Facts which have no tendency to prove or disprove an ultimate fact have no relevancy. If they have such tendency, they constitute evidence. . . . The requirement is that there must be some evidence tending to support the finding of the board, and, if this is discovered, the court may not weigh the evidence to ascertain whether it preponderates in favor of the finding." And in National Labor Relations Board v. Remington Rand, Inc., (C. C. A. 2d, 1938) 94 F. (2d) 862 at 873, it was said: "He [the examiner] did indeed admit much that would have been excluded at common law, but the act specifically so provides . . . no doubt, that does not mean that mere rumor will serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs."

In Consolidated Edison Co. v. National Labor Relations Board, (U. S. 1938) 59 S. Ct. 206 at 217, the Supreme Court said: "The obvious purpose of this [§ 10 (e)] and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in

irrelevant evidence in making its findings, as the statute says, yet it must have other evidence sustaining that finding in order to have its order enforced. And some courts have stated that *all* the evidence must be considered,[7] as was said in the principal case.[8] The meaning of such statements is uncertain. If the courts mean that the board's opinion must *discuss* all the facts introduced at the hearing, whether or not they support the decision, the reasoning seems specious. The board has admitted all the evidence and, it must be assumed, has based its finding thereon. If the courts mean merely that the record as to evidence offered, admitted and considered must exhibit freedom from bias and a judicial attitude, the position is perhaps sound. But if the courts mean that they are going into questions of credibility, their position would seem to be unsound. Courts should not consider for themselves the weight of the evidence and the credibility of witnesses. But it seems they have done this. At least, one court has criticized the board's use of "background" as a basis for inference.[9] It has also been said

judicial proceedings would not invalidate the administrative order. . . . But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

[7] Peninsular & Occidental S. S. Co. v. National Labor Relations Board, (C. C. A. 5th, 1938) 98 F. (2d) 411 at 415: "It is the duty of the Board to decide the case before it on all the evidence. It is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence." The courts in the second and fourth circuits appear to have a much more satisfactory answer. In National Labor Relations Board v. Wallace Mfg. Co., (C. C. A. 4th, 1938) 95 F. (2d) 818 at 820, it was said: "and it is well settled that we have no power to pass upon the credibility of witnesses or to substitute our judgment on questions of fact for that of the Board." And in Consolidated Edison Co. of New York v. National Labor Relations Board, (C. C. A. 2d, 1938) 95 F. (2d) 390 at 397: "The question is not whether this court would have reached the same conclusion as the Board but whether there is evidence to support the Board's findings. . . . We cannot say that the record is wholly barren of evidence to support the charge that they were discriminated against on account of union activities." The Supreme Court affirmed the decision of the circuit court as to this point. The Court said (59 S. Ct. 206 at 216-217): "[in] the statute . . . 'supported by evidence' . . . means supported by substantial evidence. . . . We do not think that the Circuit Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think the court referred to substantial evidence."

[8] "Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, error will result and great injustices be wrought." 97 F. (2d) 13 at 15.

[9] Cf. National Labor Relations Board v. Union Pacific Stages, Inc., (C. C. A. 9th, 1938) 99 F. (2d) 153 at 158, 176: "In arriving at the conclusion . . . the Board relies to a large extent on what it terms background. In developing this perspective the ordinary judicial approach to the consideration of evidence is abandoned and a novel method invoked. . . . We have carefully examined the evidence in this case, not for the purpose of making our own findings, but to ascertain if the findings made by the Board are supported by the evidence. Because the discharged drivers admittedly were guilty of infractions of the respondent's rules and regulations the Board has sought to show that these breaches were trifles and that the real reason for the discharges was the union activities of the drivers. It thus ignores or minimizes the

that the inferences to be drawn are for the board and not for the courts.[10] Probably the inference of the board must be a reasonable one.[11] But it is questionable whether the court should decide whether the inference drawn by the board, an expert body, is more reasonable than another inference which might be drawn from the same facts.[12] It is submitted that the court in the principal case failed to apply a proper test in passing upon the board's findings. It said that there was no substantial evidence to support the findings of the board. There was evidence that the discharged men were known to be connected with union activities; that their discharge came immediately after union action; that the alleged causes of discharge occurred some time previously; and that other employees doing the same thing these men did, other than participating in union activities, were not discharged. Discrimination, it is submitted, was at least *a* reasonable, even if not the *only* reasonable, inference to be drawn from such facts. That should be sufficient. Some of the more recent court decisions evincing a reluctance to give effect to the statutory provision for fact finding by the board may be explainable as a manifestation of a belief that the board has not been completely judicial in administering the act. Judicial review cannot,

violations and bases its order on what it refers to as 'background,' which we have shown is not correctly presented or rightly interpreted and therefore not to be relied on."

[10] National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261 at 271, 58 S. Ct. 571 (1938): "In view of all the circumstances the Board could have thought . . . . The inferences to be drawn were for the Board and not for the courts." Also see National Labor Relations Board v. Oregon Worsted Co., (C. C. A. 9th, 1938) 96 F. (2d) 193.

National Labor Relations Board v. Kentucky Fire Brick Co., (C. C. A. 6th, 1938) 99 F. (2d) 89 at 92: "We think that the attitude of respondent toward its Union employees both before, during and after the strike of June 18, 1935, carries a substantial inference that these 30 men were refused reinstatement because of their union activities. This inference is sufficient to support the order [of reinstatement] unless it is destroyed and refuted by other evidence. . . ."

[11] Ballston-Stillwater Knitting Co. v. National Labor Relations Board, (C. C. A. 2d, 1938) 98 F. (2d) 758 at 760: "Hence this court is not at liberty to review the evidence and make its own findings; but neither is it bound to accept findings based on evidence which merely creates a suspicion or gives rise to an inference that cannot reasonably be accepted."

[12] In Agwilines, Inc. v. National Labor Relations Board, (C. C. A. 5th, 1936) 87 F. (2d) 146 at 151, the court said: "We keep in mind . . . that it is the Board's province to find the facts not alone as the direct testimony declares them to be, but as the background, setting and circumstances under which that testimony was given and the matters testified about transpired, including the interests and motives of those testifying, give color and meaning to the testimony. It was therefore for the Board, where the evidence offered a reasonable choice, to draw its own inferences and conclusions. If the evidence reasonably admitted of the conclusions they drew, we are bound by them." Cf. this statement of the Dane County (Wisconsin) Circuit Court, in Hamm v. Blum Bros. Box Co., CCH Labor Law Service, p. 18365 (1938): "The inference must not only be rational, but it must be a logical deduction from the established facts and not one of several inferences which might with equal propriety be drawn from the same facts." Quoting Hills Dry Goods Co. v. Industrial Commission, 217 Wis. 76 at 84, 258 N. W. 336 (1935).

obviously, be exercised *in vacuo*. It seems unnecessary, however, to re-state the case for judicial self-restraint in dealing with the fact-finding functions of administrative tribunals.