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Administrative Law - "Review of Whole Record" in Determining Substantiality of Evidence to Sustain Administrative Board's Finding

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COMMENTS

ADMINISTRATIVE LAW—"REVIEW OF WHOLE RECORD" IN DETERMINING SUBSTANTIALITY OF EVIDENCE TO SUSTAIN ADMINISTRATIVE BOARD'S FINDING

The scope of review of a National Labor Relations Board order by a United States Court of Appeals has long been limited by the so-called "substantial evidence" rule.[1] The formulation of this rule grew out of the judicial interpretations of that section of the National Labor Relations Act[2] (hereafter referred to as the Wagner Act) which provided: "the findings of the Board as to the facts, if supported by evidence, shall be conclusive."[3] "Evidence" was held to mean "substantial evidence," and it was said that "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."[4] It has also been said that:

> "Substantial evidence . . . must do more than create a suspicion of the existence of the fact to be established. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[5]

The scope of review of administrative findings, under statutes such as above quoted, and of jury verdicts is therefore the same. This precludes the courts from weighing the evidence in reviewing board orders, and leaves the courts with only the duty of searching the record for substantial evidence on which the board's order was based.[6]

However, in applying the "substantial evidence" rule some courts, either in fact or by implication arising from the language used in the opinions, appeared to merely look into the record to find substantial evidence to justify the board's finding. The decisions in most instances, did not show and in fact negatived a showing, that the court examined the whole record in coming to the conclusion that there was substantial evidence. As shown by the Court's discussion in *Universal Camera Corp. v. National Labor Relations Board,*[7] the Congress, in amending

[1] Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 191, 59 S.Ct. 206, 83 L.Ed. 126, (1938).
[2] NATIONAL LABOR RELATIONS ACT (1935), 49 Stat. 449, 29 U.S.C. 151, 29 U.S.C.A. 151.
[3] *Supra,* Note 2, section 10(e).
[4] National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942).
[5] *Supra,* Note 4.
[6] National Labor Relations Board v. Columbian Enameling and Stamping Co., 306 U.S. 292, 59 S.Ct. 501, 83 L.Ed. 660 (1939).
[7] Universal Camera Corp. v. National Labor Relations Board, 71 S.Ct. 456 (1951).

the Wagner Act[8] (hereafter referred to as the Taft-Hartley Act) and in enacting the Federal Administrative Procedure Act,[9] sought to retain the substantial evidence rule but at the same time to do away with the practice of not examining the whole record in determining whether there was substantial evidence. The Taft-Hartley Act provides: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive,"[10] and the Federal Administrative Procedure Act provides that the court shall "(B) hold unlawful and set aside agency action, findings and conclusions found to be; (5) unsupported by substantial evidence . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party."[11] It was held in the *Universal Camera* case[12] that the standard of review specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by the courts reviewing every administrative action subject to the Administrative Procedure Act.

This command of the statutes to review the entire record does not mean that the court can now weigh the evidence but it does mean that the court in considering the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight."[13] Thus the court still will not weigh the evidence in support of the board's finding as against that which does not support the finding, but will consider the whole record, and consider contrary evidence in relation to its persuasiveness in determining the substantiality of the evidence in support of the board's finding. Said the court in the *Universal Camera* case:[14]

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

In that case[15] the labor board had reversed the findings of the trial examiner, and the court of appeals had said that the reasons for reversal "do not seem to us enough to overbear the evidence, which the record did not preserve and which may have convinced the examiner . . . However we think that we are altogether to disregard this as a factor

[8] National Labor Relations Act (1935), *supra*, note 2, as amended by Labor Management Relations Act (1947), 61 Stat. 136, 29 U.S.C. 151, 29 U.S.C.A. 151.
[9] ADMINISTRATIVE PROCEDURE ACT (1946), 60 Stat. 237, 5 U.S.C.A. 1001.
[10] *Supra*, Note 8, section 10(e).
[11] *Supra*, Note 9, section 10(e).
[12] *Supra*, Note 7.
[13] *Supra*, Note 7.
[14] *Supra*, Note 7.
[15] *Supra*, Note 7.

in our review, which we should confine to the bare record."[16] On appeal, the Supreme Court remanded the case to the court of appeals. "On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial."[17] This does not mean that whenever the examiner and the board do not agree the evidence may not be substantial, but it does mean that the reasons for such disagreement may affect the substantiality of the evidence. Thus the court must now review the whole record and consider the effect any opposing evidence may have upon the substantiality of the evidence in support of the board's finding.

