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EVIDENCE IN NLRB CASES IN THE SUPREME COURT

JOHN J. GEORGE

I. INTRODUCTORY

The statutory provision most pertinent to the present topic appears in section 10(e) of the National Labor Relations Act of 1935:¹

. . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made part of the transcript. The Board may modify its findings as to the facts, or may make new findings, . . . which, if supported by the evidence, shall be conclusive, and shall file its recommendations, if any, for the modification, or setting aside of its original order.

The first sentence of the above statement has figured prominently in Supreme Court treatment of evidence in NLRB cases.

Complementing the above substantive provision relative to evidence, Section 10(b) provides that in any proceeding conducted by the Board to determine the validity of a complaint of unfair labor practice affecting commerce, "the rules of evidence prevailing in courts of law or equity shall not be controlling."

Reasons for this waiver of court rules of evidence in NLRB proceedings may be observed by comparative contrast to applicability of rules of evidence in jury trials.²

First, time and money are saved, and the processes of justice expedited by avoidance of irrelevant and immaterial evidence; to that end it is a function of the judge in a jury trial to determine what evidence is relevant and what is not. In a proceeding before a trial examiner, it is his function to determine whether protests by the Board attorney or by the employer against the admission of evidence because of its irrelevancy possess merit. To the refusal to sustain an objection of the employer, an exception may be taken, and the exception may be reviewed by the NLRB, and by the circuit court

¹49 STAT. 449 (1935), 29 U. S. C. § 160 (e) (1940).

²BROOKS, ROBERT R. R., UNIONS OF THEIR OWN CHOOSING, Chapter 8, "The Board and the Courts," is a most useful discussion of the reasons for waiver of court rules of evidence.

of appeals should the employer appeal the case. Such procedure safeguards the employer's right of appeal as if the appeal were taken from a lower court, and at the same time enables the trial examiner to admit voluminous evidence to aid the NLRB "in making its order."³

Second, while application of rules of evidence in jury trials aims to prevent counsel from influencing the jury by presenting testimony which is incompetent or prejudicial, no such need for rules of evidence is imperative in court proceedings before a judge without a jury—"there is no particular point in protecting the judge from himself." "Precisely the same thing is true before a trial examiner" who operates without a jury. He decides in the first instance what to admit and what to reject, then his report goes to Washington where his rulings are examined by the NLRB and are "affirmed or denied."⁴

Third, "some of the evidence necessary to its [the NLRB's] decisions could not be admitted under the rulings prevailing in many jury trials—for example, that part of an employer's anti-union program consisting of a whispering campaign against an outside union."⁵

Fourth, the Supreme Court has said that the statute exempted the Board proceedings from the rules of evidence prevailing in courts in order to free the administrative boards "from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order."⁶

Attempts to enforce Board orders directing relief from employers' labor practices found by the Board to be unfair have brought to the Supreme Court several questions as to the evidence supporting the findings of fact on which the Board order rested.

Two introductory questions deserve attention:

1. The degree of evidence required. In its opinion in *Consolidated Edison Co. v. National Labor Relations Board* the court says the statutory provision that "the findings of the Board as to facts, if supported by evidence, shall be conclusive, means supported by substantial evidence. 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."⁷ Fur-

³*Id.* at 208.

⁴*Id.* at 209-10.

⁵Explanatory illustration of this example is presented, *id.* at 211.

⁶*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 230, 59 Sup. Ct. 206, 217 (1938).

⁷*Id.* at 229, 59 Sup. Ct. at 217, citing *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 57 Sup. Ct. 648 (1937).

ther, the court cites *Appalachian Electric Power Co. v. National Labor Relations Board*,⁸ in which the Circuit Court of Appeals for the Fourth Circuit had characterized the record as "not wholly barren of evidence." This characterization the Supreme Court in the *Consolidated Edison* case interprets to mean substantial evidence.

Shortly thereafter the Court in addressing itself further to the matter of the degree of evidence necessary to support the findings of the Board, accepted the *Consolidated Edison* formula, and offered it as analogous to necessary evidence in a jury trial. To make the findings of fact conclusive, said the Court, they must be supported by evidence, and this "means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' [citing *Consolidated Edison*.] and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusions sought to be drawn from it is one of fact for the jury."⁹

2. On review of a Board order, is the respondent precluded from questioning the sufficiency of the evidence?

To this inquiry the Court has answered that unless the respondent has filed a cross petition for certiorari to a writ of certiorari issued by the Supreme Court to review a circuit court of appeals decision modifying an order of the NLRB, respondent cannot question the sufficiency of evidence to support the Board findings, the purpose and effect of the circuit court of appeals in part sustaining the Board order being to sustain the findings on which the Board order rested.¹⁰

Where the petition for certiorari presents no question of sufficiency of the evidence to support the findings, the Supreme Court will not decide the question of sufficiency when the case is reviewed. It has refused "to review the evidence or weigh the testimony," and declared against reversing or modifying the findings "unless clearly improper or unsupported by substantial evidence."^{10a}

⁸93 F. (2d) 985 (C. C. A. 4th, 1938).

⁹National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 59 Sup. Ct. 501 (1939). "Substantial evidence" is the meaning given to "evidence" also in *National Labor Relations Board v. Automotive Machinery Co.*, 315 U. S. 282, 62 Sup. Ct. 608 (1942), and *Westinghouse E. & M. Co. v. National Labor Relations Board*, 312 U. S. 660, 61 Sup. Ct. 736 (1940).

¹⁰National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, 61 Sup. Ct. 693 (1941).

^{10a}*Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147, 57 Sup. Ct. 648, 650 (1937).

