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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER, PETITIONER

v.

CARTER COAL COMPANY, ET AL.

No. 651

GUY T. HELVERING, ET AL., PETITIONERS

v.

JAMES WALTER CARTER, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA*

**BRIEF FOR GOVERNMENT OFFICERS, RESPONDENTS IN
NO. 636 AND PETITIONERS IN NO. 651**

OPINION BELOW

The opinion of the Supreme Court of the District of Columbia (R. 1179) is reported in 63 Wash. Law Reporter 986.

JURISDICTION

The decree of the Supreme Court of the District of Columbia was entered on December 10, 1935.

(R. 216A.) Appeals were taken to the United States Court of Appeals of the District of Columbia on December 10, 1935, and petitions for writs for certiorari filed in this Court prior to hearing or submission of the appeal in the Court of Appeals. Both petitions were granted December 23, 1935. Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED IN NO. 636

1. Whether the tax imposed by the Bituminous Coal Conservation Act is constitutional if its regulatory provisions are constitutional.

2. Whether the provisions of the Act with respect to price regulation—

(a) are a valid exercise of the power of Congress to regulate commerce among the several states;

(b) infringe any rights guaranteed by the due process clause of the Fifth Amendment; or

(c) constitute an invalid delegation of legislative authority.

3. Whether the provisions of the Act regulating unfair methods of competition are a valid exercise of the commerce power of Congress.

4. Whether the provisions of the Act with respect to regulating minimum wages and maximum hours of labor and its provisions prohibiting interference by employers with their employees' right to organize and bargain collectively—

(a) are a valid exercise of the commerce power of Congress;

(b) infringe any rights guaranteed by the due process clause of the Fifth Amendment; or

(c) constitute an invalid delegation of legislative power.

5. Whether, if any of the provisions of the Act are invalid, its remaining provisions, as well as the code provisions corresponding to such remaining provisions, are severable and valid.

QUESTION PRESENTED IN NO. 651

Whether the trial court erred in permanently enjoining the collection of the tax, in excess of 10% thereof, which had accrued prior to the entry of its decree.

STATUTE INVOLVED

The Bituminous Coal Conservation Act of 1935 is set forth in the Appendix, *infra*, pp. 289 to 325. Its major provisions are summarized here for the convenience of the Court.

Section 1 (*infra*, p. 289) states that it is hereby “recognized and declared” that the production and distribution of bituminous coal “directly affect” interstate commerce and render regulation thereof “imperative for the protection of such commerce”; that overexpansion of the industry has led to practices and methods of production, distribution, and marketing that “disorganize * * * burden and obstruct” interstate commerce in such coal;

that regulation of production and prices is necessary in order to promote interstate commerce and remove burdens and obstructions therefrom; and that the right of mine workers to organize and bargain collectively "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 industrial disputes over labor relations at the mines." As a basis for these findings, Congress had before it not only the hearings conducted in the course of its consideration of the present legislation, but the facts as to conditions in the industry disclosed by numerous prior Congressional hearings, reports and investigations. (*Infra*, pp. 15-23.)

Section 2 (*infra*, pp. 290-293) provides for the creation of a National Bituminous Coal Commission (hereinafter referred to as the Commission).

Section 3 (*infra*, p. 293) imposes upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15% on the sale price at the mine, or, in the case of captive coal, on the fair market value of the coal at the mine. The tax is payable monthly on or before the first day of the second succeeding month. There is a proviso that any coal producer who has filed with the Commission his acceptance of the code provided for in Section 4 of the Act shall be

entitled to a drawback in the form of a credit equal to 90% of the amount of the tax. It is further provided that no producer shall by reason of his acceptance of the code or the drawback be “precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.”

Section 4 (*infra*, pp. 294–313) states that its provisions shall be formulated into a code and that this 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.”¹ The contents of the code, as thereafter set forth in Section 4, are divided into three parts designated Part I, Part II, and Part III, each part in turn containing several subsections.

Part I provides for the election by producers of district boards in 23 coal producing districts, the boundaries of which are specified in the Annex to the Act. Establishment of voluntary marketing agencies is authorized, but they are required to function under such general rules and regulations as the district boards and the Commission may approve.²

¹ The code actually formulated by the Commission (Pl. Ex. 15, R. 786–804) follows verbatim the language of all substantive provisions of Section 4.

² By Section 13 (*infra*, p. 322) the sale of coal at prices determined by a marketing agency which the Commission has not approved is made unlawful under the Sherman Act.

Part II contains the provisions relating to establishing minimum prices and, under certain circumstances, maximum prices, and a specification of certain practices which are declared to be unfair methods of competition.

Subsections (a) and (b) contain the provisions for determining minimum prices, which may be summarized in their main outlines as follows. The district boards are required to compute the weighted average cost of production per ton for their respective districts. These cost figures are to be submitted to the Commission which is to compute the weighted average cost of production per ton for each of the "minimum price areas", into which the districts are grouped. The latter cost figure is used as the basis for determining specific prices which reflect the relative market values of the various kinds, qualities and sizes of coal. These specific prices are to be submitted to the Commission, which may approve, disapprove or modify them. Subject to rules and regulations prescribed by the Commission, these prices are then to be coordinated so as to afford the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed. These coordinated prices become binding only upon approval by the Commission, which has power to approve, modify or disapprove them. The Commission is authorized, upon the petition of any district board or other party in interest or on its own motion, to determine,

after hearing, whether the method of fixing prices is prejudicial to any district and to correct such prejudice if found. The Commission may also conduct hearings where complaint is made by any code member, district board, State, or political subdivision of a State that is dissatisfied with the coordination of prices, and may make such order as may be required to effectuate the purpose of the price regulatory provisions of the Act. Such orders are subject to judicial review under Section 6.

By Subsection (c) the Commission is authorized to fix maximum prices f. o. b. mine for coal in any district when it deems such action necessary in the public interest in order to protect the consumer against unreasonably high prices. The basis for determining such maximum prices is specified and it is provided that no maximum price shall be established for any mine which shall not return cost plus a reasonable profit.

Subsection (e) provides that no code member shall sell or contract to sell coal at prices below the minimum or above the maximum approved or established by the Commission. It further provides that, until minimum prices are established, no contract for the sale of coal shall be made providing for delivery for a period longer than 30 days from the date of the contract.

Subsection (i) describes certain practices, which the section declares shall be unfair methods of com-

petition and shall constitute violations of the code. They include such practices as consigning unordered or unsold coal, granting secret rebates, discriminatory credit allowances or other price discriminations, commercial bribery, false advertising or misrepresentation of size or quality, unauthorized use of trade names or trademarks, and inducing breach of contract.

Part III (*infra*, pp. 310–313) deals with labor relations. It provides (Subsec. (a)) that employees shall have the right to organize and bargain collectively through representatives of their own choosing without interference, restraint or coercion by employers, and that no employee shall be required as a condition of employment to join any company union; and also (Subsec. (b)) that employees may select their own checkweighmen, and shall not be required as a condition of employment to live in company houses or to trade at company stores. Subsection (g) provides that whenever maximum hours of labor are agreed upon in contracts negotiated between producers of more than two-thirds of the annual national tonnage and representatives of more than one-half of the employees, such maximum hours shall be binding upon all code members. Similarly, if wage agreements are negotiated by collective bargaining in any district or group of districts between representatives of more than two-thirds of the producers by tonnage and of more than a majority of the mine workers, such

wages shall be binding as minimum wages upon code members in such district or group of districts.

Subsections (c) to (f) provide for the establishment of a Bituminous Coal Labor Board to administer the provisions of Part III. This Board may offer its services as mediator or, upon the request of the parties, may arbitrate labor disputes in the industry.

Section 5 (*infra*, pp. 313–315) includes provisions relating to enforcement. The Commission may, after due notice and hearing, upon proof of willful violation of the code, either issue a cease and desist order against the violator or revoke his membership in the code and his right to a drawback on the taxes levied under Section 3.¹ (Sec. 5 (b).)

Section 6 (*infra*, pp. 315–318) contains elaborate provisions for judicial review of the orders of the Commission. Any person aggrieved by any order issued by the Commission in a proceeding to which such a person is a party may obtain a review thereof in the proper Circuit Court of Appeals or in the United States Court of Appeals for the District of Columbia. The reviewing court is granted exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. At the suit of either party the court may order additional evidence to be taken before the Commission where reasonable

¹Any producer whose membership in the code has been revoked shall have it restored upon payment of all taxes in full for the time during which his violation of the code shall be found to have continued (Sec. 5 (c)).

grounds for failure to adduce such evidence in the original hearing before the Commission are shown. The court in such proceeding may stay the order of the Commission. The judgment of the Court of Appeals is subject to review in this Court upon certiorari or certification. (Sec. 6 (b).) These provision for judicial review apply, not only to cease and desist orders and orders of revocation of membership, but also to orders with respect to complaints that the method of fixing minimum prices is prejudicial to any district (Sec. 4, Part II (b)), orders with respect to complaints of dissatisfaction with coordination of prices, and orders establishing maximum prices (Sec. 4, Part II (d)).

In a similar manner the Commission may apply to the proper Circuit Court of Appeals for the enforcement of its orders if any code member fails or neglects to comply therewith (Sec. 6 (c)). Thus no order of the Commission becomes effective without an opportunity for judicial review. There is also a provision for a civil forfeiture of fifty dollars for failure to file reports required by the Act or the code. (Sec. 9 (c).)

Section 15 provides that if any provision of the Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 21 provides that the Act shall cease to be in effect four years from the date of its approval.

STATEMENT

THE PROCEEDINGS BELOW

This suit was brought by petitioner,¹ a stockholder and the president of the Carter Coal Company, against the Carter Coal Company and its officers and directors to restrain them from filing an acceptance of the Bituminous Coal Code (hereinafter referred to as the code) formulated pursuant to the Bituminous Coal Conservation Act of 1935, and from paying any tax imposed by said Act, and against certain taxing officials and law-enforcement officers of the Government to restrain them from assessing or collecting any tax imposed by the Act, or from otherwise enforcing the taxing provisions. The Act was approved on August 30, 1935, and the bill of complaint was filed in the Supreme Court of the District of Columbia on August 31, 1935.

Petitioner alleged that he was a minority stockholder of the Carter Coal Company and that he had formally demanded that the company should not comply with the Bituminous Coal Conservation Act, become a member of the code, or pay the taxes provided for in the Act. The basis of the demand was that the Act was unconstitutional and that acceptance of the Code by the company would be *ultra vires* and destructive of its business. It was further alleged that the directors of the company, although concurring in the view that the Act was

¹ Petitioner in No. 636, who is respondent in No. 651, will be referred to in this brief as petitioner.

unconstitutional, refused petitioner's demand upon the ground that the tax imposed by the Act upon bituminous coal producers who did not accept the code would seriously damage the company. The bill also alleges that a stockholders' meeting, called to consider petitioner's demand, approved the action of the directors. The bill (and its amendments) contains allegations of irreparable damage if the relief prayed for is not granted and requested both permanent and temporary relief against all of the defendants.

The answer of the Carter Coal Company and its officers and directors admitted the allegations of fact in the bill of complaint, and alleged that they intended to accept the code for the reason that a 15% tax on all sales by the company would result in irreparable and serious damage to the company and might result in its bankruptcy. (R. 39-42.)

The answer of the defendant Government officers put petitioner to his proof on other than formal matters, denied petitioner's allegations as to the unconstitutionality of the Act, and set up as a separate defense a brief description of conditions in the bituminous coal industry relevant to the constitutionality of the regulatory provisions of the Act. (R. 28-37, 104-107.)

In an oral opinion rendered at the conclusion of the trial, the Supreme Court of the District of Columbia held that petitioner was entitled to maintain his suit, that those portions of the Act which

provide for regulating prices and unfair methods of competition are valid, that the labor provisions of the Act are not within the federal commerce power¹, and that the other provisions of the Act are severable from its labor provisions. (R. 1179–1198.) In view of these conclusions the court held that the Carter Coal Company was subject to the tax imposed by the Act.

The decree which the court entered dismissed the bill of complaint, but granted a permanent injunction against collection of the tax, in excess of 10% thereof, which had accrued prior to the date of the decree. (R. 216A–216D.) The court also granted a temporary injunction, pending final determination, restraining the Carter Coal Company from accepting the code or paying the tax imposed by the Act and restraining the defendant government officers from collecting the tax, conditioned upon the payment to a depository approved by the court of a sum equal to 10% of the tax during the period from November 1, 1935, to final determination. (R. 216D–216E.)

¹ It appears from the court's findings and opinion that it found that the wage scale in the bituminous coal industry substantially affected interstate competition, the price of coal in interstate commerce, and the movement of coal in such commerce, and that it held the wage and other labor provisions of the Act not within the federal commerce power solely because it interpreted *Schechter Poultry Corp. v. United States*, 295 U. S. 495, as holding that wages and labor relations are, as a matter of law, indirect in their effect on interstate commerce.

The court at the time it entered its decree filed detailed findings of evidentiary facts (R. 111–207), findings of ultimate fact (R. 208–212), and conclusions of law (R. 213–215). The findings are based upon the evidence introduced by the Government in substantiation of the Congressional findings of fact and in refutation of petitioner’s claims that the regulatory provisions of the Act are not a valid exercise of the power of Congress to regulate interstate commerce, and that they are arbitrary, unreasonable and violative of due process. The evidence consisted of testimony taken in open court and a large number of exhibits. The parties also stipulated (R. 579–583) that the trial court and any appellate court might take judicial notice of the contents of various Congressional hearings and reports and Government publications. Petitioner’s evidence in his opening was confined to proof in support of his right to equitable relief.

The writ of certiorari granted on petitioner’s application in No. 636 brings before this Court for review the action of the trial court in dismissing petitioner’s bill. The writ of certiorari granted on the application of the defendant government officers in No. 651 raises solely the question of the correctness of the trial court’s action in permanently enjoining collection of more than 10% of the taxes which had accrued prior to the entry of the decree.

