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Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER, PETITIONER,

vs.

CARTER COAL COMPANY, GEORGE L. CARTER AS VICE-PRESIDENT AND A DIRECTOR OF SAID COMPANY, ET AL.

BRIEF OF UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE.

The United Mine Workers of America represents to this Honorable Court that it is a labor union composed of workers in and about the bituminous coal mines of the country, that it and its members are vitally interested in the legal questions involved in the above entitled case, and by reason thereof it respectfully asks permission to file this brief as amicus curiae in support of the constitutionality of the Bituminous Coal Conservation Act of 1935.

BRIEF STATEMENT

This case is before the Court on petition of James Walter Carter for writ of certiorari to the United States Court of Appeals for the District of Columbia. Suit was instituted by the petitioner in the Supreme Court of the District, as a stockholder of the Carter Coal Company, to enjoin the company from accepting the code set out in Section 4 of the Bituminous Coal Conservation Act of 1935, and asking that taxing officers of the government be enjoined from enforcing the excise tax provided in section 3 of the Act. The Supreme Court of the District, after an exhaustive hearing, made a series of findings that cover the economic history and functions of the bituminous industry, found the labor regulations invalid but separable from the other provisions of the code which were sustained, and refused to allow the injunctions prayed for in the bill of complaint. The question here involved, so far as touches the interest represented by the Brief of Argument, is the constitutionality of the Act in respect to the tax and to the regulations of the statutory code.

ARGUMENT

RESERVATION OF RIGHTS OF CONTESTATION AND THE SEPARABILITY SECTION

It is a fundamental rule of statutory construction that a legislative enactment will, if possible, be so construed as to avoid holding it repugnant to the Constitution. In United States vs. Delaware & Hudson R. R. Co., 213 U. S. 366, at page 407, the court said:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reason-

> ably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity."

To fairly appraise the Coal Act in its constitutional aspects, the following provision of Section 3 should be kept in mind:

> "That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer."

No producer is deprived of a constitutional right by the incidence of the tax or by acceptance of the

Code. Whether any regulation is beyond the power of Congress, or is, under the facts, inapplicable to any producer, is not a question foreclosed by acceptance of the code or the drawback on the taxes. The Government does not grant or withhold any benefits as the price of submission to regulations beyond its power to impose. In the case of United States vs. Butler et al., decided January 6, 1936, the Supreme Court said of the Agricultural Adjustment Act:

> "The farmer may, of course, refuse to comply, but the price of refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation."

But in the Coal Act Congress has reserved to every producer the right as a code member to enjoy the drawback and contest any regulation imposed upon him. He may accept the code (with this statutory reservation) and under section 6 (b) raise all questions involved in any proceeding or order of the Commission respecting compliance with the regulations. If the Commission makes an order, [under Section 5 (b)], either cancelling his code membership, or directing him to cease and desist, under section 6 (b) he may have judicial protection of his rights in the Circuit Court of Appeals.

If a producer elects to remain without and not accept the code, he is subject to the full taxes; but if he accepts the code he is entitled to the drawback, and neither his acceptance nor the drawback is conditioned on the waiver or any constitutional right. There is, true, a double classifcation for taxing purposes (which will be considered under the next heading), but the only restraint upon the producer ac-

cepting the code is the restraint of constitutional regulations. Why acceptance of the code was required, when this broad right of contestation is reserved would seem to be an inquiry rather of legislative than judicial concern. It may be justified as securing more effective collection of the excise taxes, as well as providing a method of contesting liability for the maximum taxes. It does not violate the "due process" clause of the fifth amendment. In Phillips vs. Commissioner of Internal Revenue, 283 U. S. 589-596, the court said:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate."

Section 15 of the Act further provides as follows:

> "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

In Crowell vs. Benson, 285 U. S. 22-62, the Court said:

> "Further, the Act expressly requires that if any of its provisions is found to be unconstitutional, 'or the applicability thereof to any person or circumstances' is held invalid the validity of the remainder of the Act and 'the applicability of its provisions to other persons and circumstances' shall not be affected. Sec. 50. We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be

> disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged."

In the absence of advisory judgments preceding legislation, and in the presence of judicial power to finally appraise the constitutional merits of enactments, the two sections would seem to be a wise accompaniment of the exercise of congressional authority in a field so beset with questionings.

THE TAX VIEWED ONLY AS REGULATORY

The excise is plainly a revenue measure. The bituminous coal production for 1934 was over 350,000,000 tons. With an average price of $2.00 per ton at the mine the revenues yielded the government on the excise tax imposed, (assuming all producers enjoyed the drawback) would be over 10 million dollars annually.

But if regarded solely as imposed for regulatory purposes, the tax must be held to coerce acceptance only of such regulations as Congress may constitutionally impose. And in this respect the tax is entirely different in its function and nature from the tax involved in the Child Labor Tax case (Bailey vs. Drexel) and the Futures Trading Act case (Hill vs. Wallace), both in 259 U. S.

Willoughby on the Constitution, Vol. 2, Sec. 379, says:

> "The primary purpose of taxes is to obtain revenue for the State. *Taxes, however, may be levied for regulatory purposes. When thus employed the constitutional right to levy them is derived from the constitutional authority of the*

legislature, which authorizes the tax, to regulate the matter in question. (1)

Where a municipal ordinance was attacked on the ground that it violated the Federal Constitution in that the excise or privilege tax imposed was for the purpose of regulating, the court said in Grudling vs. Chicago, 177 U. S. 183, at page 189:

> "It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of a privilege or excise tax. The business is more easily subjected to the operation of the power to regulate where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfills the two functions, one a regulatory and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement violates no provision of the Federal Constitution."

In Bailey vs. Drexel, 259 U. S. 30 (the Child Labor Case) the Act levied a tax of ten per cent of the annual profits of any manufacturer who employed help under 14 years of age. The court held the regulation to be beyond the constitutional power of Congress and that the tax was void as an attempt to coerce compliance with such unconstitutional regulation. But the court said (p. 38):

> "The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important.

(1) The underscoring in all quotations is ours.

> Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. . . .
>
> "So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution." (39)

In Hill vs. Wallace, 259 U. S. 44, the Futures Trading Act imposed a tax of twenty cents per bushel on all contracts for future delivery unless made upon exchanges designated as contract markets by the Secretary of Agriculture. The tax was held void on the ground that it was designed to compel observance of regulations that, in the absence of congressional declaration, were matters of state control. The court said (p. 68):

> "We come to the question, then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the state. (Citing cases.) There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words 'interstate commerce' are not to be found in any part of the act, from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the city of Chicago, for future delivery of grain, which will be settled by

> the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this respect, and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem, from evidence before it, to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. *A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind,* and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause." * * *
>
> "It follows that sales for future delivery on the Board of Trade are not, in and of themselves, interstate commerce. They cannot come within the regulatory power of Congress as such, *unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon.*"

That the taxing power may be used in connection with other powers of Congress, and to promote objectives which are entrusted to Congress, is shown in the case of Veazie Bank vs. Fenno, 8 Wall., 549, in which a tax was sustained that had the effect of driving the notes of state banks out of circulation.

In University of Illinois vs. United States, 289 U. S. 48, at p. 58, the court said:

> "It is true that the taxing power is a distinct power; that it is distinct from the power to regu-

late commerce. Gibbons vs. Ogden, *supra* (9 Wheat. p. 201, 6 L. ed. 71). It is also true that the taxing power embraces the power to lay duties. Art. I, Ch. 8, Sec. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. Gibbons vs. Ogden, *supra*, p. 202. 'Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' Groves vs. Slaughter, 15 Pet. 449, 505, 10 L. ed. 800, 821. The laying of duties is 'a common means of executing the power.' 2 Story, Const. Ch. 1088."

CLASSIFICATION FOR TAXING PURPOSES VALID

The classification of producers for taxing purposes into those who accept the code (with the statutory reservation of their rights) and those who elect not to do so, is not unconstitutional.

The constitutional limitation on the laying of "duties, imposts and excises" is that they shall be "uniform" throughout the United States. The distinction between this requirement and that of certain state constitutions providing for "equality and uniformity" is made plain in many cases, including

Knowlton vs. Moore, 178 U. S. 96;
Flint vs. Stone Tracy Co., 220 U. S. 107;
Head Money Cases, 112 U. S. 596.

In the Flint case the court said (p. 158):

> "Uniformity does not require the equal application of the tax to all persons or corporations who may come within its operations."

The requirement of the Federal Constitution is simply that of geographical uniformity. Under the simple limitation of "uniformity" the power of classification is broad.

Even with respect to the constitutional requirement of many state constitutions of equality of taxation the rule has been laid down by Cooley on Taxation, Vol. I, Sec. 334, as follows:

> "A discrimination is not arbitrary, of course, where based on sound reasons of public policy. On the other hand, while there must be a reason for the classification, the reason need not be a good one, and it is immaterial that the statute is unjust. The test is not wisdom but good faith in the classification."

When the state tax discriminated between merchants using and those not using coupons, which the Florida courts held to be a violation of the Federal Constitution, on appeal our Supreme Court said:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."
>
> Rast vs. VanDemond, 240 U. S. 347, 357.

In its opinion in this case the court further said:

> "It is the duty and function of the legislature to discover and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare."

In the recently decided case of Fox vs. Standard Oil Co. (Oct. term, 1934) 294 U. S., 87, 100, the Supreme Court sustained a West Virginia statute imposing a privilege tax on chain stores and filling stations, graduated by the number belonging to the chain. The court said:

> "Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. (Quong Wing vs. Kirkendall, 223 U. S. 59; American Sugar Ref. Co. vs. Louisiana, 179 U. S. 89, 95; Southwestern Oil Co. vs. Texas, 217 U. S. 114; Sproles vs. Binford, 286 U. S. 374, 394; Stephenson vs. Binford, 287 U. S. 251). In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. vs. Hamilton, 292 U. S. 40, supra, whereby sales of butter were fostered and sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the 'Collateral purposes or motives of a legislature choice aside as beyond their lawful competence. in levying a tax of a kind within the reach of its

> lawful powers are matters beyond the scope of judicial inquiry.' Magnano Co. vs. Hamilton, supra (292 U. S. 44); McCray vs. United States, 195 U. S. 27, 56. The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only."

The taxing power is the one power that in the Federal Constitution is textually associated with, "the general welfare of the United States." In fact, the argument that the construction of the taxing clause requires the general welfare clause to be rejected as a source of substantive power, associates the taxing power with the general welfare clause. And in exercising the taxing power from the very beginning, Congress has differentiated taxes, duties, imposts and excises upon the basis of the public policy as they conceived it.

That Federal taxes can be levied not merely to provide revenue, but by classification to promote the public policy, is illustrated in the history of our Tariff Acts.

Hampton & Co. vs. U. S., 276 U. S. 394, 411.

That public policy may motivate the tax and the classification for tax purposes, is shown in the celebrated Yacht Cases. Sec. 37 of the Tariff Act of 1909 imposed an excise tax on the use anywhere by a citizen of this country of a foreign-built yacht, that did not rest on the use of yachts built in this country. It was not a customs but an excise tax. The court held that the classification was justified and sufficiently

explained by the public policy of promoting the use of yacht construction in this country, and that the tax did not violate the uniformity clause of the Constitution.

Billings vs. United States, 232 U. S. 261, 282.