It is expected that such a review will prevent such decisions as *Nevada Consolidated Copper Co. v. N.L.R.B.*[18] where the court of appeals[19] found that upon considering credibility of witnesses and conflicting evidence the board's order was not based on substantial evidence; reversing on appeal,[20] the Supreme Court said that if the board's order was based on substantial evidence it was conclusive; *N.L.R.B. v. Columbia Products Corp.*,[21] where the court said "our only duty is to see whether there was any substantial evidence to support the finding"; *Consolidated Edison Corp. v. N.L.R.B.*,[22] where the court said the record was not wholly barren of evidence to support the board's finding and therefore the order must stand; and *Wilson and Co. v. N.L.R.B.*,[23] where the court said that it had sifted the evidence for the sole purpose of ascertaining the existence of substantial evidence to support the board's finding and added: "We have recognized (or tried to) that the findings must be sustained, even when they are contrary to the great weight of the evidence, and we have ignored, or at least tried to ignore, the shocking injustices which such findings, opposed to the overwhelming weight of the evidence, produce."

Wisconsin's Administrative Procedure Act is similar to the Federal Acts[24] in that it provides that the court may reverse or modify the decision of an agency if "unsupported by substantial evidence in view of

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[16] National Labor Relations Board v. Universal Camera Corp., 179 F. (2d) 749 (2 Cir., 1950).
[17] *Supra*, Note 7.
[18] *Supra*, Note 4.
[19] Nevada Consolidated Copper Corp. v. National Labor Relations Board, 122 F. (2d) 587 (10th Cir., 1941).
[20] *Supra*, Note 4.
[21] National Labor Relations Board v. Columbia Products Corp., 141 F. (2d) 687 (2d Cir., 1944). The court went on to say: "Though it may strain our credulity, if it does not quite break it down, we must accept it, and in the case at bar, regardless of what might have been our own conclusion, we are not prepared to say that no rational person could have come to the same conclusion."
[22] *Supra*, Note 1.
[23] *Supra*, Note 6.
[24] *Supra*, Notes 10 and 11.

the entire record as submitted."[25] In two early Wisconsin cases[26] the court held that it did not have jurisdiction to determine the factual issues nor weigh the evidence, but could only look to see if there was substantial evidence upon which the findings were based. In interpreting the vision of the Wisconsin Administrative Procedure Act as above quoted, the court in the *Gateway* case[27] said that "substantial evidence" means "any evidence." In that case quotations from the *Consolidated Edison* case[28] appear at great length as to the meaning of substantial evidence, but the case does not seem to consider or construe the meaning of "in view of the entire record." It seems that when this provision[29] again comes before the court this language should be given consideration, and the interpretation of the provision of the Wisconsin Administrative Procedure Act should be brought in accord with the interpretation of similar provisions in the Federal Acts.[30]

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[25] WIS. STATS. (1949), Sec. 227.20 (1) (d).
[26] Milwaukee v. Stratford, 245 Wis. 505, 15 N.W. (2d) 812, (1944); Ray-O-Vac v. W. E. R. B., 249 Wis. 112, 23 N.W. (2d), 1948.
[27] Gateway City Transfer Co. v. Public Service Commission, 253 Wis. 397, 34 N.W. (2d) 238 (1948).
[28] *Supra,* Note 1.
[29] *Supra,* Note 25.
[30] *Supra,* Notes 8 and 9.