

CHAPTER 9

Presentation of Evidence

THE power of administrative tribunals to disregard the common-law exclusionary rules of evidence has not resulted, as is often erroneously assumed, in their being utterly ignored in administrative proceedings involving the adjudication of judicial questions. In cases involving the discharge of legislative or executive functions, to be sure, the common-law rules of evidence have no more application than they do to proceedings before a legislature or in a conference with an executive officer. But in cases where agencies exercise judicial functions, the nature of the proof-taking procedure is often almost indistinguishable from the taking of proofs in nonjury cases in the courts.

While often freed by statutory provision from the necessity of following the common-law rules of evidence—or, as it is not infrequently expressed, the technical rules of evidence—most agencies in practice, and often by specific agency rule, apply the fundamental principles of relevancy, materiality, and probative force in a manner not unlike that of equity courts. Partly, this results from their constant consciousness of the necessity of supporting all findings by “substantial evidence,” in order to avoid the possibilities of judicial reversals of their determinations, and partly, the tendency is a reflection of their appreciation of the innate wisdom of the general rules as worked out in the courts.¹

¹ Wigmore found a “general and instructive use” of the common-law rules of evidence in contested cases deemed important. 1 WIGMORE ON EVIDENCE, 3d ed. (1940) 44. See also, Wigmore, “Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?” 17 ILL. L. REV. 263 (1922); Stephan, “The Extent to Which Fact-Finding Boards Should be Bound by Rules of Evidence,” 24 A. B. A. J. 630 (1938).

Although disregarding many of the subtleties of jury-trial evidentiary requirements which are coming to be regarded as archaic even in the courts, the agencies as they develop and mature are trending significantly in the direction of the general rule recommended by the concurring members of the Attorney General's Committee,² which would require that immaterial, irrelevant, and unduly repetitious evidence be excluded from the record of any hearing and that the basic principles of relevancy, materiality, and probative force, as recognized in federal judicial proceedings of an equitable nature, govern the proof of all questions of fact, except that such principles be (1) broadly interpreted in such manner as to make effective the adjudicative powers of administrative agencies; (2) adapted to the legislative policy under which adjudications are made; and (3) administered in such a way as to assure that testimony of reasonably probative value will not be excluded, as to any pertinent fact.

As expressed by the Eighth Circuit Court of Appeals, the practice of the hearing officer "in taking evidence and ruling upon objections thereto should be that which applies to special masters in equity proceedings."³

He should know the exclusionary rules and when he refrains from applying them he should have a cogent reason for refraining. Conversely, he should have the courage to refrain from applying them where the nature of a particular issue or proceeding requires such departure.⁴

In thus following the basic rules of evidence, the agencies have power to exclude immaterial or incompetent evidence.⁵

² Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 241.

³ *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (C.C.A. 8th 1940), 113 F. (2d) 698, 702.

⁴ Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 179. Sec. 7 (c) of the Federal Administrative Procedure Act of 1946 requires federal agencies "as a matter of policy" to exclude irrelevant and immaterial evidence.

⁵ *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (C.C.A. 8th 1944), 143 F. (2d) 488.

Logically, it would seem that this principle would authorize the exclusion of any testimony affecting issues which it was not within the power of the agency to determine, and it has been so held.⁶ But it would seem that in many cases the better administrative practice is to receive all evidence which is pertinent to the case, even though consideration of some phases of the proofs must be deferred until the case comes before the courts. Where, for example, the constitutionality of the statute under which the agency is operating depends in part upon questions of fact, the agency should permit the respondent in proceedings before it to introduce evidence bearing on such factual issues. Even though the agency may not determine the constitutional issues, nevertheless consideration of such factual matters may influence the determination of the agency as to matters within its competence. Furthermore, when the issue of constitutionality subsequently reaches the courts, it is much more convenient if all the facts which the court must consider are found in a single record.

1. Legally Incompetent Evidence: Types Admissible

The practice of general adherence to the underlying rules of evidence is ordinarily a matter of administrative choice, rather than of legal requirement.⁷ It was early recognized by the Supreme Court that administrative agencies should not be "narrowly constrained by technical rules as to the

⁶ *Engineers Public Service Co. v. Securities and Exchange Commission* (App. D. C. 1943), 138 F. (2d) 936.

