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BRIEF:

AUTHORITIES:

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1935

NO. 636

JAMES WALTER CARTER,
Petitioner,

vs.

CARTER COAL COMPANY, et al,
Respondents.

MEMORANDUM BRIEF OF AMICUS CURIAE REPRESENTING ALABAMA PRODUCERS.

I.

STATEMENT.

This brief is filed on behalf of the following thirty-one producers of bituminous coal within the State of Alabama, whose production amounts to more than 50% of the total production of bituminous coal in Alabama for commercial sale:

ALABAMA BY-PRODUCTS CORPORATION,
AETNA COAL COMPANY,
ACTON COAL COMPANY,
ALTA COAL COMPANY,
BESSEMER COAL, IRON & LAND COMPANY,

BLACK CREEK COAL & COKE COMPANY,
BLACK DIAMOND COAL MINING COMPANY,
BLOCTON MINING COMPANY,
BRILLIANT COAL COMPANY,
CANE CREEK COAL MINING COMPANY,
C. M. MILAM, doing business as Carolina Coal Company,
CEDROM COAL COMPANY,
DEBARDELEBEN COAL CORPORATION, Trustee,
DEEPWATER BLACK CREEK COAL COMPANY,
EAST PRATT COAL COMPANY,
FRANKLIN COAL MINING COMPANY,
GALLOWAY COAL COMPANY,
HAMMOND IRON COMPANY,
HILLS CREEK COAL COMPANY,
KERSHAW MINING COMPANY,
LEHIGH COAL COMPANY,
LITTLE GEM COAL COMPANY,
MONTEVALLO COAL MINING COMPANY,
MOSS & MCCORMICK,
NAUVOO BLACK CREEK COAL COMPANY,
PARAMOUNT COAL COMPANY,
PORTER COAL COMPANY,
RED DIAMOND MINING COMPANY,
REPUBLIC PRATT COAL COMPANY,
RODEN COAL COMPANY,
SOUTHERN COAL & COKE COMPANY.

The producers represented by your petitioner include the plaintiff and the interveners in a class suit pending in the United States District Court for the Southern Division of the Northern District of Alabama under the name and style of Alabama By-Products Corporation, Plaintiff, against Harwell G. Davis, individually and as Collector of Internal Revenue of the United States of the District of Alabama, et al, defendants, No. 896 in Equity.

That suit challenges the validity under the Federal Constitution of the Bitmuninous Coal Conservation Act of 1935, and specific acts of the National Bituminous Coal Commission under color of the Act.

The legal questions involved in the cause now pending before this Court have a direct and necessary bearing upon the Alabama suit.

II.

Overt and Illustrate Action Under Color of the Guffey Act is the Basis of this Brief of Amicus Curiae.

When the suits challenging the Guffey Act which are now pending before this Court were instituted, there had been no overt action by the National Bituminous Coal Commission in the administration of the Act. The suits were predicated upon the intrinsic invalidity of the Act on its face and the certainty of the enforcement of the tax and the general provisions of the Act.

The administrative acts and tax demands shown in the Alabama suit support the averments of the suit in the District of Columbia and illustrate in a concrete manner the nature of certain phases of constitutional violation inherent in the Act, on its face.

At the time of the institution of the Alabama suit and intervention by the producers on behalf of whom this brief is filed, the Commission had been appointed and organized, it had promulgated the Code, had prescribed a form of acceptance of the Coal Code, published rules of procedure for the creation of the District Boards and was functioning generally under color of the Act. The board for the district prescribed by the Act, which included the entire Alabama coal field, had been designated and was functioning.

By the time of the Alabama suit, as will appear from excerpts from the bill set out infra, p. 32 in the Appendix the following actual occurrences or overt actions under color of the Code or the Act had taken place, inter alia:

1) The District Board for District 13 (including the Alabama mines) had ascertained and announced a minimum price schedule effective instanter; and had filed the schedule with the Commission. An immediate effect of this minimum price schedule was to deprive Alabama producers of markets, wholly within the State, by reason of the fact of competition from other districts by producers who were not bound to a competitive minimum, that is, producers who had not even conditionally accepted the Code and were ignoring or attacking the

validity of the Act. There has not, moreover, been filed any minimum price schedule outside of District 13 and the Alabama operators have no means of requiring it.