In the Billings case the court said:

> "It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. Flint vs. Stone Tracy Co. supra; McCray vs. United States, 195 U. S. 27; Knowlton vs. Moore, 178 U. S. 41. It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the Amendments thereto, especially by the due process clause of the 5th Amendment, McCray vs. United States, 195 U. S. 27, and authorities there cited. Nor is there anything in Carrol vs. Greenwich Ins. Co., 199 U. S. 401, or Twining vs. New Jersey, 211 U. S. 78, which in the remotest degree nullifies or restricts the principle thus stated. Indeed it is apparent, if the suggestion as to the meaning of those cases were assented to, it would result in rendering the Constitution unconstitutional."

The drawback on the tax by those complying with prescribed regulations, is a device of taxation used in the first Customs Act and found in the present

Customs Act. The merchant marine drawback (or discount) is not different in nature from the drawback provided in the bill. In the footnote to Knowlton vs. Moore, 178 U. S., at p. 94, a number of early excise taxes are cited providing for the drawback as a method of differentiating such taxes.

Credits on taxes allowed for certain situations are familiar. The credit device to promote a public policy underlies the proposed unemployment-insurance plan. It operates under the Federal Inheritance Tax Act which was sustained in Florida vs. Mellon (273 U. S. 12). The power of taxation (unless constitutionally restrained) of any government carries the power of exemption, both being subject to the rule of public purpose.

Upon what basis of constitutional power may Congress discriminate in its levy of inheritance taxes between those who had and those who had not paid inheritance taxes to the State? Certainly there is nothing except that involved in the public policy as conceived by Congress.

In McCray vs. United States, 195 U. S. 27, a tax was leviel on oleomargarine (manufactured and sold without regard to its interstate commerce) at one-fourth cent per pound if the oleomargarine was white and ten cents per pound if it was colored so as to resemble butter. The classification was sustained although the tendency of yellow oleomargarine "to deceive the public into buying it for butter" is hardy the subject for direct legislation. The court said in this case (63):

> "The judiciary is without authority to avoid an act of Congress lawfully exerting the taxing power, even in a case where to the judicial mind it seems that Congress had, in putting such pow-

> er in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the power delegated to Congress."

The Federal revenue laws are congeries of deductions, exemptions and credits based upon public policy as conceived by Congress yet promoting objectives which lie beyond its regulatory jurisdiction.

In Nicol vs. Ames, 173 U. S. 509 at p. 516, the court said:

> "In searching for proper subjects of taxation to raise moneys for the support of the government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities and one where such facilities are not availed of by the parties to the same kind of transaction. Having the power to recognize these various facts, it must also follow that Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on."

In Appendix A are set out certain findings of the lower court indicating the relation of the bituminous

coal industry to our national economy, its financial history as a revenue producing industry, and its wasteful method under existing market practices in depleting this irreplacable natural resource.

We submit that the excise provided in this Act is a valid exercise of the taxing power; that the discrimination is in the long exercised scope of taxing statutes; that even if regarded as merely regulatory it is valid as being such only with respect to subjects within the power of Congress.

REGULATIONS OF THE "CODE"

Section 4 of the Act sets out a statutory code of regulations, with the following declaration:

> "For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions, provisions, and obligations which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal."

It was certainly within the power of Congress to establish the twenty-three districts and district boards provided, not merely to carry out other requirements of the code, but to provide the frame within which marketing agencies may operate. These marketing agencies have been validated by the Supreme Court in Appalachian Coals vs. United States, 288 U. S. 344. They were formed as experiments in cooperative interstate marketing under the Federal Anti-Trust laws, were held violative of the Sherman Act by the lower court and were upheld by the Supreme Court.

It is obvious that the question of their legality arose under congressional legislation and the judicial

interpretation of that legislation. But such judicial construction of the Sherman Act could not preclude further legislation upon the subject of these coal marketing agencies. That further legislation is found in this code which limits such sales agencies to the "district," provides that no unreasonable requirement of membership shall be imposed, that such agency must be truly representative of at least one-third the production of the country covered, that the agency shall be approved by the Commission and shall market the coal with due respect for the standards of unfair competition set out in the code.

The economic evils peculiar to the industry are graphically pointed out by the Court as justifying its conclusions that these sales agencies could operate under the anti-trust laws, but the wisdom of further dealing with them must rest with Congress.

UNFAIR METHODS OF COMPETITION

The provisions of the code defining unfair methods of competition must be within the constitutional authority of Congress. Of course where the Act (as the Federal Trade Commission Act) provides simply that the Board may direct the cessation of "unfair methods of competition," it is for the courts to finally say what constitutes such unfair methods. In Federal Trade Commission vs. Beechnut Packing Co., 257 U. S. 441, speaking of the Federal Trade Commission Act the Supreme Court said at p. 453.

> "That act declares unlawful 'unfair methods of competition,' and gives the commission authority, after hearing, to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition denounced by the act is left without specific defini-

> tion. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes."

But in the Coal Code Congress has defined the practices that shall constitute such unfair methods of competition.

A number of these practices are designated, substantially all are borrowed from the Bituminous Code that operated under the NRA, some of which are denounced in the Appalachian Coals decision (pp. 362, 363). The considerations that moved the court to its judgment may well be regarded as moving Congress to these regulations. The court said:

> "The findings of the District Court, upon abundant evidence, leave no room for doubt as to the economic condition of the coal industry. That condition, as the District Court states, 'for many years has been indeed deplorable.' Due largely to the expansion under the stimulus of the Great War,' 'the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons' to meet a demand 'of less than 500,000,000 tons.' In connection with this increase in surplus production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. The actual decrease is partly due to the industrial condition, but the relative decrease is progressing, due entirely to other causes. Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change

has been more rapid during the last few years by reason of the developments of both oil and gas fields. The court below found that 'based upon the assumption that bituminous coal would have maintained the upward trend prevailing between 1900 and 1915 in percentage of total energy supply in the United States, the total substitution between 1915 and 1930 has been equal to more than 200,000,000 tons per year.' While proper allowance must be made for differences in consumption in different parts of the country, the adverse influence upon the coal industry, including the branch of it under review, of the use of substitute fuels and of improved methods is apparent.

"This unfavorable condition has been aggravated by particular practices. One of these relates to what is called 'distress coal.' The greater part of the demand is for particular sizes of coal such as nut and slack, stove coal, egg coal, and lump coal. Any one size cannot be prepared without making several sizes. According to the finding of the court below, one of the chief problems of the industry is thus involved in the practice 'of producing different sizes of coal even though orders are on hand for only one size, and the necessity of marketing all sizes.' Usually there are no storage facilities at the mines and the different sizes produced are placed in cars on the producers' tracks, which may become so congested that either production must be stopped or the cars must be moved regardless of demand. This leads to the practice of shipping unsold coal to billing points or on consignment to the producer or his agent in the consuming territory. If the coal is not sold by

the time it reaches its destination, and is not unloaded promptly it becomes subject to demurrage charges which may exceed the amount obtainable for the coal unless it is sold quickly. The court found that this type of 'distress coal' presses on the market at all times, includes all sizes and grades, and the total amount from all causes is of substantial quantity.

" 'Pyramiding' of coal is another 'destructive practice.' It occurs when a producer authorizes several persons to sell the same coal, and they may in turn offer it for sale to other dealers. In consequence 'the coal competes with itself, thereby resulting in abnormal and destructive competition which depresses the price for all coals in the market.' Again, there is misrepresentation by some producers in selling one size of coal and shipping another size which they happen to have on hand. 'The lack of standardization of sizes and the misrepresentation as to sizes' are found to have been injurious to the coal industry as a whole. The court added, however, that the evidence did not show the existence of any trade war or widespread fraudulent conduct. The industry also suffers through 'credit losses,' which are due to the lack of agencies for the collection of comprehensive data with respect to the credits that can safely be extended."

REGULATION OF PRICES

The interest of the amicus curiae in the regulation of prices arises from the fact that the disorganized marketing of coal has been responsible for starvation wages and intolerable working conditions. It is futile for labor to deal even collectively, with a chronical

insolvent industry. By far the greater portion of coal that is mined in this country is sold and shipped in interstate commerce. More than 70 per cent of the total annual out-put is mined in four states, namely, Pennsylvania, West Virginia, Kentucky and Illinois. Substantially all that is distributed and used intrastate directly affects the marketing of that which is shipped interstate. The congressional declaration and finding upon this point was as follows (Section 1):

> "It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the excessive facilities for the production of bituminous coal and the overexpansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce, remove burdens and obstructions therefrom, and protect the national public interest therein.

The findings of ultimate facts by the lower court upon this point were as follows (Tr. 209):

175. "The distribution and marketing of bituminous coal within the United States is predominantly interstate in character, and the interstate distribution and sale and the intrastate distribution and sale of such coal are so intimately and inextricably connected, related and interwoven that the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce unless transactions of intrastate distribution and sale be regulated.

176. Small variations in the mine price of bituminous coal as between mines in different producing areas and states may cause large variations in the shipments in interstate commerce of coal from such producing areas and states, and small variations in the mine price of bituminous coal as between mines in the same state may cause large variations in the shipments of coal from such mines to points of consumption in the same state or in other states.

177. The f. o. b. mine price at which bituminous coal is sold in interstate commerce directly affects interstate commerce in bituminous coal.

178. For many years the business of distributing and marketing bituminous coal in interstate commerce has been carried on under conditions of unrestrained and destructive competition.

179. For many years the competitive conditions existing in the bituminous coal industry have led to destructive price cutting, and such price cutting has been carried to such an extent that ever since the year 1924, with the exception only of the NRA code year, 1934, and possibly of 1926, the average price realized by producers of bituminous coal throughout the United States has been less than the average cost of production.

180. Such destructive price cutting has directly burdened and restrained interstate commerce in bituminous coal and has caused substantial dislocations to and diversions of the normal flow of such commerce.

181. Such unrestrained and destructive competitive conditions have occasioned many unfair competitive practices including those set forth in finding 166, in the distribution and marketing of bituminous coal in interstate commerce, and such practices have served to further demoralize the industry and to place added burdens and restraints upon interstate commerce in bituminous coal.

185. Said competitive conditions have caused the insolvency of very many coal producers, the abandonment of a great many mining properties before they were completely worked out with a consequent waste of coal resources, repeated and substantial reductions in wage rates, and, unless corrected, threaten to destroy the solvency of a great many of the existing operators and the premature abandonment of many of the existing mines. It is probable that the operation of the law of supply and demand will not serve to eliminate the destructive competitive conditions.

186. The business of selling and distributing bituminous coal in interstate commerce so nearly touches the vital economic interests of the United States that Congress may regulate the prices of the sales of such coal and may forbid unfair competitive practices in said business."

It is clear that no state can regulate the prices at which coal is sold in interstate commerce, for any such attempted regulation by a state of sales in interstate commerce would constitute a burden upon interstate commerce which would be stricken down by the

courts. Baldwin, etc., et al., vs. G. A. F. Seelig, Inc., 293 U. S. 522 (affirmed on opinion 7 Fed. Supp. 776).

If, therefore, the price of coal sold in interstate commerce can be regulated at all, it can only be regulated by the Federal Government under the commerce clause. It would seem clear that a Federal system regulating the price of coal sold in interstate commerce would be a regulation of commerce among the states within the meaning of the commerce clause of the Federal Constitution. Pennsylvania Railroad vs. Clark Brothers Coal Mining Co., 238 U. S. 456. (Railroad cars supplied for sales 95 per cent to 98 per cent f. o. b. cars at mines.) The court said (468):

> "In the present case, to repeat it, appears that for the purpose of filling contracts with purchasers in other states, coal is delivered f. o. b. at the mines for transportation to such purchasers. The movement thus initiated is an interstate movement, and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis, and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the Commission which Congress has established."