In most of the cases where the evidence has been questioned as to adequacy, the Court has found the evidence substantial or sufficient, and sustained the Board findings based thereon.

II. EVIDENCE SUBSTANTIAL AND SUFFICIENT

Evidence adduced by the Board in the dramatic and declarative case, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*¹¹ came in for comment by the Chief Justice as follows:

While respondent criticizes the evidence . . . respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union."¹²

Substantial evidence supported a similar finding of discharge because of union activity where it was shown that shortly after the employee became active in organizing a local unit of the CIO, the plant president called him for an interview. When the employee suggested establishing a local independent union, the president told him to take two weeks off. This "take off" the employer later insisted was a disciplinary measure for earlier insubordination, trespassing on company property after hours, beginning work late, quitting early, wasting time talking to other employees, and repeated smoking in the plant.

But evidence showed that disciplinary action had never been taken against the employee on any charge until after he had become interested in union activities. The employee did not return to work at the end of two weeks, because he learned from the union officials and federal labor conciliators that the company president would not take him back.

The Board finding that he had been discharged for union activities and not for smoking the Court concluded was supported by substantial evidence where it was shown that:

- (a) Shortly after engaging in union organizing, the employee on his way to see the president who had sent for him was found smoking by an official at a plant point seldom visited by the observing official.
- (b) On admittance to the office, the employee was promptly charged

¹¹301 U. S. 1, 57 Sup. Ct. 615 (1937).

¹²*Id.* at 29, 57 Sup. Ct. at 620.

with smoking, and told to take two weeks off despite nothing being said to two other employees smoking at the same plant point at the same time.

(c) Employee failed to report back for work because he learned through reliable channels the president would not take him back.¹³

Discharge because of union activity was substantiated in the *Link-Belt* case¹⁴ in that earlier allowance of company time to solicit for a company union was withdrawn when the employee espoused the cause of an outside union. Although no discharge was meted out to those employees who continued activity for the company union, some of them operating with sanction of the supervisory staff, this discharged employee was told to get out of the plant within half an hour.

Equally supported by evidence was the Board's conclusion in this *Link-Belt* case that other employees were discharged because of their unionizing activities and not for unsatisfactory work. The employees testified that they had received no warning of inferior work, though the manager testified that time studies showed the particular employees inefficient. The employees further testified that when discharged they were told by a superior that they were good workmen and that he (the superior) did not know why they were being discharged. After reviewing the time study records the Board concluded they failed to reveal with any degree of precision the relative inefficiency of the workers.¹⁵

Likewise in the same case the Board's conclusion that union activities produced the discharge of the employee was sufficiently evidenced in (a) the employee's testimony that the employer promised if he should be shifted back to acetylene burning from welding (should welding give out), he would retain seniority rights earned as a burner; (b) the showing that when the employee was subsequently laid off the welding job, workers junior to him as burners were retained; (c) the testimony that under company practice an employee promoted to another position in the same department retained (or at least might be given) his original seniority; and (d) that the two reasons given by the employer for not restoring the welder to his former burner job were contrary to established facts as discovered by the Board.¹⁶

The fact that supervisory employees have no power to hire or fire does not preclude the Board from attaching weight to their activities in behalf of a particular union allegedly favored by the employer. "If the words or

¹³National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318, 60 Sup. Ct. 918 (1940).

¹⁴311 U. S. 584, 61 Sup. Ct. 358 (1941).

¹⁵*Id.* at 602, 61 Sup. Ct. at 367.

¹⁶*Id.* at 602-3, 61 Sup. Ct. at 367.

deeds of supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they [words and deeds] are a proper basis for the conclusion that the employer did interfere."¹⁷

But the crowning misconduct of Link-Belt appeared in its participation in the "inside" and "outside" union contest. The Board found that the "inside" union was not the free choice of the employees. This finding rested on sufficient evidence which showed that:

(a) Employer had maintained a company union from 1933 until after the NLRA was sustained by the Supreme Court in April, 1937, and disestablished it only in the latter half of that month when 760 of the 1000 employees signed for a successor union, in the organizing of which the company manager was a leader. The former union was dissolved by agreement between employer and employee.

(b) Employer had operated industrial espionage on his employees till a United States Senate Committee investigated in 1936.

(c) Hostility of employer to the outside union was revealed in statements by the manager, Berry, that "in the event outside people came into our plant and tell us how to run the plant, then I had enough of industry," and "the Link-Belt Company was able and had for many years run their organization and we did not need outside people to tell us how to run the plant economically and efficiently."¹⁸

(d) Two employees had been fired because of activity in behalf of the outside union.

(e) Most of the company union representatives were active in getting members for the inside union, and enjoyed somewhat more freedom of movement in the plant which had been accorded them as company representatives.

(f) Some of the supervisory staff actively supported the new inside union, and only after three-fourths of the employees had signed in were the supervisors told not to take sides.

(g) Employer had failed to announce to the employees that they had a freedom of choice in the union election.

(h) Employer continued support for the old union until satisfied to recognize the new one.¹⁹

These eight points of evidence deserve attention as indicating an ultimate in unfair labor practice by an employer bent upon disregarding the protective statute. A Board order directing the employer to withdraw recognition of this new inside union, to reinstate the discharged employees, to make

¹⁷*Id.* at 599, 61 Sup. Ct. at 366.

¹⁸*Id.* at 588-589, 61 Sup. Ct. at 361.