⁷ But there is a recent trend to require by statute that the agencies follow, in the main, the fundamental rules of evidence. Thus, § 7 (c) of the Federal Administrative Procedure Act provides that, in hearings held pursuant to a statutory requirement, the agencies shall "as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." The Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Supp. I, § 141, goes further in requiring the National Labor Relations Board to follow court rules of evidence "so far as practicable." For law review comment, see Hoyt, "Some Practical Problems Met in the Trial of Cases Before Administrative Tribunals," 25 MINN. L. REV. 545 (1941); Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 HARV. L. REV. 364 (1942); Norwood, "Administrative Evidence in Practice," 10 GEO. WASH. L. REV. 15 (1941).

admissibility of proof.”⁸ The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order.⁹ So long as the evidence is “of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs,”¹⁰ it may be received and considered by the agency, even though it is technically incompetent.

Hearsay is often received, if the attendant circumstances persuasively indicate its reliability, but this is the trend of the courts.¹¹

Opinion evidence, and statements by expert witnesses whose qualifications have been but sketchily established, is sometimes received.

Likewise, if the agency chooses to disregard the best evidence rule, it is not error for it to do so.¹²

But this does not mean that it is typical of administrative procedure to receive, carelessly, whatever statements of hear-

⁸ *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, 24 S. Ct. 563 (1904). This remark was dictum, the actual decision in the case being that the commission was entitled to require the production of certain evidence, the relevancy of which was challenged but which was held to be proper and relevant evidence. The remark, however, has been widely quoted and followed not only as to questions involving the relevancy of evidence, but also as to cases involving the competency of evidence. The cited case is the first in a series of five Supreme Court decisions involving the admissibility of evidence in proceedings before the Interstate Commerce Commission, which are significant as marking the origin of the rules which have since been generally applied to other agencies. The other cases, all of which are carefully analyzed in Stephens, *ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE* (1933) 21, *et seq.*, include: *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913); *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 40 S. Ct. 466 (1920); *United States and Interstate Commerce Commission v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 44 S. Ct. 565 (1924); *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 46 S. Ct. 500 (1926).

⁹ *United States and Interstate Commerce Commission v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 44 S. Ct. 565 (1924).

¹⁰ *John Bene & Sons, Inc. v. Federal Trade Commission* (C.C.A. 2d 1924), 299 Fed. 468, 471.

¹¹ E.g., Rules 503-530, American Law Institute, *MODEL CODE OF EVIDENCE* (1942).

¹² *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 133, 40 S. Ct. 466 (1920).

say or opinion a witness may offer, or to disregard the principle of the best evidence doctrine (which even in court cases is coming with great frequency to be stated as requiring only the best evidence which the nature of the case permits). Nor does it mean that the other exclusionary rules are quite forgotten. On the contrary, it is quite as common to hear objections to testimonial offers made and argued in administrative proceedings as in the courtroom. The point is that the mere reception of legally incompetent evidence, whether or not objected to (of course, if received without objection, objectionable evidence may be and is considered even in court cases), is not normally a ground for attacking the administrative determination, unless prejudice can be shown.

2. Legally Incompetent Evidence: Restrictions on Admission

While the exclusion of incompetent and immaterial evidence matter ordinarily depends upon the exercise of self-restraint by the administrative agency, there are some types of cases where such a mandate is judicially imposed.

Thus, agencies are required to recognize the privileges which the law attaches to communications to priests, attorneys, physicians, and other confidential disclosures.¹³

The admission of hearsay under such circumstances as to infringe substantially the right of cross-examination may amount to a denial of a fair hearing.¹⁴

Reception of evidence which is not only without probative force but is prejudicial in effect is similarly sometimes made a basis for invalidating an administrative determination.¹⁵

¹³ *Baldwin v. Commissioner of Internal Revenue* (C.C.A. 9th 1942), 125 F. (2d) 812; *Matter of City Council of City of New York v. Goldwater*, 284 N. Y. 296, 31 N. E. (2d) 31 (1940).

¹⁴ *Powhatan Mining Co. v. Ickes* (C.C.A. 6th 1941), 118 F. (2d) 105; *Tri-State Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 96 F. (2d) 564; *United States v. Baltimore & O. Southwestern R. Co.*, 226 U. S. 14, 33 S. Ct. 5 (1912).

