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Administrative Law - Substantial Evidence on the Record Considered as a Whole

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Comments

Administrative Law—Substantial Evidence on the Record Considered as a Whole

With the passage of the Administrative Procedure Act in 1946 and the Labor Management Relations Act in 1947 a problem arose as to the scope of review in cases where the courts of appeals were called upon to determine whether evidence upon which an administrative agency relied was substantial evidence. The Wagner Act of 1935 had provided: "The findings of the Board as to facts, if supported by evidence shall be conclusive." [1] "Evidence" was interpreted to mean substantial evidence.[2] The Labor Management Relations Act in 1947 amended the Wagner Act to read, "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." [3] Then the Administrative Procedure Act provided that a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party." [4] The question arose in the court of appeals for the second circuit as to whether review on the whole record required that differences of opinion between an agency and its examiner should be a factor in determination of substantiality of evidence.[5] Also, conflict of opinion arose among the circuit courts concerning the process the courts should use in determining the substantiality of evidence. One opinion was that the statutes were intended to broaden the scope of review so that the appellate

1. Act of July 5, 1935, § 10(f), National Labor Relations Act § 10(f), 49 Stat. 449, 455 (1935), 29 U.S.C.A. § 151 (1947).

2. Washington, V. & M. Coach Co. v. Labor Board, 301 U.S. 142 (1937).

3. Labor Management Relations Act § 10(f) (1947), 61 Stat. 136, 148 (1947), 29 U.S.C.A. § 141 et seq., § 160(f) (1947).

4. 60 Stat. 237, 243 (1946), 5 U.S.C.A. § 1001 et seq., § 1009(e).

5. In National Labor Relations Board v. Universal Camera Corp., 179 F. 2d 749 (2d Cir. 1950), the court would not take into consideration the disagreement between the board and examiner. In earlier decisions, other circuits had considered such disagreement as a factor affecting the court's decision. National Labor Relations Board v. Ohio Calcium Co., 133 F. 2d 721 (6th Cir. 1943); A. E. Staley Mfg. Co. v. National Labor Relations Board, 117 F. 2d 868 (7th Cir. 1941); Wilson & Co. v. National Labor Relations Board, 123 F. 2d 411 (8th Cir. 1941).

courts should weigh the evidence pro and con.[6] The other opinion was that no change in the reviewing power was intended;[7] that the appellate courts were to determine whether the evidence upon which the agency relied was substantial when considered in isolation—opposing evidence was to be ignored.

Both problems were answered in *Universal Camera Corporation v. National Labor Relations Board.*[8] The case came from the court of appeals for the second circuit,[9] which was of the opinion that the statutory requirement of reviewing evidence on the record as a whole was not intended to broaden the scope of the review. Appellants contended (1) that the court of appeals erred in holding that the examiner's report which the board rejected should be given no consideration in review of questions of fact, and (2) that the board's order was not supported by substantial evidence on the record considered as a whole. It was held on the basis of Section 8b of the Administrative Procedure Act[10] that an examiner's report is part of the record and must be taken into consideration; therefore difference of opinion between an agency and its examiner should be a factor in determination of substantiality of evidence. It was also held that the statutory requirement of reviewing on the whole record means that the reviewing courts must consider the evidence pro and con in determining its substantiality. "Whether or not it was ever permissible for courts to determine the substantiality of

6. Pittsburg Steamship Co. v. National Labor Relations Board, 180 F. 2d 731 (6th Cir. 1950).

7. The following courts of appeals agreed that no change was made in the scope of review: National Labor Relations Board v. Universal Camera Corp., 179 F. 2d 749 (2d Cir. 1950); Eastern Coal Corp. v. National Labor Relations Board, 176 F. 2d 131 (4th Cir. 1949); National Labor Relations Board v. Booker, 180 F. 2d 727 (5th Cir. 1950); National Labor Relations Board v. LaSalle Steele Co., 178 F. 2d 829 (7th Cir. 1949); National Labor Relations Board v. Minnesota Mining & Mfg. Co., 179 F. 2d 323 (8th Cir. 1950); National Labor Relations Board v. Continental Oil Co., 179 F. 2d 552 (10th Cir. 1950).

