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EVIDENCE OF UNFAIR LABOR PRACTICES UNDER THE TAFT-HARTLEY ACT

THOMAS F. GREEN, JR.*

I

Section 10 of the National Labor Relations Act¹ as amended by the Labor Management Relations Act, 1947,² popularly known as the Taft-Hartley Act, deals with three distinct problems of evidence in the provisions intended to prevent unfair labor practices. These three problems are dealt with in separate subdivisions of Section 10. The first problem involves the procedure of the hearing and consists largely of the rules of admissibility.³ The second is the question of the degree of persuasion and the basis of persuasion upon which the Board is to find that a person is engaging in unfair labor practices.⁴ The third is the extent of review by the courts of the evidence before the Board and of the Board's findings of fact.⁵

A device often used as an aid in interpreting statutes is to inquire what were the evils at which the statute was aimed.⁶ The statement is frequently made that the inquiry is proper only when the language is ambiguous.⁷ If such a limitation actually exists⁸ it seems to be satisfied in this statute. The requirement that the proceedings be conducted, so far as practicable, in accordance with rules of evidence presents at least three ambiguities, *i.e.*, "so far as practicable," "rules of evidence" (do these rules include presumptions, burden of proof, etc.?), and the question of what state's law is to be applied in the determination of the rules of evidence. The requirements that the Board decide according to the preponderance of the evidence and that the courts treat the Board's findings as conclusive "if supported by substantial evidence on the

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¹ Act of July 5, 1935, c. 372, 49 STAT. 449, 29 U. S. C. §§ 151-166, often referred to as the Wagner Act.

² Pub. L. No. 101, 80th Cong., 1st Sess., c. 120 (June 23, 1947).

³ Section 10(b) of the Act makes the evidence provisions of the Federal Rules of Civil Procedure applicable, so far as practicable, to the Board's unfair practices proceedings.

⁴ See §10(c).

⁵ See §10(e) and (f).

⁶ *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 489, 60 S. Ct. 982, 84 L. Ed. 1311 (1940); *Continental Construction Co. v. Lawrence*, 297 Mass. 513, 9 S. E. 2d 550, 111 A. L. R. 699 (1937); *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 652 (1884); 50 AM. JUR. 291, § 305.

⁷ *In re Boggs-Rice Co.*, 66 F. 2d 855 (C. C. A. 4th 1933); *State ex rel. Ronald v. Clausen*, 114 Wash. 520, 195 Pac. 1018 (1921); *Newby v. Yellin*, 257 Ill. App. 526 (1930).

⁸ See Horack, *In the Name of Legislative Intention*, 38 W. VA. L. Q. 119 (1932); 2 SUTHERLAND, STATUTORY CONSTRUCTION 334, 483 (3d ed. 1943).

record considered as a whole," raise the question whether the reviewing court is to weigh the evidence.

What is the meaning and the effect of these provisions in view of the intent of Congress to correct the evils mentioned in the committee reports and the debates in Congress? It is indicated that these evils are the issuing by the Board of cease and desist orders which are not supported by evidence in the record and the failure of the courts to give effective review to the Board's orders.⁹ Apparently the requirement of section 10(c) that the Board find the facts according to the preponderance of the evidence is merely a statement of the law as it existed at the time the Act was adopted. The pertinent language of the section is: "If upon the preponderance of testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue" a cease and desist order.

A former member of the National Labor Relations Board has said:

"Presumably, all agencies, in the first instance, are supposed to decide a question according to the preponderance of the evidence, or the weight of the evidence. In other words, it is not enough for the Agency, in the first instance, to make findings supported by reliable and even substantial and probative evidence. It has the duty of weighing all the evidence and reaching the right conclusion."¹⁰

The House Committee report on the Administrative Procedure Bill said, "Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance."¹¹ Congress evidently thought it desirable to include an express statement of the rule in the Labor Management Relations Act. There may be some advantage in setting the rule forth in statutory form. The statute may serve to emphasize the rule and impress upon the Board and its examiners the duty of deciding the case according to the evidence in the record. This is important because the performance of this duty cannot be fully checked by the Courts or anyone outside the Board. As Commissioner Benjamin said in his report to the Governor of New York:

"No form of judicial review, however broad in scope, could ascertain with certainty whether a quasi-judicial determination has been arrived at—as it should have been—on the administra-

⁹ Statement of the Managers on the Part of the House quoted in U. S. C. Congressional Service, 1947 Advance Sheet No. 5, pp. 2-191, see pp. 2-218; Report of Committee on Education and Labor, H. R. REP. No. 245, 80th Cong., 1st Sess., at pp. 40, 41.

¹⁰ Reilly, *The Labor Board and the Administrative Procedure Act* in *FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 468, 486 (1947).

¹¹ Report of the Committee on the Judiciary, House of Representatives on S. 7, H. R. REP. No. 1980, 79th Cong., 2d Sess. 37.

tive tribunal's own considered judgment as to the preponderance of the evidence. Adherence by the administrative tribunal to that standard of responsible adjudication must necessarily be left to the good faith of the tribunal. The substantial evidence rule, providing as it does for a review of the rationality of a quasi-judicial determination on all the evidence that was before the administrative tribunal, is broad enough, and is capable of sufficient flexibility in its application, to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. Judicial review broader in scope than the substantial evidence rule would, on the other hand, permit the reviewing court to substitute its own judgment on the evidence for that of the administrative tribunal, and thus to supersede a quasi-judicial determination even where that determination did represent the considered judgment of the administrative tribunal on the evidence."¹²

Yet it seems clear that the Act should be interpreted as broadening the scope of judicial review beyond the confines of the substantial evidence rule. The committee reports disclose an intention to extend, and a belief that the preponderance provision aids in extending, judicial review.¹³

The direct statements in the Act concerning judicial review are found in sections 10(e) and 10 (f). Subdivision (e) authorizes the Board to petition any circuit court of appeals for the enforcement of the Board's order, and continues, "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." Subdivision (f) provides that any person aggrieved by a final order of the Board may obtain a review of such order in a circuit court of appeals in the circuit where the unfair labor practice was alleged to have occurred or wherein such person resides or transacts business. He is also given a choice of seeking review in the United States Circuit Court of Appeals for the District of Columbia. The findings of the Board, if supported by substantial evidence on the record considered as a whole, are to be conclusive in such review as in the case of a petition by the Board for enforcement of its order.

