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The Right of an Administrative Agency to Draw Inferences - Radio Officers Union v. National Labor Relations Board, National Labor Relations Board v. International Brotherhood of Teamsters, Gaynor News Company, Inc. v. National Labor Relations Board

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THE RIGHT OF AN ADMINISTRATIVE AGENCY TO DRAW INFERENCES

Radio Officers' Union v. National Labor Relations Board, National Labor Relations Board v. International Brotherhood of Teamsters, Gaynor News Company, Inc. v. National Labor Relations Board[1]

By GARY W. SMITH*

A disagreement between the Federal Courts of Appeals over the interpretation of section 8(a)(3) of the National Labor Relations Act as amended by the Taft-Hartley Act (hereinafter called "the Act" when referred to in its entirety as amended) impelled the Supreme Court to grant certiorari in the above three cases consolidated on appeal. The decisive part of section 8(a)(3) reads:

> "(a) It shall be an unfair labor practice for an employer—
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> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."[2]

In all three cases sufficient facts existed to show discrimination on the employer's part towards the employee.[3] But once the basic fact that the employer had discriminated

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[1] 347 U. S. 17 (1954). Three cases consolidated.

[2] Section 8(a)(3) of the National Labor Relations Act, as amended in 1947 by the Taft-Hartley Act, 65 Stat. 601, 29 U. S. C. (Supp. V), Section 158(a)(3), 29 U. S. C. A., Section 158(a)(3).

[3] In regards to the Gaynor case even Mr. Justice Black says in his dissent, "Unquestionably payment of disparate wages to union and non-union employees is 'discrimination' as that term is used in §8(a)(3)". He also remarks as to Radio Officers' and Teamsters:

> "The Board found on sufficient evidence that each of the two unions here 'caused' an employer to treat an employee differently from the way it treated other employees, that is, the employer was caused 'to discriminate' within the meaning of §8(a)(3)." *Supra*, n. 1, *dis. op.* 57, 61.

against the employee had been established, conflict arose over whether express proof was essential to show that this discrimination encouraged or discouraged employees in their outlook towards the union, or whether the Board should have the right to infer this from facts presented before it?

The proceedings in the *Teamsters* case were brought by one Frank Boston against his union. Boston was a truck driver employed by the Byers Transportation Company. There was a seniority list established by the company under a collective bargaining agreement it had with the union. Because Boston failed to pay his union dues on time, he was dropped in seniority, and correspondingly, did not receive those driving assignments he otherwise would have obtained. The issue was whether or not Byers acted to encourage union membership. No direct evidence was mustered to show its move was prompted by this motive, but the Board concluded that this was the reason because the company knew that such end would be the natural and probable result of its actions; consequently, the union violated section 8(b)(1) and 8(b)(2) by impelling the company to drop Boston on the seniority list.[4] Upon petition the Eighth Circuit refused to grant a decree enforcing the Board's order on the grounds that no express evidence had been produced to prove that this motive actually stimulated the employer's discrimination and that the Board could not infer such.[5]

In the *Radio* and *Gaynor* cases, the Second Circuit Court of Appeals took a diametrically opposite point of view to that held by the Eighth in *Teamsters*.

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[4] The Board order required the Company to:

"1. Cease and desist from:

(a) Causing or attempting to cause Byers Transportation Company, Inc., its officers, agents, . . . to reduce the seniority of, or otherwise discriminate against, any of its employees because they are delinquent in their payment of dues to International Brotherhood of Teamsters, . . ., Local Union No. 41, A. F. L., except in accordance with Section 8(a)(3) of the Act." International Brotherhood of Teamsters, etc., 94 NLRB 1494, 1497 (1951).

[5] As Judge Thomas said for the majority of the Eighth Circuit:

"Having considered the record as a whole we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston did or would encourage or discourage membership in any labor organization." National Labor Rel. Bd. v. International Brotherhood, 196 F. 2d 1, 4 (8th Cir., 1952). Since there was enough evidence to prove a discrimination, the Court substitutes its judgment for that of the Board and concludes that it was not reasonable for the Board to infer that this discrimination encouraged an increase in union membership. The result would be to require express evidence that such discrimination encouraged membership.

