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CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER, PETITIONER

v.

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

No. 649

R. C. TWAY COAL COMPANY, ET AL.

v.

SELDEN R. GLENN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, ETC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SIXTH DISTRICT.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

It is not the intention of the Commonwealth of Pennsylvania in filing this brief to retrace the steps or cite the decisions so ably presented to your Honorable Court by the Attorney General of the United States, but rather to make known to this Court the position of the Commonwealth of Pennsylvania on the question involved.

This proceeding is one of vital concern to the State of Pennsylvania, since upon its outcome will depend whether a great industry shall be rehabilitated, stabilized and put on a firm foundation or permitted to be destroyed to the ruination of not only the coal operators and labor, but many communities and citizens of Pennsylvania as well.

The Commonwealth of Pennsylvania, as the largest single producer of bituminous, feels it essential to press upon this Court the consideration of the following points:

1. Some form of governmental regulation is indispensable not only to save the industry, but other disastrous consequence of the states involved, as well as the nation.
2. Because of the number of states concerned and their separation geographically, it is impractical for them to act jointly, and, acting individually, would be ineffective.

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I.

Some form of governmental regulation is indispensable not only to save the industry, but other disastrous consequence of the states involved, as well as the nation.

The ills of the bituminous coal industry are long standing. They are not matters of recent development nor a temporary situation due to the depression of other industries, for at the very height of the prosperity era of 1928 and the spring of 1929, the bituminous coal industry was in desperate straits.

Perhaps the best summary of its condition appears in the language of the present Chief Justice of this Court in the case of APPALACHIAN COALS, INC. *v.* UNITED STATES OF AMERICA, 288 U. S. 344-378, 77 Law Ed., page 825, where, on page 361 of the United States Reports and on page 830 of the Law Edition, the following language appears:

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

And on page 372 of the United States Reports and on page 836 of the Law Edition, the learned Chief Justice further described the inevitable result of the condition portrayed in the following language:

> "* * * The evidence leaves no doubt of the existence of the evils at which defendants' plan was

> aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. * * *"

And in a graphic summary of the economic conditions, the Court found that numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed and the states in which coal producing companies are located have found it increasingly difficult to collect taxes.

While this language described the conditions of the Appalachian coal field in Virginia, West Virginia, Kentucky and Tennessee, conditions there described are equally applicable to conditions in the State of Pennsylvania and emphasize the fact that the tragedy has become a national one.

Before a subcommittee of the Committee on Interstate Commerce of the United States Senate, Seventy-Fourth Congress, from February 19 to March 7, 1935, the summary of Doctor Alexander Sachs, Chief of the Research and Planning Division of the N. R. A., given at the Coal Code hearing on August 12, 1933, was read into the record in the following language (see page 179 of the proceedings) :

> "The coal industry thus presents the spectacle of an overdeveloped, undermanaged industry, in continuous state of internal and external economic struggle.
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> "The secret, if it is a secret after years of publicity given to the problems of the coal industry, lies in the fact that, under the regime of competitive individualism to the limit, no one mine, no one company, could alleviate the handicaps alone. In fact, any forward step made by one mining company, good by itself, brings about conditions that are prejudicial to the industry as a whole and makes the inherent contradictions only more acute.
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> "And even if by the move of a magic wand the demand for coal should double, and the partly idle mines begin to cover the financial charges on their past excessive investments and even show some profit, then bankrupt mines will be reopened and new mines will be opened and the competitive war will go merrily on. Then retrenchment, wage cuts, strikes, unemployment, cutthroat competition, bankruptcies commence all over again. The old squeaky merry-go-round will again commence its cycle; too many mines, too many miners, too much equipment, too little management, no planning, no profits, no living wage."

It thus appears that the fundamental evil of the coal industry is the overexpansion or excess which gives the industry a productive capacity of at least 50% more than the market demand. This results in a surplus, potential at all times, frequently actual, which overhangs and demoralizes the market.

The natural result was a struggle for markets and for tonnage contracts, bringing about an excessive competition, in which large consumers secured their coal at prices far below cost of production. The producers and their investers have naturally suffered, but the principal victim is and has been the mine worker.

The labor charge constitutes some 65% of the production cost of coal, which made wages the immediate object of competitive struggle. The vicious downward spiral of prices was followed by renewed and continued wage cuts. The resistance of the mine workers' union was met with injunctions, mine guards and "yellow dog" contracts. Wages dropped as low as $1.25 a day in some fields. Generally, as the union was driven out, the workers were denied the right to their own checkweighmen. Hours were lengthened from eleven to twelve per day. The miserable wage was further "sweated" in many instances by the practice of compelling miners to trade at company stores.

Fortunately, the National Recovery Act served for a short while, through its code system, to mitigate conditions. Coal prices began to rise and with them wages. But the situation was only temporary, and even before the codes were abrogated by the Shechter

decision, under cover cutthroat competition again developed and the old evils were beginning to reappear. One thing, however, was demonstrated by the National Recovery Act and the codes adopted thereunder, and that was conditions could be remedied and the industry stabilized if a uniform authority were empowered to nationally fix minimum prices and require fair treatment of labor.

The necessity of regulation is recognized by industry itself, and is demonstrated by the attempt of a number of operators in a group of states to eradicate destructive competition and price cutting through a joint selling agency, but this system ran counter to the anti-Sherman Act as held in the case of APPALACHIAN COALS, INC. *v.* UNITED STATES OF AMERICA, 288 U. S. 344-378, supra.