The term "substantial evidence" seems to have been first used in connection with discussions of the test for directing a verdict, the accepted proposition being that a party must produce substantial evidence to avoid the direction of a verdict against him. If the evidence favoring the party's contentions is such that reasonable men may differ as to whether the evidence establishes the facts then it is substantial.¹⁴

¹² ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK, REPORT OF COMMISSIONER UNDER SECTION 8 OF THE EXECUTIVE LAW 336 (1942).

¹³ VAN ARKEL, AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT, (Practicing Law Institute, 1947) 19. See reports cited in note 9 *supra*.

¹⁴ *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 643 (C. C. A. 6th 1906).

The term "substantial evidence" was seized upon by Congress and the State Legislatures as a means of describing the test to be applied when a reviewing court is called upon to decide whether the administrative record supports an agency's findings of fact. It is said to have first appeared in the Acts of Congress in the amendment of 1930 to the Radio Act of 1927.¹⁵ The expression has since been used in many other federal statutes.

The National Labor Relations Act formerly provided that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive."¹⁶ In *Consolidated Edison Co. v. National Labor Relations Board*¹⁷ the Supreme Court held that evidence in that act meant "substantial evidence." The opinion defines the term as follows: "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."

The opinion points out that under the Act as then in force the mere admission of testimony which would be deemed incompetent in judicial proceedings would not invalidate the Board's order, but adds that this flexibility in administrative procedure does not justify orders without a basis in evidence having rational probative force. The opinion also states that uncorroborated hearsay does not constitute substantial evidence. A later opinion in the same court recognizes the affinity between the test for refusing to direct a verdict and the test for sustaining the findings of an administrative agency.¹⁸

As shown above, the Labor Management Relations Act directs the Board to search for substantial evidence on the record considered as a whole. The language is somewhat ambiguous but an examination of the legislative history throws much light upon its intended meaning. Some decisions of the Supreme Court had indicated that federal courts, when reviewing findings of administrative agencies, were to sustain findings of fact upon determining that they were supported by substantial evidence in the record, without considering to what extent other evidence might conflict with or tend to weaken the evidence relied upon.¹⁹

In contrast with the federal view was the doctrine laid down by the New York Court of Appeals in 1940, when that court said:

¹⁵ Hoyt in BROCHURE ON ADMINISTRATIVE LAW (Am. Bar Ass'n, 1943) 30.

¹⁶ 29 U. S. C. §161 (1940).

¹⁷ 305 U. S. 197, 229, 59 S. Ct. 206, 216, 83 L. Ed. 126, 140 (1938).

¹⁸ *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660, 665 (1939).

¹⁹ *National Labor Relations Board v. Waterman*, 309 U. S. 696, 60 S. Ct. 611, 84 L. Ed. 1036 (1940); *National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U. S. 318, 60 S. Ct. 918, 84 L. Ed. 1226 (1940). See also *National Labor Relations Board v. Perfect Circle Co.*, 162 F. 2d 566 (C. C. A. 7th 1947).

"The evidence produced by one party must be considered in connection with the evidence produced by the other party. Evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony. The Board must consider and sift all the evidence. . . ." ²⁰

Apparently acting without knowledge of the New York decision the minority of the Attorney General's Committee on Administrative Procedure recommended the adoption by statute of the rule that the reviewing court should decide whether the administrative findings were unsupported upon the whole record by substantial evidence. ²¹

The Administrative Procedure Act in Section 10 requires the court to review the whole record or such portions thereof as may be cited by any party. This language was probably intended to adopt the recommendation of the minority of the Attorney General's Committee and to require a fuller review. ²² Some commentators, however, have claimed that the old substantial evidence law was continued in force by the Administrative Procedure Act. ²³ In an effort to assure a fuller review by the courts, the sponsors of the Labor Management Relations Act put the reference to the "whole record" in the same sentence with the words "substantial evidence." ²⁴ It seems clear that the Act requires the reviewing court to consider the evidence on both sides. The question remains, however, how shall the court deal with the evidence. At least two possibilities suggest themselves. One is a consideration *de novo* in court, similar to the appeal in equity under the orthodox procedure. The other is weighing of the evidence to determine whether the Board's decision was reasonable. The latter is the process through which a trial judge goes when he is asked to set aside the verdict of a jury as against the evidence or against the weight of the evidence. ²⁵

One aspect of the legislative history may be used as an argument that Congress did not intend for the reviewing court to weigh the evidence at all. The bill, which passed the House and was one of the bases of the conference from which the final form of the Act came, provided that the Board's findings of fact should be conclusive unless it appeared to the reviewing court that the findings were against the manifest weight of the evidence or that they were not supported by substan-

²⁰ *Stork Restaurant, Inc. v. Boland*, 282 N. Y. 256, 26 N. E. 2d 247, 255 (1940).

²¹ REP. ATT'Y GEN. COMM. AD. PROC. 211 (1941); FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 559, 591-592. See 33 A. B. A. J. 434 (1947).

²² Dickinson in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 559, 587 (Watten ed. 1947).

²³ VAN ARKEL, AN ANALYSIS OF THE LABOR MANAGEMENT ACT 17 (Practicing Law Institute, 1947).

²⁴ Report of Committee on Labor and Public Welfare to accompany S. 1126; SEN. REP. NO. 105, 80th Cong., 1st Sess. 27.

²⁵ See Smith, *The Power of the Judge to Direct a Verdict*, 24 COL. L. REV. 111 (1924).

tial evidence.²⁶ The bill approved by the conference and later adopted by both the House and the Senate omitted the provision for setting aside findings, which, in the opinion of the court, were against the manifest weight of the evidence. Yet the Act contains the requirement that the whole record be considered. This provision becomes important only when there is conflicting evidence in the record or evidence in the record leading to conflicting inferences. It is difficult to see how such a record can be reviewed *as a whole* without weighing the evidence. It seems fairly clear, therefore, that the Act contemplates a weighing of the proof in the record by the court, and the problem is, shall the court review by a consideration *de novo* or merely make such an examination of the evidence as the trial judge makes on a motion for a new trial on the ground that the verdict is against the weight of the evidence? The conference report made to the House of Representatives by its managers says that the Act materially broadens the scope of the court's reviewing power but denies that the courts will be required to decide any case *de novo*.²⁷

The earlier report of the Committee on Education and Labor, concerning the House bill, stated that the Committee believed that with a new and impartial board trials *de novo* in the courts would not be needed.²⁸ Since both conference reports say that judicial review has been broadened²⁹ we are left with the probability that the Act establishes the test for setting aside a verdict, as the basis for reviewing findings of fact. This is a definite enlargement of judicial review as it existed prior to the Administrative Procedure Act. Whether the Administrative Procedure Act had already changed judicial review before the passage of the labor act is a matter on which opinions differ. At least before the adoption of the Administrative Procedure Act the court, in reviewing findings of fact of an administrative agency, considered only the evidence which tended to support the findings and disregarded any conflicting evidence and any evidence which tended to contradict the findings. Whenever the favorable evidence was substantial when viewed alone, the findings of fact would be approved even though the substantiality of the evidence might well have been doubted had the opposing evidence been considered.