The effect of minimum price fixing on coal, with relation to competitive fuels and hydro-electric power, will be mentioned below as to its direct effect on the Alabama industry.

2) The plaintiff in the Alabama suit and others had, *prior to the adoption of the Act,* entered into a marketing agency agreement of the type found reasonable and unobjectionable in *United States v. Appalachian Coals, Inc.,* 288 U. S. 344. The operation of the agreement had proven helpful and in the public interest in the direction of sound stabilization and avoidance of unfair and wasteful practices within the industry both as to interstate and intra-state commerce in bituminous coal produced in Alabama, while leaving the industry fully competent to meet aggressive competition from outside the industry.

Section 13 of the Act purports to invalidate such agreements unless approved (on some unknown test) by the Commission.*

Being desirious of exercising the reasonable right of self-help approved as not offensive to the anti-monop-

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*Section 13 of the Act is as follows:

"Sec. 13. Any combination between producers creating a marketing agency for the disposal of competitive coals in interstate commerce at prices to be determined by such agency or by the agreement of the producers operating through such agency, shall be unlawful as a restraint of interstate trade and commerce within the provisions of the Act of Congress of July 2, 1890, known as the Sherman Act, and Acts amendatory and supplemental thereto, unless such marketing agency shall have been approved by the Commission as provided in section 4 of this Act."

oly acts, producers representing approximately 70% of the commercial bituminous production of Alabama had originally established the agency before NRA, suspended it during NRA, revived the arrangement after the Schechter decision, and were proceeding satisfactorily with the administration of this sound, voluntary program of self-help in a competitive market when Section 13 became effective, purporting to invalidate all such agencies unless and until approved by the Commission.

In order to avoid the risk or even any question of violation, although convinced of the invalidity of the Act and of Section 13, the marketing agency, operating in its own name as a business corporation, requested formal approval as such agency by the Commission, within the purview of Section 13. The application has since been denied by the Commission "without prejudice." See comment, *infra.* Thus the Act, combined with the exercise of this arbitrary discretion by the Commission, leaves the producers of bituminous coal in Alabama seriously handicapped in going forward with what appeared to be a common sense effort to avoid wasteful practices while leaving open a free market.

3) The Commission had issued bulletins* and the departments of the federal government, pursuant to Section 14 of the Act, had issued instructions to their purchasing agents to refrain from purchasing coal from producers who had not accepted the Code. For a representative boycott notice issued by the government, see Exhibit D to bill of complaint in the Alabama suit; Ap-

*November 16, 1935; November 18, 1935; December 2, 1935; December 18, 1935.

pendix, *infra,* at p. 48. See also excerpts from opinion of the Comptroller General to the Secretary of Commerce dated February 24, 1936, Appendix p. 57.

III.

"Acceptance" of Code Under Compulsion and Under Protection of Restraining Order.

The bill in the Alabama suit shows acceptance of the Code with adequate reservations, accompanied by a written statement to the Commission that the acceptance was under compulsion. The form of acceptance prescribed by the Commission and the general form of letters of transmittal used by Alabama producers who were compelled by the threat of the tax penalty to yield obedience for the time being set out in the Appendix, *infra,* pp. 53, 55.

The restraining order of the Court in the Alabama case takes cognizance of the continuing necessity that those accepting the Code under business compulsion and under threat of a tax liability so heavy as to break down resistance should be assured of a status of no prejudice in yielding obedience and avoiding risk of penalties pending adjudication of the validity of the scheme. (Appendix *infra,* p. 51.)

IV.

Scope of this Memorandum Limited to Impact of Administration of the Act and Code Upon Those Who Have Accepted the Code Under Compulsion and in Order to Avoid Penalties.

This memorandum brief is confined entirely to a discussion of the impact of actual administrative action under color of the Act upon the constitutional rights of the plaintiff and interveners in the Alabama suit who have "accepted" the Code, under compulsion, and with full reservation of the right to challenge the validity of the Act and of the Code and any administrative order of the Commission. No acceptance of benefits or affirmative request for grant of any right not already held is involved on part of those accepting the Code under the conditions stated. The form of acceptance prescribed by the Commission disclaimed waiver or estoppel. See form, *infra,* at page 53.