¹⁵ *People ex rel. Shiels v. Greene*, 179 N. Y. 195, 71 N. E. 777 (1904); *People ex rel. Moynihan v. Greene*, 179 N. Y. 253, 72 N. E. 99 (1904); *Bridges v. Wixon*, 326 U. S. 135, 65 S. Ct. 1443 (1945).

The power given the agencies to receive incompetent evidence is conditioned on the premise that it must be done fairly.¹⁶

3. Exclusion of Proper Evidence

The exclusion of proper evidence may vitiate a quasi-judicial determination of an administrative agency. Refusal to receive competent and material evidence is a denial of due process.¹⁷ The requirement that evidence be received is a necessary counterpart of the rule that the agency must also give due weight to all the evidence before it; refusal to consider evidence properly introduced or proffered falls within the condemnation that voids arbitrary administrative action.¹⁸

The wisdom of this rule is not controverted by the agencies. On the contrary, there are instances wherein an agency has dismissed charges because of the hearing officer's violation of this cardinal principle.¹⁹

If it appears that the excluded evidence could not materially have affected the outcome of the case—if a remand to receive and consider the evidence improperly excluded would amount to nothing more than "a postponement of the inevitable"²⁰ the error committed is not prejudicial. But normally it is impossible for a reviewing court to be assured that the outcome could not have been affected by the consideration of the excluded testimony, and in the usual case the necessary result of the exclusion of proper testimony is to void the administrative order.

¹⁶ *John Bene & Sons, Inc. v. Federal Trade Commission* (C.C.A. 2d 1924), 299 Fed. 468, 471.

¹⁷ The authorities are reviewed in *Donnelly Garment Co. v. National Labor Relations Board* (C.C.A. 8th 1941), 123 F. (2d) 215.

¹⁸ *Chicago Junction Case*, 264 U. S. 258, 44 S. Ct. 317 (1924).

¹⁹ E.g., *In the Matter of Mid-Continent Petroleum Corp.*, 54 N. L. R. B. 912 (1944).

²⁰ *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 61 S. Ct. 908 (1941); *idem.*, (C.C.A. 8th 1940) 113 F. (2d) 698, 702.

4. Practices of the Agencies

Perhaps the best recommendation of the wisdom of applying rules of evidence to proceedings before administrative agencies is that the agencies are coming more and more to turn to these rules voluntarily, and often develop elaborate codes of their own to govern questions relating to the proof of specific types of questions. Even in the case of the agencies whose function is primarily the distribution of governmental largess, such as pensions and old age benefits (where ordinarily there is encountered the greatest relaxation of the rules of evidence in order to permit claimants ignorant of the law and unaided by counsel to present their cases), the regulations contain extensive rules governing the modes of proving such crucial issues as birth, death, years of service, and the like.

Some agencies provide in considerable detail what rules of evidence shall be followed. The Interstate Commerce Commission is perhaps an outstanding example, its rules of practice²¹ covering such topics as the admissibility of evidence, restrictions as to cumulative evidence, reading prepared statements into the record, introduction of official records, introduction of business entries, rules regarding immaterial portions of documents, reference to documents in Commission's files, records in other Commission proceedings, abstracts of documents, exhibits, making objections to evidence, submission of further evidence subsequent to the hearing, et cetera.

The Federal Communications Commission provides that, saving exceptional cases where the ends of justice will be better served by relaxing the rules, the rules of evidence governing civil proceedings in matters not involving trial by jury in the federal courts shall be followed in formal pro-

²¹ I.C.C. Rules 75-87.

ceedings before the Commission.²² A similar provision is found in the Maritime Commission's Rules of Procedure,²³ and the general practice of the Civil Service Commission is the same.²⁴ While the rules of the Federal Trade Commission are indefinite as to the standards to be followed in the reception of evidence,²⁵ that Commission informally announced some time ago that in practice it has "intended to receive only legally competent evidence."²⁶

While there is much disagreement between the various agencies and commissions as to just what rules of evidence should be made to apply to their proceedings, it is very common to find some general provisions made in agency rules setting up certain standards to be followed in receiving evidence,²⁷ and on the whole there is no general pattern of departure from the basic principles of evidence.²⁸

A great deal depends, of course, on the training and native abilities of the hearing officer. These officials are often lawyers by training and, being accustomed to the application of the rules of evidence in court proceedings, find it natural to follow them during the administrative hearing.²⁹ In some cases, the choice of hearing officers is less fortunate, and there are of course instances wherein poorly trained or incompetent

²² F.C.C. Regulations, §§ 1.212-1.217.