In Lemke vs. Farmers Grain Co., 258 U. S. 50 (North Dakota statute to regulate the buying of wheat), the court said:

> "That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped and sold in interstate com-

merce. That this is a regulation of interstate commerce is obvious from its mere statement.

"Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. Pennsylvania R. R. vs. Clark Coal Mining Co., 238 U. S. 456, 468." (p. 58)

"It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases and to secure payment to them of fair prices for the grain actually sold. This may be true *but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed.*" (p. 60)

If such a regulation should be held to be invalid, it will be so held not because it would not be within the scope of the commerce clause but because it would be considered to violate the due process clause of the Constitution.

The due process clause as applied to State legislation by the Fourteenth Amendment has recently been construed with reference to price fixing in the first New York Milk case, Nebbia vs. New York, 291 U. S. 502. And it would seem that the due process clause of the Fifth Amendment as applied to the Federal Government should be given the same construction as the same clause in the Fourteenth Amendment when applied to State legislation.

In the Nebbia case the court held that whether price fixing was invalid as an infringement of the due process clause would be determined on the particular facts of the case. If conditions are such that under the circumstances price fixing is not un-

reasonable, arbitrary, or capricious and has a real and substantial relation to the object sought to be attained, then the regulation will be upheld. And the court found that the conditions in the milk industry in New York were such as to justify price fixing as a reasonable remedy for those conditions, saying:

> "If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixed prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatened harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

It may be said that the Nebbia case presented the question of state power, while here the question is

of federal power. But in the case of bituminous coal and the regulation of its interstate commerce the question is a national one with which only Congress can deal. That a national public interest may attach to the industry seems obvious. In Olsen vs. Board of Trade, 262 U. S. 1, the court approved the declaration of Congress in the Grain Futures Act that a national public interest attached to the operation of grain exchanges. The court said (pp. 40-41):

> "The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest. The supreme court of Illinois has so decided in respect to its publication of market quotations. New York & C. Grain Exch. vs. Board of Trade, 127 Ill. 153. In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales of futures upon interstate commerce, we find no difficulty under Munn vs. Illinois, 94 U. S. 113, 133, and Stafford vs. Wallace, 258 U. S. 495, in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest, and is subject to national regulation as such. Congress may, therefore, reasonably limit the rules governing its conduct with a view to preventing abuses and securing freedom from undue discrimination in its operations."

In the Appalachian Coals case, supra, the court has already had occasion to consider the state of the coal industry. While the decision in the Appalachian case was confined to the validity of a joint sales agency under the Sherman Anti-Trust law, it seems difficult

to read the description of conditions in the coal industry in the one case and of the milk industry in the other, without coming to the conclusion that the court would find that conditions in the coal industry justify price fixing as a reasonable regulation by Congress. In the Appalachian case the Supreme Court recognized the over-expansion of the bituminous industry, its general insolvency due to ruinous competition, the demoralizing pressure of the overhanging surplus, and the defenselessness of the industry in the national coal markets. The court said it had operated in a buyers' market for years (p. 363):

> "In addition to these factors, the District Court found that organized buying agencies, and large consumers purchasing substantial tonnage, 'constitute unfavorable forces.' 'The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past.'"

And in note 7 appended to the Appalachian decision is the following statement (p. 369):

> "J. M. Dewberry, general coal and coke agent of the Louisville & Nashville Railroad, a large consumer of Appalachian coal, testified: 'It is a well-known fact today that the buying power of these large consumers of coal is more intelligent, more forceful, more far-reaching than ever before in the history of the industry. And it just sounds to me like a joke for somebody to talk about Appalachian coals or somebody else dictating the price that they are going to pay. They dictate their own price. The purchaser

> makes it. And he makes it because of the tremendous force and influence of his buying power. Why, it is nothing these days for one interest or one concern to buy several million tons of coal."

From the earliest decision to the latest the Supreme Court has held that in the field of interstate commerce Congress is supreme. In Gibbons vs. Ogden, 9 Wheat. 1-203, Chief Justice Marshall described this power (196):

> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

REGULATIONS OF LABOR RELATIONS

The argument against the validity of the labor provisions of the Act, and the legal conclusions of the lower court, proceed upon the premise that labor conditions and relations in the bituminous mines are intrisically beyond consideration by Congress under the commerce clause; that neither Congress nor the courts may legally regard them as directly affecting interstate commerce in bituminous coal.

Thus by a legal conception, factors that may sprawl all over the problem must be ignored in its solution. In Swift & Co. vs. United States, 196 U. S. 375, 8, the Court said:

> "Commerce among the states is not a legal conception, but a practical one, drawn from the course of business."

In the case of Schechter vs. United States (Law Ed. vol. 79 p. 888) the court expressly declares that any transaction of an intrastate or local nature that directly affect the interstate commerce of a commodity, are subject to the regulatory power of Congress. The court said:

> "In determining how far the Federal Government may go in controlling intrastate transactions, upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise."

The Schechter decision dealt with control of labor relations, and the statement just quoted shows that the court was not closing the door against any and all regulations, in every industry engaged in inter-

state commerce, but was only insisting that each such industry must be dealt with upon the facts peculiar to it.

While the production of coal is not interstate commerce but is a domestic "transaction," practices peculiar to it may directly affect the interstate commerce of the commodity. Justice Cardozo, in concurrence with the opinion in the Schechter case, said:

> "The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate or national because of distant repercussions. What is near and what is distant may at times be uncertain. * * *
>
> "To take from this code the provisions as to wages and hours of labor is to destroy it altogether. If a trade or industry *is so predominantly local as to be exempt from regulation by Congress in respect to matters such as these* there can be no 'code' at all."

It was never intended by the decision in the poultry case to preclude regulations where the transaction—of whatever character—directly affected the interstate commerce of the commodity. The court points out "that it is the effect upon interstate commerce and not the source of injury which is the criterion of congressional power."

In the Schechter case the court said:

> "So far as the poultry here in question is concerned, the flow in interstate commerce has ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states."

In the case at bar it is conceded that the usual course of business is to mine bituminous coal to fill shipping contracts. And, while not conceded, it is inescapably plain that the labor regulations of the Act deal with transactions that have directly and substantially affected the commerce of coal.

The findings of fact by the Court below will be referred to later, but the following in Section 1 of the Act is the finding and declaration of Congress:

> "That practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."

EFFECTS OF THE FINDINGS OF CONGRESS

It is obvious that Congress must in the first instance declare what domestic or what intrastate transactions in a particular industry or trade directly affect its interstate commerce. The very finding and declaration by Congress that certain transactions in the mining and distribution of bituminous coal directly affect commerce and requires regulations to prevent obstructions to that commerce should be conclusive on the judicial branch "unless the relation of

the subject matter to interstate commerce and its effect upon it are clearly non-existent."

In Radice vs. New York, 264 U. S. 292, the Supreme Court said p. 294:

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression, and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination."

The first Congressional regulation of trading on grain exchanges was the "Futures Trading Act;" and it was struck down in Hill vs. Wallace, 259 U. S. 44, the court saying:

> "It follows that sales for future delivery on the Board of Trade are not, in and of themselves, interstate commerce. They cannot come within the regulatory power of Congress as such unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or burden thereon."

Congress then enacted the "Grain Futures Act," embodying the declaration that such dealings, on

grain exchanges are affected with a national public interest and if unregulated would tend to burden and obstruct commerce in grain. This Act came before the Supreme Court in Olsen vs. Chicago Board of Trade, 262 U. S. 1, and the court then said (40):

> "By reason and authority, therefore, in determining the validity of this Act *we are prevented from questioning* the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the states in grain, and that it recurs and is a constantly possible danger."

So, in passing on the Stockyards and Packers Act in Stafford vs. Wallace, 258 U. S. 495, the court said:

> *"It was for Congress to decide from its general information and from such special evidence* as was brought before it, the nature of the evils actually presented or threatened, and to take such steps by legislation within its power as it deems proper to remedy them. . . . (513)
>
> "The reasonable fear by Congress that such acts, usually lawful, *and affecting only intrastate commerce when considered alone,* will probably and more or less constantly be used in conspiracies against interstate commerce, or constitute a direct and undue burden on it, expressed in this remedial legislation, serve the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for Federal restraint. Whatever amounts to more or less constant practice, and threatens to obstruct or

> unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause, and *it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.*" (520)

It is begging the question to say that the findings of Congress are accepted by the judicial branch only with respect to "transactions" in some intermediate stage of commerce. Neither the courts nor Congress are so limited. In Local 167 vs. United States, 291 U. S. 293, the court, under the Sherman Act, restrained the Teamsters' Union from conspiracy that had to do with the delivery of poultry in New York after the interstate commerce of such poultry had terminated. But the court pointed out that transactions may directly affect interstate commerce and be within Federal control regardless of whether they occurred before the actual transportation of the commodity in interstate commerce began or ended. The Court said:

> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. Public Utilities Commission vs. Landon, 249 U. S. 236, 245; Missouri ex rel.; Barrett vs. Kansas Natural Gas Co., 265 U. S. 298, 309; East Ohio Gas Co. vs. Tax Com-

mission, 283 U. S. 456, 470, 471. But we need not decide when interstate commerce ends and that which is intrastate begins. *The control of the handling,* the sales and the prices *at the place of origin before the interstate journey begins* or in the State of destination where the interstate movement ends *may operate directly to restrain* and monopolize interstate commerce. United States vs. Brims, 272 U. S. 549."

JUDICIAL VIEWS OF MINE LABOR AND COMMERCE

The Federal Courts have recognized the direct relation of mine labor relations to interstate commerce in bituminous coal. The mine workers have been repeatedly enjoined under the Sherman Act from strike activities, not because they were interfering with the transportation of coal, or with the sale in other states, but because their interference with mining, or production, necessarily interfered with interstate commerce of coal. The determination of this fact is surely not the exclusive province of the courts.

The celebrated case of United Mine Workers vs. Red Jacket Coal Co. came before the United States Circuit Court of Appeals for the Fourth Circuit (18 Fed. 2nd 839). In that case the Miners' Union had issued a call inviting the miners of West Virginia to join the strike prevailing in the Union fields. 316 coal companies of West Virginia secured a permanent injunction in the District Court against organizing activities of the Union in pursuance of the strike. Jurisdiction was frankly based on the Sherman Act.

The Circuit Court of Appeals considered the opinions holding that mining in itself was not interstate commerce, and then decided as follows:

> "Interference with the production of these mines as contemplated by defendants would necessarily interfere with the interstate commerce in coal to a substantial degree. Moreover, it is perfectly clear that the purpose of defendants in interfering with production was to stop the shipment in interstate commerce. *It was only as the coal entered into interstate commerce that it became a factor in the price and affected defendants in their negotiations with the Union operators. And, in time of strike, it was only as it moved in interstate commerce that it relieved the coal scarcity and interfered with the strike.*" (845)

The Supreme Court (275 U. S. 536) declined to review this decision on certiorari, and it became the authority for a general resort to the Federal District Courts by operators seeking to enjoin strikes and protect their particular labor relations with employes. The result was a series of judicial (injunction) codes relating to these labor relations. In Pittsburgh Terminal Coal Co. vs. United Mine Workers of America, 22 Fed. (2nd) 559, the Court said:

> "In the case of the International Organization, United Mine Workers vs. Red Jacket Coal Co., 18 Fed. (2) 839, the Circuit Court of Appeals of the Fourth Circuit, having before them facts similar to the facts recited in the bill of complaint in this case, held that the United States Courts clearly had jurisdiction to restrain the interference of the United Mine Workers with the operation of coal mines, and held further that the interference with the production of the mines in question, as contemplated by the United

> Mine Workers, would necessarily interfere with interstate commerce in coal to a substantial degree."

