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Supreme Court of the United States

October Term, 1935

No. 636

James Walter Carter, *Petitioner*,

v.

Carter Coal Company, *et al.*

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of the District of Columbia is reported in 63 Washn. Law Reporter 986, and appears in the record at R. 1179-1198.

Jurisdiction

The decree of the Supreme Court of the District of Columbia was entered on December 10, 1935 (R. 216A), and appeal to the United States Court of Appeals for the District of Columbia was allowed upon the same day (R. 216E). The petition for writ of certiorari was filed December 16, 1935 and was granted on December 23, 1935, prior to hearing or submission of the appeal in the Court of Appeals (R. 1200). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 8(b) of that Act (43 Stat. 936, 938-940). *The Three Friends,* 166 U. S. 1, 49; *U. S.* v. *Bankers Trust Co.,* 293 U. S. 548; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 333, 334.

SUMMARY STATEMENT OF CASE

This case brings before the Court for review the validity of an Act commonly known as the Guffey Act,[1] and entitled as follows:

> "To stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on bituminous coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of bituminous coal to be affected with a national public interest; to conserve the bituminous coal resources of the United States; to provide for the general welfare, and for other purposes; and providing penalties" (Appendix, p. *2*, fols. 1-2).

As appears from its title, its context, and its legislative history, this Act has for its purpose the subjection of the bituminous coal industry to Federal regulation. This it seeks to accomplish by the imposition of a tax of 15% on the sale price (or fair market value) of *all* bituminous coal produced in the United States, provided, however, that all coal producers who subscribe to and become members of a bituminous coal code, the terms of which are incorporated in the Act, shall be entitled to a drawback or rebate of 90% of the tax so imposed (Sec. 3, Appendix, pp. *6-7,* fols. 18-22).

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[1]Act of August 30, 1935, c. 824, 49 Stat. 991, officially designated as the "Bituminous Coal Conservation Act of 1935". A synopsis of this Act will be found at pp. 10-22, *post*. It is reproduced in full in a separate Appendix filed herewith. Because of the unusual length of the several sections and sub-divisions of the Act, the Appendix carries folios for ready reference to the several parts of the Act. Reference hereinafter to provisions of the Act will carry both the page and folio of the Appendix at which such provision appears, as, *e.g.* "Act, Sec. 5 (b), Appendix, pp. *25-26,* fols. 94-98".

The Code sets up a scheme for Federal regulation of the industry through the machinery created thereby. All producers who become members of the Code surrender to the agencies set up by the Act control over the wages and hours of their employees and the prices to be charged for their coal. Their liberty of action is in other respects restrained (Sec. 4, Appendix, p. 7, fols. 23-24). The Act is, therefore, one in which Congress, under the guise of a penalty imposed in the form of a prohibitive tax, has attempted to compel all producers to submit to its regulatory provisions. It is the contention of the petitioner that neither regulation nor stabilization of the bituminous coal industry is within any of the enumerated powers of Congress but that either or both constitute an invasion of the powers reserved by the Constitution to the States and to the people, and that it is beyond the power of Congress to regulate the hours and wages of miners, or to fix the prices at which coal shall be sold.

The suit was brought in the Supreme Court of the District of Columbia (R. 1-16) by the petitioner, James Walter Carter, a stockholder of Carter Coal Company, to enjoin the Company and its officers and directors from accepting and complying with the Code, and to enjoin the Commissioner and the Collector of Internal Revenue, the Attorney General and the United States Attorney for the District of Columbia, and their assistants and subordinates,[1a] from assessing or collecting from the Company the tax imposed by the Act upon coal producers failing to accept and comply with the

[1a]Reference herein to "the respondents," "the defendants," or "the Government" is to these Government officers defendants, *i.e.*, Guy T. Helvering, *et al.*

Code, and from otherwise attempting to enforce such tax (R. 14-16).

Carter Coal Company is a Delaware corporation engaged in the production of coal in West Virginia and Virginia (FF.[2], R. 112; FF. 18, R. 119). The petitioner is its President and a large minority stockholder (FF. 1, R. 111). Prior to the institution of this suit, petitioner, as such stockholder, made formal demand upon the Board of Directors to refrain from joining the Code, to refuse to pay the tax imposed by the Act, and to take appropriate legal steps to determine the constitutionality of the Act and its liabilities thereunder, and protect the rights of the Company and its shareholders (R. 7-8; FF. 15, R. 117-118; R. 619). The ground of this demand was that the statute and Code are unconstitutional; that by accepting and complying with the Code the Company and its Board of Directors would surrender the constitutional and property rights of the Company and of its shareholders and also the vital right of the Company and its directors to manage its business, particularly with respect to the all-important matters of wages and prices; that in so doing the Company would be acting *ultra vires* and the directors would be violating their statutory duties under the laws of Delaware; that adherence to the Code would be destructive of the business of the Company; and that payment of the tax would constitute a waste and misappropriation of assets (R. 7; R. 619).

On consideration of this demand, the Board, by majority vote, resolved that the Company should "accept and obligate itself to comply with the Code" (R. 8; R. 623-624), and this resolution was confirmed by like majority vote at a shareholders' meeting called to consider the resolution

[2]The symbol "FF" refers to the findings of fact of the trial court (R. 111-212).

and petitioner's demand (R. 9; FF. 15, R. 117-118; R. 627-629). The court below has found that "the plaintiff seriously endeavored to persuade the majority stockholders and a majority of the Board of Directors to contest the validity of the Act and to refuse to join the Code, and he did all that a reasonable and prudent man, under the circumstances, should have done to secure action favorable to his views by the Board, by the stockholders and by the Corporation" (FF. 15, R. 118).

The sole reason for this action by the Board and shareholders, as shown by the minutes of the meetings (R. 8-9, 620-629) and all other evidence of record (R. 250), was thus found by the court below:

> "The view of said controlling stockholders and of a majority of the board of directors is that the statute is unconstitutional and is economically unsound, and that it would adversely affect the business of the Company and the interest of its shareholders for the Company to accept and comply with the Code, but that nevertheless the Company must accept the Code because of the tax on its gross sales applicable upon its failure to accept the same which the majority are of the opinion would result in serious damage to the Company and might result in its bankruptcy" (FF. 15, R. 117-118).

The court found and concluded, both as matter of fact and of law, that "There exists a genuine dispute between the plaintiff and the controlling stockholders of the Company" (FF. 15, R. 117); that "This proceeding is brought in good faith" (FF. 15, R. 118); and that "This cause involves a substantial adverse controversy arising under the Constitution and laws of the United States" (Conclusion 1, R. 213; FF. 167, R. 208).

The evidence established, and the court below ruled, that the exaction of the penalty tax would quickly drive the Company out of business (R. 128, 129), while acceptance of the Code would seriously affect its rights (R. 208, 125-128), and, in the view of all concerned, would seriously damage the Company and might result in its bankruptcy (R. 117-118). The petitioner, a large stockholder, obviously has no remedy whatever other than in this stockholder's suit brought in his own right and as a derivative suit to enjoin his Company and its officers from taking the threatened action, and also brought in his own right and as a derivative suit to enjoin the Government officer defendants from enforcing the penalty tax under color of a statute challenged as unconstitutional;[3] and the court below so ruled (R. 213).

As in the *Schechter* case,[4] the Government took the position that whether the statute was within the Commerce Clause was to be determined from a consideration of the "economic facts." Accordingly a large amount of evidence was introduced by the Government, which assumed the burden on this issue, or supposed issue, for the avowed purpose of bringing the Act within the provisions of the Commerce Clause. At this point it is sufficient to say that the evidence[5] failed to disclose:

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[3]As in *Hill* v. *Wallace,* 259 U. S. 44; *Smyth* v. *Ames,* 169 U. S. 466; *Ex parte Young,* 209 U. S. 123; *Dodge* v. *Woolsey,* 18 How. 331; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 253; and *Chicago* v. *Mills,* 204 U. S. 321, in all of which jurisdiction on a stockholder's bill was sustained both to enjoin the corporation from complying with, and to enjoin the Federal or State officers from enforcing, the unconstitutional statute.

[4]*Schechter Corp.* v. *United States,* 295 U. S. 495, 512.

[5]For detailed outline and review of evidence, see pp. 22-27 and 28-62, *post.*

(1) The existence of any monopolistic control or artificial restraint upon free competition requiring the intervention of governmental authority, either State or Federal, for the purpose of insuring to the public an adequate supply of coal at reasonably low prices.[6]

(2) Any national shortage of coal since the elimination in 1923 of the railway car shortage (FF. 92, R. 159: FF. 110, R. 170; R. 456; R. 330).

(3) Any restraint[7] whatsoever upon either the free play of competition or the free movement of coal in interstate commerce.[8]

(4) Any obstructions to or interruptions of the movement of coal in interstate commerce[9] during a period of more than ten years, except to the extent that occasional strikes have at times prevented movement of coal from the individual mines at which they occurred.[10]

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[6]On the contrary, the evidence and the evidentiary findings of fact disclose that there exists and has existed over a period of many years the keenest competition and rivalry among coal producers, resulting in prices as to which the complaint is that they are insufficient to return an adequate profit to the operators. (FF. 96, R. 161; FF. 153, R. 200; Defs. Exs. 3, 3A, R. 1002-1003; R. 382, 386; FF. 178-179, R. 210; also see Govt. answer, R. 36).

[7]See also Point II at pp. 103-112 *post.*

[8]On the contrary, the complaint is that competition is too free and the amount of coal produced or capable of production from existing mines is, and has been for many years, in excess of demand. (Govt. ans., R. 36; FF. 57, R. 137; R. 326; R. 476; and see preceding footnote.)

[9]See footnote 7, *ante.*

[10]It appears from the evidence and from the findings of the Court, however, that for a thirty-five year period* from 1899 to 1933 there had been an average per year of but eleven days idle time per man employed on account of labor disputes, and from 1923 to 1933, an eleven year period*, an average of but nine days idle time on this

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*Periods identified by Government witnesses as appropriate test periods.

(5) Any wide fluctuations in the price of coal for a period of more than ten years, although during that period (except for the NRA era) there has been a gradual decline therein (FF. 96-98, R. 161-162; R. 318; Def. Ex. 3-3A, R. 1002-1003).

The evidence did disclose:

[1] A shifting and reshifting of tonnage, as among the several sources of supply, in the strife for business, referred to by the Government in its Answer (as amended at the close of the trial), and by the court in its Findings, as "diversions and dislocations" (R. 105, FF. 70-74, R. 144-145; FF. 110, R. 170; FF. 119-123A, R. 179-183). This, of course, is to be expected in any industry free from monopolistic control or artificial restraint, and where competition has free play. These so-called diversions or dislocations made themselves manifest chiefly in the rivalry between the Northern and

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account (Def. Ex. 4A, R. 1006). But, that time so "lost" is not a factor which actually affects aggregate production and interstate shipment to any material degree was evidenced by the fact that total days lost on account of seasonal demand and causes other than labor disputes averaged 93 days per annum during the thirty-five year period and 114 days during the eleven year period, with a result that days lost on account of strikes were in effect recouped by working on days that otherwise would have been lost for other reasons (FF. 57-58, R. 137-138). For instance, the only serious strike which has occurred in the last ten years occurred in 1927 (Pl. Ex. 66, R. 937-939; Pl. Exs. 80-80A, R. 965-966A). This strike was not nationwide, and but 45 days of idle time were attributable thereto, while during the same year the total number of days lost was 117, and the number of days worked actually exceeded the average of the eleven-year period by six (Def. Ex. 4A, R. 1006; Pl. Ex. 76, R. 955). It also appears that these strikes caused no national shortage of the coal supply, but resulted only in a diversion of tonnage from the mines affected to those unaffected (FF. 110; R. 170; R. 456; R. 330).

Southern mines[11] for business in common consuming markets (FF. 119-123a, R. 179-183) and have resulted in a gradual increase in the proportion of the business handled by the latter (FF. 70-74, R. 144-145).