It appears that the practice of those circuit courts which before passage of the Administrative Procedure Act and the Labor Management Relations Act did not review on the whole record was justifiable on the basis of Supreme Court decisions. Baltimore & O. R.R. v. United States, 298 U.S. 349 (1936); Federal Trade Commission v. Standard Ed. Soc., 302 U.S. 112 (1937); National Labor Relations Board v. Link-Belt Co., 311 U.S. 584 (1941); National Labor Relations Board v. Nevada Consol. Copper Corp., 316 U.S. 105 (1942); Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503 (1944).

8. 340 U.S. 474 (1951).

9. 179 F. 2d 749 (2d Cir. 1950).

10. 60 Stat. 242 (1946), 5 U.S.C.A. § 1007(b). The court also held that under the Labor Management Relations Act the examiner's report must be considered as part of the record. 340 U.S. 474, 493. See Davis, Administrative Law 316 (1951).

evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice." [11]

However, in answering those questions, the decision gives rise to other questions concerning the scope of review. It is the purpose of this comment to discuss two rules governing judicial review and to observe what effect the *Universal Camera* case has upon those rules.

CREDIBILITY

The first rule is the rule that the courts may not review the credibility of witnesses. The courts must accept as final the agency's findings of credibility. This rule was laid down by the Supreme Court in *National Labor Relations Board v. Link-Belt Company* and is well established in the decisions of the courts of appeals.[12] However, the *Universal Camera* opinion indicates that in cases where an agency and its examiners differ on findings of credibility the examiner's report may be reviewed by the courts as to the credibility of testimony—a deviation from the prevailing rule. Discussing legislative history which showed the significance of examiners' reports, Justice Frankfurter quotes a Senate committee which said the examiners' reports "would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." [13] In further dis-

11. 340 U.S. 474, 487.

12. 311 U.S. 584 (1941). Accord, but perhaps dictum: Merchants Warehouse Co. v. United States, 283 U.S. 501 (1931). Credibility rule in the circuit courts: National Labor Relations Board v. Bird Mach. Co., 161 F. 2d 589 (1st Cir. 1947); National Labor Relations Board v. Air Associates, Inc., 121 F. 2d 586 (2d Cir. 1941); Billik v. Berkshire, 154 F. 2d 493 (2d Cir. 1946); National Labor Relations Board v. Geraldine Novelty Co., 173 F. 2d 14 (2d Cir. 1949); Oughton v. National Labor Relations Board, 118 F. 2d 486 (3rd Cir. 1941), cert. denied 315 U.S. 797 (1942); National Labor Relations Board v. Standard Trouser Co., 162 F.2d 1012 (4th Cir. 1947); National Labor Relations Board v. Booker, 180 F. 2d 727 (5th Cir. 1950); National Labor Relations Board v. Texas Mining & Smelting Co., 117 F. 2d 86 (5th Cir. 1941); National Labor Relations Board v. Ford, 170 F. 2d 735 (6th Cir. 1948); Superior Engraving Co. v. National Labor Relations Board, 183 F. 2d 783 (7th Cir. 1950); National Labor Relations Board v. May Department Stores Co., 162 F. 2d 247 (8th Cir. 1947); Mansfield Journal Co. v. Federal Communications Commission, 180 F. 2d 28 (D.C. Cir. 1950).

13. 340 U.S. 474, 496. The same excerpt is quoted by the circuit court's first opinion in National Labor Relations Board v. Universal Camera Corp., 179 F. 2d 749, 752 (2d Cir. 1950). The circuit court seems to construe the excerpt as bearing upon the significance which the examiner's report has

cussion of examiners' reports as a factor in review of substantiality of evidence it is said in the opinion, "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." [14] And "the significance of his report, of course, depends largely on the importance of credibility in the particular case." [15] Suppose a court reviewed a decision which depended largely on credibility and decided that a difference of opinion between an agency and its examiner concerning credibility was an important enough factor to make the evidence less than substantial support for the agency's decision. The agency's decision would have to be set aside for lack of substantial evidence. That would be reversing the agency on the actual ground that the testimony was not credible.[16] This conclusion is borne out in the history of the *Universal Camera* case in the court of appeals.

The appellate court in its first opinion[17] set out the testimony and noticed the conflicts. It noticed that the examiner believed a certain important statement in the testimony and that the board, disbelieving the statement, reversed the examiner's finding of credibility. The court said that it agreed with the examiner and would have liked to reverse the board's reversal of the examiner. But because the court thought that the difference between the board and its examiner could not be included in the scope of the court's review, it accepted the finding of the board that the testimony was not credible. The court then considered the testimony which the board did believe and concluded that, on the basis of the evidence which the board believed, a reasonable person could have reached either the board's conclusion or the opposite conclusion. Therefore the

to the agency. The Supreme Court seems to construe the excerpt as bearing upon the significance which the examiner's report should have for the appellate court.