If Congress can, by its anti-trust laws as the courts construe them, reach its restraining hand into these industrial disputes at the mine, it must have power to deal with the practices and conditions that make these disputes inevitable.

The Red Jacket decision recognizes the interstate competitive relation of wages to the commerce in coal, and bases its imputation of intent against the miners upon the compelling influence that relationship exerts upon their acts in striking.

It is sometimes said that these are conspiracy cases and therefore the acts involved in the intent afford no measure of the acts which Congress may regulate. But if the conspiracy, whatever its intent, involves acts which do not directly affect interstate commerce, the conspiracy is not actionable. Besides, if the courts sustain a conspiracy charge under the Sherman Act on the ground that the acts, though local, are intended to directly affect interstate commerce, Congress may regulate such acts—the Congressional declaration of the direct effect of the acts on commerce serving the same purpose as the charge of intent in the injunction or indictment which brought them within judicial control under the Sherman Act. In the Stafford case, where the Stockyards Act followed the decision of the Supreme Court in Swift vs. United States, 196 U. S. 375, the court said:

> "*The reasonable fear by Congress that such acts, usually lawful, and affecting only intrastate commerce when considered alone,* will probably and more or less constantly, be used in con-

> spiracies against interstate commerce, or constitute a direct and undue burden on it, expressed in this remedial legislation, *serve the same purpose as the intent* charged in the Swift indictment *to bring acts of a similar character into the current of interstate commerce for Federal restraint.*"

There is nothing in the labor regulations of the Act that are not sensibly designed to regulate transactions that notoriously and for years have had a direct and substantial effect upon interstate commerce. In United Mine Workers vs. Coronado Coal Co. 259 U. S. 345 (the first Coronado Coal case) the court after stating that mining was not interstate commerce of itself, said:

> "It is clear from these cases that if Congress deemed certain recurring practices, though not really a part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision or restraint." (408)

In the Appalachian Coals case, 288 U. S. 344, the Supreme Court recognized the peculiar problems of the industry, as affecting the right of a group of operators to sell their competing coal through a sales agency at agreed prices. The three judges of the lower Court unanimously held this scheme illegal under the Anti-Trust Act, but the Supreme Court held it lawful, saying:

> "It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendants' plan, the rea-

sons which led to its adoption and the probable consequences of carrying out that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal. * * *

"In the graphic summary of the economic situation the court found that 'numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation have been curtailed, wages to labor have been substantially lessened and the states in which coal producing companies are located have found it increasingly difficult to collect taxes.'

"When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, *the wells of commerce go dry.*"

The Supreme Court was considering conditions that reached back of transportation—into the mining industry itself. The court plainly had in mind the conditions and practices that prevailed in the mines which are the wells of commerce. The court said:

"The *industry* was in distress. It suffered from over-expansion and from a relative decline through the growing use of substitute fuels. *It was afflicted* with injurious practices within itself—practices which demanded correction."

THE FACTS FOUND IN THE CASE AT BAR

The Findings of Facts in the Record constitute an economic history of the bituminous industry. Certain findings pertaining to the labor problem and its rela-

tion to the interstate commerce of coal, are set out in Appendix B to this Brief. The following are among the Findings of Ultimate Facts (Tr. 211):

> "182. Labor costs of mining bituminous coal are a much greater percentage of total costs than is the case in any other large industry. In the bituminous coal industry cutting of wage rates is the predominant and most effective method of gaining competitive advantages and under the conditions which have existed in the industry has proven to be a destructive method of competition and has tended to create a great disparity in wage rates between producers operating in different states and producers operating in the same states. Such disparities in wage rates have permitted disparities in price which have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce to such an extent as to substantially burden, obstruct and restrain the same and to give to producers employing such competitive methods an undue advantage in interstate commerce over producers of bituminous coal not employing the same.
>
> "183. The wages of persons engaged in the production of bituminous coal have a very substantial effect upon interstate commence in the coal so produced.
>
> "184. Such unrestrained and destructive competition in the sale and distribution of bituminous coal in interstate commerce and the cutting of wage rates before described have been the cause of many strikes and suspensions of work which have closed down many mines, some

> for long periods of time, have caused violent and wide fluctuations in the price of bituminous coal to the consuming public, have caused hardship and put burdens upon many consumers of bituminous coal, have threatened to interrupt and obstruct, and have interpruted and obstructed interstate commerce in bituminous coal, and at times have even threatened to stop such interstate commerce for indefinite periods; have substantially dislocated and diverted the normal flow of interstate commerce in such coal, and have obstructed, burdened and restrained interstate commerce in such coal."

Beginning about 1923 the bituminous coal industry entered upon a competitive struggle for markets which resulted in a descending spiral of prices and which bled labor white. The breaking down of the Miners' Union took place gradually and spread over the competitive fields. Not only was collective bargaining ended in these areas, but existing wage contracts were violated. Labor began to be employed upon the individual or yellow dog contract basis. Injunctions were secured against organization activities in substantially all of these fields. The union was held at arms-length by the courts while wages were being cut, and strikes in protest began to paralyze the commerce of coal.

Wages in nonunion fields were continuously cut for, as the lower court found (Finding 115, Tr. 175) "Price reductions forced cuts in wage rates in a descending spiral." Uniformity of wage rates wholly disappeared, as the court found (F. 117, Tr. 178):

> "117. With the collapse of collective bargaining on a national scale after 1927 uniformity in wage scales gradually disappeared in the non-

union fields and operators in the same fields were paying widely varying wages. * * *

"In the Western Pennsylvania district the rates paid ranged from $4.00 a day to less than $1.75. Under such conditions, the operator attempting to maintain a reasonable living wage was exposed to competition from wage cutting by other operators within the same field; and one wage cut forced another. Such competition in wage cutting within the limits of the same field tended to develop wherever the wage rate was not stabilized by collective bargaining. (Tr. 179)

And in F. 118A (Tr. 179):

"118a. The intense competition, largely between areas from 1924 to 1927, chiefly expressed itself in price cutting and wage cutting. Thereafter, as the machinery of collective bargaining broke down in Pennsylvania and Ohio, competition in price cutting through wage cutting between operators in the same field was added to the inter-field competition."

Not only were wages cut in a competitive struggle for interstate markets, but what is known as wage sweating devices were resorted to. Hours were lengthened, in some cases to twelve hours a day. The miners were denied check-weighmen and the amount of their coal was simply estimated by the management. Compulsory trading in company stores and living in company houses absorbed whatever balance of wages was left. And the mining camps, isolated for the most part, furnished opportunity, often realized, of depriving the miners of their most fundamental constitutional rights.

Bituminous mine labor was at once the helpless and unhappy instrument and victim of the mad struggle for tonnage contracts.

Strikes in protest have marked the history of this industry whose commerce has been so largely built upon competitive wage cutting. The types and causes of these labor disputes have been set out in Findings 130 to 141 inclusive (Tr. 188-192). The effect of such strikes on the commerce of coal is shown in the findings set forth in Appendix C. The Court found the effect to be interruption of that commerce, dislocation and shifting of production, higher prices and excessive outlays for precautionary supplies.

The operation of the Bituminous Coal Code under the N. R. A. eased the competitive struggle, and resulted in correcting these labor abuses in substantially all fields. Within six weeks after the enactment of the Recovery Act, 90 per cent of the bituminous mine workers had become affiliated with the Union, and collective wage contracts were shortly thereafter negotiated in such fields. The Court found (F. 129, Tr. 187):

> "After the expiration of the Jacksonville wage agreement in 1927, this system of fixing wages was, because of price competition and wage rate cutting by non-union producers, broken down almost entirely excepting in the state of Illinois, a part of Indiana, and a few other areas of minor importance. Between the years 1927 and 1933 practically the entire industry was engaged in a demoralizing competitive warfare in which cutting of wage rates followed price-cutting in a continually descending spiral. Upon the passage of the National Industrial Recovery Act the system of fixing and correlating wages by col-

> lective bargaining agreements as formerly practiced, was established upon substantially a national scale. Since October, 1933, wage rates throughout practically the entire industry have been fixed and correlated by a basic collective agreement (Appalachian) executed by and between representatives of the producers in the industry by tonnage on the one hand, and by representatives of over 70 per cent of the workers employed in the industry on the other, such agreement then being supplemented by similar agreements in practically all other producing areas."

In the fields where the code was ignored there was a noticeable lessening of the arbitrary domination by the employer. But to get an idea of what generally prevailed in the non-union fields, and what still prevailed where no collective bargaining is tolerated, and what might reasonably be expected to recur on a wide basis, reference is made toAppendix D, being the report of the Commission appointed by the Governor of Kentucky to investigate conditions in Harlan County, introduced in the hearings before the House Ways and Means Committee on the Guffey-Snyder Bill.

COMMERCE AND LABOR IN BITUMINOUS INDUSTRY

The history of the national commerce of bituminous coal is a history of its mine labor. Repeated and exhausted investigations by Congress have led to the legislative finding above referred to. In the Ultimate Findings of Fact by the Supreme Court of the District it clearly appears that wage cutting in the industry "is the predominant and most effective

method of gaining competitive advantages and under the conditions which have existed in the industry has proven to be a destructive method of competition." That "such disparity in the wage rates have permitted disparities in prices which have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce to such extent as to substantially burden, obstruct and restrain the same." That "the wages of persons engaged in the production of bituminous coal have a very substantial effect upon interstate commerce in the coal." And, finally, "Such unrestrained and destructive competition in the sale and distribution of bituminous coal in interstate commerce and the cutting of wage rates before described have been the cause of many strikes and suspensions of work which have closed down many mines, some for long periods of time, have caused violent and wide fluctuations in the price of bituminous coal to the consuming public, have caused hardship and put burdens upon many consumers of bituminous coal, have threatened to interrupt and obstruct, and have interrupted and obstructed interstate commerce in bituminous coal, and at times have even threatened to stop such interstate commerce for indefinite periods; have substantially dislocated and diverted the normal flow of interstate commerce in such coal, and have obstructed, burdened and restrained interstate commerce in such coal."

It may be said that regulation of practices in production may not be justified on *the mere academic theory* that otherwise commerce in the commodity may be diverted from one State to another. And yet Congress may and has regulated matters primarily of state control whose direct effect was obviously to give an advantage to the commerce of that state.

Regulation of intrastate rates is upon the basis of preventing "any undue or unreasonable advantage, preference or prejudice, as between persons or localities in intrastate commerce on the one hand, and interstate and foreign commerce on the other hand." (U. S. A. C. Title 49, Sec. 13, Par. 4, Ch. 91 Sec. 416, 41 Stat. 484.)

In the Stockyards and Packers Act of 1921 there is a provision against "any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, (which) causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand." (U. S. A. C. Title 7, Ch. 9, Sec. 212.)