THE LEGISLATIVE BACKGROUND

The action of Congress in passing the Bituminous Coal Conservation Act of 1935 came as the result of more than twenty years' consideration of the bituminous coal problem and of a consequent conviction that the business of supplying the nation with this essential source of energy required Federal regulation. In the twenty-three years between 1913 and 1935, inclusive, there have been no less than 19 investigations or hearings by Congress or by specially created commissions with respect to conditions in the industry.¹ In these investiga-

¹ The official titles of these hearings are as follows:

- 1913. *Conditions in Paint Creek District, W. Va.*—Hearings before a subcommittee of Senate Committee on Education and Labor, 63d Congress, 1st Session, pursuant to S. Res. 37, authorizing investigation of Paint Creek District. 2298 pp., 2 maps.
- 1914. *Conditions in the Coal Mines of Colorado.*—Hearings before the Sub-committee of the Committee on Mines and Mining pursuant to H. Res. 387, a resolution authorizing and directing the Committee on Mines and Mining to make an investigation of conditions in the coal mines of Colorado. Report on the coal strike investigation made under H. R. 387, printed as House Document 1630, 63d Congress, 3d Session.
- 1916. *Report of the Colorado Coal Commission on the labor difficulties in the coal fields of Colorado, during the years 1914 and 1915.*—Printed as House Document 859, 64th Congress, 1st Session, with letter of transmittal from the President of the United States.
- 1917. *Price Regulation of Coal and Other Commodities.*—Hearing before Committee on Interstate Commerce, United States Senate, 65th Congress, 1st Session, on

tions and hearings, Congress has inquired into and obtained information in connection with every aspect of the bituminous coal industry.

- S. 2354, a bill to amend the Act to Regulate Commerce, and on S. J. Res. 77, to provide further for the national security and defense by regulating the production, sale, and distribution of coal. 503 pp.
- 1917-1918. *Shortage of Coal*.—Hearings before the subcommittee of Senate Committee on Manufactures, 65th Congress, 2d Session, pursuant to S. Res. 163, directing the Committee to investigate causes of shortage of coal and sugar. Coal. 1788 pp., 3 Vols.
- 1919-1920. *Increased Price of Coal*.—Hearings before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 66th Congress, 1st Session, pursuant to S. R. 126, directing the Committee on Interstate Commerce to hold hearings in order to make inquiry into the causes which have brought about the enormous increase in the market price of coal and to report its findings and recommendations with a view to Congressional or executive action. 1139 pp., 4 Vols.
1920. *United States Bituminous Coal Commission: Majority and minority reports to the President*.—120 pp. (Commission was appointed by Executive Communication dated December 6, 1919.)
- 1920-1921. *Coal and Transportation*.—Hearings before the Select Committee on Reconstruction and Production, United States Senate, 66th Congress, 3d Session, pursuant to S. Res. 350. 2361 pp., 3 Vols.
1921. *Publication of Production and Profits in Coal*.—Hearings before a Senate Committee on Manufactures, 66th Congress, 3d Session, on S. 4828, a bill to promote the general welfare by gathering information respecting the ownership, production, distribution, costs, sales, and profits in the coal industry and by publication of same, and to recognize and declare coal and its production and dis-

A number of these investigations have dealt with bitterly contested strikes arising from failure of producers in certain areas to recognize the right of their employees to bargain collectively. These in-

tribution charged with public interest and use 2235 pp., 3 Vols.

1921. *The Coal Problem*.—Hearings before a subcommittee of Senate Committee on Interstate Commerce, 67th Congress, 1st Session, on S. 41, to provide for seasonable rates for the transportation of coal; on S. 42, to provide for the appointment of a Federal Coal Commissioner; on S. 824, to provide for a Federal Coal Commissioner and directing the Director of the Geological Survey to act as such commissioner. 43 pp.
1921. *West Virginia Coal Fields*.—Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields, 67th Congress, 1st Session, pursuant to S. Res. 80, directing the Committee on Education and Labor to investigate the recent acts of violence in the coal fields of West Virginia and adjacent territory and the causes which led to the conditions which now exist in said territory.
1922. *Investigation of Wages and Working Conditions in the Coal Mining Industry*.—Hearings before House Committee on Labor, 67th Congress, 2nd Session, on H. R. 11022, to establish a Commission to inquire into labor conditions in the coal industry. 561 pp.
1923. *Report of the United States Coal Commission*.—Transmitted pursuant to the Act approved September 22, 1922 (public No. 347). 2719 pp., 4 vols. and Atlas. S. Doc. No. 195, 68th Congress, 2d Session.
1926. *Coal Legislation*.—Hearings before the Committee on Interstate and Foreign Commerce, House of Rep-

cluded the investigations of the disorders in West Virginia in 1913 and 1920–21, in Colorado in 1914

representatives, 69th Congress, 1st Session, on Coal Legislation.

1928. *Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio.*—Hearings before the Committee on Interstate Commerce, United States Senate, 70th Congress, 1st Session, pursuant to S. Res. 105, a resolution to investigate conditions in the coal fields of Pennsylvania, West Virginia, and Ohio.

1929. *Bituminous Coal Commission.*—Hearings before the Committee on Interstate Commerce, United States Senate, 70th Congress, 2d Session, on S. 4490, a bill to regulate interstate and foreign commerce in bituminous coal, provide for consolidations, mergers, and cooperative marketing; regulate the fuel supply of interstate carriers; require the licensing of corporations producing and shipping coal in interstate commerce; and to create a bituminous coal commission, and for other purposes.

1932. *To Create a Bituminous Coal Commission.*—Hearings before a subcommittee of the Committee on Mines and Mining, United States Senate, 72nd Congress, 1st Session, on S. 2935, a bill to regulate interstate and foreign commerce in bituminous coal; provide for consolidations, mergers, and cooperative marketing; require the licensing of corporations producing and shipping coal in interstate commerce; and to create a bituminous coal commission; and for other purposes. 1351 pp., 2 vols.

1935. *Stabilization of the Bituminous Coal Mining Industry.*—Hearings before a subcommittee of the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1417, a bill to stabilize the bituminous coal industry and promote its interstate commerce, etc. 624 pp.

1935. *Stabilization of Bituminous Coal Mining Industry.*—Hearings before a subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, 1st Session, on H. R. 8479. 661 pp.

and 1915, and in West Virginia, Ohio, and Pennsylvania between 1925 and 1927.¹ These disorders frequently resulted in bloodshed and martial law, and on at least four occasions were restrained only by the intervention of Federal troops.²

Another series of investigations was concerned with shortages and high prices.³ The shortage occurring during the World War had impressed upon the public the critical importance of a constantly adequate supply of fuel. For a time lack of coal became a limiting factor in the military program, and after extended hearings Congress authorized the control of distribution and also the fixing of maximum prices. (Fig. 83, R. 152-153.) When the strike of 1919 closed down mines employing 415,000 men, the war-time powers were again invoked to establish maximum prices and to control distribution, and the United States Bituminous Coal Commission was appointed to arbitrate the issues. (Fig. 84, 87, R. 152-155.) When maximum prices were removed, prices rose to an all-time peak (*Ibid*) and protests from consumers led to further congressional investigations.⁴ When a

¹ See the investigations of 1913, 1914, 1916, 1921, and 1928, referred to in note on pp. 15, 17, 18, *supra*.

² R. 447, 498; Report of the Colorado Coal Commission, House Document 859, 64th Cong., 1st Session; Report of The Secretary of War, 1920, pp. 71-72; West Virginia Coal Fields, Hearings before the Committee on Education and Labor of the Senate, 67th Cong., 1st Session.

³ See the investigations between 1917 and 1923 listed in the note on pp. 15-17, *supra*.

⁴ See the investigations of 1920 and 1921, listed in the note on p. 16, *supra*.

tremendous strike in 1922 closed down 73 percent of the mining capacity of the nation, forced industries to shut down for lack of fuel,¹ and raised prices again to exorbitant heights, Congress once more provided for Federal control of distribution and also, in order to determine the causes underlying these repeated interruptions to the movement of coal, created a fact finding commission with instructions to investigate the industry and report its findings to Congress with recommendations for legislation. (Fig. 87, R. 154.) This commission made an exhaustive study of the problems of the industry, filing a 2719 page report with Congress in 1923.

The investigations after 1923 dealt with the disastrous effects of the destructive competition in the industry emphasized by the series of important strikes between 1925 and 1927. In the hearings held in 1926, 1928, 1929, 1932 and 1935, the plight of the bituminous coal industry—the surplus capacity, the cut-throat competition, the price cutting and the wage cutting, the consequences of the breakdown of the machinery of collective bargaining, the continuous and heavy financial losses, the violence and disorder in the mining communities—were all fully revealed.

¹ United States Geological Survey, *Coke and By-Products, Mineral Resources of the United States, 1922, Part II*, pp. 676–677. Lack of coal for coke forced the shutting down of 26 iron blast furnaces in July and 36 more in August.

Some of these investigations also considered the waste of coal resources. Congress instructed the fact-finding Commission of 1922 to investigate the "waste of coal" in mining, and the Commission reported that the avoidable loss of bituminous coal under methods then in use was at the rate of 150,000,000 tons in a year of normal production.¹ In January, 1935, the President transmitted to Congress the Report of the National Resources Board and Mineral Policy Committee. The Committee, confirming the findings of the 1922 Commission, reported that "the great underlying cause" of the excessive waste in the mining of coal is "destructive competition."² (R. 1142.)

During this period many proposals for remedying the condition of the industry were before Congress. Proposals for permanent peacetime legislation began to be made early in 1919. These earlier proposals dealt principally with protecting the consumer against shortage of supply and exorbitant prices. They emphasized publicity of accounts, compulsory fact finding and ascertainment of costs and profits, mediation in labor disputes, and, in several instances, regulation of maximum

¹ Report of the U. S. Coal Commission, pp. 188, 189, 1858; U. S. Geological Survey, "Coal in 1923", p. 576.

² House Document No. 84, 74th Congress, 1st Session, Message from the President of the United States Transmitting a Report of the National Resources Board, etc., January 24, 1935. National Resources Board, Report, December 1, 1934, p. 402.

prices. Such were the characteristic features of the legislation urged by the Senate Interstate Commerce Committee, the Senate Committee on Manufactures, and by members of the Select Committee on Reconstruction and Production in the years 1920 and 1921.¹

As early as 1921, Senator Kenyon of Iowa, who was chairman of the Senate committee which investigated the disorders in West Virginia in 1920-1921 and was also a member of two of the three Senate committees which in the same year investigated the shortages and sky-rocketing prices of that period, recommended Federal legislation declaring coal to be a public utility and prescribing a code to govern the labor relations of those engaged in its production.² The United States Coal Commission of 1923 recommended that there be continuous fact finding with respect to conditions in the industry and that a Federal license be required of shippers of coal in interstate commerce. (Vol. I, pp. 265, 269.) Bills providing for fact finding, for the mediation of labor disputes, and for Federal control of distribution in emergencies were introduced in 1926, and hearings were held thereon. (H. R.

¹ Senate Report No. 55, 67th Congress, 1st Session, (Calendar No. 54); S. 4828, 66th Congress, 3d Session; Senate Report No. 815, 66th Congress, 3d Session, (Calendar No. 782).

² S. 2557, 67th Congress, 1st Session; S. 3147, 67th Congress, 2d Sess. See Kenyon, *A Code of Industrial Law*, Annals of the American Academy of Political and Social Science, Vol. CXI, January 1924, pp. 305-313.

11898, 9222, S. 4177, 69th Cong., 1st Sess.) In 1928 bills were introduced to exempt combinations of coal producers, when approved by a governmental agency, from the operation of the antitrust laws. (H. R. 8523, 4490, 70th Cong., 1st Sess.) Hearings were held in 1929 on H. R. 4490, which provided for the fixing of maximum prices, for licensing interstate shippers, and for guaranteeing the right of collective bargaining. In 1932 hearings were held on similar bills (H. R. 7536, S. 2935, 72nd Cong., 1st Sess.), providing for exemptions from the antitrust laws and for collective bargaining, as well as on more detailed proposals for the establishment of minimum and maximum prices and the allocation of production (H. R. 9924, 12916, 72nd Cong., 1st Sess.).¹ At that time it was still hoped that the chaotic conditions might be improved through the organization of voluntary sales agencies.

The bituminous coal industry was one of the first to submit a code under the National Industrial Recovery Act in 1933, and it operated under such a code from September, 1933 to May, 1935. Whatever criticism may be directed at the operation of other codes it is noteworthy that during hearings on the present Act, there was substantial unanimity of opinion that conditions in the bituminous coal industry had been greatly improved under the

¹ H. R. 12916 provided for a code, a 10-percent tax, and a 98-percent drawback to code members who comply with its provisions.

scheme of regulation which its code provided.¹ (Fg. 146-152, R. 197-200.) Congress thus had before it when it passed the Bituminous Coal Conservation Act the experience of the industry and of coal consumers under a system of Federal regulation, as well as a vast amount of information as to the problems of the industry in the past.

The law which Congress finally passed is, therefore, the result of nearly a quarter of a century of accumulated experience and discussion.² It contains features of many of the earlier proposals for legislation, such as maximum prices to protect the consumer, compulsory fact finding with prescription of the forms of accounts and a procedure for the mediation of disputes between employer and employees. The Act also contains features which emerged in later investigations centering about the peculiarly destructive effects in this industry of the competitive cutting of prices and wages. These include the authorization of marketing agencies under public supervision, the out-

¹ Mr. Carter, the petitioner herein, testified before the Senate Committee having under consideration the present Act: "I believe that there is a substantial agreement in the industry that the Code has been a benefit to the coal industry." (R. 277.)

² The report of the House Committee on Ways and Means recommending passage of the bill refers to the Congressional hearings of 1935, 1929, 1928, and 1926, and to the report of the United States Coal Commission of 1923 as furnishing the background for the proposed legislation. The Congress also had before it H. R. Doc. No. 84, 74th Cong., 1st Sess., transmitting a report of the National Resources Board. The portions of this report pertaining to coal are printed in the Record as Defendant's Exhibits 43-43C, R. 1125-1154.

lawing of unfair trade practices, the fixing of minimum prices, protection of the right of employees to bargain collectively and provision for investigations of resource waste and conservation. The Act also contains new features relating to maximum hours of labor and minimum rates of pay.