[2] That wages represent 60-65% of the cost of mining coal and practically the only controllable item of such cost (FF. 64, R. 140; R. 272; R. 441-442), although not the only controllable item in costs of coal as delivered, of which freight rates (already in large part subject to Federal control) represent more than 50% (FF. 63a, R. 140).

[3] That the industry by reason of its over-expansion has been unprofitable for a long period of time, and that higher prices would be to the advantage of operators and miners alike (FF. 102, R. 165; Def. Ex. 6A, R. 1011; FF. 148-151, R. 198-199) although, perhaps, only temporarily (FF. 53-55, R. 134-136; FF. 63, R. 139; R. 260-261; Pl. Exs. 20-34, R. 816C-866).

The court below, at the conclusion of the case, dismissed the bill (R. 216A-216B), holding the price fixing provisions of the Act and Code valid, and the wage, hours and collective bargaining provisions invalid, but separable (R. 213-215, 1179, *et seq.*). At the same time it enjoined the Government officer defendants from assessing, collecting, or attempting to collect a tax for the period intervening

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[11]The Government identified Virginia, West Virginia and Kentucky as leading "Southern" fields, and Pennsylvania, Ohio, Indiana and Illinois as leading "Northern" fields. See, for example, Findings of Fact Nos. 70-74, R. 144-146; 113-125, R. 173-185; and Defendants' Exhibits 25, 26, R. 1067-1068; 30A, R. 1076; 31A, 32, 33 and 34, R. 1078-1080. Other large fields, such as Alabama in the South, were not regarded as coming within this principal sphere of competition.

between the institution of the suit and the entry of final decree in the trial court, and granted a stay as to future taxes pending appeal (R. 216B-216E).

The petitioner Carter appealed to the United States Court of Appeals for the District of Columbia from the decree dismissing the bill, and the Government officer defendants appealed from so much of the decree as enjoined the collection of the tax up to the date of the decree.

The case is now here on writs of certiorari granted on petitions of this petitioner and of the Government officer defendants, prior to argument or submission of the appeals in the Court of Appeals.

SYNOPSIS OF THE STATUTE

1. Declaration of Policy.

The opening section of the Act contains the familiar "declaration of policy" constituting an "introduction of the Act" in "broad outline"[1] (Appendix, pp. *2-3,* fols. 2-7). It is enough to say at this point that this Section demonstrates clearly that the statute is regulatory in purpose, and that it was not enacted as a revenue measure or as a regulation of interstate commerce but has the purpose of regulating the bituminous coal industry,[2] including production, in the national interest and for the promotion of

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[1]See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 416, 418.

[2]The scope of the Act does not include all coal produced, being limited specifically to *bituminous* coal, and thus excluding *anthracite* coal, although anthracite is consumed and competes to some degree with bituminous coal in Nebraska, Kansas, Iowa, Missouri, Illinois, Indiana, Michigan, Ohio, Maryland, District of Columbia, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine and also the Lake ports (FF. 53, R. 134-135; R. 260-261; R. 864A-865).

the general welfare, and also the purpose, among others, of placing wages, hours, and labor relations in the industry under Federal control.

2. Creation of a National Bituminous Coal Commission.

Sec. 2 provides for the creation of a National Bituminous Coal Commission (hereinafter referred to as "the Commission"), whose powers and duties are elsewhere defined in the Act, and contains certain other provisions not material to this case (Appendix, pp. *3-6*, fols. 8-18).

3. The Penalty Tax.

Sec. 3 of the Act imposes

> "upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine, * * * and to be payable monthly for each calendar month, * * * *Provided further,*[3] That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue * * *" (Appendix, pp. *6-7*, fols. 18-22).

[3]So in original. Hereafter, in this brief, all italics in quotations are petitioner's unless otherwise indicated.

Under this Section, in effect, all bituminous coal producers who assent to and comply with the regulatory features of the Act and of the Code pay a tax of 1½%, while producers failing to accept and comply therewith pay a tax of 15%, being thus penalized to the extent of 13½%. This "penalty" tax is applicable to all bituminous coal produced, whether transported and consumed wholly within the limits of the State of production or outside thereof,[4] including "captive coal".

By "captive coal" is meant coal consumed by the producer itself either at the mine or after being transported to place of use (Act, Sec. 19, Appendix, pp. *36-37,* fols. 140-141). There are many mines in the United States producing a substantial tonnage, owned by steel companies, other industrial concerns, and railroads, the product of which is consumed in the manufacturing or other operations of such producers (FF. 63, R. 139). These producers of "captive coal" are not engaged in commerce in coal in any sense, but in the production of coal for their own use. Since they do not sell coal, the purpose of subjecting them to the penalty tax could not have been to impose upon them the price-fixing provisions of the Act, but obviously was to subject the wages and hours of their employees and their labor relations to the Federal control embodied in the labor provisions of the Act. Captive coal was represented by 50,000,000 out of 358,000,000 tons produced in the United States in 1934 (*Hearings before a Sub-Committee of the Committee on Ways and Means,* House of

[4]The evidence shows that in the test year, 1929, not more than 58% of the coal was sold for delivery in States outside the State of production, and at least 42% for delivery in the State of production (Def. Ex. 14, R. 1019; Pl. Ex. 67, R. 940; and see discussion, *post,* pp. 41-42).

Representatives, 74th Congress, 1st Session, on H. R. 8479, at p. 152).

The obvious purpose of the tax provision, therefore, is to subject all producers of bituminous coal in the United States to the regulatory features of the Act, whether engaged in commerce or not, and whether coal produced by them moves in interstate commerce or not.

4. Regulatory Provisions—the Bituminous Coal Code.

The regulatory features of the Act are contained in Sec. 4, which the Commission is directed to formulate into a "Bituminous Coal Code"[5].

The Act provides for the division of the coal areas of the United States into twenty-three districts[6] (Sec. 4, Part I(a), Appendix, p. *7,* fol. 24; Annex to Act—Schedule of Districts, Appendix, pp. *37-43,* fols. 144-168), which are grouped into nine minimum price areas (Sec. 4, Part II(a), Appendix, pp. *11-12,* fols. 40-43).

Within each district a "district board" is established, to be selected, in the manner provided in the statute, by the producers of the district, except that one member "of each district board shall be selected by the organization of employees representing the preponderant number of employees

[5]The Code as formulated by the Act is in itself complete, and apparently the Coal Commission is vested with no discretion or power to make any changes therein. This Code was formulated and promulgated by the Commission on October 9, 1935. As so promulgated, it is substantially in *haec verba* with Sec. 4 of the Act, changes being only those appropriate for its transition from a section of the statute to a Code. The Code appears in full in the record at R. 58-76. All Code members are required to comply with its provisions as a condition precedent to obtaining the drawback provided for in Sec. 3 of the Act (Appendix, pp. *6-7,* fols. 18-22.)

[6]Thirteen of the twenty-three districts are entirely within a single area, *i.e.,* Minimum Price Area No. 1, and fifteen are situated wholly within State lines.

in the district in question" (Sec. 4, Part I(a), Appendix, p. *8*, fol. *27*).

4a. Minimum Prices.

Elaborate provision is made for the determination of minimum prices (Sec. 4, Part II(a) and (b), Appendix, pp. *10-16*, fols. 35-37) and all Code members are forbidden to sell coal below the minimum price fixed for such members, subject to certain exceptions immaterial to the fundamental questions presented (Sec. 4, Part II(e), Appendix, p. *17*, fol. 61). The power to determine minimum prices for each mine in the district is conferred, in the first instance, upon the district board, subject to approval or modification by the Commission and subject to coordination with the minimum prices fixed in other districts as provided for in Sec. 4, Part II(b) (Appendix, pp. *14-16*, fols. 51-57). The governing provision for the determination of minimum prices is to be found in the third paragraph of Sec. 4, Part II(a), and is as follows:

> "Each district board *shall*, from time to time on its own motion or when directed by the Commission, establish minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, *with full authority*, in establishing such minimum prices, to make such classification of coals and price variations *as to mines* and *consuming market areas* as it may deem necessary and proper. *In order to sustain the stabilization of wages, working conditions, and maximum hours of labor*, said prices *shall* be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'Minimum-price area

> table', equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area." (Appendix, p. *11,* fols. 37-39).

All that follows may be properly regarded as the machinery by which the objects sought to be attained by this provision are to be accomplished, together with provision for review by the Commission of the prices fixed by the district boards. It will be observed that by this provision district boards are not only empowered, but required, to establish minimum prices for *each mine,* with full authority within their discretion to make such classification of coals and to provide for such price variations at the several mines as the board *may deem necessary and proper.* The extent of the discretionary power thus vested in the board will be better understood when it is stated that it appears by the evidence that there were recognized under the N.R.A. over 27,000 sizes, varieties and prices of coals in what roughly corresponds to Minimum Price Area No. 1, and possibly 40,000 in the entire United States (R. 266, 268), and that the number of mines in 1930 was 5,891 (FF. 93, R. 160). Each district board (subject to the provision for "coordination" to be hereinafter reviewed, and subject to review by the Commission) is thus empowered to fix, mine by mine, the minimum price at which every producer within the district may sell the several classes of coal which he mines, and to classify the several kinds and grades of coal which he mines, and to put such classification upon such coals as it, within its discretion, deems proper.

It will also be observed that the express purpose of the minimum price provisions is "in order to sustain the stabilization of working conditions and maximum hours of

labor" which, in turn, are to be fixed in accordance with the labor provisions of the Code contained in Sec. 4 of the Act, Part III(e) (Appendix, pp. *23-24,* fols. 88-89; and see discussion, pp. 82-90, *post*).

For the purpose of accomplishing the object set forth in the foregoing provision of the Act, each district board is required to ascertain the weighted average cost of coal produced within its district and report it to the Commission, which, upon the basis of such reports, shall determine the weighted average of the total costs of each minimum price area, the latter to be taken "as the basis for the establishment of minimum prices to be effective until changed by the Commission" (Sec. 4, Part II(a), Appendix, pp. *13-14,* fols. 46-49). This having been done, the district boards are then directed "under rules and regulations established by the Commission" to "coordinate in common consuming market areas upon a fair competitive basis, the minimum prices" in each district embraced in a given minimum price area, to the end that they may not be "unduly prejudicial or preferential, as between and among districts" (not among mines, it will be observed) for the purpose "of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed". Prices so coordinated are subject to review by the Commission (Sec. 4, Part II(b) and (d), Appendix, p. *15,* fols. 54-55, p. *16* fols. 59-60).

The provisions of the Act in respect of the standards and manner in which such prices are to be coordinated, as compared with the simple mathematical calculation of weighted average costs to be made as the first step, are so indefinite and complicated as to defy rational explanation.

The purpose of the minimum price provisions, however, is plain. It is to confer upon the price-fixing agencies of the Act (the district boards and the Commission) power to fix minimum prices for every kind of coal produced at every mine in the United States at such levels as may be necessary to stabilize wages, hours, and working conditions (as determined under the labor provisions of the Code), and with the hope that the aggregate of such minimum prices so fixed, class by class, and mine by mine, may approximate for each minimum price area the aggregate cost of producing coal within such area, at the same time preserving to each district that proportion theretofore enjoyed by it of the total coal moving into consuming areas in competition with other districts. If, under the complicated and indefinite provisions of the statute, the goal sought is attained, the effect is to freeze the production and distribution of coal and to limit the output of each mine to that which it has heretofore produced and sold.

The accomplishment of such a result would seem to be humanly impossible.[7] Certain it is that any error of judgment or exercise of favoritism in the process of coordinating prices must inevitably increase or decrease the output

[7]The extreme complexity, and almost certain injustice, which must accompany the effort to adjust all prices in Minimum Price Area No. 1 by treating all districts on the basis of the weighted average of the whole area, is shown by the figures in the record evidencing the great variation between districts in the average prices at the mine. Thus, the following different average values per net ton f. o. b. mine are given for 1932 (Def. Ex. 46):

District	Value	District	Value
Pennsylvania, eastern	$1.42	Southern low volatile	$1.16
Pennsylvania, western	1.28	Southern high volatile	1.07
Ohio	1.11	Kentucky, western	.84
West Virginia, Panhandle	1.10	Illinois	1.53
Michigan	2.75	Indiana	1.30
West Virginia, northern	.86	Iowa	2.40

and sale of coal from a particular mine, according to whether or not, in such coordinating process, the price fixed for that particular mine bears its proper mathematical relation to the prices fixed at other competing mines.