Practices of a local character that create shifts in tonnage may be understandable in the absence of any regulation of the interstate commerce of the commodity, but surely no effort at regulation is conceivable that ignores the play of these practices. In Houston Ry. Co. vs. United States, 234 U. S. 342 at p. 351 the court said:

> "Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (The Daniel Ball, 10 Wall. 557, 564); to adopt measures to 'promote its growth and insure its safety' (Mobile County vs. Kimball, 102 U. S. 691, 696, 697); 'to foster, protect, control, and restrain'

(Second Employers' Liability Cases, Mondou vs. New York, N. H. & H. R. Co. 223 U. S. 1, 47, 53, 54). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted *upon fair terms* and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it."

In Simpson vs. Shepard, 230 U. S. 352 (Minn. Rate Cases) at p. 398 the court said:

"The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.' Gibbons vs. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70. The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control, and to

> provide effective regulation of that intercourse *as the national interest may demand.* The words 'among the several states' distinguish between *the commerce* which concerns more states than one, and that commerce which is confined within one state and does not affect other states. 'The genius and character of the whole government,' said Chief Justice Marshal, 'seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, *which do not affect other states,* and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

But the inquiry goes further. The question after all must be whether interstate commerce of coal produced in Illinois, for instance, has been interrupted, and the inquiry cannot be diverted from that point by saying that its loss was compensated elsewhere. The question is, was the interruption of the commerce of coal shipped from Illinois or elsewhere caused by practices dealt with in the Act? Further, the Court finds as Congress did, that these recurring industrial disputes interrupt and burden the interstate commerce in bituminous coal.

And finally the problem of these labor relations lies at the very threshold of any regulation of commerce in bituminous coal. Congress and the courts may well see in the labor conditions of bituminous miners the meanest manifestation of unfair practices in interstate marketing—practices which contemplate competition not merely between states, but between fields and even neighboring producers, based

upon a free hand with the wages and working conditions of labor. The operators recognize that at the outset of any effort to stabilize the industry lies the question of hours and wages. Testifying before the Senate Sub-Committee on the hearing of the Guffey bill, the petitioner, James Walter Carter, referred to the bituminous coal code of the N. R. A. as follows (Hearing p. 261):

> "Senator, I do not believe that without the minimum wage and maximum hours provisions, any degree of stability could have been achieved in the coal industry. I believe that is the base upon which the coal industry must rely to solve its problems, some base, a fixed base of wages and hours, keeping in mind, of course, that there are equitable differentials and changes in districts that must be preserved in order to prevent dislocation of the industry that would injure the operators and all the men concerned."

LABOR REGULATIONS—COLLECTIVE BARGAINING

The public policy with reference to the rights of employees to organize without interference on the part of their employer, to collectively bargain with respect to hours, wages and working conditions, has been declared by Congress in the Norris-LaGuardia Act of 1932. The declaration in that Act upon this subject is as broad as the provisions of the Coal Act; and the rights of employees so declared became the basis of the statute regulating the issuance of injunctions by federal courts in industrial disputes. If Congress can deal with labor relations at the mine, obviously the regulations regarding organization and collective bargaining must be accepted as reasonable.

In Texas Company vs. Brotherhood, 281 U. S. 548, the Supreme Court approved the Railway Labor Act saying:

> "We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (The Daniel Ball, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (Mobile County vs. Kimball, 102 U. S. 691, 696, 697); to 'foster, protect, control and restrain' (Second Employers' Liability Cases (Mondou vs. New York, N. H. & H. R. Co.) 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. American Steel Foundries vs. Tri-City Cent. Trades Council, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences

> with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."

It may be said that this Railway Labor Act dealt with railroads, one of the agencies of interstate commerce. But the power of Congress came from the constitutional clause relating to interstate commerce, and the source of the control depends alike in both cases on the direct effect such transactions may have on interstate commerce. If Congress finds that such regulations are necessary to regulate commerce generally, or the commerce of a particular industry, the views of the court in the one case are germane to the other.

CHECK-WEIGHMEN

Where collective bargaining prevails there would be no complaint as to the miners' right to employ check-weighmen or that the producer could require the employee as a condition of employment to occupy company houses. But even among code members there may be no collective bargaining with their employees governing these matters and the code provision regulates them with respect to members accepting the code. The relation of the check-weighman provision to the matter of wages is apparent. It imposes no burden on the operator and cannot possibly deprive him of any right. It is a reasonable requirement plainly designed to prevent unfair practices that directly affect the competitive relation of producers and to remove one of the causes of industrial disputes that have marked the history of this industry.

This is true of the regulation that the operator may not, as a condition of employment, require the miner to purchase his necessities at the company-owned store, and to live in a company house, and the reason for the rule is two-fold; first, the opportunity it gives for sweating the wage of the employee, and second, the control that it creates over the fundamental liberty of the employee. These house contracts by their terms, and by the decisions of some of the state courts, have been held to create the relation, not of landlord and tenant, but of master and servant, entitling the operator to eject the family without notice. The following is a characterization of these contracts by the National Coal Commission in its report to Congress in 1925 (Part 1, p. 169):

> "Thus it appears that each mine or group of mines became a social center, with no privately owned property except the mine, and no public places or public highway except the bed of the creek which flowed between the mountain walls. These groups of villages dot the mountain sides down the river valleys and need only castles, drawbridges, and dungeons to reproduce to the physical eye a view of feudal days. There were no public corporations in many places to provide for the public welfare or to maintain law and order, so the mine owner had one of his employees deputized by the sheriff, and thus came into existence the much discussed 'mine guard.' As the employees were the only ones who were furnished homes, and their occupancy was contingent upon their employment, the courts of that State have decided that the relation of landlord

and tenant did not exist, but that it was the relation of master and servant, and when the employment ceased the mine owner came into possession of the house.

"Thus the position of the miners in company-owned houses is anomalous. They were not tenants, and have no more rights than a domestic servant who occupies a room in the household of the employer. The documents which pass for leases often give the company complete control over the social life of the families who live in the houses owned by the company. One which has been called to the commission's attention from Fayette County, Pa., actually stipulates that the lessee 'hereby further agrees not to use, allow, suffer, or permit the use of said premises, or the private ways or roads through and over other lands of the lessor used to reach said premises from the public road, for any purpose other than going into said premises from the public road, and out from the same to said public road, by himself and the members of his family; and, further, to do no act or thing, nor suffer or cause the same to be done, whereby the public or any person or persons whomsoever may be invited or allowed to go or trespass upon said premises, or upon said private ways or roads, or upon other grounds of the lessor, except physicians attending the lessee and his family, teamsters or draymen moving lessee and his family belongings into said premises or away from the same; and undertakers with hearse, carriages and drivers, and friends, in case of death of the lessee or any member of his family'."

THE LABOR BOARD

Paragraphs (c), (d), (e) and (f) of Part III of Section 4 create and define the duties of a Labor Board of three members to be appointed by the President with the advice and consent of the Senate. This Board is given authority to adjudicate disputes arising under certain of the labor regulations. Its findings and orders are to be transmitted to the Commission which in turn can make its orders thereon, but not for 60 days following the findings and orders of the Labor Board. This delay is to permit the aggrieved code member to take an appeal from the Labor Board direct to the Circuit Court of Appeals as provided in Section 6 (b). In case no such appeal is taken, the Commission may, as provided in the third paragraph of Section 5(a) make its order directing compliance, and an appeal lies from this, as from all other, orders of the Commission. Every right is hedged with provisions for judicial review, and it is difficult to conceive of any constitutional objection to the creation and function of the Labor Board. The construction of the Coal Labor Board, its duties and authority, are not in legal aspects unlike those of the "National Railroad Adjustment Board."

HOURS AND WAGES

Section 4, Part III, Sub-section (g) provides as follows: :

> "Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The

> wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts."

If Congress may provide for collective bargaining in the industry, such collective bargaining must deal specifically with hours and wages, and the scope of such collective bargaining must be a matter for Congress to determine. If there be collective bargaining in a plant it necessarily contemplates the right of a majority of the workers to fix the maximum hours and the minimum wages which shall prevail in the plant. Otherwise the right to negotiate such agreements would prove a farce. And yet in such cases the standard of maximum hours and minimum wages is fixed by a majority of the workers despite the attitude of the minority. For the purpose of making such contracts effective in securing standards that would enable employees to receive both fair wages and fair protection against the competition in the labor field, the combination of labor must necessarily include more than one plant. The Supreme Court recognizes this in American Steel Foundries vs. Tri City Council, 257 U. S. 184-209 in which the Court said:

> "To render this combination at all effective, employees must make their combination extend

> beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood."

In this provision of the Coal Act Congress merely fixed the scope of the collective bargaining in the industry with reference (1) to maximum hours, and (2) to minimum wages. In the bituminous coal industry it has been the practice and custom of negotiating wages, hours and conditions of employment between organized mine workers and operators associations upon such a basis as would provide fair competitive labor cost relations in a given territory. This is a requirement of both operators and miners. For years the basic agreement between coal producers and the organized miners was made in what is known as the Central Competitive Field, embracing Illinois, Indiana, Ohio and Western Pennsylvania. Subject to the broad interstate agreements thus made, and in conformity with it, agreements were then made with all the outlying fields. Beginning in 1933 the basic agreement was made with the so-called Appalachian territory which produced more than 70 per cent of all the bituminous coal produced in the United States; and in turn this agreement became the basis for agreements that were negotiated in all other fields. The method of arriving at the collective bargain in the bituminous fields has since been continued by the Appalachian contract of 1934 and by the Appalachian contract of 1935.

The result of the agreements provided in the Act, arrived at by more than two-thirds the tonnage and more than one-half of the employees, would establish

first, a *prima facie* presumption of reasonableness; second, an essential condition for fair competitive practices in interstate marketing; and, third, a determinative basis for minimum price regulations.

How, otherwise, are these essential objectives to be accomplished? Surely if the end is permissible, the method is in accordance with our economic philosophy. It is removed from the taint of Fascism and contemplates a reasonable spirit of self-government by the industry itself. If the method provided transcends the power of Congress, or if the ultimate test of the validity of the standards reached, lies in their reasonableness, the Act reserves to the producer the right to contest them as other regulations and orders may be contested. Always is there the right of judicial review.

CONCLUSION

In the Schechter *supra*, the Court said:

> "What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."

To say that the labor relations dealt with in this Act are subjects reserved to the state is only to decline to consider them in their direct bearing upon the interstate commerce of bituminous coal. It is only an illogical and arbitrary escape from the established rule, essential to any fair exercise of Congressional authority under the commerce clause, by setting up a novel category of transactions that cannot (legally) directly affect the commerce of a commodity.

It is said that the test of national control of domestic transactions is not simply the extent but the

directness of their effect upon the interstate commerce of a commodity. But what constitutes directness unless it be immediacy and forthrightness, followed by determinable results? When these practices shape the course of interstate marketing of bituminous coal, determine the flow of commerce in that commodity, change and divert its current, and from time to time dam its sources, is the effect to be denied the quality of directness?

It is obvious that the very consideration of the subject involves weighing the responsibilities of national sovereignty in a field wholly reserved to it. Is Congress, charged with the duty of providing "all appropriate legislation for the protection and advancement of interstate commerce," powerless here? What taboo attends the field of labor relations that necessarily paralyzes the regulatory hand of the government? It has been repeatedly declared by this court that "it is the effect upon commerce and not the source of the injury that is the criterion of congressional power." This being so, realities should dominate judgment.