14. 340 U.S. 474, 496.

15. Ibid.

16. The Supreme Court in its *Universal Camera* opinion had said, "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree." 340 U.S. 474, 496. If the statement means that the definition of substantial evidence will not change, it is correct. But if it means that the scope of review in applying the substantial evidence rule will not be broadened to include review of credibility, the statement seems to be out of line with the holding of the case as to the significance of the examiner's reports in affecting the substantiality of evidence.

17. 179 F. 2d 749 (2d Cir. 1950).

court, within that area of difference, did not weigh the evidence and sustained the board's decision of the case.

The Supreme Court held[18] that the appellate court should have taken into consideration the difference of opinion between the board and its examiner on the issue of credibility. The case was remanded and in its second opinion[19] the appellate court discussed its consideration of the difference between the board and its examiner. The court said, ". . . we cannot accept the Board's argument that we are not in as good position as itself to decide what witnesses were more likely to be telling the truth. . . ." [20] Because it found nothing which made incredible the particular testimony upon which the board and examiner disagreed, the court accepted that testimony as credible and reversed the board's reversal of the examiner on that point.[21] With that now credited testimony added to the testimony that the board had believed, the court found it could no longer uphold the board's decision of the case. The court said, ". . . we cannot escape the conclusion that the record in the case at bar was such that the . . . finding of the examiner should have turned the scale." [22] Thus the court of appeals' second decision of the *Universal Camera* case is an example of reversal of an agency decision on the actual ground that enough evidence was incredible to cause the rest of the evidence to be less than substantial.

SUBSTANTIAL EVIDENCE—REWEIGHING EVIDENCE

The second rule, the present status of which might be questioned in the light of the *Universal Camera* case is the jurisprudential rule that a court reviewing an administrative decision must not reweigh the evidence.[23] This rule is based on the theory that the agency, not the court, is the fact-finding body. The rule is a statement of how a court should not proceed in determining whether evidence is substantial. In other words, the rule against reweighing evidence is a limitation upon the application of the substantial evidence rule. Therefore the rule against reweighing evidence must be considered in relation to the substantial

18. 340 U.S. 474 (1951).
19. 190 F. 2d 429 (2d Cir. 1951).
20. Id. at 430.
21. For a discussion of examiners' reports as a factor in appellate court decisions see Davis, op. cit. supra note 10, at 316-317.
22. 190 F. 2d 429, 431 (2d Cir. 1951).
23. See cases cited supra note 7, ¶ 2. See also Davis, op. cit. supra note 10, at 916.

evidence rule, which requires that an agency's findings of fact must be supported by substantial evidence.

Facts, for the purposes of judicial review, can be divided into two classes, primary facts and ultimate facts.[24] Actually, both kinds of facts are conclusions inferred from evidence. Hence the ultimate facts found by an agency are the ultimate conclusions inferred from evidence. Testimony and other evidence are the proof from which the primary facts are inferred. Primary facts are the proof from which ultimate facts are inferred.

The statutes never and the courts seldom use the terms "primary facts" and "ultimate facts." They use the terms "evidence" and "facts." The rule is that an agency's decision will be set aside unless the "facts" are supported by substantial "evidence."[25] Does this rule mean that the primary facts must be supported by substantial evidence, or does it mean that the ultimate facts must be substantially supported by the primary facts? During the time that this rule was established the jurisprudence was that a reviewing court could not review the credibility of the testimony of the witnesses.[26] If a reviewing court may not decide whether or not testimony is credible, the court is thereby prevented from deciding whether the testimony is substantial evidence of the existence of a primary fact. Therefore the word "evidence" as used by the courts cannot refer to evidence (testimony) of the existence of primary facts. "Evidence" must refer to primary facts. As a corollary the word "facts" means ultimate facts. Hence it is fair to conclude that the rule that the facts must be supported by substantial evidence means that the ultimate facts must be supported by substantial primary facts.