¹⁹*National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 61 Sup. Ct. 358 (1941).

them whole as to lost wages resulting from the discharge, and to cease and desist from interfering with and dominating labor organization had been denied enforcement by the Circuit Court of Appeals at Chicago.²⁰ Without dissent the Supreme Court reversed the Circuit Court of Appeals and directed it to enforce the Board order on all counts.

The interference of the H. J. Heinz Company was less flagrant. The Heinz Company neither authorized nor ratified efforts of the supervisory employees on behalf of a plant union, and after the rival union had complained, the Heinz management notified the supervisors not to interfere with the organization of the employees. Although it consistently recognized the rival union after it had won the employee election, its failure after hearing of supervisors' activities to notify the employees that those activities were unauthorized by the employer, and its failure to correct the employees' belief that the employer frowned upon their preference for the outside union and would retaliate against them for it constituted sufficient evidence that Heinz was guilty of an unfair labor practice.²¹

Sufficiency of evidence that an employer aided in getting employees to join a particular union was adjudged by the Court where:

(a) Employer hostility to the competing union was well known to workers, to whom foremen relayed the manager's opposition as being so strong that he would close the plant rather than deal with a CIO union, but would deal with an AF of L union,

(b) Employer had told an employee that some of the foremen did not like the CIO, and that anti-CIO foremen would lay off the CIO fellows first, and

(c) Employees earlier associated with the company union, and currently soliciting membership for the employer—preferred union were permitted freedom of activity, while those employees sponsoring the rival organization were warned to check out their time, to confer with the manager on union matters and their right to discuss union matters on plant property was brought into question by the employer.²²

In this same case the Board's conclusion that a drive to obtain membership for the employer-preferred union was headed by the supervisory em-

²⁰Link-Belt Co. v. National Labor Relations Board, 110 F. (2d) 506 (C. C. A. 7th, 1940):

²¹H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514, 61 Sup. Ct. 320 (1941). Consequently the Supreme Court affirmed the circuit court of appeals' order of enforcement for the Board order directing Heinz to dismantle the employees' association, recognize as bargaining representative the A. F. of L. local designated by the employees, and to sign a written contract embodying any agreement Heinz might reach with the designated union.

²²International Ass'n of Machinists v. National Labor Relations Board, 311 U. S. 72, 61 Sup. Ct. 83 (1940).

ployees rests on sufficient evidence in that while they lacked power to hire and fire, these supervisory workers "did exercise general authority over the employees, and were in a strategic position to translate to their subordinate the policies and desires of the management" and "it is clear that they did exactly that."²³

Here three of the supervisors had spent much effort in "preceding weeks promoting the company union. . . . They spread the idea that the purpose in establishing petitioner [union] was 'to beat the C.I.O.' and that the employees might withdraw from the petitioner once this objective was reached." The Court held that supervisors, being *bona fide* members of the petitioner union did not negative their status as foremen of the employer enjoying some degree of direction in dealing with subordinate employees.²⁴

There was no lack of evidence in the *Consolidated Edison* case. Employing industrial spies, permitting employees to solicit membership in a particular union on company property and time, allowing such soliciting employees regular wages and providing them office facilities and financial aid—all these easily constituted adequate evidence that Consolidated Edison Company was guilty of unfair labor practices, and justified the Board order granting relief therefrom.²⁵

What evidence is necessary to establish that a particular union is dominated by the employer? In *National Labor Relations Board v. Bradford Dyeing Ass'n*²⁶ sufficient evidence was found in:

- (a) The president's having suggested the establishing of the union, and the manager's speech to workers that he would refuse to recognize any affiliate of the national union proposed by the employees.
- (b) Allowing the employees soliciting for the inside union to use offices of employers for meetings; paying regular wages to such employees soliciting and attending the meetings.
- (c) Distributing some of the membership cards for the inside union from employer's office and by foremen and other bosses.

Concerted effort to forestall applicability of the National Labor Relations Act when its enactment was imminent and later to avoid its incidence is found in *National Labor Relations Board v. Southern Bell Telephone & Telegraph*

²³*Id.* at 80, 61 Sup. Ct. at 89.

²⁴*Id.* at 81, 61 Sup. Ct. at 89.

²⁵*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 230, 59 Sup. Ct. 206, 217 (1938). Relief ordered by the Board and affirmed by the Court included reinstatement of six discharged employees, reimbursing them for wages lost, and posting notices that the employer would cease and desist from such unfair practices.

²⁶310 U. S. 318, 60 Sup. Ct. 918 (1940).

*Co.*²⁷ On charges filed by the International Brotherhood of Electrical Workers, the Board issued a complaint against the company that they were supporting and dominating the organization of their employees and had interfered with organization rights of the employees. More than two years elapsed before the evidence on which the Board order rested was passed upon by the Supreme Court.

Prior to passage of the National Labor Relations Act and in anticipation of it, several of the Bell Company officers campaigned for fifty-cent contributions from the workers so the company union could operate after the Act should become operative. Officials of the union joined in soliciting and a total of \$5000 was realized. Shortly after July 5, 1935, at an employee meeting the company announced it would follow a "hands off" policy in organizing the workers, but made no mention of disestablishing the union. A memorandum sent by the company indicated to employees approximately what could be done under the Act relative to facilities, financial aid to the union, etc. After the *Jones & Laughlin* decision in 1937 a further memorandum indicated sharp reduction of what the company could do in assisting the union. Neither memorandum mentioned any intention or attempt to dissolve the union. In 1941 the company insisted that determination of whether the company dominated the union could not be made on its long connection in finance and facilities with the union (a connection extending back to 1919) as the controlling factor.

