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Baker Sales Barn, Inc. v. Montana Livestock Commission, 367 P.2d 775 (Mont. 1962)

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It is submitted that the instant case leaves the law completely unsettled and furnishes no guide for district judges, litigants, and attorneys. A definitive, authoritative ruling must some day be made. When an appropriate case again arises, the court should have no trouble in determining that the application of the doctrine is within the inherent power of the court.

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DISCRETIONARY DECISION OF A STATE ADMINISTRATIVE AGENCY WILL BE SUSTAINED IF BASED ON SUBSTANTIAL EVIDENCE.

Baker Sales Barn, Inc. applied to the Montana Livestock Commission for a "certificate of public convenience and necessity" authorizing the licensing of a livestock market at Baker, Montana, under the appropriate Montana statutes. After a hearing the commission denied the application, concluding that the applicant failed to show the requisite public convenience and necessity. On appeal the district court set aside the commission's denial and ordered the certificate to issue. The court reviewed the evidence presented to the commission and found that the commission had acted capriciously and arbitrarily and had abused its discretion. On appeal to the Montana Supreme Court, *held,* reversed. Under the Montana statute permitting an appeal from a decision of the Montana Livestock Commission, the courts will not interfere with the commission's factual determination, if based on substantial evidence.[1] *Baker Sales Barn, Inc. v. Montana Livestock Commission,* 367 P.2d 775 (Mont. 1962) (Justice Doyle specially concurring, and Justices John C. Harrison and Adair writing separate dissenting opinions).

The instant decision recognizes what is commonly referred to as the "substantial evidence" rule for determining the evidentiary validity of an administrative decision.[2] The rule first appeared in a 1912 decision by

[1]The Montana statute permitting an appeal from a decision of the Montana Livestock Commission is § 46-917 of the REVISED CODES OF MONTANA, 1947. This section provides in part: ". . . The trial shall be held summarily before the district court upon the record of the evidence presented to the commission of which a complete record must be kept of the hearings of the commission as shown by said transcript and the exhibits, if any, presented to the commission and . . . upon which its decision was rendered and there shall not be any additional evidence introduced or anything in the nature of a trial de novo. The court shall not substitute its discretion for that of the commission but shall determine whether the commission and whether it acted according to law."

The district court held this statute unconstitutional because it did not provide for a trial *de novo.* The supreme court declared, "[The district court] did not need to go into any constitutional question [because it could have decided the case on other grounds] and under the familiar rule announced many times we shall not go into constitutional matters unless it is considered necessary to a decision on the merits." Instant case at 779. The supreme court, however, after reversing the district court's decision on the merits failed to answer the respondent's original contention that the appeal statute is unconstitutional. It can be assumed that, by finding against the respondent, the supreme court impliedly answered the question in the negative, *i.e.,* the statute is not unconstitutional.

[2]In interpreting the appeal statute, the court said, "The statutes confer, whether wisely or unwisely, the original discretion in the Commission. Such Commission is made up, presumptively at least, of men of experience in the field regulated, and when their discretion is exercised based upon substantial evidence, as it was here, that discretion should not be interfered with by the courts." Instant case at 782.

the United States Supreme Court, *ICC v. Union Pacific Railroad Co.*[3] The rule, as originally stated, was simple in form but proved to be grossly inadequate as a guide for a reviewing court.[4] Subsequent to this decision, however, in an effort to establish certainty in the scope of review, numerous attempts have been made to describe the quantum of evidence necessary to constitute "substantial" evidence.

The difficulty in applying this seemingly simple test can be traced to two principle causes: 1) legislative failure to clarify the extent to which judicial review of an administrative decision is authorized, and 2) judicial attempts to define this expression with terms that are themselves undefinable.[5] The latter merely compounded the shortcomings of the former, thereby resulting in ambiguity rather than certainty.

Two statements of the United States Supreme Court regarding substantial evidence merit particular attention. In *Consolidated Edison Co. v. NLRB*[6] Chief Justice Hughes said, "Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable man might accept as adequate to support a conclusion.'"[7] Later, during the same term of court, in *NLRB v. Columbian Enameling & Stamping Co.*,[8] Mr. Justice Stone clarified the term further by stating that substantial evidence means evidence "affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be 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.[9] These statements are often cited as being consistent with the intent of Congress regarding review of administrative decisions.[10] In these two cases, the Court seems to adopt the substantial evidence test used in the review of jury verdicts.[11] This test, because of its nearly uniform application, is to be preferred to the abstract definitions which have been attempted in other cases. The Adminis-

[3]222 U.S. 541 (1912).

[4]"[The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final: not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." 222 U.S. at 547.