²³ U.S.M.C. Rules, § 8.10.

²⁴ *In re J. M. Procter, et al.*, Docket No. 115, Jan. 22, 1944.

²⁵ F.T.C. Rule XVII.

²⁶ Stephens, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933) 82.

²⁷ Blachly and Oatman, "A New Approach to the Reform of Regulatory Procedure," 32 GEO. L. J. 325 (1944), reviewing the rules of many agencies; 1 WIGMORE ON EVIDENCE, 3d ed. (1940) § 4c.

²⁸ Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 70. Some authors believe that an exception has been, or should be, made in workmen's compensation proceedings. Among law review articles or notes as to this, see 21 IND. L. J. 473 (1946); 10 WIS. L. REV. 340, 431 (1935); 36 HARV. L. REV. 263 (1923); 68 U. PA. L. REV. 203 (1920); 24 IA. L. REV. 576 (1939).

²⁹ Chamberlain, Dowling, and Hays, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942) 22.

hearing officers admit much irrelevant and unreliable evidence, largely because of their inability to distinguish the good from the bad. But adherence to higher standards in the selection of hearing officers has in recent years done much to improve this situation. The trend is away from the loose habit of receiving almost any testimonial offer "for what it is worth," a practice which results in unduly swelling records by incorporation of much that is clearly worth nothing, and toward the practice of receiving only material, relevant evidence of reliable probative value.³⁰

5. Utilization of Written Evidence

In many types of administrative proceedings, the utilization of written evidence as a substitute for oral examination of witnesses, is effective to expedite the consideration of cases, without injury to the justice of the result. In certain types of proceedings before the Interstate Commerce Commission, for example, a so-called "shortened procedure" is made available, under which, with the consent of the affected parties, a case may be decided upon stipulations, depositions, and briefs.³¹ Over a period of time, this procedure has been chosen by the parties in approximately one third of the cases wherein it is applicable. Because of the circumstance that in many cases before the agencies there is but little argument over the facts, which are often chiefly statistical in nature—the argument being as to the significance or proper interpretation of a technical and complex factual situation—there is every indication that similar procedures could well be adopted more generally. While in some types of proceed-

³⁰ For typical administrative rulings excluding proffered evidence, see *In the Matter of Lindeman Power & Equipment Co.*, 11 N. L. R. B. 868 (1939), and *In re Riemer and the State of Illinois*, U. S. Civil Service Commission, Docket No. 56, July 7, 1943. For law review comment, see Vanderbilt, "The Technique of Proof Before Administrative Bodies," 24 IA. L. REV. 464 (1939).

³¹ Monograph No. 11 of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 10, 77th Cong., 1st Sess. (1941) 23.

ings, such as cases before the National Labor Relations Board involving charges of unfair labor practices, it would be quite out of the question to attempt to decide the cases on the basis of *ex parte* affidavits, still there are many opportunities for profitable expansion of this practice.

Without the necessity of any changes in present rules, it is possible by informal co-operation between attorneys for the agency and for the respondent to approximate this result. Often, an agency assigns a case for hearing before its staff members have become familiar with the factual data involved; and the submission by the respondent's attorney of a carefully prepared statement covering the significant facts of the case may become the basis for a stipulation of facts, on which the case may be disposed of. Utilization of this informal device is obviously advantageous for the respondent as well as for the public interests served by the agency.

6. Presumptions and Inferences; Burden of Proof

In theory at least, it is true as well in the case of administrative proceedings as in the case of proceedings in courts that the party seeking relief has the burden of proof, even though that party be the administrative agency; and it has been held that administrative agencies have no general authority by regulation to shift the fundamental burden of proof.³² But in practice it is easy for the agency, acting as judge as well as plaintiff, to satisfy itself that it has sustained the burden of proof which formally is imposed upon it. While the burden of going forward with the proofs rests indeed on the agency, in many senses the burden of ultimately convincing the tribunal that the respondent is not guilty as charged rests upon the respondent.