But the Court held that "there was certainly sufficient evidence of continuity to form a basis for the Board's conclusion that the reorganization did not so completely displace the original association as to amount at that time to the creation of a 'free and uninspired' employee agency."²⁸ It pointed out that a new agreement with a check-off feature had been made before changes in the union constitution had been ratified; that reorganization proceeded by revision and not by original creation; that members were ineligible to hold office in the organization until a year after joining; that blanks for membership had been circulated declaredly to provide merely a complete record of membership and not as new applications for membership; and that the date of formation in the preamble of the 1919 constitution was not changed to read "August 30, 1935" until the meeting of March, 1940, five years after the regulatory act was passed. Such continuity of relationship the Court held "is at least evidence of such dominance, entitled to consideration by the Board."²⁹

²⁷319 U. S. 50, 63 Sup. Ct. 905 (1943).

²⁸*Id.* at 56, 63 Sup. Ct. at 908.

²⁹*Id.* at 57, 63 Sup. Ct. at 908. The denial of the enforcement order by the Circuit

What evidence is required for a finding that a majority of the employees have chosen a particular union as the bargaining representative for all the employees? It is not necessary that a charter have been issued or dues paid. where failure to do so resulted from confusion arising from the creation and operation of a rival inside union. Testimony that out of the 800 employees 482 had signed cards of affiliation with the national union was relied upon as sufficient.³⁰

Board determination of the appropriate unit for collective bargaining must be supported by sufficient evidence. *Pittsburgh Plate Glass Co. v. National Labor Relations Board*³¹ provides an illustration. Here a Board finding that a particular division of employees at six of the company's plants constituted an appropriate unit for collective bargaining despite the employer's contention that one of the plants should be made a separate unit was supported adequately by the following evidence:

(a) From 1934 to 1937 contracts had been made on a division-wide basis between management and the union representing the majority of workers in the entire division.

(b) Contracts laid before employees who were members of the particular union providing a wage increase in "All . . . plants" embodied terms applicable only where a plant had a local union unit, which the plant involved did not have.

(c) It appeared that prior to 1937 no recognition had been made by the employer of the union which he now insists should represent the workers at the one particular plant.

(d) When questioned, the employer admitted that when a stoppage of work would ensue at any of its other plants, orders for goods could be shifted to the one particular plant which he objected to having included in the division determined as an appropriate unit by the Board.

Testimony by a father and son that the son had been offered employment on the manager's condition that the father, already employed at the plant, accept membership in a particular union favored by the management was sufficient evidence that this had occurred, though the manager denied he had required such an agreement but admitted that the father showed him the father's union card the day the son was hired. In absence of a closed shop contract such a condition for employing the son constituted an unfair labor practice forbidden by Section 8(3) of N.L.R.A.³²

Court of Appeals for the Fifth Circuit was reversed, and the case remanded to that court with instructions to enforce the Board order directing dissolution of the union.

³⁰*National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U. S. 318, 60 Sup. Ct. 918 (1940).

³¹313 U. S. 146, 61 Sup. Ct. 908 (1941).

³²*Link-Belt Co. v. National Labor Relations Board*, 311 U. S. 584, 601, 61 Sup. Ct. 358, 367 (1941).

III. EVIDENCE INSUFFICIENT

In a few cases in which the evidence has been questioned, the Supreme Court has found it insufficient to support the findings of the Board.

Concerning the standard of sufficiency announced in the *Columbian Enameling & Stamping* opinion,³³ the Court declared that measured by the entirety of tests therein established or any of them, "we cannot say that there was substantial evidence that respondent at any time between July 5, 1935, and September, 1935, was aware that the Union desired or sought to bargain collectively with respondent, or that there is support in the evidence for the Board's conclusion that on or about July 23, 1935 respondent refused to bargain collectively with the Union."³⁴

This *Columbian Enameling* case was argued before Mr. Justice Frankfurter was appointed; consequently he did not participate in deciding the case. The six non-Roosevelt appointees joined in the above majority opinion. A vigorous dissent was penned by Mr. Justice Black and concurred in by Mr. Justice Reed.³⁵

Insisting that "'courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of' an administrative body," Mr. Justice Black chides the majority for discovering "only a single link missing in the chain of evidence showing that the company refused to bargain with the Union, *i.e.*, that there was no evidence to justify the Board's finding that the president of the company was aware the conciliators had approached the company at the request of the Union."³⁶ He holds it untenable for the majority to say that substantial evidence was lacking that the president was aware of the union's desire and effort to bargain collectively with the company:

Undisputed evidence disclosed that on July 23, 1935 the conciliators at the express instance of the union conferred for three or four hours with the president of respondent; that the only purpose of the conciliators was to arrange a meeting between the company and the union in order to bring about collective bargaining; that the president agreed with the conciliators to meet the union and the conciliators at a date to be set; but that several days thereafter (when the company had obtained other employees and was operating under the protection of the militia) the president—again acting for the company—called the conciliators and flatly refused to meet further with them or the union.³⁷

³³National Labor Relations Board v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 59 Sup. Ct. 501 (1939).

³⁴*Id.* at 300, 59 Sup. Ct. at 505.

³⁵*Id.* at 300, 59 Sup. Ct. at 505.

³⁶*Id.* at 302, 59 Sup. Ct. at 506.

³⁷*Id.* at 301-2, 59 Sup. Ct. at 506.

Consequently, on the adequacy of evidence offered, Mr. Justice Black concludes that "the story in this record discloses a broad basis for the inference that the company *did* know it was actually refusing the union request."³⁸ [Italics supplied]

As to the relation between the courts and the NLRB in this matter of evidence, Mr. Justice Black, in terms and tone echoing the warning of Mr. Justice Stone to the majority in that momentous *Agriculture Adjustment Act* case three years earlier,³⁹ admonishes the majority as to their proper function.