[5]*E.g.*, "more than a mere scintilla." Consolidated Edison Co. v. NLRB 305 U.S. 197, 229 (1936); "induce conviction," "make an impression on reason," "cause one considering the evidence to arrive at a fixed conviction," NLRB v. Thompson Products, Inc., 97 F.2d 13, 15 (6th Cir. 1938); "adequate proof," "concientiously find," Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1950); "rational basis," Montana Power Co. v. Federal Power Comm'n, 112 F.2d 371, 374 (5th Cir. 1940).

[6]305 U.S. 197 (1938).

[7]*Id.* at 229.

[8]306 U.S. 292 (1939).

[9]*Id.* at 300.

[10]A statement of the Attorney General, appended to the Senate Report, explained that the Administrative Procedure Act was intended to embody the law of these cases. § 10 (e) of appendix B of S. Rep. No. 752, 79th Cong. Also see Davis, ADMINISTRATIVE LAW 118 1958).

[11]Montana has applied the *reasonable man* test to jury verdicts since 1934. The test established in Morton v. Mooney, 97 Mont. 1, 11, 33 P.2d 262, 265 (1934), was recently applied by the court in Win Del Ranches, Inc. v. Rolfe and Wood, Inc., 350 P.2d 581, 584 (Mont. 1960). Substantial evidence on which a jury verdict must be based so as to preclude the Supreme Court from disturbing the verdict on appeal, is evidence, "such as will convince reasonable men and on which such men may not reasonably differ as to whether it establishes the plaintiff's case. . . ." Morton v. Mooney, 97 Mont. 1, 11, 33 P.2d 262, 265 (1934).

trative Procedure Act,[12] as construed by Mr. Justice Frankfurter in *Universal Camera Corp. v. NLRB*,[13] has added the concept of looking to the whole record,[14] to determine whether the evidence is substantial, rather than just to the evidence which supports the agency's decision.

A fusion of these three opinions suggests the following test: *Substantial evidence* exists when and only when, after a review of the record as a whole, it can be said that a reasonable man viewing the evidence including the inferences which may be drawn therefrom, could agree with the conclusion reached by the agency.[15]

Implicit in the "reasonable man" test is the recognition that a reasonable man sitting on an administrative tribunal would not necessarily reach the same conclusion that he would reach if he were sitting on a jury, when presented with the same factual situation. Members of an administrative tribunal are often and ordinarily selected because of their particular knowledge of matters in the field regulated. They not only possess, but are also expected to use this expertise in evaluating the evidence presented. Some findings rest on judgment or discretion or policy, which in turn rests on the kind of facts that are not necessarily susceptible of proof.[16] On the other hand, a juror may or may not have special knowledge with regard to the subject matter being litigated. Even if he does have such knowledge, he is to try the case on the evidence adduced, and not upon his personal knowledge.[17]

Although the term "substantial evidence" has appeared in Montana decisions reviewing the factual determinations of administrative agencies for a period of forty-one years, the term is as uncertain and ambiguous as it was when first used. The rule made its first appearance in Montana in *Billings Utility Company v. Public Service Commission*,[18] wherein the supreme court declared, "The [reviewing] court has not the power to substitute its judgment for that of the commission, nor can it set the commission's conclusions aside when they have been made lawfully and reasonably, within

[12]5 U.S.C. §§ 1001 to 1011 (1958).

[13]340 U.S. 474 (1950). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnished, including the body of evidence opposed to the Board's view." 340 U.S. at 488 (1950).

[14]"[T]his is not the same thing as saying that every page must be read. One party normally points out the evidence supporting the finding and the other normally points out the evidence detracting from the finding; by relying on the parties' sifting the judges may often review quite conscientiously without reading the entire record." 4 DAVIS, ADMINISTRATIVE LAW 130 (1958).

[15]This is not a test which has been applied by any court. It is, however, similar to the following test which was proposed by Dean Stason in 1941. "[T]he term 'substantial evidence' should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside. Stason, "*Substantial Evidence*" *in Administrative Law*, 89 U.PA. L. REV. 1026, 1038 (1940-41).

[16]2 DAVIS, ADMINNISTRATIVE LAW 471 (1958).

[17]Downing v. Farmers Mutual Fire Ins. Co., 158 Iowa 1, 138 N.W. 917, 919 (1912).

[18]62 Mont. 21, 203 Pac. 366 (1921).

the proper sphere of authority.''[19] The Montana court then adopted language from *ICC v. Union Pacific Railroad Co.*,[20] the first United States Supreme Court case enunciating the rule.