The Act before the Court must be considered in the light of this quarter-century of legislative discussion. The declaratory findings of fact of the Congress that coal is affected with a public interest, that commerce in coal is disorganized, that conditions and practices in the industry burden and obstruct commerce and waste resources, and that recurring industrial disputes obstruct commerce, would appear to be amply confirmed by the record established through these investigations. In passing the Bituminous Coal Conservation Act of 1935 Congress was dealing not with a passing emergency but with a chronic condition which it had watched develop over many years. The findings made and the remedies proposed were designed to meet that situation as a whole. The facts brought out in detail in the many volumes comprising the record of these Congressional investigations, and in a summary fashion in the record presented in this case, afford ample justification for this conclusion. These facts are further summarized below.

THE FACTS OF THE BITUMINOUS COAL INDUSTRY

Importance of Bituminous Coal.—The importance of bituminous coal in our national life, its

primary position as a source of energy for heat and power, and the dependence of the entire industrial and commercial life of the nation upon an adequate and uninterrupted supply are matters of such common knowledge that they do not call for discussion here. The subject is summarized from a statistical standpoint in Findings 42 to 45, inclusive (R. 129-131).

How Bituminous Coal is Sold.—The general custom in the bituminous coal industry is for the producer of coal first to obtain orders for coal through selling agencies located in consuming markets in various parts of the country and then to mine the coal to fill such orders (Fig. 48, R. 132). When the coal is brought to the surface of the ground it is often separated into sizes by being run over screens, and is then loaded immediately into railroad cars for shipment to the purchaser (Fig. 49, R. 133). It is uneconomical to store coal and the mines generally do not maintain storage facilities. Consequently, coal is not ordinarily mined unless there is assurance that railroad cars will be available to receive it when it comes to the surface (*Ibid*). Since the orders frequently specify coal of a certain size, and since coal comes out of the mine in various sizes, it often happens that unsold sizes of coal are produced in the course of the mining operation (Fig. 48, R. 132). Coal in such unsold sizes is also immediately loaded into railroad cars which are held on the tracks at the mine until

sold, or until the mine tracks become congested. In the latter event, in order to avoid a suspension of mining operation, such unsold sizes are often consigned to some consuming market in the hope that they may be sold before demurrage charges consume their value. Producers are under heavy pressure to slash prices on such consigned shipments and the coal so consigned is known as distress coal (Fig. 50, R. 133-134).

Sales are customarily negotiated between producers and purchasers in the various States in terms of price f. o. b. mine, with a provision that the coal is to be shipped to the purchasers at a named destination (Fig. 51, R. 134). Such contracts often specify that there shall be no diversion of the coal in transit without the consent of the producer (*Ibid*). The producer generally orders the cars which are to carry the coal, loads the coal into the cars, gives the carrier shipping instructions, and the producer's shipping clerk furnishes the bill of lading either to the buyer or the producer (*Ibid*).

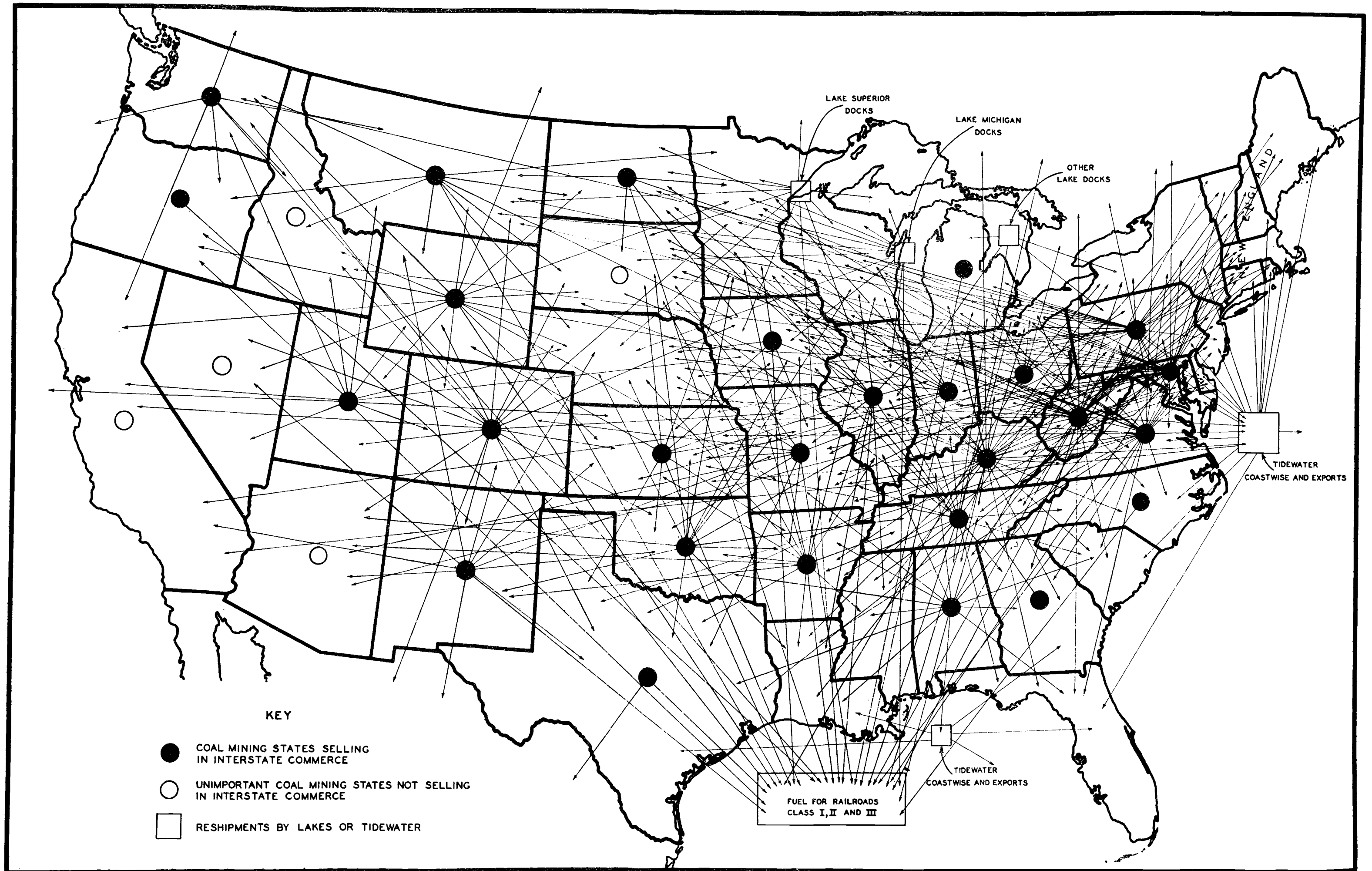
How Bituminous Coal is Distributed.—Most of the production of bituminous coal is sold in interstate commerce or for use in interstate commerce. In 1929 (the only year for which complete distribution figures are available), 50 per cent. of the coal produced was shipped to consumers (other than railroads) in States other than the State of production or in foreign countries, and 23.8 per cent. was sold to railroads subject to the jurisdic-

tion of the Interstate Commerce Commission (Fig. 47, R. 131; Def. Ex. 13, 14, R. 1018, 1019). Of this 23.8 per cent., 16.4 per cent. was delivered directly to the purchasing railroad at the mouth of the mine (Fig. 47, R. 131). The figures do not show how much of the coal sold to railroads was sold for transportation outside the State of production, or how much was used in interstate operations as distinct from local operations, but there can be little question in view of the concentration of coal resources and the nation-wide network of railroads that a considerable portion of the coal sold to railroads was sold for interstate shipment and that most of it was used in the course of interstate transportation.

Commercially important deposits of bituminous coal are found in 26 States, but the 4 States of Pennsylvania, West Virginia, Kentucky and Illinois produce over 70 per cent. of the total national production (75 per cent. in 1929, 74.3 per cent. in 1934) (Fig. 46, R. 131; Def. Ex. 36, R. 1083). Of the other producing States only Ohio and Indiana produced over 10,000,000 tons in 1934, out of a total national production of 358,000,000 tons in that year (Def. Ex. 36, R. 1083).

Coal mined in every State competes with coal mined in other States (Fig. 47, R. 132; Def. Ex. 10, R. 1015). In 1929, Pennsylvania shipped coal to 24 States and Canada, as well as to tidewater and lake cargo ports whence coal is shipped to a number of States and foreign countries. West Vir-

THE INTERSTATE MOVEMENT OF BITUMINOUS COAL IN 1929, AS SHOWN BY THE REPORTS OF U. S. BUREAU OF MINES



ginia shipped to 31 States, Canada, and tidewater and lake cargo ports; Kentucky to 31, Canada, tidewater and lake cargo; Illinois to 14 States (Def. Ex. 9 and 10, R. 1014, 1015, 314). Maryland shipped to 30, Canada, tidewater and lake cargo; Virginia to 25; Tennessee to 19; Colorado to 18; Arkansas to 14; Alabama to 14; Utah to 12; Oklahoma to 14; Ohio to 8 and Montana to 9. Iowa received coal from 18 States, Nebraska from 16, Minnesota from 16, Illinois from 14, Kansas from 16, Texas from 10, California from 7, Michigan from 9, New York from 6, Pennsylvania from 6, West Virginia from 4 and Florida from 5 (Ibid). The interstate distribution of coal and the competition between areas are portrayed graphically in Defendant's Exhibit 10 (R. 1015) reprinted on the opposite page.

Over 97 per cent. of the coal produced in the West Virginia smokeless fields, in which the mines of the Carter Coal Company are located, is shipped in interstate commerce to consumers in 20 other States (Def. Ex. 1, R. 1001), and petitioner himself testified that "substantially all of the coal mined in the Carter Coal Company mines is sold and transported into States other than the State in which produced" (R. 253; Fg. 22, R. 121). Approximately 60 per cent. of the coal produced by the Carter Coal Company moves into the Middle West, both by rail and lake cargo shipment, approximately 20 per cent. to tidewater ports on the

Atlantic seaboard, from which it is shipped to the Northeast or abroad, and approximately 20 per cent. by rail to the Southeastern and Middle Atlantic States. (Fig. 23, R. 121.)

Prices and Interstate Commerce.—Competition in bituminous coal is necessarily based upon the delivered price to the purchaser (Fig. 67, R. 142). The delivered price consists of the f. o. b. mine price plus freight (*Ibid.*). Because of the bulky nature and low value of coal per ton, transportation charges constitute an extremely high proportion of the total delivered cost (Fig. 99, R. 163).¹ From 1923 to 1933 freight charges ranged from 46.9 per cent. to 63.3 per cent. of the delivered value (Fig. 63a, R. 140). The freight rate, controlled by the Interstate Commerce Commission, is relatively inflexible, as compared with the f. o. b. mine price. Between 1923 and 1933 the average freight charge per ton ranged between \$2.36 and \$2.20. In 1932 it was only 10¢ lower than the \$2.36 average in 1923 (*Ibid.*). The average f. o. b. mine price declined steadily from \$2.68 in 1923 to \$1.31 in 1932. In 1933 it was \$1.34 (*Ibid.*).

Thus, although competition is based upon the ultimate cost to the purchaser at point of delivery, it manifests itself almost entirely in the sales price at the mine. Producers, of course, do not charge a

¹ In 1933 freight charges represented 62 per cent. of the total delivered value of bituminous coal, but only 11 per cent. of the delivered value of all commodities (Fig. 99, R. 163).

set or uniform mine price to all consumers. On the contrary, they vary their mine prices as between purchasers at different destinations in an endeavor to meet the competitive conditions existing in the various consuming markets. Buyers and sellers cannot control the freight rate, but they can determine the mine price, and they do this in the ordinary sale by individual bargaining in terms of price f. o. b. mine. Accordingly, a small change in the f. o. b. mine price of coal has a material effect upon the decision of a purchaser whether or not to buy from a particular producer, producing area or producing State (Fg. 47, R. 132). Even minor variations in the mine price directly influence and often determine who ships coal in interstate commerce, how much coal is shipped from a particular mine, field or State, and the channel of commerce in which the coal is carried (*Ibid*). Substantial variations or disparities in price, as between competing fields, such as have been common in the industry, directly determine and control the amount of coal moving in commerce from any particular mine, area or State, and the channels through which the coal moves. The extent to which commerce in coal is thus affected is well illustrated by Def. Exs. 30, 30A, 31 and 31A, which are tables and charts showing the fluctuations in shipments of coal from several important competing states attendant upon such mine price disparities.

The Relationship Between Interstate and Intrastate Prices.—There is substantial competition in coal sold for use in the State in which it is produced and coal shipped into the State in interstate commerce (Fgs. 47, 52, R. 132, 134, 376; Def. Ex. 9, 10, 15, 16; R. 1014, 1015, 1021, 1023). In all of the States producing coal, intrastate shipments meet active competition from coal produced in other States and shipped into the State in interstate commerce (Fig. 47, R. 132). In 1929, the important producing State of Pennsylvania received 6,600,000 tons of coal all rail from other States; West Virginia over 1,500,000 tons; Virginia 3,000,000 tons; Illinois and Indiana combined 32,000,000 tons; Ohio 38,000,000 tons; and Kansas and Missouri combined 9,000,000 tons (Def. Ex. 9).

Economic Condition of the Bituminous Coal Industry.—In 1933, in *Appalachian Coals Inc. v. United States*, 288 U. S. 344, this Court recognized that “The economic condition of the coal industry * * * ‘for many years has been indeed deplorable’ ” (p. 361). “The industry was in distress” (p. 372). This distress was due to a surplus of productive capacity, coupled with conditions of destructive competition which were caused by, and which in themselves accentuated, the overcapacity. (See pp. 89–90, *infra*.) Among the factors which caused and tended to perpetuate this maladjustment are the following:

A. Factors which brought about the opening of new mines.

1. The widespread ownership of coal resources far greater than were necessary to meet the demand at any one time, and the desire of each owner to cash in on the resources underlying his land regardless of what other land owners might be doing (Fig. 77, R. 148).

2. The pressure upon companies owning coal lands to open mines in order to meet taxes and carrying charges. (*Ibid.*)

3. Expansion of the railroads into new areas of undeveloped coal, permitting many new mines to be opened. (*Ibid.*: Fig. 74, R. 145).