The Congressional reports criticize the failure of the courts to review

²⁶ Section 10(e), H. R. 3020, 80th Cong., 1st Sess.

²⁷ Statement of Managers on the Part of the House, U. S. C. Congressional Service, 1947 Advance Sheet No. 5, pp. 2-218.

²⁸ Report of Committee on Education and Labor on H. R. 3020, H. R. REP. No. 245, 80th Cong., 1st Sess. 41, 42.

²⁹ 93 Cong. Rec. 6602 (June 5, 1947); 93 Cong. Rec. 6468 (June 3, 1947). The opinion in *National Labor Relations Board v. Fisher Governor Co.*, 163 F. 2d 913 (C. C. A. 8th 1947) disregards the possibility that the Taft-Hartley Act has changed the review of findings of fact.

findings which include mixed issues of law and fact.³⁰ In an effort to prevent such failure on the part of the courts the Taft-Hartley Act described the matters which might be conclusive on judicial review as "findings of the Board with respect to questions of fact." Thus the court is not to accept findings of fact when they include a mixture of law merely because the findings are supported by sufficient evidence. The court must also determine that the questions of law involved in the mixed findings were correctly decided.

The report of the House managers on the results of the conference takes the position that section 10(b), by making the rules of evidence applicable, and 10(c), by requiring the Board to decide the questions of fact on the preponderance of the evidence, give rise to questions of law which the courts must determine, the questions being whether the requirements of (b) and (c) have been met.³¹ With regard to subdivision (c) this assertion probably contemplates a statement by the Board of its reasons for accepting certain evidence and rejecting other evidence and a review by the courts of the adequacy of the reasons given. The report says that the courts will be under a duty to find that the Board observes the recommendations of the two subdivisions and that the Board "does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reason for disregarding or discrediting the evidence that is in conflict with its findings."

In the same paragraph of the conference report appears the statement that the language of section 10 "precludes the substitution of expertness for evidence in making decisions."³² This language does not seem to be directed at the principle that administrative decisions on questions of law which involve the construction of technical terms and the application of expert and specialized knowledge will not be reviewed.³³ The Act deals with the problem only by directing the Board to exclude incompetent evidence and to decide in accordance with the preponderance of the evidence, and by directing the court to review the findings by considering the whole record, and to separate questions of law and fact. These provisions hardly seem adequate to prevent the

³⁰ See note 9 *supra*.

³¹ Statement of Managers at page cited in note 27 *supra*; see also pp. 2-216.

³² Cf. REP. ATT'Y GEN. COMM. AD. PROC. 71 (1941). ("In the actual process of decision as distinguished from the process of proof, clearly administrators may call into play their special skills and expertness. The desire for expertness is one of the reasons for the utilization of the administrative process. In evaluating evidence and in reaching his judgment, an administrator can, of course, and must bring his expertness to bear. This much can be put to one side as not falling within the scope of official notice to any greater extent than the judge's use of decided cases is judicial notice. It does not involve a question of evidence or notice of 'facts' at all.")

³³ As to this principle see *Dobson v. Commissioner*, 320 U. S. 489, 502, 64 S. Ct. 239, 247, 88 L. Ed. 248, 256 (1943); 25 MINN. L. REV. 588-592 (1940).

application of the specialized-law principle. The language of the Administrative Procedure Act³⁴ which requires courts to decide all relevant questions of law would seem to be much more useful as a device for impressing upon the courts the desire of Congress for a review which includes these technical questions.

The Supreme Court has clearly stated that decisions of the administrative agencies must be based upon evidence in the record³⁵ but the conference managers seem to be charging that the federal courts have not always applied this principle consistently in labor cases. The authors of the conference report seem to believe that the Board is not as expert as the Board members and the courts have assumed, and furthermore that the Board, in some of its decisions, has relied upon its expert knowledge rather than upon the evidence introduced.

There are two ways in which the Board might make use of expert knowledge or supposed expert knowledge possessed by its members. First, where there is a total absence of evidence tending to prove some point in issue, the Board might conceivably assume facts so as to fill in the gaps. This would, in effect, be taking official notice of the existence of the facts found. If the facts were not matters of common knowledge or otherwise proper subjects for judicial notice, the Board may very well be considered to be acting improperly in making such assumptions.³⁶ The examples which the managers give and other statements contained in the report seem to point to a somewhat different basis of criticism. Apparently the authors of the report feel that the Board had been drawing inferences which were not authorized by the evidence.

One of the cases cited in the conference report as an example of an abdication by the courts to the Board's expertness in the labor relations field is a circuit court of appeals decision³⁷ which relied on *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*³⁸ In the latter case the Supreme Court held that where evidence exists in the record that the employer originally dominated the company-

³⁴ Act of June 11, 1946, c. 324 §10(e), 60 STAT. 237, 243; Dickinson in *FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 546, 582-585 (1947).

³⁵ *United States v. Abilene & Southern Ry.*, 265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924); *Morgan v. United States*, 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288, 1295 (1936).

³⁶ The Attorney General's Committee were of the opinion that administrative agencies should not be held to the same rules as courts but should be allowed to notice facts which the agency has, through its experience with many cases, learned to be obvious. Report cited in note 32 *supra* at 72. The Committee on the Judiciary seems unwilling to go so far in extending the scope of official notice. H. R. REP. NO. 1980 ON S. 7, 79th Cong., 2d Sess. 37, 38. The Administrative Procedure Act requires agencies taking official notice to so state on the record or in their decisions and to afford parties an opportunity to show the contrary. Act of June 11, 1946, c. 324 §7(d), 60 STAT. 237, 242.

³⁷ *National Labor Relations Board v. Standard Oil Co.*, 138 F. 2d 885 (C. C. A. 2d 1943).