Courts should not—as here—substitute their appraisal of the evidence for that of the Board.

And drawing on the wealth of his legislative experience to fortify his judicial warning to the majority he reminds them that:

The Labor Board, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission and many other administrative agencies were all created to deal with problems of regulation of ever increasing complexity in the fields of trade, finance and industrial conflicts. Congress thus sought to utilize procedures more expeditious and administered by more specialized and experienced experts than courts had been able to afford. The decision here tends to nullify this Congressional effort.⁴⁰

The same day the court majority found insufficient the evidence in *National Labor Relations Board v. Sands Manufacturing Co.*⁴¹ The Court in effect observed:

The Board's conclusion that the employer's refusal to take back the members of a particular union when reopening the plant after a shut down and that this negotiation of a contract with another union rested upon a discrimination against them for union activities and their exercise of the right of collective bargaining sufficient to warrant the Board order directing their reinstatement is *not supported but rather refuted*⁴² by undisputed evidence that:

(a) Employer did not attempt to discourage employees from joining the union concerned.

(b) He recognized and conferred with the shop committee whenever conference was requested.

³⁸*Ibid.*

³⁹*United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312 (1935).

⁴⁰*National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 301-2, 59 Sup. Ct. 501, 506 (1939).

⁴¹306 U. S. 332, 83 L. Ed. 682 (1939). Mr. Justice Frankfurter, the third appointee of President Roosevelt, had not yet taken his seat on the Court.

⁴²Italics added.

(c) When a strike was called because a wage increase was denied, employer continued negotiation with the union, with the result that the workers returned, a collective bargaining agreement was made with the union, the agreement restricting the seniority rule to the plant department in which the workers were employed.

(d) In order to operate its machine shop when other departments were shut down, the employer advised the union that unless the employer were allowed to employ new men in the machine shop while others were laid off, in accordance with a privilege reserved in the contract, the employer would have to shut down the whole plant.

(e) Pursuant to the advice conveyed in point (d), the employer did shut down the plant and kept it shut till members of another union had been employed under contract with the latter union, giving employer the privilege of enforcing departmental seniority, despite the testimony that a shipping clerk and superintendent had objected to the first union, but the statements of neither warranted his statement's being accepted as evidence of employer's policy, and despite the fact that on reopening the plant the employer offered reemployment to four of its former workers at the foreman level, and guaranteed annual pay averaging less per year than the amount formerly paid them.

Adjudging this lengthy evidence refutative, the Court rejected the Board finding that the employees had been "locked out, discharged, and refused employment because they were members of the 'Mesa' [a particular union] [and because they] had engaged in concerted activities for the purpose of collective bargaining."⁴³ "We think the conclusion has no support in the evidence and is contrary to the entire and uncontradicted evidence of record."⁴⁴

Thus the Board findings that discharge of employees belonging to a particular union constitutes discrimination against their union was rejected as insufficiently evidenced where the employees had concertedly repudiated the agreement made by their bargaining representative and employer, and consequently the employer had validly considered them no longer his employees and had proceeded to engage a new staff under agreement with another union.⁴⁵

IV. EVIDENCE ORDERED SUPPLEMENTED: REMAND TO BOARD

The peak of the administrative and judicial problem in collective bargaining evidence was reached in *National Labor Relations Board v. Indiana &*

⁴³306 U. S. 332, 339, 59 Sup. Ct. 508, 512 (1939).

⁴⁴*Ibid.*

⁴⁵The cleavage in this *Sands* decision is the same as in *Columbian Enameling*; Black and Reed, JJ., in dissent, Frankfurter, J., not participating. The circuit court of

*Michigan Electric Co.*⁴⁶ The essential facts may be chronologically outlined.

On November 12, 1938 the International Brotherhood of Electrical Workers filed with NLRB charges of unfair labor practices against the company, and a complaint issued that day fixing November 28 for hearing. Answer was filed by the company November 23. The next day a South Bend sub-station was dynamited. The scheduled hearings were held, and twenty witnesses were called; the intermediate report of trial examiner "recommended generally against the company."

September 1, 1939, exceptions to the intermediate report were filed. Four days thereafter power line poles were sawed off, and on September 8, a transmission tower was dynamited. October 17, the Board fixed November 9 for oral arguments on the exceptions; October 19, another tower was dynamited, and on the 28th, two more poles were similarly treated. Another tower went down on October 30, and two more on November 23. These facilities carried high voltage lines, and some of them were along public highways and railroad tracks. On February 19, 1940, the company filed a petition to reopen the case and to take further evidence, deemed proper by the company in the light of the depredations made upon its properties. Two of the Board witnesses had been arrested (along with other persons) in connection with the destruction above related, and charged with participating in and planning some or all of the depredations. The company wished to use evidence of complicity of the two witnesses to discredit their testimony upon which "the trial examiner appeared to rely." But the company also "asserted evidence of a conspiracy to destroy property to influence the pending case, which it contended was not a good-faith labor controversy, but an unlawful effort of Local B-9 to coerce the company to require its employees to join the union."

The Board denied the petition February 28, saying that "the matters therein recited have no relation to the issues in this proceeding." While the resulting Board order differed in some respects from the recommendations of the trial examiner, it directed the employer generally to cease interference with employees' right to "join or assist labor organizations."