4. High prices in periods of shortage which have a powerful effect in causing inflation of capacity. Such runaway prices have been associated with war demands, traffic congestion, extraordinary exports, or major strikes. (Fig. 89, R. 157-8, 301, 535).

5. Shifts in market demand throwing business from one district to another—such as the change from beehive to by-product coking which transferred a considerable amount of business from the northern to the southern fields. (Fig. 77, R. 148).

6. Freight rate and wage differentials which encouraged the development of outlying producing districts. (*Ibid.*: Fig. 74, R. 146).

7. Large scale strikes, or suspensions, causing consumers to seek other sources of

supply during the strike period. (Fig. 77, R. 148, 292).

B. Factors which led to expansion of capacity in excess of demand in mines already in operation.

1. Pressure to reduce such overhead cost items as those due to pumping water, repairing entries, supporting roofs, as well as taxes and other capital charges, which are relatively constant regardless of how much coal is produced. Even though coal must be sold below cost, nevertheless cost per ton may be reduced and loss thus minimized if production is increased by the continuous operation of a mine. (Fig. 61, R. 139).

2. The necessity of maintaining throughout the year capacity sufficient to meet the seasonal peak of demand each winter. (Fig. 57, R. 137).

3. Periodic increased demands in the non-unionized fields during the frequent large scale suspensions in the organized fields. (Fig. 77, R. 148).

4. High prices in periods of shortage. (R. 301).

C. Factors which prevented the closing down of excess capacity.

1. The high cost of closing down a mine. If the mine is to be reopened, water must be continually pumped, roofs supported, and taxes and other fixed charges paid. If the mine is not to be reopened, remaining resources are often lost, and all opportunity for a further return on initial investment aban-

done. Operators often prefer to operate at a loss than to close down. (Fig. 60, R. 138).

2. The bankruptcy of a mine operator does not necessarily eliminate mine capacity from the market; another operator may take over the mine and, with previous capital charges removed, be able to operate it at a lower cost. (Fig. 62, R. 139).

D. Factors relating to demand.

1. Relative inelasticity of the demand for bituminous coal. Stopping a small percentage of what the market needs causes a violent increase in price. Offering more than the market needs seriously depresses the price. A decline in price does not bring about an equivalent increase in demand. (Fig. 57, R. 137, 328.)

2. Retardation in the growth of demand for bituminous coal because of (a) increased efficiency in the use of fuel, which has resulted since the war in a saving of fuel consumption per unit of production and of transportation of 20 to 30 per cent.; (b) changes in the fuel-consuming industries resulting from a shift to lighter products, requiring less fuel and from the substitution of scrap iron for virgin pig iron, which curtailed the amount of coal needed for coke; (c) competition with oil, gas and water power. (Figs. 75, 76, 54, 55, R. 146-147, 135, 136.)

These factors did not result in any net decrease in the consumption of coal before 1929, although the percentage of the total

national energy supply attributable to coal fell considerably. (Def. Ex. 52, R. 1172.) Production between 1925 and 1929 was greater than in any previous five-year period.¹ (Def. Ex. 3-A, R. 1003.) The decline between 1929 and 1932 was, of course, largely due to the depression.

The combined effect of the factors listed above has been responsible in the past for a continuing maladjustment of supply to demand in the bituminous coal industry. In view of these factors and past experience it would seem to be extremely unlikely that this maladjustment will in the future be corrected in accordance with the orthodox theory of the normal self-adjustment between supply and demand. (Fg. 185, R. 212.) It is true that surplus capacity causes a decrease in the price of coal; but the lower prices do not increase the demand sufficiently to use up the excess capacity. It is true that the low prices may, in accordance with economic theory, cause the insolvency of the highest cost producers and eventually close down some mines; but the forced elimination by low prices of sufficient excess capacity to adjust supply to demand has been continually counteracted by increased pressure to expand the amount produced in each particular mine to reduce losses, and by the purchase and continued operation of bankrupt properties by new companies. (R. 417.) Although excess capacity might conceiv-

^{1a} See note 1 *infra* p. 55.

ably be eliminated in time by this means, such a result would be possible, if at all, only after a great many years and the bankruptcy of a large portion of the industry,¹ accompanied by the premature abandonment of many mines and a grave waste of resources.

Labor Cost as a Competitive Factor.—Another factor which tends to explain the peculiar difficulties of the bituminous coal industry is the exceptional importance of labor costs in competition. In many fields, wages constitute over 60 percent of the total cost of production, and the remaining costs consist of items which offer little leeway for reductions. (R. 340, 441, 475.) The percentage of labor cost to value of the product is very much higher in the bituminous coal industry than in any other large industry excepting anthracite coal. Wages in the coal industries constituted in 1929 (the most recent year for which comparable figures are available) over 59 percent of the total value of the product at the mine, whereas the general average for the four other large mining industries was 21 percent and for the 48 largest manufacturing industries 18.2 percent. (Fig. 64, R. 140–141.) A table showing the unique proportion of wages to value of products in this industry, condensed from Def. Ex. 38, R. 1086 is given below.

¹ When conditions were at their worst in 1932, the proportion of surplus capacity to production was greater than in any of the 10 preceding years. (Def. Ex. 3–A, R. 1003.) (See p. 61, *infra*.)

**Comparison of the ratio of wages to value of products in coal mining
and other industries, 1929 ^a**

Industry and group	Per cent that wages paid were of value of products at mine or factory
Bituminous Coal Mining	59.5
Anthracite Coal Mining	59.8
<hr/>	
Other Mining Industries:	
Iron ore.....	20.7
Copper.....	25.8
Limestone.....	33.4
Oil and gas.....	18.0
<hr/>	
Average 4 largest industries.....	21.0
<hr/>	
Manufacturing Industries:	
Boots and shoes.....	23.0
Bread and bakery products.....	18.0
Steam railroad repair shops ^b	49.8
Clothing, men's.....	19.9
Clothing, women's.....	14.3
Cotton goods.....	21.3
Electrical machinery, etc.....	19.8
Foundry and machine shops.....	25.0
Furniture.....	25.6
Steel works and rolling mills.....	20.5
Knit goods.....	23.4
Lumber and timber products.....	33.1
Meat packing, wholesale.....	4.8
Motor vehicle bodies and parts.....	23.8
Motor vehicles.....	9.8
Printing and publishing:	
Book and job.....	25.0
Newspaper and periodical.....	14.6
<hr/>	
Average 48 largest manufacturing industries.....	18.2

^a Details for these and other large industries are given in Def. Ex. 38, R. 1086. The manufacturing industries listed here are those paying over \$150,000,000 in wages in 1929.

^b Shops operated by railroad companies, not representative of manufacturing, since most of the work is repairs and involves very little raw material cost (R. 476, 477).

As a result of the high proportion of wages to total cost, the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry, and unless producers are bound either by collective agreement or by law not to cut wages, a progressive cutting of wages and a sweated exploitation of labor develops (*Ibid*; Fig. 182, R. 211, 477, 479).¹

Under the competitive conditions which have existed in the bituminous coal industry for many years—conditions which the trial court said (R. 1192) might properly be called conditions of cut-throat competition—the incentive to cut prices is greatly increased whenever producers are free, as they are in the absence of collective bargaining, to cut wages. Under such conditions there is a constant beating down of the price and wage structure, and a situation of trade warfare results. Price-cuts following wage-cuts react upon producers in the same and other states, cause them to lose business, and make it necessary that they also cut their prices and wages. The record discloses that the industry has been operating under conditions of this sort since 1923. Their effect upon the financial position of the operators is evidenced by the income tax statistics (Fig. 102, R. 165). The impact of

¹ The court below found: "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."

such conditions upon the employees was pointed out by the petitioner himself, who testified as follows (R. 278):

I believe that fair and equitable wages should be established and I believe that representing as they do, more than 60% of the cost of producing coal, such establishment would exercise a stabilizing influence on the industry. * * *

So far as labor is concerned I am sure there is a unanimity of feeling that the men and women employed by and dependent upon the industry should not be subjected to a lowering of their standards of living because of unrestrained play of economic forces. It seems obvious and unanswerable that some provision must be made for the protection of these workers, and it would seem that the best sort of protection which could be afforded them would be the maintenance, by statute, of maximum hours of labor and minimum rates of pay.

That was my feeling and it is still my feeling, but at that time I did not know that the Congress of the United States did not have the power to do that.

HISTORICAL SURVEY OF THE INDUSTRY

THE PERIOD PRIOR TO 1923

The fifteen-year period prior to the world war was marked by a rapid and continuing growth of the consumptive demand for bituminous coal and this tended to diminish the cumulative effect of the economic factors above referred to which even at

that time were operating to expand the development of the country's coal resources beyond current needs (Fig. 77, 78, R. 148, 149). The force of competition had already exerted its potent pressure upon wage standards, and the workers had felt the necessity of collective action to protect their status. As early as 1898 wages were being fixed on a coordinated competitive basis by means of a collective interstate agreement covering most of the mines in Western Pennsylvania, Ohio, Indiana and Illinois, the so-called Central Competitive Field. The practical advantages in this industry of this method of standardizing wages over large competitive areas was recognized both by the employers and the mine workers and the area covered by such joint collective agreements expanded until in 1922 seventy per cent of the industry was operating under such agreements. (Fig. 106, R. 166, 340, 341, 428, 429.) Also as early as 1906 difficulty in negotiating such wage agreements began to be encountered by reason of the pressure on wage standards exerted by competition from operators whose wage rates were not stabilized by collective agreements. This pressure was the principal cause of several large scale "suspensions" which occurred in the pre-war years. (Fig. 80, R. 149.)

In 1916 there began a great increase in the demand for American coal for the manufacture of war materials. This increase plus the increased demand for many other commodities in the eastern manufacturing areas brought about a congestion of

railroad transportation and a shortage of coal cars at the mines (Fig. 83, R. 151). As a result spot prices for coal f. o. b. mine skyrocketed from \$1.30 per ton in August, 1916, to \$3.87 per ton in November and \$4.18 in February, 1917.¹ (*Ibid.*)

After the United States entered the War in 1917, the demand for coal rose to an all-time maximum, and the resultant shortage and high prices caused the Government to fix the price and to undertake the control of distribution (Fig. 83, R. 151-152). Prices were finally adjusted under the Lever Act at an average mine realization of \$2.58; and by March 1918 the Fuel Administration had been able to alleviate the shortage through a system of distribution control. (*Ib.*)

There followed a second acute shortage, extending from the last of October, 1919, to early in 1921. A large majority of the operators and their employees had been working under the terms of the 1916 collective bargaining agreement, as modified, which was to run for the duration of the war, but not beyond March 31, 1920. (Fig. 84, R. 152.) After the Armistice the mine workers, contending that the agreement had terminated, asked for

¹ Sales of coal are classified as "spot" or "contract." Most coal is sold under contracts running for a considerable period of time, the most common period being the "coal year" from April 1st to March 31st. Approximately 25 per cent of the total sales are made on the open "spot" market; prices in spot sales are much more sensitive to market changes and reflect such changes more immediately than the average price for all sales.

increased wages in order to meet the rising cost of living (R. 343). This request was refused by the operators, who claimed that the agreement would not expire until March 31, 1920. As a result of this disagreement a general strike of all union miners was called on November 1, 1919 (R. 343). Four hundred and fifteen thousand men were on strike in 22 states and coal shipments dropped from 13,000,000 tons in the last week before the strike to 3,500,000 tons (Fig. 84, R. 152, 302). By the sixth week available supplies of coal were used up, consumers' stocks were dangerously low, and industries were beginning to close for lack of fuel (Fig. 84, R. 152, 343). The Government acted to protect consumers by obtaining an injunction under the Lever Act (R. 430) and by reinstating the maximum prices and control of distribution authorized by that Act. (Fig. 87, R. 154, 155.) The President appointed a committee of arbitration which in April, 1920, made an award granting the men a 27 per cent increase in wages. (R. 344.) Maximum price limitations were retained in effect during the arbitration. When the limitation was lifted a runaway market ensued.¹ The maximum

¹Before consumers could rebuild their customary stocks a railroad switchmen's strike created a shortage of coal cars at the mines (Fig. 84, R. 153). At the same time, the British Government placed a limitation on exports, thus creating an active demand for the export of American coal (*Ib.*).

price limitation in effect from November 1, 1919, to March 30, 1920, was \$2.58 per ton. After the removal of the limitation the average spot price f. o. b. mine rose to the peak of \$9.51 in August, 1920, and some sales as high as \$20.00 a ton were reported (Fig. 84, R. 153). During this shortage, use was made of the powers of the Interstate Commerce Commission to insure the movement of coal to those persons and areas in greatest need (Fig. 87, R. 155).

The agreement reached through the arbitration of the 1920 strike ran with amendments until March 31, 1922. At that time the union operators refused to renew the agreement at the existing basic daily wage because of competition from operators who did not practice collective bargaining and were therefore free to cut prices by cutting wages. (Fig. 85, R. 153-154.) In the resulting suspension of work in the union mines, 460,000 bituminous miners went out. At the same time 142,000 anthracite miners went on strike (*Ib.*). The bituminous strike began April 1, 1922, and lasted officially until August 16, although some districts remained out until September (*Ib.*). The effects of the strike were accentuated by a railway shopmen's strike in July, 1922, which created a shortage of coal cars in the non-union fields (*Ib.*). During this period there was another acute shortage of coal and average spot prices f.o.b. mines rose from \$2.12 a ton in March, 1922, to

\$6.13 in August (*Ib.*). The strike caused consumers to lay in abnormally large stocks in advance, to use coal not suited to their requirements and to pay excessive prices (Fig. 88, R. 156). Railroads suffered numerous locomotive failures due to inferior fuel (*Ib.*). The strike was threatening the entire industrial life of the nation. Efforts were made by the President to arrange a settlement; the priority powers of the Interstate Commerce Commission were again utilized, and a Presidential Fuel Distribution Committee was established (Fig. 87, R. 154-155). In September, 1922, Congress passed an act creating the office of Federal Fuel Administrator, and also established the United States Coal Commission to make a thorough investigation of the industry (Fig. 87, R. 155).¹ The strike was finally settled when many of the operators agreed to renew the 1920 wage scale, and the others quickly followed suit. (R. 344-345.)