II.

Because of the number of states concerned and their separation geographically, it is impractical for them to act jointly, and, acting individually, would be ineffective.

Were the bituminous coal fields contained in a single state, the situation might be remedied by the laws of that state. But here we have an industry scattered through some twenty-three different states widely separated as Pennsylvania, Texas and Washington, yet more or less competitive. These states cannot act singly, nor can they act in unison by compact. The sheer number thereof make impossible the negotiation of a compact.

Pennsylvania, New York and New Jersey, for some six years, endeavored to negotiate a compact concerning the allocation of the waters of the Delaware River, and failed. If three contiguous states located on the same watershed could not negotiate a compact under such circumstances, how futile and impossible to expect twenty-three states so widely scattered as those set forth in Section 4 of the Guffey Coal Bill to succeed.

The interstate commerce clause of the Federal Constitution prevents each state from solving its own problem separately. The commerce clause does not bar a state from fixing minimum prices in intra-state sales, but such price fixing would be wholly ineffective and would mean the absolute destruction of the industry within the state, because its consumers in that state would naturally buy their coal from producers without the state who could not be prevented from shipping their coal in, nor compelled to pay an equalizing tax.

Thus, for example, if the Commonwealth of Pennsylvania were to fix a minimum price of $3.00 a ton at the mine, the consumers in this State would be offered coal from other bituminous producing states delivered f. o. b. at half that price and Pennsylvania could do nothing to prevent it.

This Court, is therefore, urged to recognize the fact, namely, that bituminous coal, by reason of its production in many of the states, is a subject of interstate commerce and can and should be regulated as

such. This is apparent from the very location of the coal fields. Some are situate in subtropical and southern states where little if any, coal is needed for fuel. Some are located in nonindustrial states where the fuel needs leave an inevitable surplus. And even in Pennsylvania, great industrial State that it is, there is a substantial surplus produced beyond local needs for transhipment to other states.

In face of these facts, there can be no gainsaying that these fields produce not for local requirements, but for shipment to other parts of the country where needed. These conditions make the fact that coal is a proper subject of interstate commerce regulation self-evident.

So long, therefore, as interstate shipments are unregulated, state regulation will merely accentuate existing difficulties. If the Commonwealth of Pennsylvania should fix minimum wages or maximum hours to better the condition of its mining population, such wholesome legislation would increase the operating cost of the producers within the State and put them at a competitive disadvantage with producers in other states, because of the large percentage which labor cost bears to the cost of production.

To show that this reasoning is founded on fact, we have but to call this Court's attention to its decision of last year on the Milk Control Act of New York in the case of SEELIG *v.* BALDWIN, 294 U. S. 511, which case discloses a parallel situation.

It held that because of the interstate commerce clause, New York could not in any wise regulate the introduction of cheap milk from other states, even though its only purpose was to prevent the shippers thereof from obtaining a competitive advantage over the New York producers whose prices were being regulated for the purpose of stabilizing the milk industry and better protecting public health and welfare.

As a result of this decision, such chaos was created in the milk industry in the New York metropolitan area that the governors of seven states have appealed for federal action in order to alleviate the situation.

Another illustration supports the reasoning. In 1912, the Ohio Constitutional Convention approved an amendment giving its legislature full power over the methods of mining and marketing coal. Though this amendment was adopted by the people of Ohio, no legislature since has ever enacted a single statute pursuant to the amendment, not because of disinclination to act, but because of the absolute futility of action under such circumstances.

The Commonwealth of Pennsylvania stands on no futile claim of fancied sovereign rights, but instead welcomes the action of Congress in establishing uniformity of regulation of this sick industry so vitally necessary to Pennsylvania and its sister states. The very interstate commerce clause, which is a barrier to successful state action, should be the means under which the Federal Government should make

possible uniformity of regulation, which is otherwise impossible.

In conclusion, may we say that we regard the Guffey Coal Act as one of the most outstanding and constructive pieces of legislation in many years. Its general plan of a national commission for administration of a code containing regulations fixed by Congress; the division of the coal fields in twenty-three districts controlled by district boards selected from among the workers and operators; the requirement of submission of the orders of these boards relating to establishment of production costs and prices, for approval, to the national commission; the guarantee of fair treatment of labor and of collective bargaining, with settlement of disputes by a labor board created; the protection of the consumer against the possibility of extortionate prices through a consumers' council acting independently of any control by the commission; the self-liquidating feature of the plan; the enforcement of the regulations by means of "cease and desist" orders, subject to proper review by the courts; all make plain that this salutory piece of legislation is based on experiences of the past as well as an intimate knowledge of the needs to be corrected.

The Commonwealth, therefore, urges it to be upheld as the only way out of a situation that is fraught with grave peril not only to the twenty-three states concerned, but the whole nation as well.

If our Constitution is to continue, it cannot be interpreted to deny on the one hand, under the interstate

commerce clause, the right of the states to relieve and protect distressed industries against ruinous competitive practices from similar industries in other states because the commodity involved flows in interstate commerce, and then on the other hand, interpreted to deny Congress the right to regulate such industries in all the states with respect to practices and transactions that notoriously and directly affect the flow of that commerce.

Respectfully submitted,

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