³⁸ 319 U. S. 50, 63 S. Ct. 905, 87 L. Ed. 1250 (1943).

organized union the Board may forbid the appearance of such union on the ballot used to select bargaining representatives if in the Board's judgment the evidence does not establish the union's present freedom from employer control. This rule is very much like a presumption. In another case cited by the same report of the House Managers the Supreme Court expressly upheld the power of the Board to create presumptions.³⁹ As will be more fully pointed out in a subsequent part of this discussion, presumptions are generally considered to be rules of evidence.⁴⁰ Since the Act requires the unfair-practices proceedings to be conducted, so far as practicable, in accordance with the rules of evidence applicable under the Rules of Civil Procedure, may the Board continue to create presumptions not recognized by the law of evidence? This brings us to a consideration of the effect of the last sentence of section 10(b) of the Act. The remainder of the discussion will be devoted to that subject.

II

There is a great divergence of opinion concerning the desirability of requiring uniformity in administrative procedure.⁴¹ One school of thought insists that such a requirement should not be made by Congress because of the differences in the functions of the agencies.⁴² In the Administrative Procedure Act⁴³ Congress has required uniformity in certain fundamentals. Section 7(c) of that Act contains the provision, "Any oral or documentary evidence may be received. . . ."⁴⁴ This provision that the exclusionary rules of evidence, other than those requiring relevancy and materiality, were not to prevent the reception of evidence at administrative hearings, was intended to apply to all hearings under section 7, including the hearings held by trial examiners in National Labor Relations Board proceedings to prevent unfair labor practices.

Early in 1947 Carl McFarland, who had been chairman of the American Bar Association's Committee on Administrative Law during 1941-1946, said of the Federal Administrative Procedure Act:

³⁹ Republic Aviation Corporation v. National Labor Relations Board, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945). House Managers describe this as a case in which the court acquiesced in the Board's decision even when it rested only on inferences that were not "supported by facts in the record." Statement of Managers at page cited in note 27 *supra*.

⁴⁰ Green, *To What Extent May Courts under the Rule Making Power Prescribe Rules of Evidence*, 26 A. B. A. J. 482, 484 (1940).

⁴¹ See Majority and Minority views in REP. ATT'Y GEN. COMM. AD. PROC. 191-192, 203, 213-216 (1941).

⁴² See for example Beutel, *The Problem of Reform of Administrative Procedure*, 6 FED. BAR JOUR. 264 (1945).

⁴³ Act of June 11, 1946, c. 324.

⁴⁴ "This language makes it clear that the rules of admissibility of evidence are frowned upon. . . ." Sellers, *Adjudication by Federal Agencies under the Administrative Procedure Act in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 527, 531 (1947).

"Its origins lie in the basic conception of law and justice which we have inherited, in which we believe, and by which we live. . . . The one stated purpose is to secure a degree of standardization . . . The Administrative Procedure Act simply sets up a system. It will be accepted; it will pass into our legal system. Five years from now it will be regarded as one of the accepted facts of life."⁴⁵

Within a few months after this authoritative statement of the views of the organized Bar, Congress indicated that even the Senators and Representatives had not accepted the system set up by the Administrative Procedure Act. This indication was given by the passage of the Labor Management Relations Act which provides, contrary to the "standard" of the other Act, that unfair-labor-practices proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C)."⁴⁶ What are the rules of evidence applicable under the Rules of Civil Procedure? Twenty of the Rules seem to call for discussion in this connection. They are 26-37, 43-46, 50, 61, 68, 80(c).⁴⁷

Rules 26-34, inclusive, and Rule 37, deal with depositions and discovery. Since the Act requires the proceedings, rather than merely the hearing, to be conducted in accordance with the designated rules of evidence, the provisions of the Rules relating to depositions are within the language of the Act. However, the Rules are to apply "so far as practicable." The Board seems to be of opinion that adoption in toto of the provisions concerning depositions is not practicable. Unlike the court rules the Board's regulations require an official order for taking any deposition.⁴⁸ The granting or refusing of the order is in the discretion of the Regional Director or trial examiner, whichever receives the application. No grounds for using a deposition are specified but the regulations state, "The trial examiner shall rule upon the admissibility of the deposition or any part thereof."⁴⁹ The only regulation of the Board which would cover taking depositions by written interrogatories is 203.30(f):

"If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions."

⁴⁵ *Analysis of the Federal Administrative Procedure Act* in volume cited in note 44 *supra*, at 16, 22, 27.

⁴⁶ Pub. L. No. 101, 80th Cong., 1st Sess. §10(b).

⁴⁷ Rules of Civil Procedure for the District Courts of the United States, 28 U. S. C. A., following §723(c).

⁴⁸ Section 203.30, Title 29, Rules and Regulations, Series 5, N. L. R. B., 12 F. R. 5656 (August 22, 1947). Cf. FED. R. CIV. P., 26.

⁴⁹ Section 203.30(d)

Except for punctuation, this is an exact reproduction of the F. C. P. Rule 29, but the Rules of Civil Procedure also provide expressly in numbers 26 and 31 for taking depositions by written interrogatories at the instance of any party and without the consent of the other party. Another difference is that all objections to questions or evidence must be made before the official taking a deposition under the Board's regulation, but this is required under the Federal Rules of Civil Procedure only if the ground of objection is one which may be obviated if made at that time. There are other differences too numerous to mention. The Board's regulations authorize the taking of depositions only after a complaint has been filed and do not refer to the elaborate provisions of the Rules concerning discovery. This is not surprising as the perpetuation of testimony and the granting of discovery are equitable powers usually associated with courts rather than administrative agencies.

Rules 35 and 36 provide respectively for physical and mental examination and admission of facts and genuineness of documents. The former seems to have little application to proceedings of the Board.

The provision having the broadest scope is subdivision (a) of Rule 43, which provides for the admission of evidence which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in equity in the courts of the United States, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.⁵⁰ For a number of reasons the effect of this provision will probably be a disappointment to the sponsors of the act. To the problems of interpretation and application which are inherent in this Rule of Civil Procedure⁵¹ are added new problems when the Rule is applied to the proceedings of the National Labor Relations Board. In the first place the Labor Management Relations Act provides that the evidence provisions of the Rules shall govern the proceedings "so far as practicable." The quoted words are similar to the expression "as near as may be" which created so much uncertainty concerning the meaning of the Conformity Act.⁵²

The argument may be made that it is not practicable at all to conduct the unfair-labor-practices proceedings in accordance with the requirements of Rule 43(a). One of the requirements is that evidence be received which is admissible under the rules of evidence applied in the courts of *the state in which the United States court is held*. The courts involved in the labor proceedings under discussion are principally the

⁵⁰ Rule 43(a) also provides for determining the competency of a witness in like manner.

⁵¹ Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197 (1941).