But, whether the elaborate price fixing machinery be workable or capable of producing the desired result or not, one thing is plain, and that is that the price fixing agencies set up by the Act are invested with the power to determine the output and sale of coal at every mine in the United States, since it is obvious that the ability of each mine to produce depends upon its ability to sell in competition with the minimum prices fixed for competing mines. The ultimate result of the price fixing provisions is therefore not only to deprive every mine owner of the right to fix his own prices but, in addition, to control the production of coal at his mine, primarily, as appears from the statute itself, for the purpose of stabilizing hours, wages and working conditions, these to be determined, in turn, in the manner provided by the labor provisions of the Act, and the observance of them to be obligatory upon every producer.

4b. Maximum Prices.

The Commission is also empowered to fix maximum prices[8] (Sec. 4, Part II (c), Appendix, p. *16*, fols. 57-58).

4c. Other provisions relating to prices.

No coal may be sold below the minimum or above the maximum fixed in accordance with the statute, and "All

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[8]Generally, because of the excess capacity in the industry, the minimum prices fixed pursuant to the Code will likewise be the maximum prices obtainable (FF. 57-58, R. 137-138; R. 261-262; R. 388).

sales and contracts for the sale of coal shall be subject to the code prices" (Sec. 4, Part II (h), Appendix, p. *18,* fols. 67-68). Appropriate provisions are made against Code members entering into new contracts inconsistent with the Code, with exemptions for sales into foreign markets,[9] and provisions to guard against evasion, etc. (Sec. 4, Part II (e), (f), (g) and (h), Appendix, pp. *17-18,* fols. 61-68). Certain practices inconsistent with the maintenance of an established price are declared to be unfair methods of competition and are forbidden[10] (Act. Sec. 4, Part II (i), Appendix, pp. *18-21,* fols. 68-79).

4d. Labor provisions.

Sec. 4, Part III (Appendix, pp. *22-25,* fols. 81-93) provides that to effectuate the purposes of the Code the district boards and the Code members shall accept the following conditions:

(1) The right of employees to bargain collectively through representatives of their own choosing, and prohibition upon joining a company union as a condition of employment (Sec. 4, Part III(a), Appendix, p. *22,* fol. 82).

(2) The right of employees to peaceable assemblage and the selection of their own check-weighmen, with further provision that they shall not be required, as a condition of employment, to live in company houses or trade in

[9]Shipments to Canada and car-ferry shipments to Cuba are included in the statutory definition of the term "domestic market" to which the Act applies. (Act, Sec. 4, Part II (e), Appendix, p. *17,* fol. 64). See discussion pp. 167-174, 175, *post,* of the constitutional provision forbidding the United States to impose any duty in respect of foreign exports.

[10]The same provisions were contained in the N. R. A. Bituminous Coal Code in aid of the price fixing provisions of that instrument (Art. VI, R. 885-888).

company stores (Sec. 4, Part III (b), Appendix, p. *22,* fol. 83).

(3) Subjection to the jurisdiction of a Bituminous Coal Labor Board created by the statute (Sec. 4, Part III(c), Appendix, pp. *22-23,* fols. 84-86), with authority to adjudicate disputes arising under subsections (a) and (b) of Part III, to determine employee representation, including the power to hold elections for the purpose, and to order Code members to meet labor representatives for the purposes of collective bargaining (Sec. 4, Part III(e), Appendix, pp. *23-24,* fols. 88-89). The Labor Board is required to transmit its findings and orders to the parties interested and to the Commission (Sec. 4, Part III(d), Appendix, p. *23,* fols. 87-88), which is required to accept as conclusive such findings and orders and, upon complaint of violation thereof, to inquire only into the compliance or non-compliance of the Code member with respect thereto. If it finds such member has failed to comply with any order of the Labor Board (see Sec. 5, subparagraph (b), Appendix, pp. *25-26,* fols. 94-98), his membership shall be revoked, thus subjecting such member to the immediate payment of the penalty tax.

(4) The provisions of the statute governing the determination of wages and hours of labor are as follows:

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

> ment or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts" (Appendix, pp. *24-25,* fols. 91-93).

The effect of these provisions is to require every coal producer in the United States to observe hours of labor agreed upon in any contract negotiated between producers of more than two-thirds of the tonnage and representatives of more than one-half of the mine workers employed within the United States, and to observe wages negotiated "by collective bargaining" (in accordance with requirements of preceding provisions of the Act and subject to the jurisdiction of the Labor Board) between representatives of more than two-thirds of the tonnage in his district, and representatives of a majority of the mine workers therein.

The statute thus denies to any individual employer the right to bargain collectively, or otherwise, with his own men and delegates to the designated proportions of producers and miners specified in the Act the power to fix wages and hours for all mines and all miners.

5. Revocation of Code Membership.

The membership of any Code member violating any of its provisions, including any order of the Labor Board, may be revoked by the Commission after hearing (Sec.

5(b), Appendix, pp. *25-26,* fols. 94-98), and no such person may thereafter be restored to membership except upon payment of all taxes in full for the period covered by his violation[11] (Sec. 5(c), Appendix, p. *26,* fols. 98-99).

6. Treble Damages.

Any Code member injured in his business by another Code member, by reason of any violation of the Code, may recover treble damages (Sec. 5(d), Appendix, p. *26,* fol. 100).

7. Review and Enforcement of Commission and Board Orders.

Provision is made for the review and enforcement of the orders of the Commission and the Labor Board (Sec. 6(b) and (c), Appendix, pp. *27-29,* fols. 102-112).

8. Miscellaneous Provisions.

Secs. 7 to 23 contain certain miscellaneous provisions without material bearing upon the constitutional issue presented (Appendix, p. *30 et seq.*).

OUTLINE OF THE EVIDENCE PRESENTED BY THE GOVERNMENT ON "ECONOMIC FACTS."

The plaintiff from the beginning took the position that the statute was unconstitutional on its face, and that ac-

[11]The drawback may be availed of only by a producer who both accepts and "acts in compliance" with the Code (Sec. 3, Appendix, pp. *6-7,* fols. 18-22). Hence failure to comply with the Code subjects a Code member to payment of the full tax, whether his membership be revoked or not.

cordingly the only purpose of a trial would be to establish the jurisdiction of the court and the right of the plaintiff to injunctive relief.

The Government, however, took the position that, in order to sustain the constitutionality of the statute, it would be necessary for it to introduce evidence showing the conditions in the coal industry with a view to establishing that this scheme of regulation (1) was valid under the commerce clause, and (2) did not involve a denial of due process of law.[1]

On the due process clause, the evidence was designed primarily to show depressed working and living conditions at the mines, calling for governmental protection of the miners as an act promotive of social well-being and accordingly of general welfare, and that the improvement of these conditions could be accomplished through Federal enforcement of collective bargaining.

The evidence relating to the commerce clause divides into two parts: (a) evidence to show the volume of coal moving in interstate commerce, and (b) evidence attempting to show that there have existed obstructions and interruptions to interstate commerce in bituminous coal.

These were designed to sustain the regulatory provisions of the statute (a) on the theory that the production, as well as the sales, of coal are themselves largely acts *in* interstate commerce, and (b) on the alternative theory that wages of miners, and the prices of coal at the mouth of the mines, if not *in* interstate commerce, so affect interstate commerce as to permit of Federal regulation.[2]

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[1]The Government submitted a memorandum (R. 47, 48) stating that the constitutionality of the statute "depends upon" such evidence. The memorandum is quoted *post*, p. 28.

[2]For the distinction between the two theories, see *Schechter Corp. v. United States,* 295 U. S. 495, at pp. 542, 544.

The evidence on the issue whether sales of coal are predominantly *in* interstate commerce showed that for the test year 1929 at least 42% in value of the sales called for shipment to purchasers within the State of production. Practically all sales by producers were on an f.o.b. mines basis, delivery being made at the mouth of the mine.

The argument that commerce in bituminous coal was so universally interstate in character as to confer upon the Congress a sweeping power to regulate accordingly broke down, and the burden of the evidence on the facts therefore revolved around the nature and extent of the effect on interstate commerce of the alleged evils in the coal industry attempted to be cured by this Act. This presented two problems:

> (1) What are the principal characteristics in the coal industry which the statute was designed to change?
>
> (2) To what extent, if any, did those characteristics directly affect the interstate movement of coal?

The facts upon which answers to these questions must be based are not seriously in dispute between the parties. Referring to them in order:

(1a) The ills of the coal industry.

It is recognized that the outstanding characteristic of the coal industry, looked upon as a whole, in the last twelve years has been intense competition,[3] resulting *from* excess

[3]The general characteristics of the industry, as shown on this record, do not differ materially from those outlined in the Court's opinion in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, at pp. 361 *et seq.*

productive capacity, and resulting *in* reduction (a) of prices to a level slightly below average cost, and (b) of wages to a level below that prevailing during and shortly after the World War.[4]

(1b) Their attempted cure.

Obviously, if excess productive capacity and consequent intense competition be evils, a sovereign having constitutional power to attempt their cure would proceed by limiting production. On the other hand, if the Legislature were more interested in the effect than in the cause, it would attempt directly to regulate wages, hours and prices. This statute chooses the latter alternative.

(2) Their effect upon interstate commerce.

The effect upon commerce of the lowering of prices and wages consequent upon the existence of free and untrammeled competition, has, of course, *not* been to *decrease* the volume of interstate movement of coal.

The Government's proof, therefore, was designed to show, not general decrease in the volume of commerce in coal, but "interruptions" thereof. The ultimate issue of fact (if one existed at all) was as to whether there were any interruptions of commerce, and if so, what. The evidence developed along three lines:

> (1) That, principally because Southern[5] producers were non union and hence were not tied to

[4]Detailed record references (to evidentiary findings, testimony and documents) will be found under the more detailed "Review of the Evidence presented by the Government on 'Economic Facts.'" *post,* pp. 28-62. We are here presenting a broad outline only.

[5]See footnote 11 on page 9, *ante.*

definite wage rates[6] such as were fixed in the North by collective bargaining, Southern coal fields have increased their share of the national market, and the share of the Northern coal fields has correspondingly decreased.[7] This was the Government's evidence of "dislocation".

(2) That there were labor disputes[8] from time to time, the evidence showing, however, that the average days lost in strikes per man employed in the industry over the ten-year period 1924-1933 was only between 9 and 10 days per man per year,[9] and in addition that *at no time since 1922 have consumers in the United States been forced to go without coal as a result of strikes.*[10]

(3) Finally, the Government sought to show violent price fluctuations for coal. The evidence was that, although there were fluctuations during the war and immediate post-war eras, *there has been no serious fluctuation in prices since 1922.*[11]

Accordingly, it became evident that the Government's theory that there were constant and recurrent interruptions of interstate commerce could not be supported on the facts.

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[6]Reductions in wage rates do not result in smaller wages where more hours of employment are afforded through increase of business secured thereby. Reductions in the southern fields have usually been in wage rates, not in wages (FF. 114-115, R. 175-176).

[7]See pp. 37-40, *post*.

[8]As pointed out above (footnote 2, p. 10) the Act does not regulate the production of anthracite. These strike statistics accordingly do not take into account labor difficulties in the anthracite industry.

[9]See footnote 10, p. 7, *ante*.

[10]See pp. 32-35, *post*.

[11]See pp. 35-36, *post*.

The opinion of the court (R. 1178-1198) makes no mention at all of the presence or absence of direct effect on interstate commerce. Delivered as it was at the conclusion of the trial, it faithfully reflects the impression made upon the court by the evidence taken. It deals principally with factors relevant to due process, but, in so far as the interstate commerce power is concerned, proceeds broadly on the simple assumption that there is a "national commerce" in coal, and that the Congress has the inherent power to regulate it.