Radio had its beginning in a complaint made to the National Labor Relations Board by a member of the Radio Officers' Union. One Willard Christian Fowler reported to this agency that the A. H. Bull Steamship Company refused to hire him because of a request made by the union secretary. There was a collective bargaining agreement between the union and the company covering the filling of vacancies. The company agreed to hire only those men in good standing with the union. The former had notified Fowler that there was a position to be filled and that it wished to hire him. Fowler neglected to obtain clearance from the union and the former holder of the position reported this action to the Radio Officers' Union. The latter's secretary requested the company not to employ Fowler in that he was suspended for "edging" another member. The secretary actually did not have the authority to suspend Fowler; thus, the complainant was in good standing at all times up to the time the case was instituted. The Board upon these facts concluded that the union violated section 8(b)(2) of the Act, and issued a cease and desist order against it.[6] Later an enforcement decree was granted the Board on petition. The Court reasoned that there was substantial evidence showing that the action of the union precipitated a discrimination against Fowler by his employer which had the natural and probable effect of encouraging union membership.[7]

In the third case, the Gaynor News Company had an agreement with the Newspaper and Mail Deliverers' Union of New York which allowed for special wages and paid vacations. Not all employees in the delivery department were union members. A supplementary contract provided that in case the parties entered into a new agreement the wage rates set therein would be retroactive for three months. In 1948 a new agreement was made between the company and the union which provided for increased wage and vacation benefits. The union was touted as the exclusive bargaining agent for all the employees in the delivery department. Under the supplementary agreement the company retroactively paid the new wage and vacation benefits

[6] Radio Officers' Union of Commercial Telegraphers Union, 93 NLRB 1523, 1528 (1951).

[7] Chief Judge Swan, in speaking for the majority, said:

"Refusal of clearance caused the company to discriminate against Fowler in regard to hire. Without the necessary clearance it could not accept him as an employee. The result was to encourage membership in the union. No threats or promises to the company were necessary." National Labor Relations Bd. v. Radio Officers' Union, 196 F. 2d 960, 965 (2d Cir., 1952).

to union men; it did not make these payments to non-union personnel. One of these, Sheldon Loner, filed charges against the company alleging a violation of the Act. The Board agreed with this contention by holding that the company had violated section 8(a)(3) of the Act by using union membership or non-membership as a line of demarcation in its disparate policy towards the delivery department employees.[8] The defense of the company that the record disclosed no evidence that the discrimination encouraged non-union men to join the union was rejected by the Board which reasoned that the company knew that the natural and probable results of its action would be an encouragement.[9] The Court of Appeals upheld the Board in saying:

> "Discriminatory conduct, such as that practiced here, is inherently conducive to increase union membership. In this respect, there can be little doubt that it 'encourages' union membership, by increasing the number of workers who would like to join and/or their quantum of desire."[10]

The view taken by the Second Circuit Court in the *Gaynor* and the *Radio* cases that the NLRB has a right to draw reasonable inferences from the facts before it has had support in the First, Fourth and Ninth Circuits.[11] On the other hand, other circuits had held that the Board must have some express evidence to support its conclusions.[12] This split among the circuits concerning the in-

[8] Gaynor News Company, Inc., 93 NLRB 299 (1951).

[9] *Ibid.*

[10] National Labor Relations Board v. Gaynor News Co., 197 F. 2d 719, 722 (2nd Cir., 1952).

[11] Judge Hartigan, writing the opinion for the First Circuit in National Labor Relations Bd. v. Whitin Machine Works, 204 F. 2d 833, 887 (1st Cir., 1953):

> "On the record before us, we can only say that there is substantial evidence from which to infer that Tancrell was fired because he had asked Mrs. Cahill to assist him in activity which is protected by the Act. Where conflicting inferences may be drawn it is not for us to disagree with the findings of the Board."