The increased demand during the war and the high prices prevailing during the period of short-

¹ This Commission made a detailed study of conditions in the industry and reported its findings and recommendations to Congress in 1923. Among other findings and recommendations the 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.)

age permitted the industry to make large profits¹ and brought about a great increase in the number of mines and in mine capacity (Fig. 89, R. 157-158). The number of commercial mines increased from 5,726 in 1916 to 8,921 in 1920, and to 9,331 in 1923, and the calculated total mine capacity increased from 673,000,000 tons in 1916 to 796,000,000 in 1920 and to 970,000,000 in 1923—an increase of 44 per cent (*Ib.* Def. Ex. 3A, 4A, R. 1003, 1006). Production in 1923 had increased, however, only 12 per cent over that in 1916 (Fig. 89, R. 158).²

¹ Profits in the bituminous coal industry during this period were as follows:

1917	\$203,918,518
1918	148,846,632
1919	62,259,694
1920	249,367,379
1921	28,889,194

In 1922 and 1923, when no separate figures for bituminous and anthracite were available, the profits for both industries combined were \$70,851,551 and \$67,344,920, respectively (Fig. 102, R. 165).

² War, strikes, and the depression of 1921 made production during this period extremely irregular. It fluctuated as follows:

Year	Million tons	
1916.....	503	War.
1917.....	552	War.
1918.....	579	War.
1919.....	466	Strike.
1920.....	569	Strike aftermath, exports.
1921.....	416	Depression.
1922.....	422	Strike.
1923.....	565	Strike aftermath.

(Def. Ex. 3 and 3-A; R. 1002, 1003.)

THE PERIOD FROM 1923 TO 1929

The surplus capacity built up during the war and post-war period did not exert its full pressure upon the market until the middle of 1923, when the effect of the 1922 strike had run its course and an improvement in railroad service had eliminated car shortage as a factor limiting production (Fig. 92, R. 159). At the same time that this tremendous capacity sought a market outlet demand ceased to expand at its former rapid rate.¹ This combination of increased capacity and retarded demand greatly intensified the competition which had always characterized the industry, except in times of shortage. Pressure to cut prices reappeared in aggravated form. Accordingly there began after 1923 a period of price cutting warfare in the industry, which continued progressively until 1933. Price cuts soon exhausted the existing margin of profit, the majority of operators were selling at a loss, and future reductions in price could only be accomplished by wage cuts. A wave of price and wage reductions spread over the industry.

The initial cutting of wages and prices began in those fields of southern West Virginia and Kentucky where employers had persistently refused to

¹ In 1924 demand fell to 484,600,000 tons (Fig. 90, R. 158). Before the war demand had been doubling each decade (Pl. Ex. 21, R. 817). Although it continued to increase up to 1929, the growth was relatively slight (see p. 55, *infra*).

recognize the principle of collective bargaining.² It was competition from these fields that was the underlying cause of the refusal of the collective bargaining operators to renew the 1920 wage agreement which led to the strike of 1922 (Fig. 85, R. 153, 434). In the years following 1923, wage cutting in these fields again became a major disturbing factor. In February 1924 (Fig. 124, R. 184) the operators in the collective bargaining fields entered into a wage contract with their employees known as the Jacksonville agreement, which continued the existing daily wage rate (\$7.50) for three more years. Following the execution of this agreement, operators in non-bargaining fields began to cut their wage rates (Fig. 124, R. 184, 345, 435). The pressure of these wage reductions fell most heavily upon the operators in adjacent collective bargaining fields and subjected them to ruinous competition. Under such conditions collective bargaining, which operated to impede wage cutting, had to be stricken down by these employers if they desired to maintain their economic existence. From the Kanawha Valley the area of non-union production spread northward and westward as companies which had signed the Jacksonville agreement found themselves unable to meet this competition and abrogated their wage

² In the countries south of the Kanawha Valley, operators had repelled all efforts to organize their employees, many of them using armed guards, yellow-dog contracts, evictions, and labor injunctions (Fig. 107, R. 167).

contracts (Fig. 108, R. 168). By the end of 1924 the practice of fixing wages by collective bargaining was banned from all fields south of the Ohio River excepting part of northern West Virginia which broke away early in 1925 (R. 435). Before the end of 1924 practically all operators in those fields were selling at much lower prices.

Between 1923 and the end of 1924 operators in the group of non-bargaining States—West Virginia, Virginia, and Kentucky referred to in Def. Ex. 31 A, R. 1078 A as Group “B”—reduced their average mine prices 78¢¹ a ton, or 29.7% of their 1923 realization. (Fig. 122, R. 182.) Operators in the collective bargaining States—Pennsylvania, Ohio, Indiana, and Illinois referred to in said exhibit as Group “A”—attempted to meet these price cuts, but, being bound by collective wage agreements, succeeded in reducing their prices only 39¢ a ton or 14.9%. Group “B” prices had thus fallen 39¢ a ton more than Group “A” prices and, although Group “A” prices continued to drop, this differential was maintained in 1925. (Fig. 122, R. 182, Def. Ex. 31, 31A, R. 1077, 1078 A.)

The effect of this price differential on shipments in commerce was direct, immediate, and substantial. In 1923, 63.9 per cent of the total shipments

¹ The average sales realization per ton in the Group “A” States (Pennsylvania, Ohio, Illinois, and Indiana) in Defendant’s Exhibit 31 was \$2.62 in 1923, \$2.23 in 1924, and \$2.10 in 1925. In the Group “B” States (Kentucky, West Virginia, and Virginia), the average value per ton was \$2.63 in 1923, \$1.85 in 1924, and \$1.72 in 1925.

from the seven states of Pennsylvania, Ohio, Indiana, Illinois, Kentucky, West Virginia, and Virginia had originated in the four Group "A" states. In two years the percentage coming from the Group "A" states shrank to 54.7 per cent. (Fg. 119, R. 180.) Although total national production decreased from 565,000,000 tons in 1923 to 520,000,000 tons in 1925 and production in the Group "A" states decreased 21.4 percent or 64,000,000 tons in this period, the production of the Group³ rose 15 per cent, or 26,000,000 tons.¹ (Def. Ex. 31, 31a, R. 1077, 1078A.)

A few illustrations of the many afforded by Defendant's Exhibits 24, 24a, 24b, 24c, 24d, 25, 26, 28, 28a, 29, 29a, 29b, 29c, 30, 30a, 31, 31a, 17, 18, and 19² will demonstrate how shipments in interstate commerce were affected by these differences in price. Between 1923 and 1925 shipments into Michigan from Western Pennsylvania shrank from 541,351 tons to 82,656 tons, and from Ohio to Michigan from

¹ The court below found that this diversion of commerce to the southern area was primarily due to the more rapid reduction of f. o. b. prices and not to expansion of capacity in the southern fields, though some part was due to quality. (F. 122, R. 182.) New development resulted in the production in the southern area gaining rapidly as compared with the northern area up until 1914 (F. 119, R. 180), but from 1914 to 1921, although southern capacity continued to grow with the expansion of the industry there was little change (1.3%) in the relative proportion between the two (*Ib.*; Def. Ex. 28, 28a, R. 1069-1070). After 1923 capacity declined in the southern fields as well as in the northern fields, though less rapidly. (F. 122, R. 182.)

² R. 1062-1078A, 1023-1025.

1,818,695 tons to 544,403 tons; while shipments to these areas from the more distant southern high volatile fields of West Virginia and Kentucky increased from 11,893,931 to 14,221,842 tons, and from the southern low volatile fields of West Virginia from 1,906,278 to 2,529,947 tons. (Def. Ex. 24b, R. 1064.) Shipments from the western Pennsylvania high volatile fields to Great Lake Ports for transshipment declined from 9,528,966 tons in 1923 to 2,479,083 tons in 1925 and from the Ohio high volatile fields from 5,941,938 tons to 1,450,230 tons; while shipments from the southern high volatile fields to Great Lake Ports increased from 8,262,571 tons to 16,321,178 tons. (Def. Ex. 24C, R. 1065.) Between these same dates shipments to Atlantic ports for transshipment either abroad or to other Atlantic ports from northern high volatile fields dropped 1,890,673 tons (from 6,329,266 to 4,438,593 tons) and from the northern low volatile fields 1,673,461 (from 11,313,821 to 9,640,360) tons; while shipments from southern high volatile fields increased 547,210 tons (from 3,697,724 to 4,244,934 tons) and from southern low volatile fields 2,663,114 tons (from 12,159,194 to 14,822,308 tons). (Def. Ex. 24D, R. 1066.)

The economic pressure resulting from such great losses of business to producers in territories where collective wage agreements were not tolerated, and where wages and prices could therefore be reduced without limit, forced the collective bargaining operators to lower their prices to meet such competi-

tion; but as long as the producers who operated without collective bargaining were free to cut wages without restriction while their competitors were not, the latter could not regain their lost markets. The only alternative to economic destruction was a reduction in wages—and this could not be obtained without departing from the existing wage agreement. Before the end of 1924 certain producers who had signed the 1924 agreement found themselves forced to break it in order to preserve their economic existence. (Fig. 108, R. 168.) The miners resisted efforts to reduce wages to non-union levels, and a series of bitter local strikes resulted through northern West Virginia, Pennsylvania, and Ohio as these producers turned from union to non-union operations. Many of these strikes were prolonged, many mines were closed down and interstate commerce in coal was substantially affected (Fig. 108, R. 168, 169). As groups of these operators in the north cut their wage rates and their prices, the pressure upon their neighboring competitors became more intense with the result that before the expiration in 1927 of the existing wage agreement, very many operators in Pennsylvania, northern West Virginia, and Ohio had been forced at the cost of much violence, strife and bitterness to break their contracts and to abrogate the collective bargaining relationship which had so long existed between themselves and their employees.

As a result of this situation upon the expiration of the Jacksonville agreement on March 1, 1927, it

proved impossible to renew the interstate collective bargaining arrangement under which most of the industry had been operating for many years. A protracted and bitterly contested strike ensued. Although this strike caused no *national shortage* of coal, it did directly and substantially affect the distribution of coal in interstate commerce. (Fig. 108, R. 168, 169.) During the seven months period of the strike, production, and necessarily shipments in commerce decreased in Illinois 77.8%, as compared with 1926, in Indiana 45.9%, in Ohio 67.8%, and in Pennsylvania, which by that time had become mainly non-union, 14.1%. Kentucky production increased 19.2%. (United States Bureau of Mines, Coal in 1927, p. 333.)

The demoralizing nature of the forces brought into play by the sort of competition that has characterized this industry was strikingly illustrated during this struggle over collective bargaining in the period between 1924 and 1927. It was a life or death struggle and both sides were desperate.¹ (R. 385, 392.) The battle was not completely won by either side but after the 1927 strike the only important producing areas east of the Mississippi which continued to operate under collective bar-

¹ In 1928 the Senate Committee on Interstate Commerce investigated the conditions in the coal fields of Pennsylvania, Ohio, and West Virginia, connected with the strikes in those areas during the period 1924-1928. The testimony presented at this hearing describes in forceful detail the financial losses of the operators, the privation and sufferings endured by the mine workers, and many acts of brutality, violence, and repression.

gaining agreements were Illinois and a section of Indiana. (Fig. 109, R. 170.)

Following the break-down of collective bargaining in 1927, the southern operators, no longer having a competitive advantage over the northern operators in the matter of the absence of collective bargaining, were forced to a still further cutting of prices and wages in an attempt to retain the increased tonnage which they had won from the former collective bargaining states. But since the latter were no longer operating with fixed labor costs, they could now meet such competition. Accordingly between 1927 and 1929, prices and wages in both groups of states were progressively forced down, though more rapidly in the north than in the south.¹ The northern fields were thus able to recapture a portion of the markets lost in the previous years, but since they never completely caught up with the price reductions of the southern fields, the latter retained a large proportion of the gains formerly made. (Fig. 121, R. 181.)²

¹ Prices in the northern states declined from an average realization of \$2.06 in 1927 to \$1.78 in 1929, while prices in the south dropped from \$1.73 to \$1.55, narrowing the average differential in favor of the south from 33¢ to 23¢. (Def. Ex. 31, R. 1077.) Wages in the north declined from 86¢ average hourly earnings in 1926 to 70.7¢ in 1929, and in the south from 67¢ to 61.6, narrowing the differential from 19¢ to 9.1¢. (Def. Ex. 32A, R. 1079.)

² While the percentage of total shipments from the four northern states of the coal originating in the group referred to in footnote 1, p. 49, *supra*, had fallen from 63.9% in 1923 to 46.1% in 1927, it rose to 51.8% in 1929 and 52.7% in 1930. (Fig. 119, R. 180.)

The above is a brief summary of the competitive situation in the industry between 1923 and 1929. During this period industry generally throughout the country was unusually prosperous, prices and wages were stable, and employment and payrolls were expanding. (Fig. 92, R. 159.) In the bituminous coal industry production was greater than for any other period in the history of the industry, being higher in *every* year from 1924 through 1929 than in any preceding year except the War years and the years 1920 and 1923. (Def. Ex. 3A, R. 1003.)¹ And yet the average sales realization, f. o. b. mine, declined almost without interruption² from \$2.68 in 1923 to \$2.20 in 1924, \$2.04 in 1925, and ultimately to \$1.78 in 1929—90¢ a ton or 33.6% below the 1923 level. (Fig. 96, R. 161; Def. Ex. 3A,

¹ The average annual production by five-year periods was as follows:

1910-1914	435,000,000 tons
1915-1919	508,000,000 tons
1920-1924	491,000,000 tons
1925-1929	529,000,000 tons

The period from 1915 to 1919 includes the abnormal war years of 1917 and 1918. The average for the other three years in this period was 470,000,000 tons. (Def. Ex. 3-A, R. 1003.)

² There was a temporary recovery of 2¢ a ton in 1926, which was an exceptional year. In that year the British coal strike shut down the British mines for nine months, greatly increasing the amount of American coal exported, and in addition, there was heavy purchasing in anticipation of the strike which it was accurately predicted would follow the termination of the Jacksonville agreement on March 31, 1927. (Fig. 97, R. 162.)

