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# Administrative Law -- Scope of Judicial Review -- Taft-Hartley Act

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# CASES NOTED

## ADMINISTRATIVE LAW—SCOPE OF JUDICIAL REVIEW— TAFT-HARTLEY ACT

The National Labor Relations Board issued a cease and desist order against petitioner for unfair labor practices, under the authority of the Wagner Act.<sup>1</sup> The Circuit Court denied enforcement of the order, subsequent to the passage of the Administrative Procedure Act and of the Taft-Hartley Act which were admittedly the controlling statutes. The court did not consider whether the requirements in the aforementioned acts, that labor board findings be in accordance with law and supported by substantial evidence on the whole record, had extended the scope of judicial review.<sup>2</sup> The Supreme Court remanded the case for consideration of the effect of the Administrative Procedure Act and of the Taft-Hartley Act on the scope of judicial review of National Labor Relations Board findings.<sup>3</sup> *Held*, that more effective judicial review of Board findings was initiated by the Administrative Procedure and Taft-Hartley Acts and that the Board's findings were not sustained by substantial evidence on the record considered as a whole. *Pittsburgh S. S. Co. v. NLRB*, 180 F.2d 731 (6th Cir. 1950).

Under the Wagner Act, National Labor Relation Board findings were based on all the testimony<sup>4</sup> and were conclusive if supported by evidence.<sup>5</sup> Both the Administrative Procedure Act and the Taft-Hartley Act, however, require that the findings be supported by substantial evidence<sup>6</sup> on the record considered as a whole.<sup>7</sup> The Board was not bound by any rules of evidence by express provision in the Wagner Act,<sup>8</sup> and this was not changed in the Administrative Procedure Act.<sup>9</sup> However, the Taft-Hartley Act requires that the Board proceed, so far as is practicable, in accordance with the rules of evidence of the district courts of the United States<sup>10</sup> and act only in accordance with the preponderance of evidence.<sup>11</sup>

The Administrative Procedure Act generally was believed to call for a more critical examination of administrative findings by the courts, but judi-

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1. *Pittsburgh S.S. Co.*, 69 N.L.R.B. 1395 (1946).
  2. *Pittsburgh S.S. Co. v. NLRB*, 167 F.2d 126 (6th Cir. 1948).
  3. *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656 (1949).
  4. 49 STAT. 454 (1935), 29 U.S.C. § 160 (c) (1946) (Wagner Act).
  5. 49 STAT. 454 (1935), 29 U.S.C. § 160 (e) (1946) (Wagner Act).
  6. 60 STAT. 244 (1946), 5 U.S.C. § 1009 (e) (1946) (Administrative Procedure Act); 61 STAT. 148 (1947), 29 U.S.C. § 160 (e) (Supp. 1946) (Taft-Hartley Act).
  7. 60 STAT. 241 (1946), 5 U.S.C. § 1006 (c) (1946) (Administrative Procedure Act); 61 STAT. 148 (1947), 29 U.S.C. § 160 (e) (Supp. 1946) (Taft-Hartley Act).
  8. 49 STAT. 454 (1935), 29 U.S.C. § 160 (b) (1946) (Wagner Act).
  9. 60 STAT. 244 (1946), 5 U.S.C. § 1009 (c) (1946) (Administrative Procedure Act).
  10. 61 STAT. 147 (1947), 29 U.S.C. § 160 (b) (Supp. 1946) (Taft-Hartley Act).
  11. 61 STAT. 147 (1947), 29 U.S.C. § 160 (c) (Supp. 1946) (Taft-Hartley Act).

cial interpretation has not sustained that belief.<sup>12</sup> It was hoped that the Taft-Hartley Act would succeed where the Administrative Procedure Act failed.<sup>13</sup> By requiring the NLRB to follow rules of evidence, Congress expected to do away with unfounded inferences which courts had been reluctant to set aside in deference to the specialized knowledge supposedly inherent in administrative boards.<sup>14</sup> Congress anticipated that expert inference would not satisfy the requirement that the Board act only on a preponderance of the testimony.<sup>15</sup>

Weighing of the evidence by a reviewing court was not considered within the scope of judicial review under the Administrative Procedure Act<sup>16</sup> or the Taft-Hartley Act<sup>17</sup> for to do so would be to burden the courts with cases *de novo*.<sup>18</sup> By inserting the statutory provisions in the Taft-Hartley Act allowing only legally admissible, competent and relevant evidence and requiring determination in accordance with the preponderance of the evidence, Congress expected to materially extend the scope of review.<sup>19</sup> The courts would have to see that the statutory requirements were observed by the Board and determine questions of law which would be raised.