In December, 1940, the Board asked Circuit Court of Appeals for the Sixth Circuit for enforcement of a Board order, but the court was in no hurry to act. Eight months later the company petitioned the same court for a remand order to the Board, so that evidence from the criminal trials

appeals' denial of the enforcement order on the Board order directing the employer to cease and desist from unfair labor practices and to reinstate the former employees with recoupment of lost wages was affirmed by the Supreme Court.

⁴⁶318 U. S. 9, 63 Sup. Ct. 394 (1943).

in Indiana courts of two of the Board witnesses, which had meantime resulted in conviction in one of the dynamitings of company property, could be used to discredit these witnesses.

In a unanimous opinion the circuit court granted the petition for remand to the Board with a supporting argument relative to evidence which in effect was this:⁴⁷

(a) Whether criminal syndicalism revealed in evidence offered by the employer was chargeable to the labor union, and was committed in retaliation for the employer's refusal to aid the union in organizing the employer's employees and to recognize the union as employees' bargaining representative was a "question of fact" to be considered by the Board.

(b) The proffered evidence was material to establishing whether the International Brotherhood of Electrical Workers Local B-9 was a labor organization within the terms of Section 2(5) of the Act.

(c) Both business manager Samuel Guy and assistant manager John R. Marks of the union testified at the Board hearing that they talked with vice-president English and secretary Calvert of the company "about organizing respondent's employees and that English stated that he had nothing to say about their union but that he thought respondent's employees were well paid, satisfied, and without need of a labor organization. The trial examiner accepted the statements of these witnesses (Guy and Marks) as true and the ultimate facts based on their testimony was material to the Board's decision."

(d) When the trial was held "evidence adduced on trial of the criminal cases was not available to respondent or to the Board. The new evidence is of such character that its consideration by the Board would probably produce a different result."

(e) The evidence on which the Board relied in its finding that respondent was guilty of unfair labor practices is that respondent dominated and interfered with the formation of Michiana Electric Utility Workers Association through its supervisory employees. Whether these latter employees were acting on their own behalf and that of their co-employees, or at the behest of the respondent is the crux of the case . . . The new evidence may throw some light on the question of employer domination.

The Board was directed to take back the case, "to hear and consider such additional evidence as may be tendered by the parties relating to the destruction of respondent's property by International Brotherhood of Electrical Workers Local B-9, or its agents, or representatives . . . to make appropriate findings in the light of such evidence a part of the transcript herein and the

⁴⁷National Labor Relations Board v. Indiana and Michigan Electric Co., 124 F. (2d) 50 (C. C. A. 6th, 1941).

Board is also authorized to make such modification, if any, in its present order as the additional evidence may require."⁴⁸

On receipt of the remand order from the circuit court, the NLRB petitioned the Supreme Court for review of the remand order.

On review, the Supreme Court made an exhaustive examination of the whole record of the Board proceeding. The majority opinion by Jackson, J., acknowledges that the NLRA grants the Board "a great degree of finality" as to its findings of fact, and that the act requires respect for the Board judgment "as to what the evidence proves," but emphasizes the fact that courts whose enforcement powers are called upon to effectuate the Board orders have "some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross examination material to the issue"; "the court is given discretion to see that before a party's rights are finally foreclosed, his case has been fairly heard."

"Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." Further, the Court disclaims all assumption that the Board "will in any event refuse to modify its conclusions." It refuses to assume that the Board will find the alleged company-dominated union actually company-dominated regardless of what the additional evidence may show. "We do not prejudge the issue—we hold only that it is not unreasonable or an abuse of judicial power to reserve judgment on it until the full story has been heard and judged by the Board itself."⁴⁹

The remand order was affirmed.

The majority position makes it clear that the issue is whether the alleged company-dominated union is such in actuality; this the Board had answered "yes." But the Supreme Court holds, with the Circuit Court of Appeals for the Sixth Circuit, that whether such a conclusion is warranted must take into account evidence derived from another jurisdiction dealing with the criminal aspects of certain acts for the commission of which some of those who had earlier testified before the NLRB had been convicted.

Black, Douglas, and Murphy, J J., in dissent declare in effect that:

(a) A desire to punish dynamiters does not justify a failure to protect respondent's employees, innocent of wrong doing, in their freedom either to bargain collectively through representatives of their own choosing or to be represented by no one at all.

⁴⁸*Id.* at 58.

⁴⁹National Labor Relations Board v. Indiana and Michigan Electric Co., 318 U. S. 9, 28, 29, 63 Sup. Ct. 394, 405 (1943).

(b) Without relying in the slightest degree on the evidence of persons convicted of or charged with dynamiting, the Board found the Association to be company-dominated.

(c) Its order gave no benefit to anyone even remotely suspected of complicity in the crimes charged. Instead it carefully eliminated such individuals, and the Union, from the scope of its award and gave no credence to the suspect witnesses.

(d) The Board order contemplates only that this company shall not intimidate or coerce its employees—that it shall leave them free. This freedom is their legal right; and crime by some of them cannot justify the company in destroying the freedom of all, or even a few of them. Under our government guilt is personal; it cannot, or should not, provide an excuse for one injured by it to invade the liberty of others.

(e) If the evidence respondent asks to offer has any relevance whatever, it must be [either] that the union's purpose in filing the complaint was not salutary and the character of its activities was such that the Board might, upon hearing the proffered evidence, decline to exercise any jurisdiction to protect the rights of the employees, even the innocent; or that the Board's witnesses were of such character as to be unworthy of belief.

(f) The opinion here seems to suggest that administrative agencies should hereafter spend a large part of their time in trying complainants instead of those charged with violating the law.