⁵² 28 U. S. C. §24; DOBIE, *FEDERAL JURISDICTION AND PROCEDURE* 585 (1928).

circuit courts of appeals.⁵³ Obviously Rule 43 as applied to the Board's proceedings is not to be interpreted as referring to these courts. The Rule cannot be applied literally but by analogy can be read to require the reception of evidence which is admissible by the law of the state in which the trial examiner holds the hearing. Such an interpretation prevents the last sentence of section 10(b)⁵⁴ from being altogether meaningless when applied to Rule 43(a). However, section 10(b) interpreted in this way creates a peculiar situation. The regulations of the Board do not require the hearing to be held in any particular place. They provide that the hearing is "usually conducted in the Region where the charge originated."⁵⁵ The United States has been divided into 24 regions. Since a region is not limited to a single state, the state of the hearing may be selected by the Board.⁵⁶ The Act merely says that the place and time of hearing shall be fixed in the complaint filed by the Board or its representative. The state whose law of evidence is to play a part in the hearing may thus be selected at random or with a view to making certain evidence admissible. By contrast, the plaintiff's choice of a district in a court action is limited by the law of venue and the opportunity to serve the defendant within the state.

The conference report on the bill, which upon adoption became the Labor Management Relations Act, shows clearly that the Rules of Civil Procedure relating to evidence were not made applicable to Section 10 proceedings for the purpose of getting evidence admitted.⁵⁷ Yet some authorities take the position that Rule 43(a) removes most of the exclusionary rules of evidence and puts admissibility largely upon the sole basis of relevancy and materiality.⁵⁸ It has also been suggested that Rule 43 does not say what shall be excluded but only that evidence shall be admitted under certain circumstances.⁵⁹ Other United States courts have rejected these views and held that if the United States statutes or precedents and also the law of the forum-state exclude the evidence it should be excluded.⁶⁰ The search for federal precedents has not been limited to equity cases. This is due to the fact that the

⁵³ Sections 10(e) and (f) of Pub. L. No. 101, 80th Cong., 1st Sess., 120 (June 23, 1947).

⁵⁴ Note 46 *supra*.

⁵⁵ Section 202.10.

⁵⁶ Actually by the General Counsel or Regional Director as they now act independently of the Board in filing complaints. See §3(d) of the Act.

⁵⁷ Statement of the Managers on the Part of the House, U. S. C. Congressional Service, 1947 Advance Sheet No. 5, pp. 2-217, 2-219.

⁵⁸ 3 MOORE, FEDERAL PRACTICE 3063 (1938). See also Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*: 2, 47 YALE L. J. 194, 198 (1938).

⁵⁹ *United States v. Aluminum Co. of America*, 4 D. J. Bulletin 18, 1 Fed. Rules Serv. 43a.3, Case No. 1 (S. D. N. Y. 1938) quoted in HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* 120 (1940) and in 3 MOORE, FEDERAL PRACTICE 32, n.6a (Supp. 1940); *Wright v. Wilson*, 154 F. 2d 616 (1946), *cert. denied*, 67 S. Ct. 50.

⁶⁰ Note, 46 COL. L. REV. 267, 270 (1946).

rules of evidence are the same in equity as at law, although an equity court is supposed to apply the rules less strictly.⁶¹ Therefore Rule 43(a) provides three possible sources of authority for admitting testimony, namely, federal statutes, federal decisions, and forum-state law. In addition to the doubt as to what the Rule requires when there is no federal statute and the other two sources say the evidence shall be excluded, there is doubt as to the situations in which there are no applicable federal or state statutes and the federal and forum-state cases have not decided the question or one of the two latter sources has not decided and the other excludes the evidence in question. There is also doubt concerning the situation in which an act of Congress provides that certain evidence shall be inadmissible and the question has not been decided in the forum-state. Can the Board's examiner decide for himself what is admissible under the system of evidence law followed in the state although the particular question has not been decided in a reported case from a court of the state in question? It is believed that Rule 43 does not make a particular piece of evidence inadmissible simply because there is no federal or forum-state decision holding it admissible. If either source of authority leaves the question open, the presiding officer (whether a district court judge or an N.L.R.B. examiner) may decide for himself what the applicable rule of evidence is. If the federal courts have not decided the question the presiding officer would consider the general principles of evidence law, the precedents in Anglo-American jurisdictions, and the policy of the federal courts. If it is the forum-state courts that have not decided the question of admissibility, the same considerations are pertinent except that the state rather than the federal court policy should be considered.

In order to conduct a hearing smoothly and without too much delay an examiner must be prepared to rule promptly upon objections to evidence. He can make a real attempt to apply Rule 43(a) only when he is familiar with the rules of admissibility in the state where the hearing is being held. He cannot have the necessary familiarity with the local law unless his assignments are limited to hearings in a very few states.⁶²

⁶¹ *Harmer v. Gwynne*, Fed. Cas. No. 6,075 (C. C. Ohio 1851), 1 BATES, FEDERAL EQUITY PROCEDURE 441 (1901); *W. F. & John Barnes Co. v. International Harvester Co.*, 145 F. 2d 915 (C. C. A. 7th 1945).

⁶² The Committee on Education and Labor of the House indicates in its report on H. R. 3020 that it does not think the examiner will need to know the law. The report says "There is no such diversity in the rules of evidence among the several states as to make this clause unduly burdensome to the Board or to its trial examiners. Local lawyers and the Administrator's regional attorneys appearing before the trial examiners can always advise them of oddities in local laws. And, in any event, an error in admitting or excluding evidence can be grounds for reversal only if it is substantial." H. R. REP. No. 245, 80th Cong., 1st Sess. 41. It should be kept in mind that objections to evidence become important when opposing attorneys disagree. Is the trial examiner to allow the regional attorney representing the Board, or his opponent, to furnish the information on the local law?

Because trial examiners are members of the Washington staff and are assigned from the office of the Chief Trial Examiner it seems probable that such a limitation will not be convenient and will not be made.