R. 1003.)¹ During the same period the average wholesale price for all commodities declined only 5.3%. (Fg. 100, R. 163-164.)²

While industry generally was showing large profits³, the bituminous coal industry suffered heavy losses. In 1924 the bituminous and anthracite industries together reported to the Treasury a total net deficit of \$49,250,562⁴; in 1925 the bi-

¹ The course of the decline was as follows:

1923-----	\$2. 68
1924-----	2. 20
1925-----	2. 04
1926-----	2. 06
1927-----	1. 99
1928-----	1. 86
1929-----	1. 78

(Def. Ex. 3A, R. 1003; Fg. 96, R. 161.)

² The wholesale commodity price index compiled by the Bureau of Labor Statistics includes transportation charges; the average f. o. b. mine realization price computed for coal by the Bureau of Mines does not include such charges. In view of the exceptionally high proportion of transportation charges in the coal industry, as compared to other industries, see p. 30, *supra*, the mine price (used in the text) would seem more strictly comparable than the delivered wholesale price for coal. But even on the latter basis (which includes the inflexible freight rate in the coal price) coal prices declined 19.5% between 1923 and 1929, as compared to the 5.3% drop for industry generally. (Fgs. 99-101, R. 162, 164.)

³ Four other industrial groups out of 91 showed a net loss for the period 1925 through 1929. (Fg. 103, R. 165; Def. Exs. 49, 49A, R. 1166a, 561-563.)

⁴ During the two years, 1924 and 1927, separate figures for bituminous were not available. It would seem clear that the largest part of the deficit in these years was attributable

bituminous industry reported a net deficit of \$22,363,497; in 1926 bituminous and anthracite combined showed a profit of \$37,714,000, and in 1927 a deficit of \$20,303,000.³⁹ In 1928 the bituminous industry lost \$24,508,000; and in 1929 \$11,304,000. The Carter Coal Company, itself, operating efficient mines with up-to-date machinery and plant, in the valuable smokeless coal area, lost large sums in every year of this period—ranging from \$209,560, or 11.7¢ a ton in 1927, to \$602,758, or 74.1¢ a ton in 1924. (Def. Ex. 47, R. 1163.) Many companies were forced into bankruptcy and receivership (Fig. 102, R. 165). Many mines were shut down or abandoned; the number of mines in operation declining from 9331 in 1923 to 6057 in 1929. (Fig. 93, R. 159-160; Def. Ex. 4A, R. 1006.) Many of these mines were abandoned before exhaustion, resulting in a considerable waste of coal resources. (Fig. 94, R. 160-161.)

Between 1923 and 1929, the computed wage payments in the industry dropped from \$851,000,000 to \$588,000,000, a decline of 30.9%. (Fig. 116a, R. 177-178; Def. Ex. 54, R. 1174-1175.) This decline

to the bituminous industry, inasmuch as in 1925, 1928 and 1929 (the only years during this period for which separate figures for bituminous and anthracite were available) anthracite either broke even (in 1925 the loss was the insignificant figure of \$44,359), or made a net profit—\$5,251,000 in 1928, and \$2,422,000 in 1929. As has been pointed out, note 2, p. 55, *supra*, 1926 was an exceptional year. (Fig. 102, R. 165.)

was brought about by the drastic wage reductions already referred to and by a large decrease in the number of persons employed in the industry. The number of men employed fell from 705,000 in 1923 to 594,000 in 1926 and in 1927, and to 503,000 in 1929. (Def. Ex. 4A, R. 1006.) This factor alone, with the accompanying increase in the average number of days worked per man per year from 179 to 219 days (*Ibid.*), might, standing alone, be regarded as a healthful sign of the elimination of excess workers from the payrolls in an over-expanded industry, with better conditions for those remaining employed. But during the same period wages were also falling rapidly. Between the Bureau of Labor Statistics survey the winter of 1921-1922,¹ and that in the winter of 1929, average hourly earnings (for miners and loaders, constituting the largest proportion of underground workers) for the nation as a whole fell 25.9%, from 84.5¢

¹ No survey of wage rates was made by the Bureau of Labor Statistics in 1923. (R. 468.) The surveys nearest to 1923 occurred in the period October 1921-February 1922, and in the fall of 1924. Between these two dates wage rates in the northern fields were substantially unchanged. (Fig. 124, R. 183; Def. Ex. 32A, R. 1079.) Wage rates in the southern non-union fields, however, increased if anything from 1921-1922 to 1923. (R. 469. "The southern rates of 1923 were relatively close to the northern rates.") After the signing of the Jacksonville wage agreement in February 1924, the southern rates declined markedly. (R. 469.) For these reasons the wage survey of 1921-22 is more representative of conditions in 1923 than is that of 1924.

per hour to 62.6¢ per hour. (Pl. Ex. 63, R. 926.) With the average number of days worked per year increasing, nevertheless average *annual* earnings for mine workers in the nation as a whole fell from \$1,208 in 1923 to \$1,169 in 1929. (Computed from Def. Ex. 54, R. 1174–1175.) Thus, while the employed miner worked on an average 40 days more per year, an increase of 22%, he received a smaller sum for his year's work.

Similarly, the decrease in capacity resulting from the shutting of many mines from 1923 to 1929 should have served to restore the industry to a sound economic position; but, even in the prosperous years of 1928 and 1929, after competition from most of the mines which closed down during the 1923–1929 period had been eliminated, the industry continued to lose money. (See Def. Exs. 3A, 4A, R. 1003, 1006.)

THE PERIOD SINCE 1929

With the competitive forces already described pressing on the industry before 1929, a complete collapse during the depression was inevitable. The cumulative effect of the slowing-down of all business added to the other factors affecting the growth of demand caused production to drop from 535,000,000 tons in 1929 to 310,000,000 tons in 1932. The loss of market outlets made competition much more intense, as each mine sought to

keep up its tonnage by cutting prices drastically and repeatedly. Loss of tonnage meant inability to pay fixed charges—and cutting of prices below all but actual out-of-pocket cash expenses became general. The producer making the largest cut in prices got the business; his coal rather than that of his competitors moved in interstate commerce. Inasmuch as labor costs were the only flexible cost item of consequence (see p. 37, *supra*), and since in most areas wages were no longer fixed by collective agreements placing operators on an even plane in this regard, operators reduced wages in order to make the necessary price cuts. (R. 347, 439.) It was not uncommon for an operator to obtain a contract by making an extremely low bid and then cut wages in order to fill it (R. 411, 348); from the viewpoint of his own interest and that of his employees, it seemed better to obtain work at lower wages than no work at all. But with all producers forced to adopt the same tactics the net result was that all had to keep cutting prices and wages, with ultimate benefit to none. (R. 347.)

As has been pointed out, the average price of coal had already fallen from \$2.68 in 1923 to \$1.78 in 1929. In 1930 the average sales realization dropped to \$1.70; in 1931 to \$1.54; in 1932 to \$1.31, and in 1933 the average was \$1.34. (Fig. 96, R. 161; Def. Ex. 3, 3A, R. 1002, 1003). The southern mines, at a greater distance from large consuming

markets and no longer able to cut labor costs more rapidly than their northern competitors, were forced to cut their prices to an average realization of \$1.05 in 1932.¹ (Def. Ex. 31, R. 1077.)

During this period the coal industry as a whole was suffering very great losses. (R. 347, 382, 411.) In 1930 the deficit reported to the Treasury Department was \$42,071,000; in 1931 \$47,745,000; in 1932 \$51,167,000, and in 1933 \$47,549,000 (Fig. 102, R. 165).

Although many mines were abandoned and capacity shrank to 653,000,000 tons in 1932 and to 615,000,000 in 1933, the surplus capacity was greater in 1933 than in 1923. (Fig. 95, R. 161; Def. Ex. 3A, R. 1003.) In 1923 capacity was 73 percent in excess of production; in 1933, after production had begun to expand, it was 84 percent in excess (*Ib.*). In 1932 the excess was even greater, 110 percent (*Ib.*).

Wages declined even more drastically than prices. The total annual wage payments for 1933, computed at the rate prevailing before the N. R. A. Code, would have been \$235,000,000, as contrasted with \$588,000,000 in 1929, and \$851,000,000 in 1923 (Def. Ex. 54, R. 1174-1175.) Average daily earnings for the mine workers in the nation as a whole

¹ Such an *average* realization means that a great deal of coal must have been sold to large consumers at prices well under \$1.00.

declined to \$3.36 in 1933 (Def. Ex. 54, R. 1174-1175).¹ Many mines in both northern and southern states were paying as low as \$1.50 to \$2.50 per day (Fig. 117, 147, R. 178, 198; Def. Ex. 33, 33A, 34, 34A, R. 1080A-1080D). Annual earnings per miner fell even more rapidly, as the average number of days' work per year dropped from 219 in 1929 to 160 in 1931, 146 in 1932, and 167 in 1933. (Def. Ex. 4A, R. 1006.) The calculated average annual income for 1933 at the rates in force before the N. R. A. Code for the average number of days worked in that year was \$561 (computed from Def. Ex. 54, R. 1174-1175). Between 1929 and 1933 the annual income of the West Virginia loader had been reduced from \$1233 to \$557, and that of the

¹ In the leading coal producing states, the average daily wages for trackmen (the basic day wage occupation for skilled workers underground) and hand loaders (the principal piece-work occupation underground) were as follows: (Fig. 113, R. 174.)

	Average daily earnings in				
	Illinois	Ohio	Penna.	W. Va.	Kentucky
Trackmen:					
1929.....	\$6.10	\$5.16	\$5.77	\$4.82	\$4.87
1933.....	4.97	3.14	3.40	3.06	2.96
Hand loaders:					
1929.....	7.03	4.61	4.88	4.99	4.77
1933.....	5.06	2.50	2.65	2.84	2.80

Pennsylvania loader from \$1122 to \$429 (Fig. 115, R. 176).¹

With the collapse of collective bargaining on a national scale after 1927 uniformity in wage scales gradually disappeared even in the same fields and operators in the same fields were paying widely varying wages (Def. Exs. 33, 34, R. 1080A-1080D). In May 1933, the rates paid to trackmen at representative commercial mines varied as follows (Def. Ex. 33, 33A) :

District	Number of mines paying daily rates of—					
	Under \$1.50	\$1.50 to \$1.99	\$2.00 to \$2.49	\$2.50 to \$2.99	\$3.00 to \$3.49	\$3.50 and over
Ohio.....				8	26	2
Western Pa.....		4	46	31	54	18
Eastern Pa.....			4	13	49	25
Northern W. Va.....		2	6	51	7	1
Southern Sub.-Div. No. 2.....	2	16	55	51	28	9
Alabama.....	1	7	6	9		

In the Western Pennsylvania district, the rates paid ranged from \$4.00 a day to less than \$1.75.

¹ Calculated average annual earnings by states for trackmen and hand loaders was as follows (Fig. 115, R. 176) :

	Calculated annual earnings in				
	Illinois	Ohio	Penna.	W. Va.	Kentucky
Trackmen:					
1929.....	\$1,080	\$1,037	\$1,327	\$1,191	\$1,081
1933.....	701	531	551	600	503
Hand loaders:					
1929.....	1,244	927	1,122	1,233	1,059
1933.....	713	423	429	557	476

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 (Fig. 117, R. 178-179).

Efforts to Improve Competitive Conditions and to Stabilize the Industry

Bituminous coal producers by themselves and in collaboration with Governors of the coal-producing states made various efforts to rescue the industry from economic disaster by voluntary and state action. In 1925, 1927 and 1929 producers in the relatively prosperous Smokeless Fields considered plans for cooperative action (Fig. 145, R. 195-196). In 1931 the Governor of Kentucky called a conference of governors of the coal-producing states and of the coal operators in an effort to stabilize conditions (*Ib.*). These conferences achieved no tangible results, the representatives of the producing states apparently feeling helpless in the face of a national problem. The Governor of West Virginia then asked the National Coal Association to consider the question. As a result a plan for the formation of voluntary regional selling agencies was proposed and Appalachian Coals, Inc., was formed. At that time many operators

hoped and believed that these selling agencies would stabilize the industry. No selling agencies went into operation until the middle of 1933, pending the decision of this Court in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344. After that, Appalachian Coals, Inc., began operating and two additional agencies were set up in Ohio (Fg. 145, R. 196). But even in the short period of time during which these agencies functioned prior to the adoption of the Bituminous Coal Code under the National Industrial Recovery Act, it became apparent that they would be unable to protect their members against falling prices because of competition from non-member producers in the same and other areas.¹ Competition from outside producers clearly prevented any purely voluntary plan from correcting the chaotic and disorganized condition. (*Ibid.*)

¹ Leading producers, including those who suggested and supported the Appalachian sales agency plan, testified that it was unworkable. E. C. Mahan of Tennessee, Chairman of the Sub-Committee of the National Coal Association, from which came the suggestion which subsequently evolved into Appalachian Coals, Inc., testified with respect thereto as follows: "I saw that tried out and, in my opinion, it was unworkable." (R. 414.)

Ex-Senator C. W. Watson of West Virginia testified: "I do not think the selling agency formed under the Appalachian plan would have brought the industry out of the condition it was in, and kept it out." (R. 409.)

Chas. O'Neill of Pennsylvania testified: "The effect of the Appalachian Coals, Inc., so far as I could observe, was not the answer to the needs of this industry. The difficulties

During the same period from 1925 to 1932 while these attempts to stabilize the industry by voluntary or State action were being made, proposals for Federal regulation were being urged in Congress, as already indicated (*supra*, pp. 21-23). In 1932,

that I had in my own district trying to get a sales agency organized made me feel that it could never become strongly enough organized in all the districts of the United States to effect the general situation." (R. 359.)

Harry O. Findlay, a member of the Appalachian Coals, Inc., and Chairman of the organization committee of Northern Coals, Inc., described the failure of efforts at stabilization through voluntary selling agencies as follows:

"After the Supreme Court decision in the Appalachian case an organization was set up covering the eight districts in that area and one also was set up in Ohio shortly after Appalachian was organized and a second one sometime after [fol. 478] that. Those three organizations are the only ones that I know of that have really functioned. My company was a member of Appalachian Coals, Incorporated, for our southern West Virginia property. I was chairman of the organization committee that set up Northern Coals, Incorporated, in Ohio, and was a director of that company after it was organized. We in the industry for the most part accepted that plan in the hope that we might be able to work something out of it of a practical nature and stabilize the industry. Appalachian Coals and Northern Coals did succeed in improving the methods of selling their coal and probably did considerable good in extending the distribution of their coal. They furnished combustion engineers to go out and help show the buyer how to use their coals (815). In ways like that they have been very beneficial, but as to stabilizing the industry they have been very ineffective for the reason that they were not able to get all of the producers in the respective districts into their organization. Those that remained out set the price for those that were in and they had competition from other districts that were not organized in any way. The net effect has been that it has been im-

especially, extended hearings were held.¹ With the passage of the National Industrial Recovery Act, discussion of special legislation for the coal industry was for the time being set aside, and proponents of Federal control attempted to work out a solution through a code of fair competition.