Under this rule a reviewing court is required to determine whether or not the primary facts amount to substantial evidence. In order to ascertain their substantiality the court must weigh

24. The Supreme Court recognized two classes of facts in United States v. Pierce Auto Lines, 327 U.S. 515 (1946) and in Colorado-Wyoming Gas Co. v. Federal Power Commission, 324 U.S. 626 (1945). For a more minute analysis see Saginaw Broadcasting Co. v. Federal Communications Commission, 68 App. D.C. 282, 96 F. 2d 554, 559-560 (1938). See also Davis, op. cit. supra note 10, at 531 et seq.

25. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); National Labor Relations Board v. Nevada Consol. Copper Corp., 316 U.S. 105 (1942); National Labor Relations Board v. Crompton-Highland Mills, 337 U.S. 217 (1949).

26. See note 12, supra.

the primary facts. A court could not conclude whether or not those facts were substantial without considering how much weight they should be given, because substantiality is a quantitative concept. As long as the substantial evidence rule has been a part of the jurisprudence, the courts have consistently ruled that the evidence must not be reweighed. Taken literally, the substantial evidence rule and the rule against reweighing evidence are in conflict. The substantial evidence rule does exist; it is actually applied; and its application necessarily results in reweighing evidence. Therefore, unless the rule against reweighing evidence has some meaning other than its literal meaning, that rule is simply a fiction and cannot exist.

Actually it seems that the rule against reweighing evidence does have other than a literal meaning. The rule is merely a limitation upon the degree of precision with which a court should measure the weight of evidence. Substantial evidence has been defined to mean "such relevant evidence as a reasonable mind[27] might accept as adequate to support a conclusion." [28] It has also been defined as "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." [29] Thus, evidence is substantial, and an administrative decision must be upheld, when the evidence is sufficient to compel reasonable men to reach the same conclusion as the agency. And the evidence is substantial support for an administrative decision when it is such that reasonable men might or might not reach the same conclusion as the agency. It is within this latter area that the rule against reweighing evidence can and does apply.[30] The rule against

27. For a discussion of the "reasonable man" test in judicial review of administrative agency decisions, see Stason, "Substantial Evidence" in Administrative Law, 89 U. of Pa. L. Rev. 1026, 1038 (1941).

28. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938).

29. National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939).

30. National Labor Relations Board v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949). In *National Labor Relations Board v. Nevada Consol. Copper Corp.*, the Court said, "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." 316 U.S. 105, 107 (1942). In the *Universal Camera* opinion the Supreme Court noticed that Congress by requiring review on the record as a whole intended to preclude such decisions as the *Nevada Consolidated Copper* case. However, the Court impliedly indicated that decisions such as the *Nevada Consolidated Copper* case are inconsistent with review on the record as a whole, only in that they may be construed to mean that the evidence on only one side of the record should be considered by reviewing courts. The Court affirmed the rule against reweighing evidence which admits of different reasonable conclusions, when

reweighing evidence may be summarized thus: The court must, as a practical necessity, reweigh the evidence to determine whether or not the evidence has sufficient weight to compel reasonable men to reach the same conclusion as the agency, or sufficient weight for reasonable men to differ among themselves as to the conclusion. Once the court decides that the evidence has sufficient weight to meet either of those conditions, the court may weigh no further. Within the area wherein reasonable men might differ among themselves, the agency's conclusion (which depends upon what the agency finds to be the precise weight of the evidence)[31] is final.

In the past some of the courts of appeals have interpreted the rule against reweighing evidence to mean that those courts were prohibited from weighing the evidence on one side of the record against the opposing evidence.[32] Such an interpretation cannot stand in light of the Supreme Court's *Universal Camera* opinion.[33] There are statements in the opinion which indicate a recognition of the fact that the courts must weigh the evidence pro and con in considering the whole record. Writing for the majority, Justice Frankfurter uses the word "weight." "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." [34] Words equivalent to "weight" are used in other parts of the opinion. "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses." [35] Is there any difference between an "estimate of the worth" and an estimate of the weight? Or is there any difference between estimating the worth and weighing the worth? In declaring that an exam-

it said (speaking of the whole record requirement), "Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U.S. 474, 488. To this extent *National Labor Relations Board v. Nevada Consol. Copper Corporation* is impliedly affirmed.