Additional problems exist in connection with those rules of evidence which are not ordinarily described in terms of admissibility.⁶³ The principle of judicial notice is an example in point. When judicial notice may be taken of a fact evidence of that particular fact is unnecessary. Prior to 1938 the rule was well established that the federal courts would take judicial notice of the laws of all the states.⁶⁴ The Second Circuit Court of Appeals has held that Rule 43(a) requires a federal court to take judicial notice of the law of another state although the law of the state where the district court is sitting does not permit such notice.⁶⁵ The Fifth Circuit Court of Appeals has held that a federal court is authorized by the Rule to take judicial notice of a regulation of a state administrative agency.⁶⁶ The doctrine that United States courts would judicially notice the law of the forum-state and of all other states of the Union did not extend to the law of foreign countries, but the United States District Court for the Southern District of New York has said that Rule 43(a) makes the New York statute authorizing judicial notice of foreign law applicable in federal courts located in New York.⁶⁷ None of the opinions explain how language which appears to be inapplicable to judicial notice can be used to determine whether to take judicial notice. Apparently the thought is to dispense with technical introduction of evidence if either United States or forum-state authorities authorize such dispensation. Of course many opinions merely state that judicial notice is taken of a certain fact without citing any authority. In the same way the trial examiner may feel in many instances that the fact is so clearly a matter of common knowledge that he can take official notice without seeking precedents. When the question raises a doubt, either forum-state or federal authority in favor of judicial notice will apparently justify the taking of official notice.⁶⁸

Similar problems relate to presumptions, privileges, and the necessity for corroboration. Precepts which place the burden of persuasion on one or the other of the parties are sometimes called presumptions. Since this type of burden of proof has been held by the Supreme Court to be

⁶³ 1 WIGMORE, EVIDENCE 201 (3rd ed. 1940).

⁶⁴ *Lamar v. Micore*, 114 U. S. 218, 223, 5 S. Ct. 857, 29 L. Ed. 94 (1885); *In re Paramount Publix Corp.*, 85 F. 2d 83, 86 (C. C. A. 2d 1936).

⁶⁵ *Newman v. Clayton F. Summy Co.*, 133 F. 2d 565, 567 n. 3 (1942). See also *Zell v. American Seating Co.*, 138 F. 2d 641 (C. C. A. 2d 1943), *rev'd on other grounds*, 322 U. S. 709, 64 S. Ct. 1053, 88 L. Ed. 1552 (1943).

⁶⁶ *Milwaukee Mechanics Ins. Co. v. Oliver*, 139 F. 2d 405 (C. C. A. 5th 1944).

⁶⁷ *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corporation*, 57 F. Supp. 649 (S. D. N. Y. 1944).

⁶⁸ The Administrative Procedure Act requires an agency which rests a decision on official notice to afford any party, on timely request, an opportunity to show the contrary. Act of June 11, 1946, c. 324 §7(d), 60 STAT. 237.

substantive,⁶⁹ the Rules of Civil Procedure do not apply. The second sentence of section 10(c) of the Act contains the provision that "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practices," then the Board shall issue a cease and desist order. The sentence places the burden of proof upon the officials of the Board who issued the complaint. True presumptions, *i.e.*, rules which provide that when fact A is established fact B shall be taken to be true unless and until the presumption is rebutted, may be considered procedural.⁷⁰ At least one circuit court of appeals has indicated that Rule 43(a) may cover presumptions.⁷¹ Several recent decisions seem to assume that presumptions established by forum-state law are applicable to actions in United States district courts.⁷² These decisions do not cite Rule 43 and fail to state the courts' views, if any, concerning the substantive or procedural nature of the presumptions involved. Indeed they do not even show the effect of the particular presumption, whether it assists in carrying the burden of going forward with evidence or has some other effect. If the law of presumptions is not covered by the Federal Rules of Civil Procedure, and therefore not within the last sentence of section 10(b) of the Act, the Board will have to adopt the views of the circuit courts of appeal nevertheless, because those courts have the power to review the Board's conclusions of law. Of course the Supreme Court will have the last word. In a recent case that court cited only its own precedents as to a presumption relating to acceptance of jurisdiction by the United States over land ceded by a state.⁷³ It is difficult to draw any general conclusions from the treatment of the problem in this case.⁷⁴

No case expressly applying Rule 43 to the field of privilege was found. In connection with judicial notice and presumptions there seems to be a tendency to interpret the Rule to mean that the law which permits the establishing of the fact in question by the most convenient means shall be followed. Privilege prevents certain evidence from being used to establish a fact and it might be argued that the Rule requires the federal court to follow the law which does not recognize the state statutory privileges. Were such privileges respected and protected under "the rules of evidence heretofore applied in the courts of the

⁶⁹ *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939).

⁷⁰ See note 40 *supra*.

⁷¹ *Howard v. United States*, 125 F. 2d 986, 993 (C. C. A. 5th 1942).

⁷² *Metropolitan Life Ins. Co. v. Shalloway*, 151 F. 2d 548 (C. C. A. 5th 1945); *Rosenberg v. Baum*, 153 F. 2d 10 (C. C. A. 10th 1946).

⁷³ *S. R. A., Inc. v. Minnesota*, 327 U. S. 558, 66 S. Ct. 749, 90 L. Ed. 85 (1946).

⁷⁴ If presumptions are rules of evidence within the meaning of Rule 43(a) the Board may have to apply the presumptions recognized by the courts and may not be permitted to create presumptions of its own. See note 93 *infra*.

United States on the hearing of suits in equity"? On principle the answer would seem to be No, because the federal courts sitting as courts of equity did not conform to state evidence law. However, several cases had held prior to the Rules that state statutes granting privileges in the field of evidence would be followed in equity cases.⁷⁵ A recent decision of the Sixth Circuit Court of Appeals seems to assume that this is still the federal practice.⁷⁶ However, the court refused to treat the testimony in that case as privileged, because to do so would be inequitable and also because the court decided the privilege had been waived. The Second Circuit Court of Appeals recently held the New York statutory privilege for confidential communications made to a physician or surgeon,⁷⁷ to be applicable to actions brought in the United States district courts in New York.⁷⁸ The court gave as authority for the ruling a United States Supreme Court case⁷⁹ decided in 1884 and did not discuss the change made in federal evidence law by the Rules of Civil Procedure. A conceivable justification for the holding exists in the possibility that the privilege should be treated as substantive and therefore beyond the scope of the Rules. Certainly one privilege is beyond their scope—the privilege against self-incrimination which is established as a precept of constitutional law by the Fifth Amendment.

The language of Rule 43(a) considered apart from its history seems to provide for adoption of a scope of cross-examination in accordance with the most liberal law whether federal or forum-state. Not only the second sentence but also the third sentence points in that direction. The pertinent part of the latter sentence is the statement, "the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made." In Massachusetts and Georgia, and perhaps other states, the most convenient method would be the state practice of permitting the cross-examiner to ask about anything relevant to the case.⁸⁰ The doctrine heretofore applied in the United States courts concerning the proper scope of cross-examination is very inconvenient because it frequently leads to the necessity for deciding difficult problems relating to whether a question deals with the same subject matter as the questions asked on direct examination.⁸¹ Although the language of Rule 43(a) seems broad

⁷⁵ See *Witters v. Sowles*, 32 Fed. 130 (C. C. D. Vt. 1887); *Lloyd v. Pennie*, 50 Fed. 4 (N. D. Cal. 1892); *Mutual Benefit Life Ins. Co. v. Robinson*, 58 Fed. 723 (C. C. A. 8th 1893). The reasoning of these cases is questionable.