The situation cannot be met with speculations over the implications involved in such an exercise of power. Some reliance must be placed in the Congress, and, after all, the Court has with respect to this very question, said that "the precise line can be drawn only as individual cases arise." To strike down the labor regulations of this Act, under the findings of Congress and the record presented, would be "to break the word of promise to the hope."

Respectfully submitted,

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Amicus Curiae.

APPENDIX A

Certain findings referred to on page 16 of the Brief.

"42. Bituminous coal is, and probably will continue to be, the principal source of energy in the United States. Nearly one-half of the mechanical energy is at present derived from bituminous coal. In 1934, water power supplied 9.3 per cent, natural gas 8.7 per cent, oil 28 per cent (including energy used by automobiles), anthracite coal 7.7 per cent, and bituminous coal 46.3 per cent of the total energy consumed in the United States. Bituminous coal likewise furnishes an important part of the fuel used for household heating. In 1929 bituminous coal supplied approximately 75 per cent of all primary energy used in the manufacturing industries of the country, in 1934 it supplied approximately 75 per cent of all fuel used by public utilities, and in 1933 it supplied approximately 83 per cent of all energy used by railroads for locomotive power. It is estimated by scientists that water power can never furnish a major portion of the energy requirements of the United States. The known supplies of oil and gas are limited, so that, unless new sources of energy are discovered or developed, coal will continue to be the primary source of energy. (Tr. 129.)

"43. Bituminous coal is consumed in every state of the United States in generating energy for the production of light, heat and power, and its use for such purpose is indispensable to the industrial and economic life and to the health and comfort, of the inhabitants of the United States and is vital to the public welfare. In view

of the present importance of bituminous coal as a source of energy it is of great importance to the public welfare that the distribution and marketing of bituminous coal both in interstate and intrastate commerce be not subjected to interruptions, dislocations, burdens or restraints. (Tr. 130.)

"46. Commercially important deposits of bituminous coal within the United States are limited to 23 producing areas confined within the boundaries of 26 states, and more than 70 per cent of the total annual output is mined in 4 states, namely, Pennsylvania, West Virginia, Kentucky and Illinois. (Tr. 131.)

"96. The competitive conditions existing after 1923 caused the price of bituminous coal to fall substantially, and resulted in the average mine realization price of the industry as a whole being less than the cost of production of the industry as a whole. The average sales realization declined from $2.68 a ton in 1923 to $2.20 in 1924, a drop of 48 cents in one year. The decline continued thereafter, interrupted only in 1926 in which year there was a temporary recovery of 2 cents a ton. In 1925 the average sales realization was $2.04; in 1926 it was $2.06; in 1927 it was $1.99; and in 1928 it was $1.86. By 1929 the average realization had declined to $1.78 a ton, a decrease of 90 cents a ton or 33.6% below 1923. In 1930 the average sales realization was $1.70 and in 1931 was $1.54. By 1932 the average realization had fallen to $1.31 a ton. In 1933 the average sales realization price was $1.34. The decline of one-third in the average realization from 1923 to 1929 took place in a period of general

business prosperity when the average of commodity prices was relatively stable. After 1929 there was a period of general business depression when the average of commodity prices declined approximately one-third. (Tr. 161.)

"102. As a result of the intense competition and consequent low prices, so far as figured are available, the bituminous coal industry as a whole showed deficits during the period 1924-1933, with the possible exception of 1926. The following table gives the statistics as to net income or deficit of the coal industry, according to Treasury Department data from income tax returns:

Year	Bituminous coal industry	Anthracite industry	Bituminous coal and anthracite combined
1917	$203,918,518	*	*
1918	148,846,632	*	*
1919	62,259,694	*	*
1920	249,367,379	*	*
1921	28,889,194	*	*
1922	*	*	$70,851,551†
1923	*	*	67,344,920†
1924	*	*	—49,250,562†
1925	—22,363,497	—$44,359	—22,407,856
1926	*	*	+37,714,000
1927	*	*	—20,303,000
1928	—24,508,000	5,251,000	—19,257,000
1929	—11,304,000	2,422,000	—8,882,000
1930	—42,071,000	8,109,000	—33,962,000
1931	—47,745,000	—1,614,000	—49,359,000
1932	—51,167,000	—16,697,000	—67,864,000
1933	—47,549,000	*	*

*Separate or comparable data not available.
†Prior year's losses deducted.

Throughout the period from 1924 to 1933, many producers were forced into bankruptcy or receivership. (Tr. 165.)

"160. Present mining generally is concentrated on the richest and most accessible deposits, many of which are relatively short-lived. It is estimated that at 1929 rates of production the life of the Connellsville coking coal is from 20 to 30 years; of the Pittsburgh bed in Pennsylvania, 100 years; of the beds of present workable thickness (36 inches or more) in the smokeless or low-volatile fields of southern West Virginia, 85 years. Veins of less than 18 inches are commonly mined in Europe today.

"162. The intense competition in periods of low prices has caused a waste of coal resources. Waste of the beds now being mined are substantial. In Europe the average extraction is 90 per cent. In America, according to an engineering study by the United States Coal Commission and the Bureau of Mines in 1923, the average extraction was 65.3 per cent. The average loss was 34.7 per cent, of which close to 20 per cent was classified as avoidable and 15 per cent as unavoidable. At the 1923 rate, in a year of normal production of 500,000,000 tons, the avoidable loss would amount to 150,000,000 tons. Mining methods have improved since 1923 despite decreased prices. Less wasteful methods are not necessarily more expensive.

"163. In the State of Pennsylvania the average loss in the 1923 survey was 28 per cent, of which 13 per cent was unavoidable and 15 per cent was avoidable. In the Pittsburgh Coal seam the avoidable losses range from 9 per cent to 15 per cent. Since 1923, however, there have been great additional losses not covered by the survey of that year, through the premature

abandonment of mines before exhaustion. In many cases such abandonment results in the crushing and burying of the workings and the isolation of irregular areas of unmined coal in such way as to make subsequent recovery possible, if at all, only at very great increase in cost. Losses due to premature abandonment are not accurately known. Such wastes are largely connected with the financial condition of the industry.

APPENDIX B

Certain Findings of Facts relating to labor, referred to in the Brief at page 42.

"64. The cost of labor in the production of coal averages between 60 per cent and 65 per cent of the total cost of production. The remaining costs consist of such items as taxes, insurance, interest, selling and administrative expenses, depreciation and depletion, some of which are fixed and other of which offer little leeway for making reductions. The percentage of labor cost to value is very much higher in the bituminous coal industry than in any other large industry excepting anthracite coal. As a result, wage rates are an important element in the conduct of the business of coal mining. Wages in the coal industries constituted in 1929 (the most recent year for which comparable figures are available) over 59 per cent of the total value of the product, whereas the general average for the four other large mining industries was 21 per cent and for the 48 large manufacturing industries 18.2 per cent. As a result the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry.

Where one employer cuts his wage costs his competitors in order to maintain their share of the market, must do likewise (Tr. 140.)

"65. The average of employment in bituminous coal mining is irregular and intermittent. Over the last 35 years the mines have averaged 204 days of operation per year, or 3.9 days a week. This has meant an average idleness of 104 days out of the 308 days in a normal working year. The highest average working time ever attained was 249 days in 1918, the year of the munitions demand. In 1929, the mines averaged 219 days, or 4.2 days a week. In 1933, they averaged 167 days, or 3.2 days a week. The idle days are scattered a few days a week over much, if not all, of the year. The bituminous coal industry is an industry in which unemployment, resulting from irregular operation, is chronic. (Report of U. S. Coal Comm. on Labor Relations in Coal Mining, Vol. 3, p. 1308.) (Tr. 141)

"66. Adequacy of wages in the mines should also be considered in the light of the high accident hazard. In 1930 and 1934, the accident severity rate at bituminous coal mines was higher than in any other industry reporting to the National Safety Council. The incident frequency rate in bituminous coal mines was higher than in any other industry in 1930, and in 1934 it was higher than in any other industry except anthracite coal mining and lumbering. In 1934, the accident frequency rate in bituminous mines was 2.9 times as great as the average for all industries, and the accident severity rate was 6.7 times the average for all industries. The actuarial chance of death in the mines, judging

from the last 5 years experience, is 1 out of 10, that is 1 out of 10 men who spend their working lives in the mines will be killed in a mine accident. The American accident rate in the year 1933 was the highest of any important coal mining country in the world. In American bituminous coal mines 3.6 men were killed per 1,000 employed, as against 1.0 in Great Britain.

"106. As a result of the competitive conditions which existed in the industry in the decade following 1923, the method of fixing and correlating wages which had theretofore been employed throughout a very large part of the industry through the instrumentality of wage agreements between associations of producers representing a number of areas and states, on the one hand, and the miners' union, was almost entirely broken down. At the beginning of 1923 approximately 70% of the total capacity of the industry was covered by collective wage agreements. Such arrangements covered the Central Competitive Field (Illinois, Indiana, Ohio and Western Pennsylvania); the Southwest Interstate Field (Missouri, Kansas, Oklahoma, Northern Texas and Arkansas); the states of Michigan, Iowa, Wyoming, and Montana; parts of Washington and Colorado; most of the central Pennsylvania district; northern West Virginia; the Kanawha, Coal River and New River districts of southern West Virginia, and portions of eastern Kentucky, western Kentucky and Tennessee. (Report of U. S. Coal Comm., Vol. III, p. 1050-52.) (Tr. 166)

"107. In a number of important areas, however, including several major districts in south-

ern West Virginia, in Kentucky and in portions of Tennessee, and the States of Virginia, Utah, New Mexico and Alabama the collective method of fixing, and coordinating wages had not been adopted. Various attempts were made by the miners' union, the United Mine Workers of America, to organize these fields. Operators in these areas had successfully resisted these attempts to organize and in so doing many of them used armed guards, relied on the fact of their ownership of land and houses, obtained labor injunctions and used individual or "yellow dog" contracts of employment. The attempts to organize these fields had frequently been accompanied by acts of violence and by bloodshed. Serious disorders occured in West Virginia in 1920-21, culminating in a march of several thousand armed men, clashes with mine guards, and hired detectives and State militia, and intervention at the request of the State Governor of 2,000 Federal troops. Such attempts to organize and the operators' resistance to such attempts were continued after 1923. The attempts of the miners' union, the United Mine Workers of America, to organize these fields were prompted in a large measure by the competitive pressure exerted by the cutting of wage rates in non-union fields upon the union scale of wages in competing areas.

"108. *** From the Kanawha Valley the area of non-union or open-shop production spread northward and westward as companies that had signed the Jacksonville wage agreement, finding themselves unable to meet the competition from the adjacent non-union areas,

abrogated their wage contracts. These contract abrogations commenced in the year 1924 and continued throughout the period covered by the Jacksonville agreement. They were followed by a series of strikes, many of which were prolonged, strikes which closed down many mines in Ohio, northern West Virginia, and Pennsylvania and the closing of these mines during the strike period substantially affected the distribution of coal in interstate commerce. When the Jacksonville wage agreement expired on March 31, 1927, practically all of the remaining union operators in the Appalachian fields, including Pennsylvania and Ohio being unwilling in the face of non-union competition to enter into any agreement providing for a fixed wage scale, offered to the union miners represented by the United Mine Workers of America a plan, known as the Miami Proposal, for a contract in which wages would be based on a sliding scale based on wages in the unorganized fields. This proposal was rejected by the miners upon the ground that it offered them no protection against having to accept the wages, hours, and working conditions of non-union miners employed under individual contract, in non-union territory. A protracted strike followed the failure of the operators and the miners to make any wage agreement with the result that many mines were closed down in Illinois, Indiana, Ohio and parts of Pennsylvania and in the organized States of the West, during the period of the strike which lasted for periods varying from March 31, 1927, into August, September and October of that year. The conditions in the coal fields of Pennsylvania, West Virginia and Ohio resulting from this strike and

the strikes in 1925-6 were the subject of investigation by the Committee on Interstate Commerce of the Senate of the United States (70th Cong., 1st Sess., 1928). The closing down because of this strike of many mines in the States mentioned substantially affected the distribution of bituminous coal in interstate commerce.