(g) Now, four years after the proceeding began, it is broadly hinted that the Board should permit the employer to try the informer and it is clearly implied that if the complaining union is proved evil, the employees should not be free of company-domination, no matter how extreme it may be. If the practice here suggested is not soon repudiated, a new method will have been provided in which to paralyze administrative agencies by discursive delay.

(h) Of course, no court should shelter dynamiters from exposure and inquiry. But compelling the Board to digress from the adjudication of a labor dispute in which such dynamiting has no part into a pursuit of the guilty, punishes the innocent employees of the respondent rather than the evil doers themselves. The Labor Board is no fair substitute for a grand jury or a criminal court.

The dissenters conclude that since the record demonstrates that the Board did not deny "respondents an opportunity to offer newly discovered evidence which tended to show that witnesses to material facts relied on by the Board had since the hearing been convicted of serious crimes affecting their credibility," the case should go back to the circuit court of appeals for the normal review procedure and not back to the Board.⁵⁰

⁵⁰*Id.* at 36, 63 Sup. Ct. at 408.

"The Board has taken no further formal action in this matter since the case was remanded by the Circuit Court of Appeals for the Sixth Circuit."⁵¹ However, "on May 25, 1943, a consent election was held, and District 50 United Mine Workers, Utility Division, Local 12259, was certified as the bargaining representative."⁵²

Thus the inquiry by the International Brotherhood of Electrical Workers charges whether Michiana Association was dominated by the Indiana and Michigan Electric Company management remains unanswered. The employees chose as a bargaining representative an outside union unbesmirched by the incriminations of this five year old controversy.⁵³ Wonderful are the ways and delays of litigation!

V. MISCELLANEOUS

1. It is for the Board to draw the inferences of fact from the evidence. In *National Labor Relations Board v. Pennsylvania Greyhound Lines*,⁵⁴ the Board had ordered the company to cease and desist from creating and fostering a company-dominated union, and to withdraw all recognition of such a union as the representative of its employees and to post notices informing them of such withdrawal of recognition. The Supreme Court opinion by Mr. Justice Stone reasons that (a) whether the company continued recognition of the company-created union would in itself constitute a continuing obstacle to the exercise of the employees' right to organize and bargain collectively through representatives of their own choosing "is an inference of fact to be drawn by the Board from the evidence reviewed in its subsidiary findings"; and (b) "the inferences to be drawn were for the Board and not for the courts."⁵⁵ The Board order directing withdrawal of recognition was sustained.

In a similar case against the Pacific Greyhound Lines,⁵⁶ the court said "Whether the continued recognition of the Drivers' Association [a company-created and company-dominated union] by respondent" would discourage the exercise of the right of employees to organize and bargain collectively "was an inference of fact which the Board could draw if there was evidence to support it. We cannot say that the Board's conclusion was without support

⁵¹Letter to the writer, December 28, 1944, by Malcolm F. Halliday, Associate General Counsel, NLRB.

⁵²*Ibid.*

⁵³Jackson, J., appends in a footnote at the end of the majority opinion, a detailed calendar of procedural steps in this cause.

⁵⁴303 U. S. 261, 58 Sup. Ct. 571 (1938).

⁵⁵*Id.* at 271, 58 Sup. Ct. at 576.

⁵⁶*National Labor Relations Board v. Pacific Greyhound Lines*, 303 U. S. 272, 58 Sup. Ct. 577 (1938).

in the evidence and subsidiary findings which the respondent does not challenge."⁵⁷

The Board conclusion that a union set up and dominated prior to NLRA continued to be a company-dominated union after the NLRA became effective despite a reorganization of the union is an inference of fact "which may not be set aside upon judicial review because the courts would have drawn a different inference," said the Supreme Court in May, 1943.⁵⁸

2. The Board has discretion where substantial evidence supports either of two inferences. Where there was substantial evidence to warrant the Board in concluding that the employer's refusal to hire men was due to his belief that they had already engaged in or threatened to engage in damaging the property of the employer and his belief that they had threatened injury to the managerial staff and their families, and where the Board could have concluded from substantial evidence that the refusal of the employer to hire these men in order to discourage labor union membership the Board was free to draw either of these inferences, and the availability of the two did not invalidate the Board's drawing the latter inference, as the Circuit Court of Appeals for the Tenth Circuit apparently thought.⁵⁹

"We have repeatedly held that Congress, by providing . . . that the Board's findings 'as to the facts, if supported by evidence, shall be conclusive,' precludes the courts from weighing evidence in reviewing the Board's orders, and if the findings of the Board are supported by evidence the courts are not free to set them aside, even though the Board could have drawn different inferences."⁶⁰

3. Board findings based on uncorroborated hearsay or rumor are not conclusive, but such hearsay and rumor evidence is admissible because the Board proceedings are statutorily exempted from the rules of evidence.⁶¹ But the statutory guarantee of such flexibility in Board procedure does not warrant orders which lack as a basis evidence of probative value. "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."⁶²

4. Circumstantial evidence may prove adequate support for a Board find-

⁵⁷*Id.* at 275, 58 Sup. Ct. at 578.

⁵⁸*National Labor Relations Board v. Southern Bell Telephone and Telegraph Co.*, 319 U. S. 50, 60, 63 Sup. Ct. 905, 910 (1943).

⁵⁹*National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 62 Sup. Ct. 960 (1942).

⁶⁰*Id.* at 106, 62 Sup. Ct. at 961, relying on *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 61 Sup. Ct. 358 (1941), *National Labor Relations Board v. Automotive Machinery Co.*, 315 U. S. 282, 62 Sup. Ct. 608 (1942).

⁶¹*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, 59 Sup. Ct. 206, 217 (1938).