He then cited National Labor Relations Bd. v. Southland Mfg. Co., 201 F. 2d 244 (4th Cir., 1952), *infra, circa*, n. 14. See also National Labor Relations Bd. v. Walt Disney Productions, 146 F. 2d 44 (9th Cir., 1944).

[12] The Court said in National Labor Rel. Bd. v. Reliable Newspaper Del., 187 F. 2d 547, 552 (3rd Cir., 1950):

> "Generally speaking, the proposition that in order to establish an 8(a)(3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support."

See Western Cartridge Co. v. National Labor Relations Board, 139 F. 2d 855 (7th Cir., 1943), which held there had to be evidence to prove an employer's discrimination discouraged membership in the Union. (The Court said this on a rehearing.)

ference drawing powers of this administrative agency points up the significance of the instant case. The opinion sets forth the Court's view on the effect which section 8(a)(3) exerts upon the power of the NLRB to draw conclusions, thereby reflecting the view of the Court as to the inference drawing powers of administrative agencies generally. Up until these cases, lawyers and judges had not been sure exactly what stand the Supreme Court would take as to the effect that the Taft-Hartley Act might have on the review power of the Appellate courts on NLRB matters.[13] Should the appellate courts take the same position that they maintain towards a tribunal sitting in equity or without jury? Or should they adopt a different attitude towards the administrative board? When two reasonable but differing inferences may be drawn from the same premise, should they allow the Board's finding to stand or instead substitute their own judgment?

Earlier opinions written in the Fourth Circuit by Chief Judge Parker and Associate Judge Soper discuss the problem in *National Labor Relations Board v. Southland Mfg. Co.*[14] Chief Judge Parker argues that the only duty of the Circuit Courts is to see that there has been enough evidence before the Board to uphold the feasibility of its conclusion.[15] He says that the review made by the Circuit Courts of Appeal should be one to secure NLRB action based on a study of all the evidence instead of upon parts of it.[16] Judge Parker makes it clear that the Supreme Court in *Universal Camera Corp. v. National Labor Relations Board*,[17] did not go so far as to say that the Circuit Courts could substitute their judgment for that of the Board's when two reasonable but differing inferences could be

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[13] *Supra*, ns. 11, 12.

[14] 201 F. 2d 244 (4th Cir., 1952).

[15] *Ibid*, 248. Judge Parker expresses the view of the Fourth Circuit in saying:

> "This Court has never taken any other view than that the substantiality of the testimony to support the Board's findings must be determined from the record considered as a whole. The question here is, whether in considering the whole record, there is substantial evidence of circumstances from which the conclusion of discriminatory discharge can legitimately be drawn. . . . We wish to make it clear, however, that the Courts have not fallen into the Serbonian Bog, which Congress so carefully avoided, of adopting the rule applicable in equity appeals for reviewing administrative agency action."

See also Eastern Coal Corp. v. National Labor Relations Board, 176 F. 2d 131 (4th Cir., 1949).

[16] *Ibid.*

[17] 340 U. S. 474 (1951).

drawn from the same facts.[18] His argument is subsequently paralleled by that line of thought expressed by Judge Chase in his part-concurring, part-dissenting opinion to the Second Circuit Court of Appeal's decision in *National Labor Relations Board v. Gaynor News Service.*[19]

In concurring in the *Southland* case, Judge Soper thought that *Universal Camera* went further than merely expressing the Court's dissatisfaction over the application of the substantial evidence rule by the circuit courts in reviewing cases up from the Labor Board. His view was that the Taft-Hartley Act, as interpreted in the *Universal Camera* case, augmented the reviewing Court's power of review to the extent of allowing the judiciary to substitute its judgment for that of the Board's whenever it deemed it

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[18] The majority opinion in Southland Mfg. Co., *supra*, n. 14, 248, restates the following passage from Universal Camera, *supra*, n. 14:

"To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. 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*."