Thereafter,[12] evidentiary and ultimate findings of fact were signed. The ultimate findings contain several broad statements, in the nature of conclusions, that there have been direct burdens and restraints on interstate commerce in bituminous coal.[13] However, not merely are those ultimate findings (all of which were excepted to, R. 239) inconsistent with the theory of the opinion and on their face based upon an erroneous conception of law as to what constitutes a burden or restraint (see pp. 103-112, *post*), but they find no substantial support either in the evidence or in the evidentiary findings, and there is abundant evidence in the record (exclusively from official Government documents and Government witnesses) establishing the contrary beyond dispute.

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[12]The opinion was rendered November 27 (R. 1179). The findings of fact were signed December 10 (R. 215).

[13]FF. 180, 181, 182, 184. R. 210-211.

REVIEW OF THE EVIDENCE PRESENTED BY THE GOVERNMENT ON "ECONOMIC FACTS" AND OF THE RELEVANT EVIDENTIARY FINDINGS.

1. The Government Answer: Affirmative Defense in Respect of the Commerce Clause.

The great bulk of the evidence at the trial was taken under that part of the Government answer headed "II", relating to interstate commerce (R. 33-37).

The theory of this defense was summarized by the Government in its memorandum submitted in opposition to the request by the plaintiff for the setting of a trial date prior to November 1, 1935 (R. 47, 48):

> "In the view of these defendants the constitutionality of said Act depends upon the existence of the burdens, dislocations, restraints and interruptions to interstate commerce in bituminous coal specified in the separate defense set up in sub-division II of defendant's answer and upon the facts relative to the causes and effects thereof, as therein set forth, and also upon facts relative to the reasonableness under the due process clause of the Fifth Amendment of the regulatory provisions of the proposed coal code."

Passing over the reference to due process (an issue which arises only if the statute be otherwise valid under the commerce clause), this memorandum disclosed an intention to base the argument for validity of the statute upon the facts relative to the causes and effects of alleged restraints to interstate commerce. Under this theory, the issue of fact (if any) was as to the nature and extent of those restraints. The restraints specified were (Answer, R. 34): (a) "sudden unforeseeable, recurrent and prolonged inter-

ruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets"; (b) "sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to the consuming public in other States than the State of production, and tending directly and substantially to restrict and control the movement of coal in interstate commerce"; and (c) "unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden and restrain interstate commerce in bituminous coal".

No testimony was taken as to the alleged unfair and demoralized methods of competition (sub-paragraph (c)); but this was disposed of by a stipulated finding in substance that unfair trade practices, although they exist throughout the bituminous coal industry, are not and have not been engaged in by reputable firms, and are not and have not been the *general practice,* and finally, that similar practices exist in other industries (FF. 166, R. 207). Moreover, no question is here presented as to whether the fair trade practice provisions of the Code (Statute, Sec. 4, Part II (i), Appendix, pp. *18-21,* fols. 68-79; Code, Part II, Sec. 12, R. 67) would be valid if enacted alone and apart from wage and price-fixing provisions. If confined to unfair practices in interstate commerce, a prohibition of them would bear an obvious resemblance to the Federal Trade Commission Act. On the other hand, it seems equally obvious that, if the wage or price-fixing provisions of the Code be unlawful, the entire Code cannot be sustained as valid (and the compulsive tax be likewise sustained) because these fair trade practice provisions would have been valid if enacted alone. In the first place they are only an

insignificant part of the whole Code, and in the second place, they are designed primarily for the purpose of enforcing the price fixing provisions, without which they would be useless. Accordingly, the question of their validity, if standing alone, will receive no independent consideration in this brief.

The two principal issues of fact to be resolved under the original Government pleading involved, therefore, the nature and extent of

(1) stoppages in shipment of coal, and

(2) price fluctuations.

If (as the Government contended in its memorandum) the constitutionality of the statute depends upon the existence of such burdens to interstate commerce as might have been caused by a recurrence of stoppages in shipment of coal, or of violent price fluctuations, then the nature and extent of that recurrence become a proper subject of inquiry (*Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Borden's Co.* v. *Baldwin,* 293 U. S. 194, 209-210).

2. Evidence as to Nature and Extent of Alleged Interruptions and Stoppages in the Shipment of Coal.

The recent history of the bituminous coal industry breaks into four periods: (1) the pre-war period, (2) the war period and post-war period (1916-1922), (3) the period from 1923 to 1933, and (4) the NRA period (see FF. at R. 147, 151, 159, 197).

The pre-war period, now more than twenty years past, appears to us obviously to be too remote to have substantial probative value in determining whether the industry has

been so subject to interruptions and stoppages as to warrant national price and wage fixing today.

The war period and post-war period were likewise remote, and were also wholly unusual, the industry having been tremendously stimulated by the war, so that prices and wages rose to abnormal heights, conditions being further accentuated by a chronic railway car shortage, which came to an end in 1923 (FF. 92, R. 159).

The NRA period was also unusual, having both benefited and suffered from artificial stimuli of an unconstitutional character.

Accordingly, the important period for our consideration is that from 1923 to 1933. This was a period of gradual decline in production, in the number of men employed, and in prices. The reasons for this were principally (1) improved methods for saving in fuel consumption, (2) the shift in the steel industry from crude heavy products to light products requiring less fuel and to the substitution of scrap iron for virgin pig iron, and (3) competition of other sources of energy, notably of oil, natural gas and hydroelectric power (FF. 76, R. 146-147; FF. 55, R. 136). None of these is, of course, eliminated or in any way affected so as to increase the use of coal, through the regulatory system of the Guffey Act.[1]

But, from the point of view of effect on interstate commerce, the pertinent subjects of inquiry were:

> (1) What has been the extent of interruptions of commerce (if any) during the years in question?

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[1]In fact, the Guffey Act will certainly increase prices, and this in turn will certainly tend further to decrease the use of coal in favor of other fuel substitutes and through improvements in burning apparatus to save fuel (FF. 53-55, R. 134-136).

(2) What were the causes?

(3) Are there any provisions of the statute designed to cure those causes?

Plaintiff believes that the evidence conclusively establishes:

(1) That there were no interruptions of shipments in recent years that were due to other than natural economic causes (such as lack of demand), or physical causes (such as breakdowns), except for a few sporadic labor disturbances;

(2) That such minor interruptions as did occur did not result in any material interruptions of commerce;

(3) That the statute contains no provision designed to cure the underlying economic causes of the alleged excess of competition in the industry, viz., over-capacity (quite apart from the fundamental legal argument that cure of interruptions of production as such is outside the power of Congress).

A. Alleged interruptions of production.

The official figures of the Bureau of Mines, introduced in evidence by Mr. Tryon, the Government expert, showed that the following figures represent the annual averages for the periods shown (Def. Ex. 4a, R. 1006; and FF. 57-58, R. 137-138):

	35-year period (1899-1933)		Test period (1923-1933)	
Maximum potential working days		308		308
Days idle—				
Labor disputes	11		9	
Other causes	93	104	114	123
Average days worked		204		185

Mr. Tryon further testified that, for the period 1890-1914, an average of 9 days per year were lost through breakdowns and power failures, and 34 days through seasonal fluctuations of demand. He identified no other specific causes for interruptions.

The significance of these statistics lies in the fact that, of the various causes for interruptions and stoppages of shipments (which in this industry are practically coincidental with production),[2] the only cause for which a remedy is sought to be provided in the statute, or in respect of which evidence was sought to be introduced in support of the statute, is the item of labor disputes.

In other words, a nation-wide scheme of local regulation is sought to be supported under the commerce clause, because such scheme purports to provide a remedy for a factor which has been responsible (according to the Government's own Exhibit) for only about 10% of the idle time at the mines.

More significant yet is the utter absence from the record of any showing that even that 10% resulted in any

[2]The government introduced production figures as representative of shipments, because customarily coal is shipped as soon as produced (FF. 48, R. 132).

diminution of aggregate production, or of aggregate shipments, in the long run. Every presumption is to the contrary—that the 9 or 10 days recorded as lost on account of labor disputes were in the end not lost at all—for doubtless they simply resulted in reducing the number of days lost through lack of orders, seasonal fluctuations or other causes.

The Government's Exhibit (4a) gives mute testimony to this presumption. Thus, for the period 1923-1933, by far the worst year from the point of view of labor disputes was 1927, in which 45 days, or 36 more than the annual average for the period, were lost on that account; yet the average number of days worked in that year was 191, *i. e.,* not less than the average for the period, but actually 6 days more than the average.

And the witnesses themselves had to admit the lack of substantial connection between labor disputes and coal consumption.[8]

Of the bad year 1927, Mr. Murray, Vice-President of the United Mine Workers of America, and one of the principal Government witnesses, testified:

> "In 1927, as in the earlier strikes, the difficulty of the mine workers was that the non-striking territories continued to ship coal into markets that would otherwise have taken the coal that the men on strike would have mined if they had not been on strike. There is no question as to that." (R. 456)

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[8]Of course, a local dispute will tie up the production at a particular mine and consequently the interstate shipments from such mines, *Coronado Co.* v. *United Mine Workers of America,* 268 U. S. 295; but the record shows that the market thus vacated is promptly filled by the product of a competing mine (R. 456).

Tryon testified as to that same year, 1927:

> "We have no record that any consumer of coal in the United States actually went without it in that year (1927) because of a labor dispute." (R. 330)

It is apparent, therefore, that whatever production was lost through strikes (even in the worst year, 1927) was made up either by production by other mines or by working later in the year at the same mines on days on which otherwise the mines would have had to be closed for lack of demand or other causes.

Of the year 1933, which was an average year (having 9 days idle on account of labor disputes), Mr. Murray testified that the disputes "were sporadic outbreaks taking place in individual mines * * *" (R. 455).

It is apparent, therefore, that there is nothing in this record to support the proposition that labor disputes or any other causes, when viewed nationally, have given rise to material burdens or obstructions to commerce among the several states in bituminous coal.

B. Alleged price fluctuations.

Contract prices represent about 75% of the coal sales, and spot prices 25%. Of these (FF. 56, R. 136-137; R. 298) spot prices generally fluctuate much more than contract prices (R. 299). But even the spot price curve from 1923 to 1931 does not show violent fluctuations (FF. 97, R. 162; R. 318).

The foregoing statements were all made by the Government expert from the Bureau of Mines, Mr. Tryon, and in themselves dispose of the affirmative defense that price

regulation has been rendered necessary by violent price fluctuations.

The affirmative defense made particular reference to the supply of bituminous coal for railroad fuel as evidencing the impact of coal production conditions on interstate commerce. However, any theory of violent fluctuation in prices to the railroads was also disposed of by Mr. Tryon (R. 321-322), resulting in a finding of fact that "There have been no violent fluctuations in the prices of bituminous coal for railroad fuel since 1923" (FF. 98, R. 162).

Price fluctuations being a comparative term, evidence was introduced by the plaintiff, and findings were made, as to price fluctuations in other commodities.

> "During the period from 1926 to 1934 the wholesale delivered prices of bituminous coal have had considerably less fluctuation than either the average of all commodities, or the average of all raw materials, or of the following specific commodities: non-ferrous metals, petroleum products, lumber, cotton goods, and hides and skins (Tr. 1569 [R. 552], Pl. Exs. 60, 70-A, 70-B). During the period 1929-1935 retail prices of bituminous coal have had less fluctuation than those of meats, cereals, other foods and the average of all foods, and also of anthracite (Tr. 1571 [R. 553], Pl. Ex. 71)." (FF. 99, R. 163).

3. So-called Diversions and Dislocations of Interstate Commerce.

The allegations of the affirmative defense having completely failed of proof, the Government's answer was

amended at the trial so as to include allegations of diversion and dislocation of commerce, of which the following is fairly typical (R. 105, *cf.* R. 34):

> "For many years the distribution and marketing of bituminous coal in interstate commerce has been subject (a) to sudden unforeseeable, recurrent and prolonged interruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets *and to substantial diversions and dislocations of such coal shipments;* * * *" [New matter in italics].