The substantial evidence rule, thus established, was not applied again by the Montana court until 1933 in *Fulmer v. Board of Railroad Commissioners*.[21] In that case the court was satisfied with the orders of the Board when it found that those orders ''were based upon substantial evidence.''[22] During the twelve year period between these two decisions the Montana court, ignoring the substantial evidence rule, resorted to a variety of tests, including wholly inadequate''[23] and ''honestly arrived at.''[24]

Adding to the uncertainty of the term in Montana is a 1954 case[25] wherein the court leaves the reader wondering whether the substantial evidence test is to be applied by the agency in reaching its decision or by the reviewing court in determining whether the agency's decision should be allowed to stand. In concluding that certain carriers had not shown the necessity for a rate increase, the court declared, ''The proper time for the carriers to justify their request for increased rates by satisfactory and substantial evidence was at the hearing on their application which was then being considered.''[26] In 1957 the court had two opportunities to clarify the term, but instead, chose only to reiterate what they had said in the past. In *State ex rel. Olsen v. Public Service Commission*[27] the court said, ''The rule is that if there be substantial evidence sustaining the order of the board, the courts will not interfere with its conclusion.''[28] In another rate case,[29] decided during the same term, the supreme court stated that it must approve the action of the trial court in affirming the order when ''[a] reading of the transcript and the order of the Commission demonstartes that there was substantial evidence to support its findings.''[30]

The statement that an agency's order will be sustained if supported by substantial evidence is useful for one purpose only, that of settling the controversy then before the court. This statement adds nothin toward the solidification of administrative review in Montana. The court has failed to give the expression the definiteness of content that courts, administrative agencies, litigants, and practitioners need in order to achieve the certainty which is necessary to avoid futile appeals.

The uncertainty referred to above is clearly illustrated by the various opinions in the instant case. The district court apparently did not have the substantial evidence rule in mind when it reviewed the record, and rendered its decision. It is not clear whether that court, in reversing the commission, independently found that the weight of evidence supported the applicant, or whether it failed to find substantial evidence to support

[19] *Id.* at 35, 203 Pac. at 368.
[20] 222 U.S. 541 (1912), discussed *supra* at note 3. See also *supra* note 4.
[21] 96 Mont. 22, 28 P.2d 849 (1933).
[22] *Id.* at 39, 28 P.2d at 855.
[23] Interstate Transit Co. v. Derr, 71 Mont. 222, 232, 228 Pac. 624, 628 (1924).
[24] State *ex rel.* Schoonover v. Stewart, 89 Mont. 257, 275, 297 Pac. 476, 481 (1931).
[25] Freight Rate Ass'n v. Board of R.R. Comm'rs, 128 Mont. 127, 271 P.2d 1024 (1954).
[26] *Id.* at 133, 271 P.2d at 1027.
[27] 131 Mont. 104, 308 P.2d 633 (1957).
[28] *Id.* at 110, 308 P.2d at 636.
[29] State *ex rel.* Olsen v. Public Service Comm'n., 131 Mont. 272, 309 P.2d 1035 (1957).
[30] *Id.* at 280, 309 P.2d at 1040.

the commission's decision.[31] Neither of the dessenting justices seems to base his opinion on substantial evidence. Mr. Justice John C. Harrison concluded that the district court had "sufficient"[32] or "ample"[33] evidence to overturn the decision of the commission. Mr. Justice Adair concluded that the district court had "ample"[34] evidence to warrant its reversing the commission. The majority decision, representing the opinion of two of the justices, concluded that there was substantial evidence to support the commission's decision, but left unanswered several fundamental questions. First, what standard did the court use in determining the substantiality of the evidence. Was the court satisfied with a "mere scintilla," or did it require a "preponderance" of the evidence, or did it apply some standard within these limits?[35] Second, did the court conclude that the evidence was substantial merely by looking at the evidence which supported the commission's decision, or did it look to the record as a whole? Third, what evidence did the court find which it concluded was substantial? These are questions which must be resolved before any measure of certainty can be achieved.

The federal courts have continuously attempted to establish uniformity and definiteness in the scope of judicial review of administrative decisions. The Montana court, on the other hand, has made little, if any progress toward achieving this goal. Perhaps uniformity has not been attempted because the Montana court has determined that it must retain complete discretionary power to tailor the scope of review according to the particular agency involved and factual situation presented. If this premise is incorrect, or improper, it is then submitted that a single comprehensive test, regardless of how broad or how narrow it may be, must be formulated and adopted before any degree of certainty will be achieved. A possible solution is the "reasonable man" test, suggested above.

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[31]The district court concluded that the testimony clearly indicated that the applicant had shown that the proposed market met both the requirements of public convenience and public necessity and therefore the commission had acted capriciously. arbitrarily, and abused its discretion by not granting the certificate. Instant case at 777.

[32]Instant case at 783.

[33]Instant case at 784.

[34]Instant case at 786.

[35]The quantum of evidence which the term "substantial evidence" can be used to describe was summarized in Osage Nation of Indians v. United States, 97 F. Supp. 381, 387 (Ct. Cl. 1951). The court noted that the expression has been judicially construed as meaning everything from "warrant in the record," "rational basis," "not arbitrary," "some evidence," "reasonable," to what is commonly understood as being "the preponderance of the evidence."