⁶²*Ibid.*

ing if there is no direct evidence available. A case in point appears where the Board adjudged time-studies inconclusive of employees inefficiency and ruled their discharge an unfair labor practice. The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that employer knew these men had joined the Amalgamated, and was displeased or wanted to make an example of them.⁶³

It is also the province of the Board to evaluate conflicting and circumstantial evidence and to determine the weight and credibility of the evidence.⁶⁴

VI. CONCLUSION

The foregoing recital of evidentiary developments leads to several concluding observations.

In practical application, evidence to support a Board finding means substantial evidence sufficient to convince a reasonable mind.⁶⁵ Even without this mythical "reasonable mind," the above standard denotes nothing definite as a guiding rule, but rather that the amount of evidence necessary seems to vary according to the exigencies of each case as it arises. It therefore must be added to a great host of other judicial shibboleths in constitutional construction.

Not only may the evidence be presented as oral testimony or written record, but also it may be direct and positive in character, or in lieu thereof it may be merely circumstantial.

The evidence may emanate from employees, including those who have been discharged illegally, supervisory personnel, or from the employer. Evidence from the latter source may be derived from the employer's attitude toward outside unionization, his speeches and printed communications to the employees, or from his activities, such as collecting money from employ-

⁶³National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 61 Sup. Ct. 358 (1941).

⁶⁴*Ibid.*

⁶⁵As to evidence supporting administrative findings of fact, the Communications Act of 1934 specifies *substantial evidence*, as does the Securities and Exchange Act. Similar wording appears in the Federal Alcohol Administration Act, Federal Power Act, Fair Labor Standards Act, and the Bituminous Coal Act. The Walsh-Healey Act requires that findings to be conclusive must be *supported by the preponderance of evidence*, while the Commodities and Exchange Act is possibly slightly less exacting in the phrase *the weight of evidence*. The NLRA evidence standard finds its prototype in the Federal Trade Commission Act, *if supported by evidence*. See page 210 of *Report* cited in note 67, *infra*.

In specifying that findings in reparations cases by the ICC shall be "*prima facie evidence* of the matters recited therein" Congress allowed the ICC a decided advantage which has been withheld from the later administrative agencies mentioned in this footnote.

ees, or offering facilities for meetings and financial aid to those "unionizing" efforts he approves, or his employing industrial spies.

There is a clearly recognizable judicial presumption that employees are warranted in their belief that foremen represent to employees the policy and desires of the employer. And this *dual* responsibility of the foremen is not an *equal* responsibility as between the two.

The Board "discoveries" may constitute determinative evidence, for example the factors found to influence judgments as to what is an appropriate bargaining unit: learning that if a strike should shut either of five plants, orders for goods could be shifted to a sixth, which the employer insists should constitute a separate bargaining unit.

The case record seems void of any attempt to balk Board efforts to obtain from either public or private sources evidence relating to any matter being questioned or investigated by the Board.⁶⁶

An order of the Board, adjudged by it adequately supported by evidence, is not self-operative, being in this respect similar to orders of the ICC prior to 1906, and those of FTC until 1938.⁶⁷ Enforcement of the NLRB order resisted or ignored by him at whom it is directed is sought by Board petition to the circuit court of appeals.⁶⁸

Probable repercussions of judicial review of NLRB evidence include (1) that the review will *check* but not *replace* Board action; (2) that fair consideration will be afforded in Board proceedings; and (3) that extremes of incompetence and arbitrariness in Board performance will be avoided.⁶⁹

In the *Columbian Enameling* and *Sands Manufacturing* cases the Court has replaced the Board's judgment with its own judgment. The disposition in the *Indiana and Michigan* case illustrates Court application of point (2) above. There appears no instance in which (3) has been applied.

In some of the cases before the Court, for example, *Jones and Laughlin*, considerations of evidence have played a minor part; in several others, especially *Southern Bell Telephone*, *Link-Belt*, and *Indiana and Michigan Electric Company*, evidentiary matters have proved paramount in the handling of the causes.

While the record reminds us of judicial deferences to the presumed val-

⁶⁶The Board is amply empowered thus to obtain evidence by Section 11 of the Act.

⁶⁷REP. ATT'Y GEN.'S COMMITTEE, *Administrative Procedure in Government Agencies*, Senate Document No. 8, p. 82, 77th Cong., 1st Sess. (1941).

⁶⁸In either the area in which the unfair labor practice occurred or in which the person complained of resides or does business. NLRA, Sec. 10(e). If the circuit court of appeals is on vacation, petition goes to the district court in the area.

⁶⁹Probable repercussions of judicial review of administrative agencies generally are incisively presented on pages 77-79 of source cited in footnote 67, *supra*.

idity of Board findings, certainly we cannot conclude that the Court has overdone itself in observing these standards.

In most of the cases, the Board findings have been sustained by the Court. These came in the year 1937, and especially the latter part of 1939, and 1940-42. Board defeats center in the years 1938 and 1939.

It could hardly be said that these "low" years for Board findings constitute the formative period for Board technique and procedure, for the Board had three years experience by 1938. Insistence that Board procedure or attitude was being refined and stabilized beginning in the latter part of 1939 encounters the significant fact that Supreme Court personnel was undergoing drastic change during the period in which the Board score improves so markedly.

Only one of the evidence cases has been decided by 5-4 vote; most of them by a greater margin than 6-3.

Use of physical dynamite against electric utility property reasonably will have its philosophical repercussions among those lawfully charged with supervision of the administrative process.

The last two years may be characterized as a period of balancing off and levelling out. They may be taken as a direction indicator for at least the next few years.