[19] *Supra*, n. 10, 724. Chase (concurring in part and dissenting in part):

"I agree with my brothers that the unfair labor practices found were established by the evidence and differ with them only in that I would enforce the order as made by the Board. As was said in International Association of Machinists, etc. v. National Labor Relations Board, 311 U. S. 72, 82, 61 S. Ct. 83, 89, 85 L. Ed. 50, 'It is for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged. National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 271, 58 S. Ct. 571, 576, 82 L. Ed. 831; National Labor Relations Board v. Falk Corp., 308 U. S. 543, 461; 60 S. Ct. 307, 311, 84 L. Ed. 396.' Indeed, it is not because the remedy itself is wrong but only because the Board has not acted upon the union's petition for certification, while the unfair labor practices of which the union is in part the beneficiary remain in effect, that my brothers are withholding full enforcement. That seems to be such an unjustifiable interference with the power of the Board to exercise its sound discretion that I can not subscribe to it."

It must be understood that the majority enforced the Board's order only after modifying it. So one may suppose that although the Court did not feel that it had the right to completely substitute its judgment for that of the Board in that it felt that the latter's conclusions were on the whole reasonable, it did take upon itself to modify the order because it felt as originally stated such order was much too harsh. Thus, it still, to a lesser degree, substituted its judgment for that of the Board's. This is apparently what Judge Chase disagrees with; he appears to be nearly unequivocally for the idea that the Court should rarely substitute its judgment for that of the NLRB.

necessary.[20] Judge Soper respects the Board's "expertise", but still implies "soft-pedaling" when considering its merit in evaluating an agency decision. He does not think that the Board's judgment should have as much finality as is accorded by Chief Judge Parker.[21] Upon comparison, it is apparent that this view is comparable to that taken by the Eighth Circuit in *Teamsters*.[22]

In affirming *Gaynor* and *Radio*, while reversing *Teamsters* in the instant case, the Supreme Court says flatly that the Board may draw a conclusion as to the effect of an employer's action towards his employees so long as it is reasonably derived from those facts before it.[23] There need not be separate and direct evidence of every conclusion of fact. Reasonable inferences of fact may be drawn. Analysis discloses that the reasoning that the Court uses in affirming the Second Circuit stems from basic administrative law theory. The "expertise" of an administrative agency in a particular field sets the agency apart from the judiciary. This quality (ordinarily) merits more weight to be given a conclusion made by an agency than to that drawn by a court on the same point.[24] Consequently, the

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[20] "But it is now obvious that we may not continue to apply the rules which we announced in West Virginia Glass Speciality Co. v. N.L.R.B., 4 Cir., 134 F. 2d 551, before the Acts of 1946 and 1947 were passed, and which we repeated in Eastern Coal Corp. v. N.L.R.B., 4 Cir., 176 F. 2d 131, after these statutes were enacted. Specifically we may not say that the findings of fact of the Board must be sustained unless the supporting evidence is so weak that we would direct a verdict if the case had been tried by a jury; and we may not say broadly that it is beyond our power to inquire whether the findings are so clearly erroneous that an injustice has been done, or that we are not permitted in any case to substitute our judgment for that of the Board." *Supra*, n. 14, 250.

[21] "True it is that the judgment of the Board is entitled to respect, and weight must be given to its expertness in its specialized field and we may not try the case *de novo* or displace the Board's choice between two fairly conflicting views; yet we must exercise our independent judgment and substitute it for that of the Board's if it is clear to us that the Board has not made a fair estimate of the worth of the testimony or we cannot conscientiously find that the supporting evidence is substantial when viewed in the light supplied by the entire record, including the evidence opposed by the Board's view." *Ibid. Cf.* n. 18.

[22] *Cf.* n. 5 with n. 20.

[23] "Since encouragement of union membership is obviously a natural and forseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership, and the Eighth Circuit erred in holding encouragement not proved." 347 U. S. 17, 52 (1954).