As the expiration of the National Industrial Recovery Act approached the industry was again confronted with the necessity of attempting to discover and apply remedial measures of some character.² The result of the representations made to Congress was the statute now before the Court. The record indicates a practically unanimous opinion on the part of the producer witnesses, labor witnesses and expert witnesses alike, that national regulation affords the only possible solution of an intolerable

possible to maintain any fair price structure through those organizations, although, when they started, we were all hopeful that something of the kind might be developed and we would be able to get a price for coal which would enable us to do what we finally did under the code, pay our labor a reasonable wage and at least come out even on our sales. I have studied that situation very carefully and have been living with it for some time, and I am absolutely satisfied that there is no way in this industry that it can be stabilized without some effective Government force bringing about that stabilization. The industry just cannot do it itself." (R. 387-388.)

¹ Hearings on S. 2935, a bill to regulate interstate and foreign commerce in bituminous coal, etc. See list of hearings, footnote, p. 18, *supra*.

² The Bituminous Coal Conservation Act was introduced in both Houses in January, 1935. Committee hearings commenced the following month.

condition in one of our most vital basic industries. This conclusion appears from the record to have been confirmed by the experience under the operation of the National Recovery code. That code proved by experience to the satisfaction of the industry that, in spite of its complicated nature, price regulation and coordination of prices as between different producing areas in different markets was feasible and practicable. The results were beneficial to the producers and employees alike.¹ Increases in miners' wages and in operators' sales realizations were secured without reduction in volume of employment² or loss of markets to competing fuels. (Def. Ex. 52, R. 1172.) The maximum number of hours per day was reduced and miners' annual earnings were increased in some fields by

¹ Petitioner himself testified (R. 277) as follows: "I testified before the Senate Committee when it was holding hearings on the present Act that: 'Those of us in the coal industry may differ as to the protection of the code. I believe that there is substantial agreement in the industry that the code has been of benefit to the coal industry, and that part which you played (addressing Senator Davis) and to which you have just referred in connection with the N. I. R. A. has been fruitful of results in the bituminous-coal industry.'"

"That was in connection with an exchange between the Senator and me in which the Senator was seeking to imply that his interest in furthering the enactment of the NIRA had had in mind the coal industry and that I might be an ungrateful recipient of the favors that had accrued to me as a member of the industry."

* * * * *

² The average number of men employed increased from 406,000 in 1932 to approximately 450,000 in 1934. (Def. Ex. 4A, R. 1006.)

as much as 50%.¹ At the same time returns for the principal fields indicated a sufficient margin over average total cost to enable the industry to operate at some return on investment.² Meanwhile, the interest of the general public was not sacrificed, as is indicated by the fact that the record discloses no complaint from consumers over price levels and the percentage contributed by coal to the total national supply of energy increased in comparison with oil and water power.³

¹ The working day agreed upon (at the place of duty underground) was 8 hours effective October 2, 1933, and 7 hours, effective April 1, 1934. The basic wage rates, in effect after April 1, 1934, were \$5.00 a day for Illinois, Pennsylvania, and Ohio, and \$4.60 for Southern West Virginia and Eastern Kentucky. (Fig. 147, R. 198.) At the rates prevailing before the code in early 1933, the average West Virginia trackman earned \$3.06 a day, or \$600 a year. At the code rate of \$4.60, after April 1, 1934, he earned at the rate of \$902 a year, an increase of 50 percent. (Working time in West Virginia was the same in 1934 as in 1933.) (Fig. 148, R. 198.)

² In Code Divisions I and II, which produce 89% of the national output, the results for the 10-month period April 1934 to January 1935, showed an average mine realization of \$1.86 a ton, an average total cost, excluding interest on indebtedness, of \$1.83, and an average margin (before interest) of 3¢ a ton. (Fig. 150, R. 199.)

³ The percentages contributed by the various sources of energy in 1933 and 1934 were as follows:

	Anthracite	Bituminous Coal	Domestic Oil	Natural Gas	Imported Oil	Water Power	Grand Total
1933.....	7.0	45.2	28.1	8.7	1.0	10.0	100.0
1934.....	7.7	46.3	28.9	8.7	1.1	9.3	100.0

(Def. Ex. 52, R. 1172.)

PETITIONER'S REVIEW OF THE FACTS

Counsel for petitioner devote pages 22 to 62 of their brief to an "outline of the evidence" and review of the facts. This review consists largely of a legal argument as to the effect in law of the facts discussed. In this brief the legal effects of the facts in the record will be considered in later sections. Consequently, no detailed refutation will be attempted at this time of all of the conclusions presented in the petitioner's factual review, but it seems desirable to examine the methods of reasoning and the treatment of evidence by which some of the more important conclusions presented in that review have been reached. It is submitted that the results of such an examination are not such as to justify confidence in the correctness of these conclusions.

So far as the plaintiff's outline of the evidence presents conclusions of fact, the resulting picture is, it is submitted, not that disclosed by the record. Petitioner denies the existence of stoppages in and interruptions to interstate commerce, denies the presence of price fluctuations and instability, denies the abuse of wage-cutting as a competitive practice. We therefore proceed to consider his discussion of each of these topics as well as his conclusions on dislocations and diversions of interstate commerce in bituminous coal, on over-capacity and on conservation.

STOPPAGES AND INTERRUPTIONS TO COMMERCE

At page 61 of their brief counsel for petitioner arrive at an ultimate conclusion which they state in the following language: "In any event there have been no material interruptions or stoppages to commerce calling for the exercise of federal power."¹ In view of the record this is, indeed, a strange conclusion. We have already set forth in some detail the conditions attendant upon the great interruptions to commerce caused by the suspensions of 1919 and 1922 and will not repeat them here. Surely counsel do not contend that the situation which has the obvious and disastrous effects upon interstate commerce attendant upon the 1919 and 1922 suspensions does not give rise to or call for the exercise of federal power. Inasmuch, however, as counsel lay so much stress on the period since 1923 and pass over the effects upon commerce of the 1927 strike as of no consequence, it may be well to further review the facts.

The basic cause of the 1927 strike was unquestionably the cutthroat competitive price warfare

¹ Petitioner in his original brief served upon the respondents stated his ultimate conclusion relative to stoppages and interruptions in the language above quoted. After this portion of respondent's brief had been put in type, petitioner served a revised brief in which his ultimate conclusion on this point is stated thus (p. 61): "(7) There have been no material interruptions or stoppages in coal and no restraints or burdens upon its free movement or upon the free play of competition."

that was being carried on between the union and non-union fields (R. 346, 437). Counsel say that this strike could have had no substantial effect upon commerce because during the year 1927 the miners in the country as a whole lost only 45 days work on account of labor disputes, while the working days were more than average. Let us see what the record has to say about the actual effects upon commerce of this suspension. The record discloses that the 1927 suspension involved only approximately 169,000 men in 8 states. (R. 332.) But in the State of Illinois shipments fell from 10,000,000 tons a month before the suspension to a negligible quantity. Individual railroads serving Illinois and adjacent districts were similarly affected. Loadings on the Chicago, Milwaukee, St. Paul & Pacific Railroad, for example, dropped from 23,000 cars a month before the strike to approximately 2,900 cars a month during the strike. (R. 332.) During the 7 months of the strike shipments from Illinois averaged 78% below normal, and similar though less marked declines occurred in other states. At the same time the non-union fields to the south which were not affected by the suspension increased their tonnage, the State of Kentucky expanding its output 19.2% during this period (*supra*, p. 53). The net dislocation of business enforced by this suspension from the states affected by the stoppage to the non-bargaining states south of the Ohio River was approximately 15,000,000

tons. (R. 332, 333.) Counsel for petitioner apparently take the position that these facts constitute no interruption of commerce because whatever stoppages occurred in the commerce from certain states was made up for in amount by shipments from elsewhere or by the speeding up of production later. This is surely a novel test of the existence of a stoppage or interruption. But there are other incidents and results of the strike of 1927 which petitioner's brief does not mention at all.

Consumers of coal remembering the shortages attending earlier strikes, in self-defense, laid in enormous stocks of coal in anticipation of this suspension. A total stock of 75,000,000 tons was purchased, 40,000,000 tons in excess of normal requirements. (R. 333.) It is estimated that the working capital of consumers tied up in the extra 40,000,000 tons amounted to \$200,000,000 and that the cost of the operation to consumers in interest charges and physical handling cost was approximately \$20,000,000. (R. 333.) Accumulation of these stocks had begun in the summer of 1926 and it was an auxiliary cause of the sudden rise in spot prices of that year. The emergency stocks built up before the 1927 strike were not entirely consumed in the period of the suspension and the surplus continued to hang over the market for two years, exercising a depressing effect upon prices. (R. 333.) The diversion of orders during the suspension tended to encourage a temporary increase in capacity in the southern fields. (R. 335.)

Similar unsettling effects have attended other widespread suspensions of coal mining, even though no such general shortages as those of 1919, 1920, and 1922 were created. The suspensions of 1906, 1908, 1910, and 1912 all led to sudden and wide fluctuations in coal shipments and in the use of railroad transportation facilities, 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. (Fig. 111, R, 172, 333, 334.)

In 1928 and in 1932 the expiration of wage agreements in the few remaining collective bargaining areas was also marked by a suspension of work. (Fig. 134, R. 190, 463.) As in previous years, the existence of competitive areas where collective bargaining did not prevail, and where in consequence the producers were free to cut wage rates at any time, operated as a strong deterrent against renewal of the collective agreement in the still remaining areas of collective bargaining, since the producers in these areas naturally wished to be free to carry on the price warfare on the same terms

as their wage-cutting competitors. (Fig. 139, R. 192.) These stoppages are, in short, the inevitable result of the chronic prevalence of price war in an industry such as this, when carried on under conditions which leave some of the competitors free to adopt wage-cutting tactics while others are bound by collective agreements.

Opinions may, no doubt, differ as to the appropriate method for preventing in the future the stoppages of interstate commerce in bituminous coal, which have come to be chronic in the industry. Such opinions may well lie in the field of proper legislative discretion. But, in the face of the record, it seems impossible to understand how any one can reach the conclusion of petitioner's counsel that "there have been no material interruptions or stoppages to commerce." Of course, after these words, petitioner's counsel add the words "calling for the exercise of Federal power." Whether or not the material interruptions or stoppages shown by the record are such as to "call for the exercise of Federal power" is, of course, another question. If the words "call for" mean "important enough" or "material enough" to be a proper subject of governmental concern, the record clearly indicates an affirmative answer. If, on the other hand, "call for" means sufficient in law to afford a justification for governmental action, then the answer involves a legal question of *due process* which obviously can not be supplied

by the facts alone, but which requires such a discussion of the law of *due process* as is contained in later sections of this brief. Similarly, if the words "call for the exercise of federal power" are meant to raise the question of whether there is a constitutional basis for Federal as distinct from State action, again a question of law is presented which can not be answered from the facts alone, but which requires a discussion of the commerce power of the Federal Government in the light of the fact situation presented by the record. This legal issue is later discussed (*infra*, pp. 118 ff., 238 ff.)

If on the face of the record it is impossible to deny, as petitioner denies, the chronic occurrence of stoppages and interruptions to interstate commerce in the bituminous coal industry, it may of course be contended that these stoppages are due to the existence of labor organizations and the practice of collective bargaining in the industry which the statute at issue is designed to protect. Petitioner apparently refrains from making such a contention. So far as concerns past experience, the answer to it is obvious. The stoppages and interruptions have been due not to the existence or non-existence of collective bargaining but in large part to the prevalence of price cutting warfare in an industry where competitive areas exist side by side in some of which collective bargaining has prevailed and in others not. The pressure of price cutting from the areas without collective bargaining on the producers in collective bargaining areas has been

such as to operate as a constant incentive to the latter to break their collective agreements or to refuse to renew them. Strikes and interruptions of commerce in these areas have been the result. On the other hand, in order to remove this incentive there has been a constant effort by labor to extend collective bargaining into the areas where it did not previously exist. As a result, strikes and interruptions to commerce have taken place in these areas also. The existence side by side of areas with collective bargaining and areas without, inevitably and necessarily, in an industry like the bituminous coal industry, holds out a constant threat of stoppages and interruptions which has chronically been translated into actuality. Quite independently of the provisions of the statute which sanction the right of collective bargaining, the elimination of price cutting warfare is a legitimate and appropriate means of diminishing the incentive to such interruptions, since in the absence of such warfare the pressure for competitive wage cutting would be greatly reduced if not altogether removed.

PRICE FLUCTUATIONS AND DECLINES

Petitioner ignores the effect on commerce of the steady decline in the price of bituminous coal since 1923, and belittles the existence of price fluctuations. It is admitted by all that there were violent fluctuations in prices during the period of shortage from 1916 to 1922, the average spot price ranging from \$1.21 to \$9.51 a ton. (Def. Ex. 5, R. 1007.)

In insisting that there have been no *violent fluctuations* in price since 1923 (Br. 35, 36), petitioner overlooks the severity and abruptness of the price *decreases* during that period. The increases in spot prices, which in periods of shortage at times amounted to 450 per cent in certain fields,¹ are easy to picture arithmetically and graphically. On the other hand, it is not arithmetically possible for a decrease to reach any such figure as 450 per cent, or even 100 per cent. Long before any spectacular percentage of decrease is reached, however, it is possible for the decrease to be carried below production costs and so, when characteristic of an entire basic industry, to become a proper cause for governmental concern. As has been demonstrated elsewhere in this brief, with the exception of the code year 1934, prices in the bituminous coal industry as a whole have been below production costs continuously since 1923, with the possible exception of a single year (Fig. 102, R. 165).