⁷⁶ *Fraser v. United States*, 145 F. 2d 139, 144 (C. C. A. 6th 1944), *cert. denied*, 324 U. S. 849, 65 S. Ct. 684, 89 L. Ed. 1409.

⁷⁷ NEW YORK CIVIL PRACTICE ACT §352.

⁷⁸ *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469 (C. C. A. 2d 1943).

⁷⁹ *Connecticut Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708 (1884).

⁸⁰ *Ficken v. Atlanta*, 114 Ga. 970, 41 S. E. 58 (1902); *Moody v. Rowell*, 17 Pick. 490 (Mass. 1836); *Mask v. State*, 32 Mass. 405 (1856).

⁸¹ 6 WIGMORE, EVIDENCE §§1885, 1888 (3d ed. 1940).

enough to cover the matter of permissible range in cross examination the history of Rule 43(b) must also be considered. Subdivision (b) as drafted by the Advisory Committee provided for cross-examination "upon all matters material to every issue of the action," but the Supreme Court rejected this proposal. It has been held that the omission of the proposed language shows the intention of the Supreme Court to leave this matter outside the Rules of Civil Procedure and the former federal law in force.⁸² This view is debatable⁸³ but has the support of one of the leading treatises.⁸⁴

Rule 43 contains four subdivisions in addition to (a). Subdivision (b) authorizes the interrogation by leading questions of any unwilling or hostile witness, adverse party or an officer, director, or managing agent of a corporation, partnership, or association which is an adverse party. The adverse party or described representative may be contradicted and impeached as if he had been called by the adverse party. Subdivision (c) provides for offer of proof and then says:

"In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

There are, of course, no juries in the N.L.R.B. proceedings and if Rule 43(c) requires the examiner, upon request, to take the evidence to which objection is made whenever there is any doubt as to its admissibility, much of the supposed restrictive effect of Rule 43(a) is removed. When the doctrine of harmless error⁸⁵ and the language of the Act, "so far as practicable," are also considered, there appears to be very little effect left in the exclusionary rules.⁸⁶

The remaining provisions have little significance for our present purposes. Subdivision (d) permits affirmation in lieu of oath;⁸⁷ (e) provides for evidence by affidavits when a motion is based on facts. Rule 44 furnishes an additional method for proving official records or lack of record. Because of the nature of the provisions of Rule 45 (Subpoena) and also because section 11(1) of the Labor Management Act authorizes the issuance of subpoenas requiring attendance or pro-

⁸² *Moyer v. Aetna Life Ins. Co.*, 126 F. 2d 141, 143 (C. C. A. 3d 1942).

⁸³ *PROCEEDINGS OF ATLANTA INSTITUTE ON FEDERAL RULES* 84 (1938). Cf. *PROCEEDINGS OF CLEVELAND INSTITUTE ON FEDERAL RULES* 388, 391 (1938).

⁸⁴ 3 MOORE, *FEDERAL PRACTICE* 3075-3076 (1938).

⁸⁵ *FED. R. CIV. P.*, 61, 28 U. S. C. A. following §723c.

⁸⁶ "Then, too, the limitation 'so far as practicable' gives to the trial examiner considerable discretion as to how closely he will apply the rules of evidence." Senator Taft, 93 Cong. Rec. 7002 (June 12, 1947).

⁸⁷ Section 203.35(a) of the Board's Rules and Regulations, Series 5, gives the trial examiner authority to administer oaths and affirmations. 12 F. R. 5661, August 22, 1947.

duction of evidence from anywhere in the United States or a Territory or possession, at any designated place of hearing, it seems probable that Congress did not intend for Rule 45 to apply to the Board's proceedings. Rule 50 permits a party, who moves for a directed verdict at the close of his opponent's evidence, to introduce evidence in the event the motion is not granted. This permission may possibly be thought to extend to a person who moves to dismiss a complaint before the trial examiner on the ground that the evidence introduced by the Board's regional attorney is insufficient. Rule 61 states the doctrine of "harmless error" referred to above. The doctrine is that any error or defect in the proceedings which does not affect the substantial rights of the parties must be disregarded. The Rule expressly makes this proposition applicable to the admission and exclusion of evidence. Rule 68 makes evidence of an unaccepted offer of judgment inadmissible. This may be applied to the Board's proceedings by translating offer of judgment as offer to consent to an order. Rule 80(c) provides for the proof of prior testimony by the transcript of the appropriate part of the earlier hearing.

If the various complications which have been mentioned in the foregoing pages do not make the requirement of section 10 (b) that the proceedings be conducted in accordance with the rules of civil procedure which deal with evidence a practical nullity, the requirement may have several effects. Incompetent hearsay and other inadmissible evidence will not be received⁸⁸ and will not be in the record to influence those who read and act upon it. In those cases in which it is received a new ground for refusing to enforce a Board order may exist. The court may hold the order invalid because of prejudicial reception of incompetent evidence. It is not at all clear that either result will follow. Senator Taft said on the floor of the Senate that the limitation, "so far as practicable," gives the trial examiner considerable discretion as to how closely he will apply the rules of evidence.⁸⁹

Although the Committee reports undertake to document a number of their charges against the Board by citing reported cases, no examples of violations of the rules of admissibility are pointed out. Since no such charge is expressed and the examples do not show any such practice it may be assumed that this was not considered an evil to be corrected. Commentators have occasionally suggested that some check should be placed upon the reception of remote hearsay and opinion but they fail to give us any specific instances of the supposed misconduct

⁸⁸ Section 203.39 of the regulations of the Board consists of the language of the Act making the Rules of Civil Procedure on evidence applicable, so far as practicable.