These amendments were made in the course of the trial, and as a result of the fact that the proof, having completely failed to sustain either the allegations that there were recurrent or prolonged stoppages or interruptions in interstate commerce, or the allegations that there had been violent or extremely wide price fluctuations, had however shown that there had been some shift in business from Northern producers to Southern producers. No subject received more attention or occupies more space in the Record than this one. The Government's theory evidently is that the Congress has the power under the Constitution to restrain Southern producers from taking markets away from Northern producers, this extraordinary doctrine being based upon the theory that this constitutes a "diversion and dislocation" of interstate commerce. Concededly, it is not a burden or obstruction, for then the amendment to the pleading would be unnecessary.

A glance at the elaborate charts submitted by the Government to show the increase in production in Kentucky, West Virginia and Virginia, and the corresponding de-

crease in the so-called Northern Competitive Field (Pennsylvania, Ohio, Indiana and Illinois) illustrates this extraordinary theory at a glance.

Thus, Government Exhibits 25 and 26 (R. 1067-1068) are charts purporting to show how rises and falls in shipments from Illinois mines are conversely matched by falls and rises in shipments from Kentucky mines.

Government Exhibit 28 (R. 1069) purports to show in graphic waves the fact that between 1913 and 1934, of the seven States in question, the three States of Kentucky, West Virginia and Virginia increased their share of the common markets from approximately 30% to approximately 50%.

Government Exhibit 30-A (R. 1076B) shows, by numerous graphic charts, the source of this "evil", in that as the prices charged by the West Virginia or Kentucky mines (as the case may be) fall below those of Pennsylvania, Ohio and Illinois, so their shipments rise above those of their Northern rivals. In Government Exhibit 31-A (R. 1078A), the same tale is graphically told for the two "groups" as a whole (Northern and Southern).

As a matter of fact, this rivalry between the North and the South is the subject matter of the Government's Exhibits from 24 through 34 (R. 1062 through R. 1080-C). Most of these exhibits were carefully prepared and elaborately commented on by Mr. Berquist, a witness called from the National Recovery Administration (R. 459-475).

The only inference reasonably to be drawn from this evidence is that the Government takes the position that the Federal Government has the power to preserve or to

"freeze" commerce within existing channels, or indeed to shift it from one channel to another.[4]

As bearing upon the implications of the Government's theory that the commerce power includes the power to prevent one State from obtaining a competitive advantage that it had not theretofore had over another State in a common market, evidence was introduced by the plaintiff to indicate what might have been the effect of such legislation if it had been indulged in by the Congress at earlier stages of our history.

It appears of record that in the year 1820 the only bituminous coal producing State was Maryland (See Pl. Ex. 69, R. 946-A). Could the Congress have passed a statute in 1820 designed to confine the production of bituminous coal in the United States to the State of Maryland so that the "normal flow" of commerce from that State would not be "diverted" to Pennsylvania?

The largest producing State in 1934 (West Virginia with 27.3%) did not even appear among the larger producers in 1850, and in 1880 was producing only 4.3%. Can it be seriously suggested that the Congress could either have excluded West Virginia from the production of coal, or have rivetted it to its 4% share based on 1880?

There appear to be two justifications for introducing this strange issue into this record, the first being that the

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[4]Thus, Mr. O'Neill, the principal producer witness for the government, after referring to the "normal flow" of commerce (R. 365), then gave his philosophy of "natural markets" (R. 366):

> "When I testified before the House that Pennsylvania has a natural market, I meant by that a market close-by, where freight rates ought to be substantially lower than from far-distant fields. It seems to me that the close-by fields should supply the coal to those markets under any fair competitive circumstances" (R. 366).

allegations as to stoppages and price fluctuations having failed, a sort of counsel of desperation dictated evidence of these "diversions" and "dislocations", and the second, and perhaps more reasonable, explanation being that, inasmuch as the heart of the statute, and its expressed purpose, is to stabilize the industry by fastening it down to conditions "heretofore existing", it was appropriate to seek to justify such a provision.

One provision in question is that which directs the local District Boards to coordinate prices

> "to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed" (Act, Sec. 4, Part II(b), Appendix, p. *15,* fol. 53; Code, Part II, 5; R. 64).

In other words, what the Congress refrained from doing for Maryland in 1820, and for Pennsylvania in 1880, it now does for States enjoying markets that otherwise they might lose with the further progress of competition.

4. Evidence as to the Volume of Coal Sold for Shipment Across State Lines—Comparison of Coal Industry with Others.

The statute applies without distinction to all sales of coal whether intended or ever in fact resulting in shipment across State lines or not. However, the record shows (1) that nearly one-half of all of the coal sold in the United States is consigned to intrastate destinations and (2) that there are many states in which only a negligible amount of coal is imported from other states.

A. Proportion of total coal in the United States sold for Consignment to Interstate Destinations.

The record shows that practically all coal is delivered f. o. b. mine; and further that at least 42% of the total coal sold is consigned to *intra*state points and not more than 58% to *inter*state destinations. These figures were provided only in respect of the year 1929 (the only year for which complete figures as to distribution were available), and are determined by combining the facts shown in defendants' Exhibit 14 (R. 1019) with those shown in plaintiff's Exhibit 67 (R. 941), both exhibits having been compiled by the Bureau of Mines. Defendants' Exhibit 14 gives the following percentages:

Railroad fuel delivered to carriers subject to jurisdiction of the Interstate Commerce Commission	23.76
Other intrastate shipments plus local sales	26.21
Other interstate (and foreign) shipments	50.03
	100.00

Plaintiff's Exhibit 67 gives the division of the railroad fuel deliveries:

Deliveries on which freight was paid	30.9
Deliveries on which no freight was paid	69.1

"Deliveries on which no freight was paid" represent, of course, deliveries to the consuming railroad at the mouth of the mine, with no further consignment, and accordingly relate to wholly local transactions. "Deliveries on which freight was paid" may represent either deliveries consigned to ultimate destination within the same state, or may represent deliveries consigned to ultimate destinations in other States. The figures of 58% and 42% for interstate and intrastate shipments, respectively, are based upon

the assumption (favorable to the Government) that all "deliveries on which freight was paid" were for interstate shipment. Accordingly, the aggregate figures are:

Interstate Transactions

Railroad fuel	7.34[5]
Other interstate sales	50.03
	57.37

Intrastate Transactions

Railroad fuel	16.42[5]
Other intrastate sales	26.21
	42.63

B. STATES IN WHICH VERY LITTLE INTERSTATE COMMERCE OCCURS.

The sole basis in the record for the following Finding of Ultimate Fact:

> "175. The distribution and marketing of bituminous coal within the United States is predominantly interstate in character, and the interstate distribution and sale and the intrastate distribution and sale of such coal are so intimately and inextricably connected, related and interwoven that the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce unless transactions of intrastate distribution and sale be regulated" (R. 209),

is in the following stipulation (R. 376):

> " 'The competitive situation is such that the effect upon intrastate sales resulting from a minimum-

[5]Being respectively 30.9% and 69.1% of all railroad fuel (see tables in text, *supra*).

> price regulation for interstate sales, if such regulation were not applied to intrastate sales, would be to give such a competitive advantage to the intrastate seller that the interstate seller could not fairly compete with him, so that there would result a discrimination against the interstate seller.'
>
> "2. That the other Government producer witnesses would each make the same answer in respect of the producing and marketing territories as to which they testified and as to the other areas of substantial production throughout the country to which they testified.
>
> "Mr. Whitney[6] stated that he made no concession as to the legal effect of such evidence upon the issues in this case but that he makes no contention that such evidence is incompetent or inadmissible as a conclusion."

The fair construction of this stipulation appears to be that, *wherever* interstate coal comes into competition with intrastate coal, regulation of the price of either would be discriminatory against the other, unless the other were likewise regulated; but it leaves open entirely the question as to the territories in which such competition exists. Obviously, individual producers (such as those who testified for the Government) or other witnesses could not identify by oral testimony all of the territories in which such a state of competition exists, and similarly identify the territories in which it does not exist. This must be ascertained by reference to the documentary testimony (produced from the Bureau of Mines). This clearly shows that, although no doubt interstate coal comes into competition with intrastate coal in many, if not most, of the consuming markets

[6]Trial counsel for the petitioner.

in this country, it by no means follows that there are not large and substantial markets which are wholly supplied by intrastate shipments. This being the case, the Finding of Ultimate Fact No. 175 must clearly be construed in the light of the record, and thereby to mean, not that *all* interstate and intrastate distribution comes into competition, but simply that *wherever* that state of facts does exist, there discrimination would result unless both be regulated.

Defendants' Exhibit 9 (R. 1014) (also based on 1929 figures) gives the most reliable evidence as to the distribution of coal by States.

The Findings of Fact include the statement that:

> "In every state producing bituminous coal intrastate shipments from the mines of that state meet active competition from interstate shipments" (FF. 47, R. 132).

This finding leaves open the *extent* of such "active competition". The Finding of Fact refers to Defendants' Exhibits 9, 10, 15 and 16; and a close examination of those exhibits (all of which are taken from official Government publications) shows that in the cases of many States the competition between interstate shipments and intrastate shipments is negligible.

Alabama

One of the largest producing States is Alabama. In the test year of 1929, only 3% of the coal shipped by rail or by river to destinations in Alabama came from other States. 97% was produced in Alabama. Defendants' Exhibit 9 shows that 9,419,956 tons were thus shipped to Alabama destinations, of which 9,118,794 tons were produced in Alabama fields. It is evident that, although the 300,000

tons from other fields may have provided "active competition", such shipments were trivial compared to the intrastate shipments. The competition could not, therefore, have been really serious, and there must be great stretches in the State of Alabama into which no interstate coal penetrated at all.

Colorado

Even more striking is the case of the largest Western producing state—Colorado. Defendants' Exhibit 9 shows that shipments to Colorado destinations in 1929 aggregated 4,663,683 tons, of which those shipped from Colorado fields aggregated 4,618,169 tons. In other words, less than 1% of the shipments to Colorado destinations moved in interstate commerce.

Pennsylvania

Less extreme, but none the less significant, figures are shown for the largest producing State in 1929—the State of Pennsylvania. Much was made on the trial of the "dislocation" of commerce involved in invasion of Pennsylvania markets by West Virginia producers. As a matter of fact, the defendants' exhibits show that shipments to Pennsylvania destinations in that year were 38,585,891 tons from Pennsylvania fields and 4,937,358 tons from West Virginia fields.

C. Comparison with other industries.

The Government's affirmative defense alleged (R. 33-34) that:

> "Commercially important deposits of bituminous coal within the United States are limited to 23 pro-

> ducing areas confined within the boundaries of 26 States and more than 70% of the total annual output is mined in 4 States."

In the opening arguments before the trial court, repeated reference was made by the Government to the fact that the coal industry was *sui generis* for the reason, among others, that coal was produced in a limited number of States but was shipped throughout the Union. The thought evidently was that the coal industry had a peculiarly *national* character.

It is obvious, however, that this is equally true of most industries, and, as examples, there appear in the Record under Plaintiff's Exhibit 81 numerous maps and charts showing graphically that the same considerations apply in a more extreme manner to anthracite coal, iron ore, copper, salt, oranges and other basic commodities. If it be established that the fact that coal is predominantly produced in certain States, or even exclusively produced in certain States, entitles the Federal Government under the provisions of the commerce clause to regulate its local production, then the same will apply to the industries named, and to innumerable others.

5. Evidence that the Fundamental Evil in the Industry—Over-Capacity—Will Be Accentuated, Rather than Alleviated, by the Statute.

The trial court found that:

> "The fundamental or chief underlying evil of the bituminous coal industry is over-capacity." (FF. 57, R. 137)

This was the unanimous conviction of the Government witnesses (Tryon, of the Bureau of Mines, at R. 326; the Pennsylvania operator, O'Neill, at R. 368; and the Department of Labor statitistician, Lubin, at R. 476).