This is so, largely because of the fact that the ultimate finding by the administrative agency frequently depends on

³² *Petition of Warszawski* (D. C. Mich. 1936), 16 F. Supp. 43. And note provisions of Federal Administrative Procedure Act.

inference. It must determine, for example, whether a gift was made in contemplation of death, or what the intent was which motivated an employer in discharging an employee. Where the important question is not a matter of primary fact but of inference, it is inevitable that an agency approaching a case (as many administrative agencies do) with a desire to reach one result, if possible, rather than another, will often find it easy to make an inference on facts which to a totally disinterested judge would not preponderate in support of the inference.

This situation gives rise to a question which has a long history in the field of administrative law. In cases where the evidence equally supports an inference imposing liability and likewise a contrary inference exonerating of liability, must the agency dismiss the case, or may it choose the inference it desires? In the earlier days, there was a strong tendency in the courts to rule that where the evidence equally supported either inference, the agency would not be permitted to make the inference that would impose liability.³³

Dissatisfied with the result of such decisions (which frequently made it impossible, for example, to award workmen's compensation to the family of a worker killed while at work, but under circumstances which rendered it impossible to establish clearly whether the death was due to accident or suicide), the state legislatures and Congress as well, sought to change the rule by adopting various "presumption" statutes. They were principally of two types: first, creating a presumption effective on appeal in favor of the correctness of the administrative decision; and second, a presumption in favor of one party that would operate throughout the administrative proceedings (for example, a presumption that a workmen's compensation claim came within the statute, that

³³ See, for example, *Chaudier v. Stearns & Culver Lumber Co.*, 206 Mich. 433, 173 N. W. 198 (1919); *Sparks v. Consolidated Indiana Coal Co.*, 195 Iowa 334, 190 N. W. 593 (1922). Many state courts follow this rule.

the injury did not result from negligence or intoxication, that death was not suicide, et cetera).

Some state courts quite ignored these presumption statutes, construing them so as to deprive them of any substantial operative effect.³⁴ But it has now been established at least for the federal agencies that such presumptions are valid; and while their force vanishes upon the introduction of any countervailing evidence, it is indicated that in the absence thereof, the statutory presumption satisfies the requirement that the finding be supported by evidence.³⁵

7. The Requirement of Substantial Evidence

A further limitation on the power of administrative tribunals to exercise free discretion in making inferences as to facts not specifically established, is the provision so frequently found in the statutes (and imposed by the courts themselves where the statute is silent) that the findings of the administrative body are binding and conclusive only if supported by substantial evidence. So used, the term is chiefly significant as a criterion of the scope of judicial review. As hereinafter discussed, the term in such connection has no fixed meaning. The extent to which the courts will examine the reasonableness of the inferences made by an agency, in ascertaining whether there is substantial evidence to support those inferences, varies widely from agency to agency, if not from court to court. The extent to which the inferences are examined is influenced by many factors, and the characterization of the supporting evidence as substantial or otherwise, ordi-

³⁴ See e.g., *Joseph v. United Kimono Co.*, 194 App. Div. 568, 185 N. Y. S. 700 (1921).

³⁵ See *Del Vecchio v. Bowers*, 296 U. S. 280, 56 S. Ct. 190 (1935), commented on in 34 MICH. L. REV. 878 (1936); *Tot v. United States*, 319 U. S. 463, 63 S. Ct. 1241 (1943), commented on in 17 S. CAL. L. REV. 48 (1943); *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 57 S. Ct. 816 (1937); *Webre Steib Co. Ltd. v. Commissioner of Internal Revenue*, 324 U. S. 164, 65 S. Ct. 578 (1945).

narily reflects the result attained rather than the tests employed.

However, the existence of this vague requirement that a finding may be revised, if not supported by substantial evidence, has influenced the proof-taking processes of the agencies. In making a record in a case which may be subjected to judicial review, an administrative agency is assiduous in its effort to make sure that substantial evidence can be pointed to in support of its findings.