Prior to the instant case the weight of authority has been that the scope of judicial review was not extended by the Administrative Procedure Act and the Taft-Hartley Act.<sup>20</sup> While the courts recognize that the Congressional intent was to broaden the scope of judicial review, they have held that the Congress failed in its intent.<sup>21</sup> The reviewing court cannot weigh the evidence because there cannot be a trial *de novo*.<sup>22</sup> Consideration of the whole record has not been interpreted as allowing the courts to weigh evidence or to make independent findings of fact, but to require them to find substantial evidence on the whole record rather than only on one side.<sup>23</sup> Congress apparently believed some courts had been satisfied with substantial evidence on one side only.<sup>24</sup> The power to draw inferences, decide facts and determine credibility of witnesses remains in the Labor Board.<sup>25</sup>

A determination by the NLRB is similar to a jury verdict which may

12. H.R. REP. No. 510, 80th Cong., 1st Sess. 1162 (1947).

13. *Ibid.*

14. *Ibid.*

15. *Id.* at 1159.

16. *See* Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 685 (9th Cir. 1949).

17. H.R. REP. No. 510, 80th Cong., 1st Sess. 1159 (1947).

18. *Id.* at 1162.

19. *Ibid.*

20. *But see* NLRB v. Caroline Mills, Inc., 167 F.2d 212, 213 (5th Cir. 1948) ("there total purpose has been . . . to give the courts more latitude on review."); NLRB v. Tappan Stove Co., 174 F.2d 1007, 1008 (8th Cir. 1949) ("In the matter of factual review, the Taft-Hartley Act . . . merely broadened the Wagner Act . . .").

21. *See* NLRB v. Austin Co., 165 F.2d 592, 595 (7th Cir. 1947); NLRB v. Continental Oil Co., 179 F.2d 552, 555 (10th Cir. 1950).

22. NLRB v. Austin Co., *supra* note 21.

23. *See* Willapoint Oysters, Inc. v. Ewing, *supra* note 16 at 689.

24. NLRB v. Universal Camera Corp., 174 F.2d 749, 752 (2d Cir. 1950).

25. *See, e.g.,* Victor Mfg. & Gasket Co. v. NLRB, 174 F.2d 867, 868 (7th Cir. 1949); Eastern Coal Corp. v. NLRB, 176 F.2d 131, 135 (4th Cir. 1949); NLRB v. Minnesota Mining & Mfg. Co., 179 F.2d 323, 325 (8th Cir. 1950).

be set aside only if not supported by substantial evidence.<sup>26</sup> The courts are in the same position as they were under the Wagner Act in reviewing to determine whether or not there is substantial evidence to sustain the findings on the record as a whole.<sup>27</sup> The provisions in the Wagner Act that findings supported by evidence are conclusive is qualified in both the Administrative Procedure Act and the Taft-Hartley Act by the word "substantial".<sup>28</sup> But the Supreme Court has interpreted the word "evidence" in the Wagner Act as meaning substantial evidence.<sup>29</sup> The courts have said that all that has been done by the statutes is to make definite what was already implied by the courts.<sup>30</sup>

The principal case, though not alone in holding that the scope of judicial review has been broadened,<sup>31</sup> appears to be the strongest on the side it takes. Certainly there are changes in procedure by the Administrative Procedure Act and the Taft-Hartley Act, but whether or not there has been a substantial broadening of judicial review is not obvious. The majority of cases recognize that it was the intent of Congress to broaden the scope of judicial review but that they were not successful. The court in the instant case has rendered the decision with deference to interpretations by the members of Congress in the Congressional reports of both the Administrative Procedure Act and the Taft-Hartley Act. While, strictly speaking, the scope of review may not have been extended, the practical effect is a lessening of power in the National Labor Relations Board by the abolition of hearsay and expert inferences unsupported by evidence.

## BAILMENT — USE OF COIN OPERATED LOCKERS

Defendant rented coin operated lockers to the public retaining duplicate keys which were used to remove goods left overtime. Plaintiff placed jewelry in one of the lockers, locked it, took the key; and, opening the locker within the time allowed for storage, he found the jewelry missing. An action based on constructive bailment was brought by the plaintiff to recover the value of the goods stored. *Held*, that since the defendant could not exclude the plaintiff's access to and control over the plaintiff's property, the exclusive possession and physical control essential to a constructive bailment were absent and no recovery was allowed. *Marsh v. American Locker Co.*, 72 A.2d 343 (Super. Ct. N.J. 1950).

In both actual and constructive bailment the common law relationship

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26. See *NLRB v. Minnesota Mining & Mfg. Co.*, *supra* note 25.

27. See *NLRB v. Continental Oil Co.*, *supra* note 21.

28. See note 6 *supra*.

29. See *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299 (1939).

30. See *NLRB v. Universal Camera Corp.*, *supra* note 24.

31. See note 20 *supra*.