Obviously, the cure for over-capacity is to limit capacity. And prior to the decision in the *Schechter* case the Guffey bill pending before Congress was expressly based upon the principle of governmental limitation of capacity and production (*Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry, 74th Cong., First Sess., 1935,* referred to in the Government's Answer, R. 35, and, at the request of the Government, submitted for judicial notice by the Court). This was considered absolutely essential to accomplish the purpose of curing the fundamental or underlying evil. Thus, the Pennsylvania operator, O'Neill, testified for the Government in those hearings:

> "So far as I know no price fixing plan has ever worked unless it had back of it control of production, and under this bill, control of capacity as well" (R. 364).

On its face, this statement is consistent only with the conclusion that the present statute cannot work (for, exclusive of the wage and hour provisions, the present statute provides only for price control). Mr. O'Neill temporized on cross-examination by saying that the present Act would work for a year without limitation of production, but that control of production would have to be provided by the next Congress:

> "I have always had the idea that price control was one of the essential elements of any scheme of regulation of the industry by the Government.

Another essential element is the proposition that there might be production control. I think that is an essential element. It is not provided for in this statute because it was taken out. I think price control can be made to function almost as a production control *temporarily,* and if the finding of Congress is later that it is necessary to amend it it can do so and price control will operate a sufficient length of time to develop that situation, in my opinion. It is my opinion that the present Act needs the amendment to provide for limitation of production, finally, if it is going to be made to operate successfully. I think it could be made to operate successfully for the time being, as it now is. I think the first price list will operate successfully for a considerable period of time. I would say that it would *go along for a year.*" (R. 363)

The question may well be asked, why (if over-capacity is the fundamental evil of the industry) did Congress change from a bill designed to cure that evil to a bill designed only to provide higher wages and prices. The answer appears in the testimony of all the witnesses, viz., that the primary purpose is to increase the income of the operators and miners.[6a] The sequence of thought is conclusively shown in the testimony of the Government expert, Mr. Tryon, of the Bureau of Mines (R. 326):

(1) "Over-capacity is the fundamental and underlying evil of the coal industry."

(2) "Increases in prices, under any system of stabilized control of the market, will in time need

[6a]Another obvious purpose was, however, to set up a device for production control in the sense of pro-ration of production among the various areas, districts, and mines. This was to correct the "injustices" caused by the Southern mines taking business away from the Northern mines.

to be accompanied by some control of sales tonnages, or some control of capacity, in order to be effective over the long run"

Because

(3) "It is the normal tendency in mineral economics for increases in prices to lead to increases in number of mines or wells"

Yet

(4) "I think prices would be higher than they would otherwise be, at the same levels of production cost, under the Act"

But

(5) "However, if prices are set at minimum levels and are effectively policed and maintained, the result on the financial position of the industry will be beneficial from the point of view of lessening the present financial losses of the operator and of making it possible for him to pay a reasonable wage. I believe the collective effect of the Guffey Act would be to stabilize prices, to increase the sales realization of the operator, to enable him to avoid some at least of the present loss incurred, and to enable him to pay some higher wage than he would otherwise be able to pay."

In other words:

(1) The fundamental evil of the industry can be cured only by limitation of production.

(2) The present statute does not provide for national *limitation* of production (although it does provide for *allocation* as among the different States).

(3) But the present statute provides for increasing prices.

(4) To be sure, by the normal workings of mineral economics, this would naturally increase nation-wide production instead of decreasing it, and therefore would tend to increase the *fundamental* evil of the industry.

(5) Notwithstanding that it would increase the fundamental evil of the industry, it will be beneficial *because* it will increase the profits of the operator and the wages of the miner.

6. Evidence as to the Coercive Effect of the Penalty Tax.

The trial court sustained the plaintiff in his contention that the tax was compulsive in character, and accordingly entered a permanent injunction against assessment or collection of the tax during the period required to litigate the constitutional issue presented by the Government in its affirmative defense. This part of the decree is questioned by the Government's petition in *Helvering* v. *Carter,* No. 651, and discussion of the question in point of law will be reserved for our answering brief in that case.

A. As to Carter Coal Company.

Neither in the present year nor at any time during the past eight years have the net proceeds of Carter Coal Company equaled 15%, or, for that matter, 13½%, of the total sales price received by the Company at the mine. In 1934, the most profitable year for Carter Coal Company during that entire period (Def. Ex. 47, R. 1163), the

net profit of the Company was $323,998; yet the 15% tax would have been $587,740 and the 13½% tax would have been $528,966 (FF. 40, R. 128). The Court further found (FF. 41, R. 129) that it is the view of the officers and directors charged with the management of Carter Coal Company, and of all its voting shareholders, that the tax provisions of Section 3 will in fact induce the Company to accept and comply with the Code,[7] and further that:

> "The weight of the tax is such, compared with the earnings of the Company, that it could not long continue in business and pay the said 13½% tax" (FF. 41, R. 129).

It is obvious that should Carter Coal Company be compelled to discontinue its business this would result in the loss to the Company and its stockholders of its presently existing valuable goodwill, and would make it impossible for the Company to carry out contracts at the time existing. The court below found that the Company has been doing business since 1912, has a valuable goodwill and established registered trade names for its products, and presently has customers with whom it has been dealing with regularity, and also that the goodwill and going concern value of the Company are of substantial value (FF. 37, R. 127). The court also found that the Company has presently existing contracts for the sale of an aggregate of 850,750 net tons of coal at an aggregate price f. o. b. mines of $1,004,765, all of which contracts run at least to May 27, 1936, and most of which continue beyond that date (FF. 39, R. 127), and that therefore the Company cannot avoid the penalties

[7]Unless, of course, relief is obtained from the courts.

of the tax by shutting down, without thereby subjecting itself to other equally undesirable penalties for breach of contract.

B. As to the industry generally.

Finding of Fact No. 41 (R. 128), based principally upon the testimony by Government witnesses, covers this point completely and the pertinent portion is here set out:

> "41. Bituminous coal producing companies generally have not earned 13½% of their mine realization price as a net profit at any time during the last eight or nine years. In the view of those familiar with the bituminous coal industry the tax provisions of Section 3 will in fact induce those bituminous coal producing companies who are opposed to the Code to accept and comply with the Code * * *" (R. 128-129).[8]

C. Background of the tax provision as shown by the evidence.

The operators, who were called as witnesses by the Government, testified that the Guffey Act was designed to re-enact for the coal industry the provisions of the National Industrial Recovery Act, and to add to them sanctions which would compel compliance in a manner which the National Industrial Recovery Act had failed to accomplish. Mr. O'Neill, testifying for the Pennsylvania producers in favor of the statute, said:

> "So far as the companies which can evade the Code, the amount of the penalty taken out of their sales

[8]The balance of the Finding has been quoted above in regard to Carter Coal Company.

> realization will take whatever advantage they have in cost, and their competition will be fair. It will add to them that much additional cost. I think the 13½% tax added to their cost will stop them from breaking down the Code and prices fixed under it." (R. 365; and see also Mr. O'Neill, at R. 361.)

Mr. Findlay, testifying for the Ohio producers in favor of the statute, said:

> "I think there are provisions in this Code, by Act of Congress, that will give the enforcement bodies opportunity to effectively enforce the Code, which they did not have under the old Code. I do not know of any company which I honestly believe makes a net profit of more than 13½% of its sales price." (R. 394-395)

7. Evidence as to the Effect of Transportation Charges.

Upwards of 50% of the delivered cost of coal is represented by freight charges, the percentage having in fact exceeded 60% during 1932 and 1933 (FF. 63a, R. 140).

Indeed, the Pennsylvania producer O'Neill, testifying for the Government, confirmed on cross-examination that he had been right in testifying before the Congress in 1932 that "the chief trouble with the coal industry today is freight rates" (R. 368), and that accordingly

> "It is my opinion that the most important thing that can be done to improve the situation in the industry is for the railroads to put the destination price of coal where it will successfully meet its present-day competitors, from whom they get very little traffic." (R. 369)

8. Evidence Relating to Wage Levels.

Whether or not wages are fair and reasonable, whether or not hours are excessive, and whether or not working conditions generally in the coal industry are satisfactory from the point of view of social conscience, are questions the importance of which we do not dispute. In view of the firmly established principle that wages, hours and working conditions of miners are not within the regulatory power of the Federal Government, however, we are at a loss to understand their applicability to the determination of the constitutionality of the statute.

However, the salient features of the voluminous testimony introduced by the Government on this subject will be outlined here.

The Government's theory appears to be three-fold: (1) that miners' wages declined unduly during the test period 1923-1933; (2) that Northern wages were dragged down by Southern wages; and (3) that miners' wages were lower during the depression than other wages. Numerous findings of fact were made on the subject by the court; but these findings actually refute the positions taken by the Government.

A. Trend of typical wages.

The findings state that the occupation of trackmen is typical of the skilled day workers underground, and most of the earnings figures are accordingly given for trackmen in Illinois (FF. 79 *et seq.,* R. 149 *et seq.*). The trend of trackmen's wages appears from the following figures contained in FF. 79, R. 149 and FF. 112, R. 173:

	Daily Wage	Annual Earnings
1899	$1.90	$445
1913	2.85	540
1923	7.50	1,185
1929	6.10	1,080
1932	5.00	560

It appears, therefore, that daily wages in the depths of the depression were at a level about equal to ⅔rds of the level of the post-war boom in coal, but still about twice as high as pre-war wages.

B. Northern and Southern wages contrasted.

In the "diversion and dislocation" evidence, Kentucky was established as the competitor which was taking business from Illinois. See, *e. g.* Government Exs. 25 and 26 (R. 1067, 1068) showing the reciprocal rise and fall in Illinois and Kentucky tonnage. In meeting the argument that the South, by rapidly reducing wages, was unfairly taking business from the North, it seems appropriate, therefore, to compare the Kentucky trackman's wage (FF. 113, R. 174) with the Illinois trackman's wages. Figures are not given for the Kentucky trackman prior to the war; but after the war, the following appeared:

	Illinois Daily Wage	Illinois Annual Earning	Kentucky Daily Wage	Kentucky Annual Earning
1923	$7.50	$1,185	$5.58	$848
1929	6.10	1,080	4.87	1,081
1932	5.00	560	3.71	592

It is apparent that, so far as daily wage rates go, the two moved generally in unison, each earning about two-

thirds per day in 1932 of what he earned in 1923. From the viewpoint of annual earnings, however (which to the miner is much more important than the wage rate), it will be observed that the Kentucky man (instead of suffering in comparison with the Illinois man) has actually pulled himself up to a position of equality or better with the Illinois man. The "evil", if one exists, is that, as a result of a successful invasion of the "natural markets" of Illinois, the Kentucky operators have increased their business and the earnings of their employees at the expense of the Illinois operators and miners.

C. Comparison with cost of living.

No figures were introduced by the Government as to the cost of living, but the plaintiff introduced figures from the statistics of the Department of Labor, and appropriate findings were made thereon (FF. 116, R. 177) showing that the all-commodities price index declined from 100 in 1926 to 64 in 1932,—a decline roughly proportionate to the decline in earnings of the "typical" trackman, North or South.

D. Mine wages compared with wages generally.

Here again, the Government introduced no figures, but the plaintiff introduced statistics of the Department of Labor, and an appropriate finding was made (FF. 125, R. 184) that average hourly wage rates paid to common laborers and to skilled textile workers in the South Atlantic and East South Central States have been in the neighborhood of two-thirds of the wage rates paid for the same

class of labor in the East North Central and Middle Atlantic States, and that "wage rates for coal miners during the same period in the two districts were, until the adoption of the National Recovery Act, roughly in the same ratio".