"112. As the area covered by collective bargaining contracted, the union wage scale in the northern districts was reduced from $7.50 a day for inside skilled labor to $5.00 a day. The change is illustrated by the union scale in Illinois, which remained $7.50 until after the suspension of 1928, then dropped to $6.10, and after another suspension in 1932 dropped to $5.00. An indication of what these wage scales meant in terms of annual income is given in the table below, constructed from defendant's exhibits 4A and 46.

ILLINOIS

1923	
Scale, inside day labor	$ 7.50
Days operated	158
Calculated annual income	$1,185
1926	
Scale, inside day labor	$ 7.50
Days operated	172
Calculated	$1,290
1929	
Scale, inside day labor	$ 6.10
Days operated	177
Calculated annual income	$1,080
1932	
Scale, inside day labor	$ 5.00
Days operated	112
Calculated annual income	$ 560

The decrease in the Illinois rate from 1923 to 1932 was 33 1-3 per cent; the decrease in days worked was 29.1 per cent; and the decrease in annual income was 52.7 per cent. (Tr. 172)

> "113. During the period that the union day wage scale was reduced from $7.50 to $5.00, the corresponding wage scales in the non-union areas suffered a greater reduction. The wages of trackmen are typical of the skilled day wage occupations underground. Hand loaders constitute the principal piecework occupation underground. Piece workers underground constitute 67 per cent of the working force in Pennsylvania and 57 per cent in West Virginia. Day wage workers constitute 33 per cent of the force in Pennsylvania and 43 per cent in West Virginia, of whom 22 per cent and 29 per cent, respectively, work underground, 11 per cent and 14 per cent, respectively, working on the surface. **** The largest reductions on a percentage basis in wage rates from 1922 to 1933 occured in areas which were union in 1922 and went non-union after 1927. Throughout this period wage rates in the non-union mines were, with few exceptions, substantially below those in the union mines. The lower wage rates generally paid, and the proportionately greater wage reductions, in the non-union mines enabled them to capture business from the higher wage union mines, and to increase their operating time. ****
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> "115. The steadier employment thus obtained by southern mine workers for a time acted to offset the greater reduction in their daily wages, especially during the period of the Jacksonville wage agreement. As Pennsylvania and Ohio

went non-union and cut their wage rates, and as Illinois and Indiana were forced to reduce the union scale, further wage cuts were made in the South. Price reductions forced cuts in wage rates a descending spiral. ***** Between 1926 and 1933, the income of the West Virginia loader had been reduced from $1,361 to $557, a decrease of 59.1 per cent while the income of the Pennsylvania had been reduced from $1,288 to $429, a decrease of 66.7%. The West Virginia loader's opportunity to work had been reduced to the extent of 20.6 per cent, but his wage rate had been reduced 48.5 per cent. The Pennsylvania loader's opportunity to work had been reduced to the extent of 27.6 per cent, but his wage rate had been reduced 53.9 per cent. (Tr. 175)

"121. As Pennsylvania and Ohio went non-union and as Illinois and Indiana reduced their union scale, the northern group reduced their prices and recovered a part of the percentage lost to the South during the years of the Jacksonville agreement. They did not, however, match the price reduction of the Southern fields, and consequently the Southern group retained a large part of the percentage gains made. Over the 10-year period the proportion from the South rose from 36.1% in 1923 to 50.2% in 1933. A measure of the actual tonnage involved in this shift of business is found by comparing shipments in 1923 and 1929, both years of active business. Between these years shipments from the northern group decreased 52,800,000 tons, and shipments from the southern group increased 50,300,000 tons. These figures represent not

the cumulative shift but the total for the single year 1929. (Tr. 181)

"127. It has been customary in the bituminous coal industry for large groups of producers operating in competing areas in several states to associate themselves for the purpose of bargaining collectively with representatives of their employees, organized in an industrial trade union on a national scale, namely the United Mine Workers of America, concerning wages, hours and other conditions of employment. The main purpose of negotiating such agreements to cover large producing areas has been to fix, stabilize and correlate wage rates and other conditions affecting the same throughout such areas and to avoid interruptions of work caused by labor disputes. (Tr. 186)

"128. Beginning with the year 1898, the basic collective wage agreement of this character was negotiated between an association of practically all of the producers operating in the Central Competitive Field (Illinois, Indiana, Ohio and the western part of Pennsylvania) and representatives of their employees namely the United Mine Workers of America. Taking the wage rates fixed in this fashion in the Central Competitive Field, wage rates correlated to such basic rates on the basis of competitive conditions were then fixed by similar collective agreements made between groups of operators and the United Mine Workers of America, as representatives of their employees, in adjacent unionized areas. This method of fixing and correlating wage rates was continued and expanded until 1922, when approximately 70%

of the industry was operating under such agreements.

"129. **** Between the years 1927 and 1933 practically the entire industry was engaged in a demoralizing competitive warfare in which cutting of wage rates followed price-cutting in a continually descending spiral. Upon the passage of the National Industrial Recovery Act the system of fixing and correlating wages by collective bargaining agreements as formerly practiced, was established upon substantially a national scale. Since October, 1933, wage rates throughout practically the entire industry have been fixed, and correlated by a basic collective agreement (Appalachian) executed by and between representatives of the producers in the industry by tonnage on the one hand, and by representatives of over 70 per cent of the workers employed in the industry on the other, such agreement then being supplemented by similar agreements in practically all other producing areas.

"142. A number of social workers who investigated the coal fields from 1931 to 1933 testified to the conditions observed by them. This testimony covered observations and conditions in the five largest bituminous coal counties in Pennsylvania, ranked according to number of miners employed in 1931; in the first, fourth, fifth, sixth, seventh, and eighth largest counties of West Virginia; in the four largest counties of Kentucky; in the largest county of Tennessee; in the first, third, and fourth largest counties of Illinois; and in seven other coal-mining counties in these same States. The liv-

ing standards of miners and families in these areas at that time were found to be very low. Diet was meager and a great many families were under-nourished. Milk was not available for the children. The clothing of many of the miners and their families was dilapidated and time-worn. House furnishings were paltry. The living conditions of the employes at the larger and better operated mines were upon a considerably better plane. Though many bituminous coal-mining communities were so impoverished as to be of particular concern to agencies engaged in relief and social work, and in 1931, two years before the Federal Government assumed responsibility for provision of depression relief, President Hoover asked The American Friends Service Committee to undertake a program of child feeding in the bituminous coal area. This child feeding program was conducted in 640 schools scattered through 40 counties in six coal mining states. In 1923 the United States Coal Commission caused detailed studies to be made of living conditions in 880 bituminous mining communities, as a result of which that Commission found somewhat similar living conditions to exist. (Tr. 193)

"143. Over one-half of the miners engaged in the industry are piece workers and are paid on the basis of the weight of coal mined. It has been a common practice for non-union producers to pay on the basis of weights as estimated by them, and prior to October, 1933, a great many mines did not have scales with which coal loaded by the piece workers might be weighed. Among the mines where scales were provided

for this purpose there were a large number of non-union fields where the mine workers were not permitted to check the weights as determined by the operators. Some operators took advantage of these conditions to short-pay their piece workers. As a result in some areas there was a general feeling on the part of the workers that they were unfairly treated and there was strong general demand on the part of the workers for adequate scales for weighing coal and for check-weighmen employed and paid by the workers to check the weighing. The evidence in this case does not justify a finding that said practice was general.

"144. It was a not uncommon practice for operators in non-union areas to require their employees to trade at company stores and to live in company houses and to provide in the lease covering such houses that the employee would be subject to immediate eviction without notice in case of discharge. As a result there was a general feeling on the part of such employees that if they attempted to organize in opposition to the wishes of their employers, they might be evicted immediately from their houses. It was also not an uncommon practice for operators in non-union areas to require their employees to sign individual contracts of employment containing provisions under which the employee undertook not to join a labor organization. All of these conditions have tended directly to cause unrest and dissatisfaction on the part of the mine workers. Just prior to the passage of the National Industrial Recovery Act, approximately only 20 per cent of the mine work-

ers employed in the industry were organized for collective bargaining purposes. Within six weeks after the passage of that Act over 90 per cent of the mine workers had become members of a labor organization for such purpose."

APPENDIX C

Findings of fact with respect to strikes and their effect on commerce; referred to at p. 45, of Brief.

"80. When union wage contracts expired, it was found difficult to renew them on terms mutually satisfactory, and at the expiration of wage contracts suspensions of mining operations in union areas took place in 1904, 1906, 1908, 1910, 1912, and 1914. The suspension of 1906 involved approximately 211,000 men in 10 states and lasted in the different districts from 2 to 3 months. In the suspension of 1910, again approximately 211,000 men were involved, this time in 10 states, the duration of the dispute ranging in different states from 45 days to 157 days. The resistance of the union employers to renewal of the agreement was due largely to an inability to meet the competition of other operators who were free to adjust or to lower wages and were not bound by collective agreements. (Tr. 149) * * *

"82. The strike of 1912-1913 in the Paint Creek and Cabin Creek District of West Virginia was accompanied by bloodshed and declaration of martial law and led to investigation by the United States Senate. (Conditions in Paint Creek District, West Virginia, Hearings before a subcommittee of Senate Committee on Education and Labor, 63d Congress, 1st Session, pur-

suant to S. Res. 37.) The strike in Colorado in 1913-1914 was likewise accompanied by bloodshed, use of the state militia, and federal troops and a Congressional investigation. (House Committee on Mines and Mining. Conditions in the Coal Mines of Colorado. Hearings before a Subcommittee on Mines and Mining, pursuant to H. R. 387.) (Tr. 150)

"84. A second acute shortage of coal occurred in 1919 to 1920. The initial cause was a general strike of all union miners which began November 1, 1919, and lasted to December 16. A total of 415,000 men were on strike in 22 states. By the time the strike had reached its sixth (and last) week consumers' stocks in the territory north of the Ohio and Potomac and east of the Mississippi were dangerously low and industries were beginning to close for lack of fuel. After the miners' strike was settled, but before consumers had succeeded in rebuilding their customary stocks, an outlaw strike of railway switchmen, beginning April 1, 1920, congested railroad terminals and created an acute shortage of cars at the mines. At the same time the British Government placed a limitation on customary exports of coal from the United Kingdom, creating an active demand for the export of American coal. These three factors drove up the price to unprecedented heights. From November 1, 1919, to March 31, 1920, the Government fixed maximum prices, acting under the Lever Act. The average spot price, f. o. b. mines, fixed by the Government as of March, 1920, was $2.58 a ton. When the price regulations were removed, the average spot price f. o. b. mines, rose to a peak of $9.51 a ton in August, 1920. The increase of

prices was greatest on the eastern seaboard where sales at $20 a ton, f. o. b. mines, were reported. The average spot price of Pocahontas coal in August was $12.90 a ton, f. o. b. mines, and that of Somerset mine-run coal was $11.97 a ton. These prices refer to spot sales, which ordinarily constitute about 25 per cent of total sales. The average sales realization for the year 1920, contract and spot business for the country as a whole, was $3.75 a ton. (Tr. 153)