[24] Professor Davis says in his text on ADMINISTRATIVE LAW:

"The one element that stands out above all others is the comparative qualification of the agency and of the court to decide the particular question." DAVIS, ADMINISTRATIVE LAW (1951), Sec. 248, p. 893.

appellate court may not substitute its judgment for that of the Board's as it might with regard to a lower tribunal. Its power is limited to reviewing the substantiality of the evidence on the whole record. This is primarily what the Supreme Court said in *Universal Camera.*[25] The *Radio Operator's Union*[26] case emphasizes this to be the Court's view by dispelling the belief that as interpreted in *Universal Camera* the Taft-Hartley Act negates the Labor Board's power to draw inferences as previously permitted under the *Wagner Act* and extended in the *Republic Aviation*[27] case. The Court supports the Labor Board's having the right to draw reasonable inferences as previously, but the inferences must be reasonable in the light of all the evidence before it and not related solely to some part of it without regard to the record as a whole.

Mr. Justices Burton and Minton joined Mr. Justice Frankfurter's concurring opinion which delineates and clarifies that of the majority.[28] This opinion poses two alternative interpretations of section 8(a)(3) and then selects that one allowing the Board to conclude that the employer's conduct had a tendency to encourage or discourage union membership.[29] It points out that the Court voices approval of the NLRB possessing the power to "reasonably infer" from the facts laid before it.[30] On the other hand, the Court need not always uphold the Board's conclusion. Any order issued because of a decision based on only part of the record would be deemed unreasonable and thereby be looked upon unfavorably by the Justices. However, if the Board weighs all the evidence before it, it appears that their decision would have to be most arbitrary before the

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[25] *Supra*, n. 17.

[26] "In *Universal Camera*, 340 U. S. 474, we carefully considered this legislative history and interpreted it to express dissatisfaction with too restricted application of the 'substantial evidence' test of the Wagner Act. We noted, however, that sufficiency of evidence to support findings of fact was not involved in the *Republic Aviation* case, and stated that the amendment was not 'intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, . . .' There is nothing in the language of the amendment itself that suggests denial to the Board of the power to draw reasonable inferences." *Supra*, n. 23, 50.

[27] 324 U. S. 793 (1945).

[28] Mr. Justice Frankfurter, concurring:
"Since, guidance in the exercise of this discretion by the Labor Board, and not merely guidance for litigants, thus becomes a function of the Court's opinion, it is doubly necessary to define the scope of our ruling as explicitly as possible." *Supra*, n. 23, *conc. op.* 55.

[29] *Ibid*, 55, 56.

[30] *Ibid.*

Supreme Court would uphold a substitution of judgment by a Circuit Court of Appeals.[31]

Mr. Justices Black and Douglas dissented. In regard to *Gaynor,* they do not agree with the new construction given section 8(a)(3) by the Labor Board and upheld by the majority. Justice Black tends to substitute his judgment for that of the Board in saying:

> "I think the Court's new interpretation of §8(a)(3) imputes guilt to an employer for conduct which Congress did not wish to outlaw."[32]

It is reasonable to suppose that the Gaynor News Company knew that the natural and probable results of its discrimination would be an encouraging of membership in the union.[33] On the other hand, it is logical to assume that Congress did not mean to penalize an employer exercising his judgment in fixing working conditions unless he discriminates to vary the strength of the union for his own gain.[34] However, between the two logical and reasonable constructions of the phrase "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization: . . ."[35] that of the Board should prevail.[36]

The second part of the dissent is concerned with *Radio* and *Teamsters,* but is based upon the same reasoning set forth in that part of the opinion that discusses Gaynor. Justice Black does not think the unions in *Radio* and *Teamsters* violated section 8(b)(2) of the Act in making their requests to the companies because a violation of section 8(b)(2) depends on a violation of 8(a)(3) and the companies here did not violate section 8(a)(3) by discriminating against their employees.[37] Apparently the two dissent-

[31] "Of course, there will be cases in which the circumstances under which the employer acted serve to rebut any inference that might be drawn from his acts of alleged discrimination standing alone."