⁸⁹ 93 Cong. Rec. 7002 (June 12, 1947).

of the examiners in this respect.⁹⁰ On the other hand statements are available which tend to show that the Board's practice concerning the admission of testimony has not been subject to criticism, at least in the recent past. To quote Senator Taft again, the co-sponsor of the Act said: "I am informed that now the trial examiners conduct their hearings pretty much in conformity with the practice of the courts in the locality where the hearing is being held."⁹¹ This statement was made during the discussion of the bill. Other support can be found for the view that the practice of the examiners, in recent years, was not objectionable.⁹² Therefore a possible effect of the last sentence of section 10(b) is to require the examiners to do what they were already doing to a considerable extent anyway. Another effect may be to prevent the Board from creating presumptions which are not recognized by either the state or federal courts. This application of the Act is debatable, however.⁹³

Certain members of Congress showed considerable concern over what they considered an improper use of inferences by the Board. For example, the report on the House bill states that the provisions making the rules of evidence applicable would prevent the resting of the Board's finding upon inferences, imponderables, background material, or the whole congeries of facts.⁹⁴ It is difficult to see how the rules of admissibility could have any effect upon the way in which the evidence is used to reach a decision. Furthermore, the committee shows a lack of knowledge concerning logical processes and reasoning when it suggests that the resting of findings upon inferences could be prevented. Obviously no findings of fact can be made without drawing inferences. The decision of questions of fact necessarily involves inferences.⁹⁵

In legal terminology the word "inference" is sometimes used to describe the process of accepting a proposition as true on the basis of evidence, and sometimes to describe the conclusion reached on the evidence that the proposition is probably true. Taking either meaning, inferences are essential to the determination of issues of fact. What the members of Congress had in mind was probably conjectures rather than inferences. The latter term is sometimes loosely used in place of the former. The real need was better enforcement of existing law, rather than statutory changes in the law. The substantial evidence rule if

⁹⁰ Iserman, *The Labor Management Act: New Law as to Evidence and Scope of Review*, 33 A. B. A. J. 760, 761-762 (1947).

⁹¹ 93 Cong. Rec. 7002 (June 12, 1947).

⁹² Reilly, *The Labor Board and the Administrative Procedure Act* in *FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 468, 473 (1947); Report to Senate in 93 Cong. Rec. 6602 (June 5, 1947).

⁹³ See note 39 *supra*, and the accompanying and following text.

⁹⁴ Report of the Committee on Education and Labor to accompany H. R. 3020, H. R. REP. NO. 245, 80th Cong., 1st Sess. 41.

⁹⁵ WIGMORE, *PRINCIPLES OF JUDICIAL PROOF* 9 (2d ed. 1931).

consistently applied seems adequate to prevent the Board from basing its orders upon conjecture or inferences not based upon evidence in the record.⁹⁶ It is well established that administrative findings supported by evidence which permits conflicting inferences are conclusive in review proceedings in court.⁹⁷ It is also well established that findings based upon legally sufficient evidence are not to be set aside merely because the court might draw different inferences.⁹⁸ There is nothing in the Act to change these propositions and there should not be. The circuit courts of appeal should not be expected to deal with questions of fact. Their function is to determine whether errors of law have been committed. Such an error is committed when an order is issued without legally sufficient evidence to support it. Should Congress require the reviewing courts to go beyond the correction of such errors and decide again the issues of fact, a duplication of effort would result, and the work of the courts would be increased to the point where present personnel could not handle the load.⁹⁹

The committees do not say so but they may have thought of the rules concerning permissible inferences as within the field of evidence.¹⁰⁰ Assuming that these are rules of evidence, it is not at all clear that they are "applicable. . . . under the rules of civil procedure. . . ."

The Congressional committee, in their thinking and expression, confused the process of admitting evidence with the process of arriving at a decision. The House Committee says that by making the rules of evidence applicable the Board will be required to base its rulings "upon facts" (presumably meaning upon evidence in the record).¹⁰¹ The result which Congress appears to be seeking here is to bring about review of the sufficiency of the evidence to support all findings and to lessen deference on the part of the courts to the Board's "expertness."¹⁰²

⁹⁶ Substantial evidence means evidence that affords "a substantial basis of fact from which the fact in issue can be reasonably inferred." *National Labor Relations Board v. Columbian Enameling and Stamping Co.*, 306 U. S. 292, 299 (1939). *But see Stason, Substantial Evidence in Administrative Law*, 89 U. OF PA. L. REV. 1026, 1050 (1941).

⁹⁷ *Helvering v. Lazarus & Co.*, 308 U. S. 252, 255, 60 S. Ct. 209, 84 L. Ed. 226 (1939).

⁹⁸ *Palmer v. Commissioner*, 302 U. S. 63, 70, 58 S. Ct. 67, 82 L. Ed. 50 (1937).
⁹⁹ ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (Report to Governor Lehman, 1942) 338; McFarland at hearing on Administrative Procedure Bill before Committee on Judiciary, House of Representatives, as reported in ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY (1946), SENATE DOCUMENT No. 348.

¹⁰⁰ Is this a matter of sufficiency of evidence? The holding of the Supreme Court that sufficiency of evidence is a matter of substantive law removes it from the possible scope of the Rules of Civil Procedure. *See Stoner v. New York Life Ins. Co.*, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284 (1940).

¹⁰¹ H. R. REP. No. 245, 80th Cong., 1st Sess. 41.

¹⁰² "In important respects, the rule is perhaps more one of judicial review than of the admissibility of evidence." VAN ARKEL, AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT 16 (1947). Note, 96 U. OF PA. L. REV. 67, 76-85 (1947).

Although the language used is not scientifically chosen the courts may give effect to the intention which the committee reports make so clear.

In the same way it was thought that the preponderance of the evidence requirement of section 10(c) would strengthen judicial review. Since that provision merely expresses previously existing law it may have the additional effect only of requiring the Board to explain its findings of fact more fully.

What should we conclude concerning the sentence of section 10(e), "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," and the similar provision of section 10(f)? This language is intended to bring about a broader review of the Board's orders by requiring a full review of mixed findings of law and fact and a review of questions of fact on the whole record, that is, a review by applying to the findings on questions of fact, the reasonableness test of a motion to set aside a verdict as against the evidence.¹⁰³

It is regrettable that Congress did not limit the Labor Management Relations Act to the definition of unfair labor practices, increase in personnel of the Board, the separation of prosecuting and adjudicating functions, and the other substantive provisions. If changes in procedure of the type considered in the foregoing discussion were desirable,¹⁰⁴ they should have been applied to all agencies by amendment of the Administrative Procedure Act.

¹⁰³ See note 25 *supra*. Benjamin disapproves this test for use on judicial review. ADMINISTRATIVE ADJUDICATION (Report to Governor Lehman, 1942) 336.

¹⁰⁴ The provision making the rules of evidence applicable seems clearly undesirable. REP. ATT'Y GEN. COMM. AD. PROC. 70 (1941); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).