"85. Another acute shortage of coal occurred in 1922. The primary cause was a suspension of mining at the expiration of the wage agreement on March 31, 1922, which affected all of the union bituminous mines and the non-union mines in a number of districts and was accompanied by a simultaneous suspension at the anthracite mines. This strike resulted from the refusal of the union operators to renew the agreement on the basis of prevailing wages because of competition from non-union operators paying lower wages. In this suspension 460,000 bituminous miners went out, and at one time 73 per cent of the productive capacity of the bituminous coal fields was shut down. At the same time, 142,000 anthracite miners went out. The strike began April 1, 1922, and lasted officially to August 16, some districts remaining out into September, 1922. The effects of the mine suspension were accentuated by a strike of the railway shopmen on July 1, 1922, which created a further shortage of railway cars in the non-union coal fields. During the 1922 shortage the average spot price of bituminous coal, f. o. b. mines, rose from $2.12 a ton in March, 1922, before the suspension, to a peak of $6.13 a ton in August, 1922. The

average spot price for the year 1922 was $3.64 a ton and the average sales realization, including contract as well as spot sales, was $3.02. (Tr. 153)

"87. During the strike of 1919 the Federal Government restored the regulations of the United States Fuel Administration under the Lever Act, reinstated the maximum prices fixed during the War, and distributed the limited supply of coal to consumers most in need. To arbitrate the issue in dispute at this strike the President tendered his offices and appointed the "United States Bituminous Coal Commission" which handed down its award, effective April 1, 1920. In the shortage of 1920 use was made of the powers of the Interstate Commerce Commission under the Transportation Act to declare priorities in the movement of coal. During the strike of 1922 the President attempted to effect a settlement, (U. S. Bureau of Mines, Coal, 1922, P. 450) the priority powers of the Interstate Commerce Commission were again utilized, and a Presidential Fuel Distribution Committee was set up. In September, 1922, Congress passed an act creating the office of Federal Fuel Distributor for a period of one year. Between 1917 and 1922, six Congressional Investigations were made with reference to the price and supply of coal. By an Act approved September 22, 1922, Congress created the United States Coal Commission to make an investigation of the coal industry and to report its findings and recommendations, this Commission concluded that:

(1) Coal mining is an indispensable public service.

(2) Continuous fact-finding on the basis of compulsory submission of reports is advisable.
(3) A Coal Division should be established in the Interstate Commerce Commission.
(4) A Federal license should be required of shippers of coal in interstate commerce.

(Report of the U. S. Coal Commission, pp. 259, 263, 264, 269.) (Tr. 155)

"88. These shortages laid a burden on the consumer of coal. During the 1922 shortage buyers were frequently compelled to accept impure coal or coal from unaccustomed sources not suited to their requirements. Numerous locomotive failures on the railroads occurred as a result of inferior coal they were compelled to use. Consumers had to put in heavy stocks of coal in anticipation of a suspension of mining. Consumers' stocks at the beginning of the 1922 suspension were 60,000,000 tons, or 30,000,000 tons above what would have been needed had there been no strike. There were many complaints to Congress by consumers concerning the high prices. * * *

"108. * * * From the Kanawha Valley the area of non-union or open-shop production spread northward and westward as companies that had signed the Jacksonville wage agreement, finding themselves unable to meet the competition from the adjacent non-union areas, abrogated their wage contracts. These contract abrogations commenced in the year 1924 and continued throughout the period covered by the

Jacksonville agreement. They were followed by a series of strikes, many of which were prolonged, strikes which closed down many mines in Ohio, northern West Virginia, and Pennsylvana and the closing of these mines during the strike period substantially affected the distribution of coal in interstate commerce. When the Jacksonville wage agreement expired on March 31, 1927, practically all of the remaining union operators in the Appalachian fields, including Pennsylvania and Ohio being unwilling in the face of non-union competition to enter into any agreement providing for a fixed wage scale, offered to the union miners represented by the United Mine Workers of America a plan, known as the Miami Proposal, for a contract in which wages would be based on a sliding scale based on wages in the unorganized fields. * * * A protracted strike followed the failure of the operators and the miners to make any wage agreement with the result that many mines were closed down in Illinois, Indiana, Ohio and parts of Pennsylvana and in the organized States of the West, during the period of the strike which lasted for periods varying from March 31, 1927, into August, September and October of that year. The conditions in the coal fields of Pennsylvania, West Virginia and Ohio resulting from this strike and the strikes in 1925-26 were the subject of investigation by the Committee on Interstate Commerce of the Senate of the United States (70th Cong., 1st Sess., 1928). The closing down because of this strike of many mines in the States mentioned substantially affected the distribution of bituminous coal in interstate commerce. (Tr. 169)

"109. After this strike most of the operators in the States of Pennsylvania, Ohio and part of Indiana, reopened their mines on an open-shop basis at lower wage rates, in order that they might be able to meet the competition of the unorganized districts. Further strikes in the few remaining unionized areas occurred in 1928 and 1932. * * * (Tr. 170)

"110. Unlike the strike of 1919 and the suspension of 1922, these later suspensions caused no national shortage of coal, and there was no marked increase in price. They did, however, cause shifts and diversions of shipments between the various producing states, and laid upon consumers the burden of accumulating large stocks in antcipation of shortage. * * *

At the time of the suspension of 1927, production in the State of Illinois dropped from 10,000,000 tons a month before the suspension to a negligible quantity. Individual railroads serving Illinois and adjacent fields were similarly affected, coal loadings on the Chicago, Milwaukee, St. Paul & Pacific System declining from 23,000 cars a month before the strike to approximately 2,900 cars a month during the strike.

"111. * * * The suspension of 1906, 1908, 1910, 1912, and 1927 all led to sudden and wide fluctuation in the production of coal and in the use of mine capacity and railroad transport facilities in the districts affected; and to the accumulation of emergency stocks. Even when the price did not advance sharply, the consumer had to pay the cost of emergency storage, and if the excess stocks were not used during the strike, they acted to depress the market thereafter. The diversion of orders to new channels

created an illusory anticipation of profits, led to ill-advised investments in new mines or new equipment, and was one of the factors tending to create or to perpetuate the surplus of mine capacity. (Tr. 172.)

APPENDIX D

Extracts from the report of the Commission appointed by the Governor of Kentucky to investigate conditions in Harlan County, dated June 7, 1935, and introduced in the record of the hearings before the Ways and Means Committee of the House on the Guffey bill at p. 636:

"It is almost unbelievable that anywhere in a free and democratic Nation such as ours, conditions can be found as bad as they are in Harlan County. There exists a virtual reign of terror, financed in general by a group of coal-mine operators in collusion with certain public officials; the victims of this reign of terror are the coal miners and their families.

"We found conditions in Bell and Letcher Counties entirely the reverse of those in Harlan. We believe that these better conditions existing in the first two counties are due to a better understanding between employers and employee. In these counties, freedom of speech and the right to peaceably assemble are recognized. There is no oppression from above; there is helpful cooperation and understanding between 'the operators and the miners. However, it is true that these outrageous conditons complained of in Harlan County do not exist in all the mines in that county. There are some

operators in Harlan County who do not condone the practices indulged in by the Harlan County Coal Operators' Association. These operators who do not endorse the methods of the Harlan County Coal Operators' Association are fair and just to their men and treat them as human beings, yet while affording fair and decent treatment to their employees, these operators are operating their mines apparently as successfully as are other operators where ruthless oppression is the rule. The commission wishes to especially express its commendation of these operators who have the courage to operate their mines in a righteous manner when surrounded by so many operations where unjust and un-American methods are practiced.

"In Harlan County we found a monsterlike reign of oppression, whose tentacles reached into the very foundation of a social structure and even into the church of God. Ministers of the Gospel of the very highest standing complained to us of these conditions. Reprisals on the part of bankers, coal operators, and others of the wealthier class were practiced against churches whose ministers had the courage to criticize from the pulpit, the intolerable state of conditions that they of their knowledge know to exist in Harlan County. The miners themselves and their families generally, hesitated to discuss their affairs with the commission. Free speech and the right to peaceable assemblage is scarcely tolerated. Those who attend meetings or voice any sentiment favorable to organized labor are promptly discharged and evicted from their homes. Many are beaten and mistreated

in most unjust and un-American methods by some operators using certain so-called 'peace offiicers' to carry out their desires. * * *

"The proof shows that the homes of union miners and organizers were dynamited and fired into, that the United States flag was defiled in the presence of, and with the consent of, peace officers who were sworn to uphold the principles for which it stands. These flags were on cars that were being used for organization purposes by the United Mine Workers. A deputy sheriff from an adjoining county entering Harlan County to make an arrest was disarmed, his gun was broken up with a sledge hammer, at the direction of the sheriff and he, himself, was ordered to leave the county by Sheriff Middleton in person.

"The Honorable Charles Barnes of Cincinnati and New York, chairman of the National Recovery Administration Bituminous Coal Labor Board for District No. 1 South, told your commission under oath, that his board had been unable to obtain the least semblance of cooperation from most of the large Harlan County coal operators. * * * Mr. Barnes testified that the charges against the Harlan County operators consist of discrimination against the men, intimidation, lack of checkweighmen; the discharging of a number of men for no other reason than for union activities. Violation of code hours and wages were numerous and general. He stated that every mine in the Harlan district, except those in contractual relations with the union, violated the code's regulations.

"Mr. Barnes testified that he had received 128 sworn affidavits supporting complaints against different mines in Harlan County concerning the beating-up of men by deputy sheriffs, and also for other causes. * * *

"The evidence shows that the miners' wages are cut for additional school costs such as longer terms, additional teachers, etc., but it also appears that the operators have much to say as to the selection of the teachers, who naturally are friendly. The men are also out for the expense of company doctors. Of course, the companies select these, who are also friendly.

"The only newspaper in the county is owned by a gentleman who is the enthusiastic friend and supporter of the operators. Even the choice of banks for their savings and of undertaker for the burials of their men are handled to the satisfaction of the operator.

"Many cities and towns of Harlan County are not incorporated as in other counties, because the operators prefer to maintain their own government rather than give their men the right to participate and elect their officials, police officers, etc., as they do in Jenkins, Letcher County, and in many other places where the rights of the people are respected. Thus, it cradle to the grave, the things most vitally will be seen that in Harlan County, from the affecting the lives of the people are under the friendly control and supervision of the operators. * * *

"Your commission fully recognizes the fact that the southeastern Kentucky bituminous-

coal fields are among the most extensive and the wealthiest in the world and that the operators who have heavily invested their capital in this field have a right to lawful protection and a fair profit on their investment. It also recognizes the fact that the United Mine Workers of America or any similar organization has the constitutional right, so long as it remains in the bounds of legal propriety and reason, to organize, to speak and to conduct meetings wherever and whenever it may desire.

"It appears that the principal cause of existing conditions in Harlan County is the desire of the mine operators to amass for themselves fortunes through the oppression of the laborers, which they do through the sheriff's office. Mine owners have a right to have their property properly protected, but these mine guards should not be made use of away from the property of their employers. They should not be gunmen or ex-convicts; they should not be organized into "flying squadrons" to terrorize and intimidate people anywhere in the county wherever the sheriff may direct."