It was stipulated (R. 402) that the average wage for labor in all manufacturing industries in Illinois was $27.07 per week in 1923, and $18.28 per week in 1933, this being almost precisely in the same proportion borne by the "typical" trackmen's wages in Illinois in the same years ($7.50 and $5.00 per day). It is a matter of common knowledge, however, that the decline in real wages for labor in all manufacturing industries from 1923 to 1933 was infinitely greater than one-third, in that 1933 was a year of wide-spread unemployment in the manufacturing business. On the other hand, miners had the great advantage of being continued in employment through the spreading of work.

Bureau of Labor statistics figures showed for the depression period that average hourly earnings of "outside laborers" at the bituminous coal mines were—for the States of Pennsylvania, Ohio, West Virginia, Kentucky and Virginia—almost precisely the same as average hourly rates of common laborers in other industries; whereas, they were substantially higher in the States of Indiana, Illinois, Tennessee and Alabama. (Def. Ex. 53, R. 1174.)

9. The Purposes of the Statute, as Interpreted by the Witnesses Familiar with the Industry.

The purpose of the Guffey Act appears on its face, as hereinafter pointed out (Points I and II, *post* pp. 69, 79). In addition, a great deal of testimony was given at the

trial by Government witnesses as to the purpose and functioning of the statute. This evidence gave a fair cross-section of the opinion behind the bill, as the witnesses included experts from the Bureau of Mines and the Department of Labor, coal producers, labor leaders and social workers. Testimony was thereby obtained, from those familiar with the industry itself, as to the meaning of the term "stabilization", which all agreed was the great end to be attained.

Thus, the first witness, Mr. Tryon, expert of the Bureau of Mines, testified (R. 328):

> "By stabilization, I mean an attempt to put the industry on a basis on which heavy financial losses can be turned into a reasonable profit and in which the industry will be able to pay reasonable rates of wages."

The Pennsylvania producer, Mr. O'Neill, used almost the same language (R. 363):

> "By stabilization, I mean stability of competition, that is, fair pricing of coals to sell against each other in common consuming markets, and the other trade practices that go with such marketing, the maintenance of proper wage standards, maximum hours of labor, and conditions of employment."

Isador Lubin, United States Commissioner of Labor Statistics, opened his cross-examination with an explanation of what he considered to be the evils in the industry (R. 483):

> "When I said that the industry was decaying that was with reference to the general situation in terms of profits, opportunities for employment of

> miners, opportunities to earn money, wage rates, and the general economic situation in the industry."

At the close of the cross-examination, he gave his philosophy for a cure of these evils, presumably to be accomplished by this Federal regulation (R. 494):

> "*The economists,* in talking of the competitive system, justify it on the ground that it makes it possible for the individual who is most efficient, in terms of the type of product he gives to the consumer, and the relative cost of the product, to get the business and make the profits. The competitive system is a system of individual enterprise whereby individuals are *permitted* to enter into industries and use their ingenuity and capital in the production of goods for market. In industries in which it is found as a fact that the reward does not necessarily go to the efficient, I do not think individual enterprise should be forbidden, but I feel that we should fix the plan of competition so that they will all have to abide by the same rules of the game. *'We' is the economists.*"

This is, in effect, an argument that Congress should have the power to impose upon industry a "planned economy," a power contended for in the *Schechter* case, and refused recognition by this Court.

The Tennessee operator, Mr. E. C. Mahan, was less profound, but perhaps more practical, when he said at the close of his cross-examination (R. 413-414):

> "I still feel as I did in 1932 when I said:
>
> 'Frankly speaking, personally, and not as a representative of the industry, if there was some way that I could unload my troubles on the Fed-

eral Government, I would be more than delighted to do so.' "

10. Evidence as to Coal Resources and Conservation.

This evidence hardly appears significant, in view of the fact that the statute (notwithstanding its title) contains no provision whatsoever for conservation, except a direction (in itself unobjectionable) to the Commission to make a study of the subject.

That there would have been no urgent need in any event to overthrow constitutional practice of 150 years' standing in the interests of coal conservation, is established by the findings of fact that:

(a) at 1929 rates of production and losses in mining, without allowing for the possibility of increase in consumption, total reserves of coal and lignite would suffice for 3,500 years (FF. 158, R. 203);

(b) at 1934 rates, the period would be longer (FF. 158, R. 203); and, although the bulk of these reserves (particularly the lignite) is low in grade,

(c) bituminous coal alone will last approximately 2,000 years at the 1929 rate of production and longer at the 1934 rate of production (FF. 161, R. 204); and

(d) the life of the bituminous coal of good quality and workable thickness and position which could be extracted at reasonable cost under present conditions is 300 years (FF. 161, R. 204).

11. Conclusion as to the Evidence.

Reviewing the evidence as an entirety, it appears indisputably to support the following conclusions:

(1) The underlying evil of the coal industry is over-capacity;

(2) This is not cured by the Guffey Act;

(3) Profits and wages have declined for many of those engaged in the industry, because of the highly competitive conditions existing therein;

(4) The Guffey Act makes an effort to yield higher profits and wages;

(5) This is accomplished by regulating wages with a view to enabling the miners to obtain higher wages than in the past and by prescription of minimum prices, thereby enabling the operators to pay higher wages and at the same time derive greater return for themselves, thus destroying the free play of competition and creating restraints upon the free movement of coal in interstate commerce by legislative fiat;

(6) Such higher prices and wages, although desirable from the point of view of certain operators and miners, will necessarily injure other operators and miners, who have been benefitting from the natural play of competition; and

(7) There have been no material interruptions or stoppages of interstate commerce in coal and no restraints or burdens upon its free movement or upon the free play of competition.

The foregoing conclusions are fully supported by the evidentiary findings of the court below, as well as by the evidence. Consequently, the conclusions which the trial court expressed in ultimate findings 180, 181, 182 and 184 (R. 210-211) with respect to the existence of burdens and restraints upon interstate commerce caused by "destructive price cutting," "unfair competitive practices," "disparities in wage rates," "unrestrained and destructive competition and the cutting of wage rates" (to each of which an exception was taken, R. 239), in so far as in conflict with the conclusions stated above, are in conflict with the court's own evidentiary findings and unsupported by any evidence. It is moreover clear that in expressing such conclusions the court was operating under a misconception of the meaning of the words "burdens" and "restraints," both as a matter of fact and of law, but particularly the latter. In other ultimate findings (FF. 178, 179, R. 210), upon which the findings in question depend, the court itself found that at present and for many years the business of mining and selling coal had been carried on under conditions of "unrestrained competition" leading to the "destructive competition" and "price cutting" referred to in these findings. The findings themselves on their face thus indicate the inconsistency of the trial court in concluding that the very concomitants of free and unrestrained competition, in other words, a free and open commerce in bituminous coal, may be made a predicate for a finding of burden or restraint. The findings as well as the evidence disclose the absence of any such. It is the purpose of the statute to create them, not to remove them. (See Point II, 7, pp. 103-112, *post*).

SPECIFICATION OF ERRORS

The Supreme Court of the District of Columbia erred:

1. In holding and concluding that the exactions imposed by Section 3 of the Act upon producers of bituminous coal failing to accept and comply with the Code are valid; and in failing to hold and conclude that the said exactions constitute penalties to enforce compliance with regulations not within the Federal power to prescribe, and are therefore invalid. (Assignments 31, 32, 33, 34, R. 237, 238; see Point I, *post.*)

2. In failing to find, hold, adjudge and decree that the Act and the Code are invalid because constituting a plan for the accomplishment of purposes not entrusted to the Federal Government by the Constitution; and in finding, holding, adjudging and decreeing that the Act and Code are constitutional, valid and enforceable in part. (Assignment 10, R. 234; see Point II, *post.*)

3. In failing to find, hold, adjudge and decree that the Act and the Code are invalid because violative of the Fifth Amendment; and in finding, holding, adjudging and decreeing that the Act and Code are constitutional, valid and enforceable in part. (Assignment 10, R. 234; see Point IX, *post.*)

4. In failing to hold and conclude that Section 4, Part III (a), (b) and (g) of the Act, and the corresponding sections of the Code, and each of them, are invalid because repugnant to and violative of the Fifth Amendment to the Constitution of the United States. (Assignment 12, R. 235; see Points IX and III, *post.*)

5. In failing to hold and conclude that Section 4, Part III (c), (d), (e) and (f) of the Act, and the corresponding sections of the Code, and each of them, are invalid because not within the power of the Congress under the Commerce Clause and because repugnant to the Fifth and Tenth Amendments to the Constitution of the United States. (Assignment 13, R. 235; see points IX and III, *post.*)

6. In holding and concluding that the labor provisions of the Act and of the Code are separable from the other provisions and in refusing to hold and conclude that the labor provisions are inseparable from the other provisions, and each of them, and particularly from the price fixing provisions. (Assignments 28, 29, R. 237; see Point IV, *post.*)

7. In refusing to hold and conclude that the price fixing provisions of the Act and of the Code are invalid because inseparable from the invalid labor provisions of the Act and Code. (Assignments 25, 10, R. 237, 234; see Point IV, *post.*)

8. In holding and concluding that the price fixing provisions of the Act and of the Code constitute a valid exercise of the power of the Congress to regulate interstate commerce; and in failing to hold and conclude that said provisions are not within the powers conferred upon the Congress by the Commerce Clause of the Constitution of the United States and are violative of the Tenth Amendment. (Assignments 19, 21 and 24, R. 235-236; see Points V, VI, VII, *post.*)

9. In holding and concluding that the price fixing provisions of the Act and of the Code are valid as applied to

all coal produced and sold; and in failing to hold and conclude that the price fixing provisions are invalid in their entirety since intended to be applicable in respect of transactions not within the power of the Congress to regulate. (Assignment 22, R. 236; see Point VII, *post.*)

10. In refusing to hold and conclude that Section 3 of the Act is not separable in its application to Section 4, or to the Code or to the several parts of each. (Assignment 30, R. 237; see Point VII, *post.*)

11. In holding and concluding that the price fixing provisions of the Act and of the Code contain no invalid delegation of authority, and in failing to hold and conclude that they constitute an unauthorized delegation of authority in violation of Article I, Sec. 1, and Article II, Sec. 2, Clause 2 of the Constitution of the United States and are arbitrary and violative of the Fifth Amendment. (Assignment 20, R. 236; see Points VIII and IX *post.*)

12. In holding and concluding that the price fixing provisions of the Act and of the Code are not arbitrary or unreasonable or unrelated to a proper Congressional purpose and do not violate the Fifth Amendment; and in refusing to hold and conclude to the contrary. (Assignment 23, R. 236; see Points IX and VI, *post.*)

13. In finding, holding and concluding that Section 4, Part II(i) of the Act and the corresponding section of the Code constitute a proper exercise of the interstate commerce power and do not violate the Fifth Amendment; and in failing to find, hold and conclude to the contrary. (Assignment 27, R. 237; see Points II, III and VI, *post.*)

14. In holding and concluding that plaintiff is entitled to the relief prayed only if the Code be invalid as an entirety, and in failing to hold and conclude that plaintiff is entitled to the relief prayed if any provision of the Act or Code challenged in this proceeding be invalid. (Assignment 11, R. 234-235; see Point X, *post.*)

15. In making findings of ultimate fact which are not supported by the evidentiary findings, are inconsistent with facts found or concluded, and are not supported by the evidence, as specified in Assignment 35 (R. 238, 239); in making findings of evidentiary facts that are not supported by the evidence and are inconsistent with other facts found, as specified in Assignment 37 (R. 241, 243); and in refusing to make findings of ultimate and evidentiary fact as specified in Assignments 36 and 38 (R. 239-241, 243-244). (See *ante* pp. 61-62 and Points II, VI, VII, IX and XI, *post.*)

16. In refusing to adjudge and decree the relief prayed for by the plaintiff, or any of such relief, as to each and every of the defendants severally, or as to any of them. (Assignments 2, 3 and 4, R. 233.)

17. In dismissing plaintiff's bill of complaint. (Assignment 5, R. 234.)

18. In overruling and denying plaintiff's applications for permanent injunction as prayed. (Assignments 1 and 34, R. 233, 238.)