31. That is, the total impact of inferences drawn from primary facts on the establishment of ultimate facts.

32. This interpretation of the rule was applied in Wilson & Company v. National Labor Relations Board, 126 F. 2d 114 (7th Cir. 1942) and National Labor Relations Board v. Standard Oil Co., 138 F. 2d 885 (2d Cir. 1943). Such an interpretation is justifiable on the basis of the Supreme Court decisions listed in note 7, paragraph 2, supra.

33. 340 U.S. 474 (1951).

34. Id. at 488.

35. Id. at 490.

iner's report must be considered as a factor in determining substantiality of evidence, Justice Frankfurter wrote, "Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands." [36] Here "probative force" is equivalent to weight. Further in the opinion Justice Frankfurter reverts to the word "weight," saying, "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve." [37]

From the foregoing it follows that in the future, as in the past, the appellate courts must continue to weigh the evidence, to the extent set out in the discussion above, to determine its substantiality. And if the appellate courts follow the ruling of the Supreme Court in the *Universal Camera* case, those courts which formerly considered the evidence on only one side of the record must in the future weigh the evidence on one side of the record against the evidence on the other side, and then weigh the evidence to determine its substantiality. That is, they must weigh the evidence tending to support the agency's conclusions against the weight of the evidence tending to negative the agency's conclusions; then in the light of their relative weights decide whether the weight of the former is still sufficient to meet the definition discussed above of substantial evidence.

CONCLUSIONS

The circuit courts of appeals must weigh the evidence to determine substantiality of the evidence, but they may not weigh the evidence in the area wherein reasonable men might differ.

The circuit courts of appeals may review credibility of testimony and reverse agency decisions on the actual ground that the evidence is not credible, in cases where an agency and its examiner disagreed as to credibility of testimony.

The appellate courts should no longer consider themselves constrained to render decisions such as *Wilson Company v. National Labor Relations Board*[38] and *National Labor Relations Board v. Standard Oil Company*,[39] wherein the courts rendered admittedly unjust decisions because they reviewed only one side

36. Id. at 495.
37. Id. at 496.
38. 126 F. 2d 114 (7th Cir. 1942).
39. 138 F. 2d 885 (2d Cir. 1943).

of the record, ignoring opposing evidence. The policy which the *Universal Camera* case is intended to sanction is expressed in the Court's statement that "the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past." [40] That policy, of course, applies to all agencies subject to the Administrative Procedure Act.[41]

40. 340 U.S. 474, 490 (1951).

41. It may be observed that a theoretical difference has prevailed between review of administrative agency decisions and review of district court decisions. (See Davis, Administrative Law p. 914-915 [1951]). Whereas the findings of fact made by an administrative agency are tested under the substantial evidence rule (within the limitation of the rule against reweighing evidence), the findings of a district judge are tested under Rule 52 of the Federal Rules of Civil Procedure. That rule provides that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (Federal Rules of Civil Procedure, 28 U.S.C.A. Rule 52 [1948].)

The Supreme Court has held that "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (United States v. United States Gypsum Co., 333 U.S. 364, 395 [1948]. Boh Bros. Constr. Co. v. Perry Heavy Haulers, 166 F. 2d 719 [5th Cir. 1948] held clear error must be based upon review of the whole record. In accord with *Gypsum* case where "entire record" is included in definition of "clearly erroneous." But see Fox River Paper Corp. v. United States, 165 F. 2d 639 [7th Cir. 1948] where it is said review should be restricted to consideration of evidence on only one side of the record.) Under such a definition, the reviewing court may weigh evidence precisely; it may draw from the primary facts the precise inferences of ultimate facts. However, merely because the court may draw different inferences from those of the district judge, the court *need* not reverse the judge's findings. (United States v. National Association of Real Estate Boards, 339 U.S. 485, 495 [1950]. Columbian Nat. Life Ins. Co. v. Goldberg, 138 F. 2d 192 [6th Cir. 1943] held that preponderance of evidence is not the test for "clearly erroneous" findings.) But in view of the fact that in reviewing a judge's decision the court *may* substitute judgment and draw its own inferences from the evidence (primary facts), and in view of the fact that in reviewing an agency decision the court is limited by the rule against reweighing evidence, it follows that in determining substantiality of evidence the court is less restricted in reviewing a judge's findings of fact than an agency's findings.