One particular aspect of the requirement of substantial evidence is particularly significant in this connection. This is the so-called legal residuum rule.³⁶ Under this rule, it is said that a finding cannot be deemed to be supported by substantial evidence unless there is at least a residuum of legally competent evidence to support it. This would mean, for example, that no matter how convincing the record might be, the courts would have the power to set aside the findings of fact on the sole ground that nowhere in the record was there a residuum of technically competent proof which supported the finding.

The artificiality of this legal residuum rule seems clear. The administrative officers reach their decision upon a consideration of all the evidence received, be it hearsay or otherwise. Their decision is influenced by the preponderance of the testimony, not by the residuum thereof. The fact that there is some residuum of proof pointing in one direction or another has nothing to do with the making of the administrative finding. As observed by Wigmore, "it is obviously fallacious to assume that one or more pieces of 'legal' evidence are

³⁶ The legal residuum rule is sometimes spoken of as a rule separate from and in fact opposed to the substantial evidence rule. Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 189. It is true that many courts which apply the substantial evidence requirement have repudiated the legal residuum rule, but it would seem that the two rules are but a broader and narrower aspect of the same general requirement.

'per se' a sufficient guarantee of truth."³⁷ The only beneficial effect which the rule has had lies in the influence that has been exerted upon administrative tribunals to follow generally the basic principles of evidence so far as it is practical to do so.

Despite the artificiality of the rule, it has been of some indirect value in this way, and has at least done no substantial amount of harm. For better or worse, the rule is still in effect in apparently a majority of the state courts.³⁸

The extent to which the legal residuum rule will be followed in the federal courts is not so clear. The different circuits are not in complete agreement, and the Supreme Court has not spoken with finality.

Some of the circuit courts of appeal insist that there must be a residuum at least of legally competent proof to support the finding of an administrative agency. Thus, the Fifth Circuit declared on one occasion that a statutory provision that rules of evidence prevailing in courts of law and equity will not control an administrative agency means that it is not error for the Board to "hear incompetent evidence, but does not mean that a finding of fact may rest solely on such evidence."³⁹ Similarly, the Seventh Circuit has declared that the relaxation of the strict rules of evidence in the case of proceedings before administrative agencies "was done for the sole purpose of expediting administrative procedure, and not to limit in any manner the well-known rules relating to

³⁷ 1 Wigmore on EVIDENCE, 3d ed. (1940) 41.

³⁸ Many cases are cited in 1 Wigmore on EVIDENCE, 3d ed. (1940) 83 *et seq.*; *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916); *Englebreton v. Industrial Accident Commission*, 170 Cal. 793, 151 Pac. 421 (1915); *Jensen v. Wheeler & England*, 51 Idaho 91, 1 P. (2d) 624 (1931); *Selz-Schwab & Co. v. Industrial Commission*, 326 Ill. 120, 156 N. E. 763 (1927); *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247 (1914); *Smith v. Philadelphia & Reading Coal & Iron Co.*, 284 Pa. 35, 130 Atl. 265 (1925).

³⁹ *National Labor Relations Board v. Bell Oil & Gas Co.* (C.C.A. 5th 1938), 98 F. (2d) 870.

the weight or the applicability, or the materiality of the evidence.”⁴⁰

Similarly, the Ninth Circuit has declared that where improper, immaterial, or hearsay testimony “is the only foundation for the findings . . . [then it cannot be said that] they are supported by such substantial evidence as the law requires.”⁴¹ The position of the Court of Appeals for the District of Columbia is not so clear, but in at least one case it has applied a similar rule.⁴²

In other circuits, however, it has been specifically ruled that the evidence in support of a finding may be “substantial,” so as to render that finding unassailable, even though there is no residuum of technically competent proof. The Second Circuit Court of Appeals has spoken clearly, declaring that while mere rumor would doubtless not be sufficient to support a finding, yet “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.”⁴³

⁴⁰ *National Labor Relations Board v. Illinois Tool Works* (C.C.A. 7th 1941), 119 F. (2d) 356, 363, 364; the court added:

“We think Congress presupposed that the trier of facts would weigh and apply the evidence as before and use only that which was competent and material, and disregard that which was not. The effect of the statute is to shorten trial procedure by permitting the trier, if he chooses, to admit all evidence of doubtful materiality and thus eliminate delays caused by arguments. The statute does not attempt to define competent and material evidence. That is still left to the determination of the trier. The statute merely gives him a longer time in which to make his decision, and at the same time shortens the trial. There is nothing new in this formula, for courts have used it from time immemorial in cases not triable by juries. They could always, in their findings, guard against errors in the admission of evidence, and when they did, the reviewing court would regard such errors as harmless. What was heretofore permitted by the courts has likewise been authorized by this statute in cases of this character.”