19. In refusing to hold and conclude that the declaratory judgment statute is applicable to this controversy and to each and every part thereof severally, and in refusing to grant the declaratory relief prayed in the plaintiff's bill or any part thereof. (Assignments 6, 7, 14, 15, 16, 17 and 18, R. 234, 235.)

SUMMARY OF ARGUMENT

POINT I. THE SO-CALLED "TAX" IS IN REALITY A PENALTY TO ENFORCE COMPLIANCE WITH THE CODE, AND THE ACT CANNOT BE SUSTAINED AS AN EXERCISE OF THE FEDERAL TAXING POWER.

POINT II. THE STATUTE, CONSIDERED AS A WHOLE, IS INVALID.

POINT III. THE LABOR PROVISIONS OF THE ACT ARE INVALID.

POINT IV. SINCE THE LABOR PROVISIONS ARE INVALID AND THE CODE WAS SOUGHT TO BE ENACTED AS A WHOLE, THE ENTIRE REGULATORY SCHEME REPRESENTED BY THE CODE IS INVALID.

POINT V. THE FACT THAT SALES OF BITUMINOUS COAL CONTEMPLATE AND RESULT IN INTERSTATE MOVEMENTS OF SUCH COAL DOES NOT AUTHORIZE THE CONGRESS TO FIX THE SALES PRICE.

Part I. The Question Presented as to the Scope of the Commerce Clause, and the Settled Rules of Constitutional Interpretation Applicable to its Solution.

Part II. The Power Asserted by the Government is Destructive of the Principal of Duality in our System of Government, and is Repugnant to the Tenth Amendment.

Part III. The History of the Formation, Adoption and Ratification of the Constitution, and Contemporary Expositions thereof, Establish that the Power Now Asserted Was Not Granted.

Part IV. The Decisions of this Court under the Commerce Clause Support and are Consistent with this View.

POINT VI. THE PRICE FIXING PROVISIONS CANNOT BE SUSTAINED AS A MEANS FOR CARRYING INTO EXECUTION THE POWER TO REGULATE COMMERCE.

POINT VII. SINCE THE STATUTORY SCHEME IS MADE APPLICABLE TO ALL BITUMINOUS COAL PRODUCERS AND IN RESPECT OF ALL BITUMINOUS COAL PRODUCED, IT IS INVALID IN ITS ENTIRETY.

POINT VIII. THE MIMIMUM PRICE FIXING PROVISIONS OF THE STATUTE AND CODE ARE VOID BECAUSE INDEFINITE AND ARBITRARY AND BECAUSE CONSTITUTING AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

POINT IX. THE STATUTE AND THE CODE ARE REPUGNANT TO THE FIFTH AMENDMENT.

POINT X. IF EITHER THE LABOR OR THE PRICE FIXING PROVISIONS BE INVALID, PETITIONER IS ENTITLED TO INJUNCTIONS AS PRAYED, IRRESPECTIVE OF THE QUESTION OF SEPARABILITY.

POINT XI. THE RIGHT TO EQUITABLE RELIEF IN THIS PROCEEDING IS CLEAR.

ARGUMENT

POINT I

THE SO-CALLED "TAX" IS IN REALITY A PENALTY TO ENFORCE COMPLIANCE WITH THE CODE, AND THE ACT CANNOT BE SUSTAINED AS AN EXERCISE OF THE FEDERAL TAXING POWER.

The recent decisions of this Court in *United States* v. *Constantine,* 80 L. Ed. 195, and *United States* v. *Butler,* No. 401, Oct. Term 1935, expressly reaffirmed and reapplied the doctrines of *Hill* v. *Wallace* and *Bailey* v. *Drexel Furniture Company* (the *Child Labor Tax Case*) to the effect that exactions entitled "taxes", but in reality designed to enforce compliance with the regulation of a course of conduct, can not be sustained as exercises of the taxing power of the United States. Those cases, and the principle which they reaffirmed, are too fresh in the mind of the Court to require restatement here.

On its face, by its title, and by its legislative history, the taxing section of the statute under review does not impose a tax at all but a penalty to enforce compliance with a course of conduct prescribed in the statute.

As previously pointed out, the title of the Act shows its regulatory character (see p. 2, *ante*).

In an attempt to lay a basis for the regulatory provisions to follow, Section 1 of the Act recites, among other things, that the interests of the Nation

> "require that the bituminous coal industry be regulated as herein provided" (Appendix, p. 2, fol. 3);

that production and distribution of bituminous coal directly affect interstate commerce

> "and render regulation of all such production and distribution imperative for the protection of such commerce" (Appendix, p. *2,* fol. 4);

that

> "control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce" (Appendix, p. *3,* fol. 6);

and that practices prevailing in the bituminous coal industry

> "directly affect its interstate commerce and require regulation" (Appendix, p. *3,* fol. 6).

That such regulation is the primary purpose of this statute is also put beyond question by its legislative history. It is sufficient for present purposes to refer to the opening sentence of the Majority Report of the House Committee which reported out the bill which became the Guffey Act. That Committee said:

> "The purpose of the bill herewith reported is to provide for Federal regulation of the bituminous-coal industry" (House Report No. 1800, 74th Cong., 1st Sess., p. 1).[1]

Yet, with this primary purpose, the regulatory provisions of the statute are contained in a section (Sec. 4, Ap-

[1] It is worthy of note that this Report contains no express statement that the statute is constitutional, and contains no recommendations that the bill do pass.

pendix, pp. *7-25*, fols. 23-93) which on its face purports to set up a voluntary code.[2]

Compulsion is applied by Section 3 (Appendix, pp. *6-7*, fols. 18-22), which imposes a tax of 15% of the sales price (or fair market value) "upon the sale or other disposal of *all bituminous coal produced in the United States*," but provides that producers accepting the Code and complying with it are entitled to a drawback in the form of a credit equivalent to 90% of the amount of the tax. The result is that producers who join the Code will pay a tax of but 1½%, while producers who refuse to submit to the regulation of the Code are taxed 15%, on the sales price of all coal produced by them.

It thus appears, on the face of the statute, that the tax is intended to operate not as a taxing provision but as a penalty to enforce compliance with the regulation of conduct.[3]

Upon this point *Bailey* v. *Drexel Furniture Company* (*Child Labor Tax Case*), 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, are conclusive.

In the *Child Labor Tax Case* the Federal statute provided that any person operating a mine, quarry or factory employing child labor should thereby become subject to an excise tax equivalent to 10% of its entire annual net prof-

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[2]The statement of the minority of the House Committee (House Report No. 1800, *ante*, p. 45) in respect of this matter has remained unchallenged to this date. That report stated: "Although the code which the bill prescribes is supposedly voluntary, compulsion is directly applied by levying a tax on bituminous coal and allowing a refund of 90 percent thereof to mine operators who assent to, and comply with, its provisions."

[3]As previously pointed out (pp. 50-53, *ante*), the evidence and findings establish that this penalty provision is effective for the accomplishment of the purpose so intended (FF. 40-41, R. 128-129; FF. 15, R. 117-118; R. 366, 395, 414-415, 8, 19, 12, 41, 257-258).

its. No tax was imposed upon persons not employing child labor. The statute contained specific details as to what should be considered the employment of child labor within the meaning of the Act. This Court had previously held invalid an Act of Congress prohibiting the transportation in interstate commerce of goods made at factories which employed child labor, *Hammer* v. *Dagenhart*, 247 U. S. 251. In the *Child Labor Tax Case* the Court found that "Congress in the name of a tax which on the face of the act is a penalty" (p. 39) was seeking to do what the Court had held in *Hammer* v. *Dagenhart* that it had no power to accomplish. The Court ruled that "the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution" (259 U. S., at p. 39).

The Court recognized that it is sometimes difficult to distinguish between a tax and a penalty, but concluded that when it appears from the face of the statute that the purpose is regulation and the tax merely the means of enforcement, then "the so-called tax * * * loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment" (p. 38).

The Government had argued (259 U. S., at pp. 21-22) that so long as the statute did not expressly *prohibit* the course of conduct and add the so-called tax as an express penalty for breach of the prohibition, then the Court could not say that the tax was a penalty. The Court ruled, however, that where the tax is imposed if a course of conduct outlined in the law is not followed, and is not imposed if such course of conduct is followed, it is a penalty and not a tax.

To similar effect, the Court said at pages 37-38, and repeated in *Hill* v. *Wallace,* in the same volume at pages 67-68:

> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

Hill v. *Wallace* involved the constitutionality of the Future Trading Act of 1921, entitled "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes." It imposed a tax of 20 cents per pushel on every contract of sale of grain for future delivery, excepting (a) those made by farmers or farmers' cooperative associations, and (b) those made by members of a board of trade which had been designated by the Secretary of Agriculture as a "contract market." The Secretary of Agriculture was authorized to designate

boards of trade as contract markets only after they had complied with certain regulations and conditions promulgated by him, including the requirement that they admit coöperative associations to membership; that they delete their rules prohibiting rebates on commissions in the case of cooperatives; that they make and file reports of all transactions with the Secretary and submit to rules calculated to prevent the promulgation of inaccurate or misleading reports of the manipulation of prices or corners. The statute, therefore, was on the same model as the statute here at bar, —the Future Trading Act of 1921 being a statute designed to force the acceptance of Federal regulation of grain markets under the penalty of a 20 cent per bushel tax for failure to comply with the regulations, and the present statute being an attempt to coerce bituminous coal producers into surrendering to Federal regulation of their prices, wages, hours and trade practices in order to obtain a "drawback", the loss of which would be in effect a 13½% tax upon their sales.

This Court, in a unanimous opinion by Mr. Chief Justice Taft, held that, under the principles announced in the *Child Labor Tax Case,* the statute could not be sustained as an exercise of the Federal taxing power. The Chief Justice said:

> "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal * * *. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade * * *. The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collec-

> tion of the tax * * *. The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power" (pp. 66-67).

The Court then referred to its decision in the *Child Labor Tax Case* and continued:

> "This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing can not be sustained as an exercise of the taxing power of Congress conferred by § 8, Article I" (p. 68).

The Court then inquired:

> "Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution?" (p. 68).

Finding that on its face the statute did not purport to be a regulation of *interstate commerce* but only to be a regulation of local boards of trade, as was shown by its very title (259 U. S., p. 68), the Court declared the whole statute unconstitutional.[4]

[4]In the *Child Labor Tax Case* and in *Hill* v. *Wallace,* there were *two* rulings made by the Court from the face of each of the statutes (1) that the "tax" was not a tax but a penalty to enforce compliance with regulations, and (2) that the regulations were beyond the power of the Congress under the Commerce Clause. On this tax point, and for the moment, the cases are relied upon for the first of such findings only.

The principle thus applied in *Hill* v. *Wallace* has also "complete application" to the case at bar. Here, as there, the statute shows on its face and by its title that it is not for the purpose of raising revenue but is for the purpose of compelling submission of coal producers to the regulations for the conduct of their business which are set forth in great detail in the Act.

The rulings in these cases have never been questioned or qualified in any way by this Court, but on the contrary have recently been extended to cover cases within their principle although not in all respects similar. Thus, in *U. S.* v. *Butler,* the doctrine was applied although the attempt was not to regulate the conduct of the person taxed, as it is under the instant statute and was under the statutes involved in *Child Labor Tax Case* and in *Hill* v. *Wallace.* To rule that the tax in the instant case, which is not laid upon every person who produces coal, but only on those producers who refuse to submit to Federal regulation of their wages, hours and sales prices, among other things, is not a true tax is but to follow the settled rulings of this Court in *Hill* v. *Wallace* and *Child Labor Tax Case* on the indisputable proposition that where the statute on its face purports to regulate the conduct of the person subjected to the tax, it is a penalty and not a tax; that it cannot be sustained under the taxing power and can in no event be upheld unless as a penalty to enforce a regulation which is itself valid under the Commerce Clause and the Fifth Amendment.

The circumstance that in the Guffey Act the tax is in form laid equally on all producers of bituminous coal, but with a drawback simultaneously credited to those who assent to the Code, of course cannot serve to distinguish