As to findings of credibility, Rule 52 requires only that due regard be given the judge's opportunity to judge the credibility of witnesses. The language of the rule is weak and literally would give the reviewing courts broad power to review and reverse judges' findings of credibility. However, the courts have restricted themselves in review of credibility, and judges' findings of credibility have been given a large degree of finality. (For example, United States v. Yellow Cab Co., 338 U.S. 338 [1949]; Gates v. Woods, 169 F. 2d 440 [4th Cir. 1948]; Beard v. Achenbach Memorial Hospital Ass'n, 170 F. 2d 859 [10th Cir. 1948]; Ruud v. American Packing & Provision Co., 177 F. 2d 538 [9th Cir. 1949].) The finality of a judge's findings of credibility where he has observed the witnesses is about the same as was an administrative agency's findings of credibility before the *Universal Camera* case was decided. Since the *Universal Camera* case ruling, it seems that district court findings of credibility are to have more finality than do administrative findings of credibility in cases where an agency and its examiner disagree. The district court findings are entitled to "due regard,"

SUBSEQUENT CASES

In *Radio Corporation of America v. United States*[42] the Federal Communications Commission, prescribing standards for transmission of color television, had adopted the transmission system proposed by the Columbia Broadcasting System (CBS) and rejected the system proposed by Radio Corporation of America (RCA). RCA contended before the Supreme Court that the district court failed to review the record as a whole in determining whether the commission's order was supported by substantial evidence. The Supreme Court said, "we are convinced that the review already afforded did not fall short of that which is required. . . . Both the majority and dissenting opinions show a familiarity with RCA's basic contention (and the minor ones as well) that could have come only from careful study of the record as a whole." [43]

The opinion of the district court[44] shows that the court did consider the evidence on the whole record. Only the primary facts tending to support the commission's decision to accept the CBS system are mentioned in the opinion, but in a footnote the court listed the commission's "basic findings" [45] (primary facts) as to the system proposed by plaintiff RCA and as to the system proposed by defendant-intervenor CBS. Speaking of the findings of the commission, the court said, "it is not contended in the main that they are not supported by substantial evidence." [46] But in view of the fact that the court set out the primary facts pro and con, and the fact that the court rendered judgment for the commission, the decision can be construed as affirming the commission's decision as supported by substantial evidence, after actual consideration of the whole record. The court also considered arguments pro and con on the issue of continuing an order delaying the effective date of the commission's order during appeal to the Supreme Court.

The opinions rendered on the case of *National Labor Relations Board v. Pittsburgh Steamship Company*[47] will be consid-

but actually are accorded almost complete finality. But administrative findings of credibility in cases where the agency and examiner disagree are entitled to whatever weight the reviewing court may think they reasonably deserve in each case.

42. 341 U.S. 412 (1951).
43. Id. at 415.
44. 95 F. Supp. 660 (N.D. Ill. 1950).
45. Id. at 665.
46. Id. at 667.
47. In the Supreme Court's second decision on this case (340 U.S. 498

ered in chronological order. The appellate court's first decision[48] denying enforcement of a board order because the court found the examiner to be biased was reversed and remanded.[49] In its second opinion[50] the appellate court considered the evidence pro and con on the record as a whole, and again refused to enforce the board's order—this time on the ground that there was not substantial evidence to support the board's conclusions. The Supreme Court in its second opinion[51] approvingly recognized the appellate court's review of the whole record and affirmed the decision.

Speaking of the circuit court's review the Supreme Court said, "The court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence." [52] Thus the circuit court's second decision of *National Labor Relations Board v. Pittsburg Steamship Company*[53] stands as an approved example of a review of the record as a whole, in which it was found that opposing evidence detracted so much from the weight of the evidence upon which the board relied that the evidence for the board's conclusion was less than substantial.

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Criminal Liability for Nonsupport of an Illegitimate Child

With the passage of Act 164 of 1950, Article 74 of the Criminal Code, which establishes criminal liability for the nonsupport of a wife or child, was broadened to cover illegitimate children. A provision was inserted to the effect that "Solely for the purpose of determining the obligation to support the court

[1951]) handed down the same day the Court decided the *Universal Camera* case, it was held that this case was controlled by the *Universal Camera* decision. Therefore the case is discussed as being subsequent to the *Universal Camera* case.

48. 167 F. 2d 126 (6th Cir. 1948).
49. 337 U.S. 656 (1949).
50. 180 F. 2d 731 (6th Cir. 1950).
51. 340 U.S. 498 (1951).
52. Id. at 502.
53. 180 F. 2d 731 (6th Cir. 1950).