"In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. . . . The Board's task is to weigh everything before it, including those inferences which, with its specialized experience, it believes can fairly be drawn." *Ibid.*

[32] 347 U. S. 17 (1954), *dis. op.* 57, 58.

[33] *Ibid,* 36-38, 52.

[34] *Ibid,* 60.

[35] *Supra,* n. 2.

[36] *Supra,* n. 24.

[37] They did not do it voluntarily for their own gain, *supra,* n. 34:

"A union does not violate §8(b)(2) by causing an employer to discriminate unless that employer discrimination is 'in violation of §8(a)(3)'." *Supra,* n. 30, 61.

ing justices foster the view that there should have been evidence expressly pointing out that the companies discriminated against the employees to encourage union membership.[38] They do not seem to think that the Board should have as broad a right to infer as shown in these three cases.[39]

While the instant decisions deal only with the Labor Board, their larger and more significant import is apparent. As previously mentioned, the majority rests heavily on the NLRB's "expertise" in labor relations as a reason for allowing its broad inferences.[40] Of necessity, the same reasoning carries over to other agencies, which are assessed with the responsibility of administering statutes controlling particular areas of economic importance and requiring development of specialized knowledge for their proper administration.

Many commentators favor the principle of comparative qualifications being used as a governing criteria in fixing the scope of review given decisions made by administrative agencies.[41] But this works best only when tempered by giving additional consideration to the particular field over which the agency presides and to the particular case before such agency. For example, it would seem that no one would normally question the superiority of an F.C.C. decision that depended upon a fine point in electronics, where the Commission is required to have special skill and experience.[42] On the other hand, there are many matters involved in agency decisions, where judicial competence exceeds that of the agency.[43] As to such matters the shadow of indecision looms and the authorities hedge.[44] In the area of the instant cases, it could be felt that judges may have

[38] "The Board also found that this 'discrimination' had a tendency to encourage union membership. But there was no finding that either employer's discrimination occurred *in order* to encourage union membership. For the reasons set out in my discussion of §8(a)(3) in the *Gaynor* case I think these findings fall short of showing an employer 'violation of §8(a)(3)'." *Supra*, n. 32, 61.

[39] *Cf.* the text of Justice Black's dissent with the concurrence of Judge Soper in NLRB v. Southland Mfg. Co., *supra*, n. 21.

[40] *Supra*, n. 26, where the text of the opinion showing the majority's position is quoted.

[41] DAVIS, *loc. cit.*, *supra*, n. 24, 893, says: "Variation in intensiveness of review in accordance with comparative qualifications is so natural as to be almost inevitable whatever the theoretical formula." In footnote 113, he says: "Landis expressed the belief that 'the extent of review is being shaped . . . by reference to an appreciation of the qualities of expertness for decision that the administrative may possess'."

[42] "When a problem of radio engineering has been decided by the FCC's technicians, one can hardly expect legally trained judges to substitute judgment." *Ibid*, 894.

[43] *Ibid.*

[44] *Ibid.*

the capacity to decide many labor problems as well as the NLRB, and that the concept of "expertise" has been extended beyond its proper and useful scope. In at least one comment, attention has been called to the fact that Congress had some such feeling in passing the Taft-Hartley Act.[45] It would seem that the majority of the Supreme Court, however, is obviously inclined to require more explicit direction from Congress before allowing reviewing courts to substitute their judgment as to the inferences that may be reasonably drawn from evidence in the area of the agency's competence such as is involved in the instant cases. It would seem, also, that this could carry over into other related matters for the same agency, the NLRB, and as to similar matters for all other agencies.

[45] "The language of the conference and committee reports to the LMRA indicate Congress was no longer impressed with the Board's expert knowledge and disapproved of certain of its decisions. But what it enacted was an enlargement of the scope of review over the Board's decisions. It did not explicitly take away the Board's power of inference, and thereby eliminate one of the basic reasons for the Board's existence." 40 Va. L. Rev. 494, 496 (1954).