⁴¹ *National Labor Relations Board v. Washington Dehydrated Food Co.* (C.C.A. 9th 1941), 118 F. (2d) 980.

⁴² *Tri-State Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 96 F. (2d) 564—a decision on which Wigmore commented, “No wonder the administrative agencies chafe under such impractical control.” 1 Wigmore on EVIDENCE, 3d ed. (1940) 34.

⁴³ *National Labor Relations Board v. Remington Rand, Inc.* (C.C.A. 2d 1938), 94 F. (2d) 862, 864; see also *Art Metals Const. Co. v. National Labor*

Similarly, the First Circuit Court of Appeals has held that since an administrative agency is not bound by technical rules of evidence, and may admit evidence, such as hearsay, which would be inadmissible in a court, it need not single out this evidence for special treatment but may make it the basis for findings, if the evidence is such as would normally be relied on by reasonable people.⁴⁴

Again, the Court of Appeals for the District of Columbia has declared that "it is only convincing, not lawyers' evidence which is required."⁴⁵

Many other cases could be cited from these and other circuits, but the resulting picture would be the same. There is no consistent trend, and remarks found in one opinion of a given court are sometimes seemingly at odds with remarks found in other decisions by the same court.

The test toward which the federal courts are apparently moving is to say that a finding may be deemed to be supported by substantial evidence, even though there is no residuum of legally competent proof, so long as the evidence on which the Board relied was the best that was conveniently available and was of a kind on which responsible persons are accustomed to rely in serious affairs; but to say that technically incompetent proof, such as hearsay, is not sufficient to constitute substantial evidence in a case where it is substi-

Relations Board (C.C.A. 2d 1940), 110 F. (2d) 148, 149-150, where the court said:

"We cannot see any basis to challenge the competency of this evidence, or its sufficiency to support the finding, even though common law evidence alone were competent, which is not the case."

In an earlier decision, *John Bene & Sons, Inc. v. Federal Trade Commission* (C.C.A. 2d 1924), 299 Fed. 468, the court held it proper for an agency to consider legally incompetent evidence so long as it was evidence of a kind that would affect fairminded men in the conduct of important affairs.

⁴⁴ *National Labor Relations Board v. Service Wood Heel Co., Inc.* (C.C.A. 1st 1941), 124 F. (2d) 470.

⁴⁵ *International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. National Labor Relations Board* (App. D. C. 1939), 110 F. (2d) 29, 35, *aff'd* 311 U. S. 72, 61 S. Ct. 83 (1940).

tuted for direct evidence that is conveniently available—and particularly where there is a denial of the hearsay.⁴⁶

The Supreme Court declared in *Consolidated Edison Co. v. National Labor Relations Board*:⁴⁷ “Mere uncorroborated hearsay or rumor does not constitute substantial evidence.” This may properly be taken as suggesting that hearsay which rises above the level of rumor and is corroborated by circumstantial indication of its reliability, may constitute substantial evidence. In *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor*,⁴⁸ the court found that statistical studies by a government department, which would not be legally competent, were sufficient to constitute substantial support for the agency’s findings. The opinion strongly indicates that evidence which would not be competent in a court of law may be substantial evidence to support a finding of an administrative board. However, the court did not squarely face the question, since it appeared that the documents in question were received in evidence without objection, and that accordingly, even in a court of law, such evidence could have been considered and accorded its natural probative effect, as if it were admissible.