EVIDENCE RELATING TO WAGE LEVELS

Petitioner attempts to refute the evidence that wage-cutting brought about serious reduction of miners' earnings from 1923 to 1933, by a series of statistical comparisons of such doubtful validity as to be, in several instances, entirely misleading. We shall consider seven points.

1. *Trend of Typical Wages*.—In the first place, in commenting on the decline of daily wages during

¹ In August, 1920, the price of Pocahontas coal, f. o. b. mines, was \$12.90 a ton (R. 303).

the depression (Br. 55), petitioner mentions only the State of Illinois, in which the wage rate was supported by collective bargaining throughout the entire period. In the four other largest States, daily wages declined substantially more than in Illinois during the period 1922 to 1933, as is shown by Finding 113, (R. 174) which is based upon petitioner's own exhibits. (Pl. Ex. 82B, R. 985.)

2. *Relative Decline of Coal Mine and Other Wages.*—In comparing the rate of decline in coal mining with that in other industries (Br. 57), petitioner matches the trend of *daily wage rates* in Illinois mines with *weekly earnings* in Illinois manufacturing plants, from 1923 to 1933. This makes no allowance for the irregular employment characteristic of mining, and the fact that daily wages are accordingly no measure of weekly earnings. If petitioner will compare the trend of miners' *earnings* (as indicated by his own Exhibit 82B on an annual basis) with the decline in factory workers' *earnings*, for the same years, he will find that the miner suffered a substantially greater reduction.

	1923	1933	Percent decline
Illinois miners' <i>earnings</i> (trackmen, per year).....	• \$1, 185	• \$701	—40. 8%
Illinois factory workers' earnings (all wage earners, including women, per week) ^c	\$27. 07	\$18. 28	—32. 5%

• Finding 112, R. 173.

• Finding 115.

• Record, p. 402.

Petitioner states (page 57) that the decline in “real wages” for labor in all manufacturing indus-

tries from 1923 to 1933 was much greater than in mining. How slender a basis there is for such a statement is shown by comparing the total sum paid out in wages in manufacturing with that in mining:

	1923	1929	1933	Percent decline, 1923-33
Total wage payments:				
In manufacturing.....	* \$11,009,298,000	\$11,620,973,000	\$5,261,576,000	-52.1%
In bituminous coal mining.....	† \$851,000,000	\$588,000,000	\$235,000,000	-72.4%

* U. S. Bureau of the Census, Census of Manufactures, 1931, p. 20; 1933, Summary by Industries, p. 1.

† Defendant's Exhibit 54, R., p. 1174-1175.

From 1923 to 1929 the manufacturing industries of the country were expanding their payrolls. But during this period of general prosperity the annual payroll of the bituminous coal mines fell from \$851,000,000 to \$588,000,000. Over the decade 1923 to 1933 manufacturing payrolls declined 52.2% and coal mining payrolls declined 72.4%.

3. *Comparative Level of Coal Mine and Other Wages.*—In comparing the level of miners' wages with that in other industries (p. 57), petitioner matches average hourly *earnings* of "outside laborers" with average hourly *entrance rates* for common labor in other industries. His comparison is based upon Def. Ex. 53, R. 1173, which was supplied by the U. S. Bureau of Labor Statistics. He fails, however, to note the Bureau's warning that (R. 1173) "in any comparison of hourly wage rates such as those shown here, the intermittent

employment characteristic of bituminous coal mining should also be kept in mind'' and that at the time covered by the comparison bituminous coal employees received 20 percent to 33 percent less work than manufacturing employees. (R. 1173). If petitioner were to allow for the irregular employment, he would find that the mine laborer's actual earnings per week were substantially less than those of the laborers in other industries in seven of the nine States shown. The comparison leaves no doubt that before the coming of the N. R. A. Code, the earnings of bituminous coal miners had been beaten down to very low levels.

4. *Accident Hazard and the Wage Rate.*—In commenting upon the adequacy of miners' earnings, petitioner omits all reference to the accident hazard in mining. 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 severity rate in bituminous mines was higher than in any other industry reporting to the National Safety Council. The actuarial chance is that one out of ten men who spend their working lives in the mines will be killed in a mine accident (Fig. 66, R. 142).

(5) *Coal Mine Wages and the Cost of Living.*—In comparing the decline of miners' earnings with the "cost of living" (Br. 56), petitioner makes use of the wholesale price index of all commodities.

This index, consisting largely of raw materials, industrial products, and agricultural staples quoted in central markets, is not a trustworthy measure of the cost of living. A miner's family does not buy steel billets and pig lead.

The fair yardstick for such a comparison is the official index of the cost of living, as calculated by the U. S. Bureau of Labor Statistics, which yields the following result:

	1926	1933	Percent decline
<i>Cost of living index</i> * (1913=100.0)	178.7	132.2	-25.9%
<i>Miners' earnings</i> (trackmen) ^b :			
Illinois, per day	\$7.60	\$4.97	-34.6%
Kentucky, per day	\$4.84	\$2.96	-38.8%
Illinois, per year	\$1,307	\$701	-46.4%
Kentucky, per year	\$1,113	\$503	-54.8%

* U. S. Bureau of Labor Statistics. Serial No. 329, *Changes in Cost of Living*, Oct. 15, 1935, p. 6. The figures used are the averages for June and December.

^b Findings 113 and 115, R. 173, 175, based on petitioner's Exhibit 82B.

It is clear that, contrary to petitioner's contention, the wages of both the northern and the southern mine worker declined much more than did the cost of living.

(6) *Northern and Southern Wages Contrasted*.—Petitioner's brief gives a table (Br. 55) purporting to compare the wages of Kentucky trackmen and Illinois trackmen, but some of the figures used are not quoted from the findings allegedly cited, nor can they be derived from the findings without assumptions contrary to fact.¹

¹ For example, in computing the Kentucky trackman's earnings in 1923, petitioner's brief has apparently assumed that wage rates in 1923 would be equal to the average for

It was quite unnecessary to construct this table, for more complete and entirely comparable data had been introduced by petitioner himself in Pl. Ex. 82B. (R. 985.) These data were correctly summarized by the trial court in Findings 113 and 115 (R. 174, 176) from which the following comparison is taken, using all of the years shown by the record :

	1922	1924	1926	1929	1931	1933
<i>Daily earnings ^a:</i>						
Illinois trackmen.....	\$7. 62	\$7. 49	\$7. 60	\$6. 10	\$6. 12	\$4. 97
Kentucky trackmen.....	5. 94	5. 22	4. 84	4. 87	4. 46	2. 96
Kentucky under Illi- nois.....	-\$1. 68	-\$2. 27	-\$2. 76	-\$1. 23	-\$1. 66	-\$2. 01
<i>Annual earnings ^b:</i>						
Illinois trackmen.....	\$914	\$1, 109	\$1, 307	\$1, 080	\$832	\$701
Kentucky trackmen.....	832	908	1, 113	1, 081	709	503
Kentucky under Illi- nois.....	-\$82	-\$201	-\$194	+\$1	-\$123	-\$198

^a From Finding 113, R. 174.

^b From Finding 115, R. 176.

Petitioner admits that Kentucky mines had been taking business from Illinois mines by reducing wages. The record shows that daily earnings of trackmen ran consistently lower in Kentucky than in Illinois and that after the Illinois union scale was reduced, in an attempt to meet non-union competition, Kentucky rates were cut still further.

The disparity in rates between the districts was greatest in 1924 and 1926 during the period of the

1922 and 1924. It is known, however, that nonunion wages were generally maintained at comparatively high levels in 1923, and that the cutting in wages came in 1924 after the signing of the Jacksonville agreement. (Fg. 124, R. 183-184, 469.)

Jacksonville wage agreement. The record shows also (Fig. 113, 114, R. 175) that by cutting their wages during this period Kentucky operators were enabled to run their mines more steadily than the Illinois mines and to offer their employees more days of work. But the record also shows conclusively that the steadier working time of the non-union miner was sufficient to offset his lower wage rate in only one year out of the six years shown (his income exceeding that of the Illinois miner by \$1 in the year 1929). In all the other years, his annual income was much below that of the Illinois miner. At the beginning of the period the Kentucky worker was \$82 below and at the end of the period \$198 below.

This comparison of the two northern and southern groups selected by petitioner for analysis brings out clearly the ultimate effects upon the mine workers of competitive wage cutting. For a time the ability to undercut the collective-bargaining scale seemed to work to the non-union miner's advantage, but as collective bargaining broke down, and more and more fields went non-union, the entire wage structure crumbled. The net result was to drive all wages down and to more than destroy the temporary advantage gained by the non-union worker. In the end, the Kentucky miner's daily wage had been cut 50 per cent and his annual income had fallen to \$503.

(7) *Evidence of Relief Rolls.*—Perhaps the best commentary on petitioner's contention that the position of mine labor was not unduly depressed is afforded by the burden of relief during the depression. Existence of an exceptional need for relief in the bituminous coal area was early recognized and in 1931, two years before the Federal Government accepted general responsibility for relief, President Hoover requested the American Friends Service Committee to undertake child feeding in the coal fields (R. 503).

Under the Federal Emergency Relief program also the relief load was found to be exceptionally heavy in the coal fields. A recent study by the University of Pennsylvania shows that out of 163 of the leading manufacturing counties in the United States there was one county in which 24% or more of the population was on relief during the year July 1933 to July 1934. Out of 41 other important urban counties in the United States there was also one with more than 24% of the population on relief. But out of the 88 counties classified as chiefly engaged in mining bituminous coal there were 22 counties in which over 24% of the population was on relief.¹

¹ Goodrich, Allin, and Hayes, *Migration and Planes of Living*, Bulletin No. 2, Study of Population Redistribution, University of Pennsylvania, 1935, pp. 89-106.

The counties classified as dominantly coal-mining include all those in which 20% or more of the working population was engaged in producing bituminous coal.

DIVERSION AND DISLOCATIONS OF INTERSTATE
COMMERCE

Petitioner admits the fact of shifts in tonnage from fields in certain states to those in other states and back again, brought about by under-cutting of prices with attendant cutting of wage rates, but proceeds to make the legal argument that such diversions of commerce lie beyond the power of Congress to mitigate by regulation, because such regulation would amount to preventing one state or area from obtaining a competitive advantage that it did not theretofore have over another state or area in a common market. This argument either denies to Congress the power to regulate competition in interstate commerce altogether, or else amounts to an argument that the kind of regulation in question would be an unreasonable and hence invalid regulation since it would interfere arbitrarily with reasonable and proper competition. The power of Congress to regulate competition in interstate commerce has never, so far as we know, been questioned until this case, and will be discussed at length in later sections of this brief. The question therefore remains as to the reasonableness or propriety of the kind of competition here involved. Petitioner apparently takes the position that since the volume of commerce may ebb and flow from state to state as a result of proper and legitimate competition, any kind of competition which produces such ebb and flow is proper and legitimate.

The shifts in the proportion of the volume of bituminous coal in interstate commerce contributed from time to time by the different states and areas prior to the war period may well have been, and probably were, the results of competition quite unlike the fierce price cutting and wage cutting warfare since 1923. There is nothing in the Act which would prevent, as petitioner seems to suggest, a decline in the proportionate production of a state like Maryland, extending over a century and resulting from wholly natural causes. That the objective of the Act is not, and that its natural effect will not be, to freeze production, will be argued in the course of the discussion of the law at a later point in this brief (pp. 172 ff.). From the standpoint of the facts it is sufficient to point out that there is a distinction which it is competent for the legislative body to recognize between reasonable and socially advantageous competition on the one hand and destructive price cutting warfare on the other. It has been recognized in the decisions under the anti-trust laws and in specific provisions of these laws themselves. Petitioner makes no effort, except by assumption, to support his identification of the type of competition which has gone on in the bituminous coal fields since 1923, and produced the results apparent in the record, with the competition which because of its reasonable and beneficial character may conceivably be protected by the Constitution from governmental regulation. He simply assumes the point to be proved.

OVERCAPACITY

Petitioner contends that overcapacity will be accentuated rather than alleviated by the Bituminous Coal Conservation Act and would make it appear that overcapacity is the sole cause of all the evils in the industry. (Br. 46). Thus on pages 24-25, it is contended that the intense competition results *from* excess capacity and results *in* low prices and low wages. This analysis over-simplifies a complicated mass of interacting causes and effects. Every witness interrogated on this point agreed that the bituminous coal industry has a large surplus of capacity and agreed that the presence of excess capacity was one of the principal difficulties of the industry. But they also specified other major factors making for its continued instability. The witness Tryon (R. 328) referred to the inelasticity of coal demand and the fact that labor constitutes 65 percent of the costs of production. The witness Lubin stated, "The situation is the result of a series of causes," and mentioned first overcapacity and also the unique proportion which wages constitute of cost and the high cost of shutting down a mine. (R. 476-477.) These and the other factors referred to on pages 32-40 *supra* were also emphasized by other witnesses. Overcapacity is a result as well as a cause of instability.

But in any event petitioner's argument that if the Act results in an increase in price, it will aggravate and increase the condition of over-capacity is unsound. It would tend to have that effect only

if the amount of price increase should increase the margin above cost, and the Act takes cost for its standard. It is not price in itself, but the margin of profit between price and cost which measures the incentive to increase capacity. (R. 327.) The evidence shows that a slight increase in capacity had occurred under the N. R. A. Code (R. 327). It was estimated that a profit margin of 5¢ a ton might cause an increase of 5% in capacity by the end of two years (R. 327, 328); and that minimum prices equal to the average cost of production but not in excess thereof, in the manner contemplated by the Act, would not result in any increase in capacity (R. 351).

To deal with the problem of inflation of capacity, it is necessary to get at the causes of the expansion of capacity. Forty years of unregulated competition have failed to bring about a balance between capacity and demand. The period of intense competition after 1923 did force a heavy liquidation of capacity. Yet the degree of excess was greater in 1929 than it had been in 1913 (Defendant's Ex. 3, 3A, R. 1002, 1003) and the further declines in capacity from 1929 to 1933 were more than offset by the decline of demand associated with the depression. (Fig. 95, R. 161.)

On the other hand the Act before the court should tend to remove three of the causes of capacity inflation—(1) violent increases in price in times of shortage, (2) large-scale strikes cutting