Ordinarily, it cannot be said that evidence is substantial unless at least a substantial portion of the evidence relied upon is technically competent. The administrative agencies have refused to make findings on the basis of charts made by witnesses who were not examined, on the basis of letters, et cetera.⁴⁹ But in rare cases, such incompetent testimony may be the best that is available, and if it is persuasive, many

⁴⁶ *Martel Mills Corp. v. National Labor Relations Board* (C.C.A. 4th 1940), 114 F. (2d) 624.

⁴⁷ 305 U. S. 197, 230, 59 S. Ct. 206 (1938).

⁴⁸ 312 U. S. 126, 61 S. Ct. 524 (1941). This case has been the subject of extensive law review comment, e. g., 27 WASH. U. L. Q. 1 (1941); 35 ILL. L. REV. 840 (1941); 29 GEO. L. J. 882 (1941); 10 GEO. WASH. L. REV. 219 (1941).

⁴⁹ See *In the Matter of W. H. B. Broadcasting Co.*, 3 F. C. C. 592 (1936); *In re Queensboro Gold Mines, Ltd.*, 2 S. E. C. 860 (1937).

courts can be expected to rule that there is substantial evidence to support the finding, even though there is no residuum of legally competent proof.

In many cases, the requirement that there be substantial evidence in order to render the findings unassailable, is said to be approximately the same test as that applied by appellate courts in determining whether or not a jury verdict must be set aside—the test then being, generally, whether the finding is so contrary to the evidence that no reasonable group acting reasonably could have reached the conclusion assailed.⁵⁰ The suggestion cannot be taken technically because in a jury trial, if there is not at least a residuum of legal evidence to support the verdict, a directed verdict must be entered by the court. The rule, rather, should be construed broadly to mean that such substantial evidence as confers finality upon the administrative decision on the facts exists when the evidence is such that a reasonable man acting reasonably might have reached the decision which is assailed.

The rule is then not much different from saying, as the courts sometimes do, that substantial evidence exists if there is a rational basis for the decision. The general spirit of this requirement is illustrated by the provisions of Section 7 of

⁵⁰ E. B. Stason, "Substantial Evidence" in Administrative Law, 89 U. PA. L. REV. 1026 (1941). Among the numerous cases in which "substantial evidence" is equated to the directed verdict rule in jury trial are the following: National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 59 S. Ct. 501 (1939); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938); Magnolia Petroleum Co. v. National Labor Relations Board (C.C.A. 5th 1940), 112 F. (2d) 545; National Labor Relations Board v. Goshen Rubber & Manufacturing Co., (C.C.A. 7th 1940), 110 F. (2d) 432; National Labor Relations Board v. Sterling Electric Motors, Inc. (C.C.A. 9th 1940), 109 F. (2d) 194; National Labor Relations Board v. Asheville Hosiery Co. (C.C.A. 4th 1939), 108 F. (2d) 288; National Labor Relations Board v. Bell Oil & Gas Co. (C.C.A. 5th 1938), 98 F. (2d) 406; National Labor Relations Board v. Wallace Mfg. Co. (C.C.A. 4th 1938), 95 F. (2d) 818; Appalachian Electric Power Co. v. National Labor Relations Board (C.C.A. 4th 1938), 93 F. (2d) 985. That the provisions of the Federal Administrative Procedure Act somewhat enlarge the powers of the courts to hold evidence not "substantial" is indicated by Universal Camera Corp. v. N.L.R.B. (Feb. 26, 1951, No. 40, Oct. 1950 term). The precise extent of the enlargement has not been precisely defined. See citations in n. 25, Ch. 16, at p. 313, *infra*.

the Federal Administrative Procedure Act of 1946 that decision must be based on the *whole record* and "in accordance with the reliable, probative, and substantial evidence." See the cases cited below.⁵¹

Thus the substantial evidence rule is a strong inducement to administrative agencies to insist upon a general adherence to the basic principles of evidence; but it is doubtful that this requirement will continue to be available as a basis for setting aside an administrative determination on the sole ground that it is not supported in part, at least, by proof which is technically "competent" under common-law standards.

⁵¹ *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 59 S. Ct. 754 (1939); *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 54 S. Ct. 692 (1934); *Montana Power Co. v. Federal Power Commission* (C.C.A. 9th 1940), 112 F. (2d) 371; *Yankee Network, Inc. v. Federal Communications Commission* (App. D. C. 1939), 107 F. (2d) 212.