The affirmative provisions of the restraining order have been stated. The element of compulsion based on the tax penalty and upon Sections 13 and 14 of the Act are obvious.

Under these circumstances when, on or about January 2nd, 1936, the Collector of Internal Revenue at Birmingham began issuing his demands for payment of the tax imposed by Section 3 of the Guffey Act, following promulgation of minimum prices by the District Board under color of the Act, and non-action upon the marketing agency application, the suit mentioned above was instituted. It had become obvious that the Alabama in-

dustry could survive only if the rigid program made mandatory by the Act and unavoidable by the penalty were held invalid.

The suit challenges the constitutional validity of the Guffey Act in the light of specific transactions and specific interferences under color of the Act.

Brief reference will be made to certain of the economic facts underlying the bituminous coal industry in Alabaam and its admitted position of peril as much from competition without as from within the industry.

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The industry data necessary to an understanding of the relation of the industry in Alabama to the constitutional questions involved are readily obtainable from official reports. Reference is also made to the condensed statement of the facts in the bill (Appendix, *infra*). The facts are presented in broad outline merely and involve no possible controversial issue of fact. While accentuated in the Alabama field, these competitive conditions are actually or potentially present in every field. They were in part expressly recognized in the opinion in *United States v. Appalachian Coals, Inc., supra.*

There are in the Alabama coal field thirty-five producers of commercial coal who ship their product by rail.

In addition to the producers of coal for commercial sale there are in this field five producers who consume in whole or in part the output of their mines in furnace or by-product operations in Alabama.

Suits challenging validity of Act. All producers of coal in Alabama who market or ship any part of their tonnage by rail and many so-called "truck" operators have instituted and there are pending in the Northern District of Alabama suits against the Collector of Internal Revenue, the United States District Attorney and the District Board designated under color of the Guffey Act. The object of the suits is to challenge the constitutionality of the Act, to enjoin enforcement of the penalty and tax imposed by the Act (Section 3), etc. A schedule of these units is set out in the footnote.*

Production and Market—Alabama Coal.

During the year 1935 the production of bituminous coal in Alabama was 8,412,000 tons, of which 2,800,000 tons was captive coal, that is, coal consumed by the operators producing the coal in plants for the manufacture of iron or steel, coke or by-products, and at no time entered the market as coal either in intrastate or interstate commerce.

Of the total coal produced in Alabama, not less than 86% was consumed within the State of Alabama or de-

*1) Alabama By-Products Corporation vs. Harwell G. Davis, at al, No. 896. In this suit interventions have been allowed admitting 30 additional parties as parties plaintiff.
2) Alabama Fuel & Iron Company vs. Harwell G. Davis, et al, No. 880.
3) Woodward Iron Company vs. Harwell G. Davis, et al, No. 880.
4) Sloss-Sheffield Steel & Iron Co. vs. Harwell G. Davis, et al, No. 889.
5) Birmingham Cahaba Coal Co. et al vs. Harwell G. Davis, et al, No. 893 (twenty plaintiffs).
6) Newcastle Coal Company vs. Harwell G. Davis, et al, No. 883.
7) Little Cahaba Coal Company vs. Harwell G. Davis, et al, No. 885.
8) Stith Coal Company vs. Harwell G. Davis, et al, No. 885.
9) Blocton Cahaba Coal Company vs. Harwell G. Davis, et al, No. 887.

livered within the State to railroads for their own use. Practically all coal mined and sold within the State, whether eventually consumed beyond the State or not, which moves by rail, is sold to the purchaser f.o.b. railroad cars at the mine, for such routing as the purchaser may elect.

Approximately 48% of the commercial tonnage produced in Alabama is railroad fuel sold and delivered generally to the consuming railroad or to its connection f.o.b. mine in the State, and is distributed by the purchasing railroad at its various coaling stations in or out of Alabama as it may determine.

It is under these circumstances that less than 14% of the coal produced in Alabama actually crosses the State line before consumption, except the indeterminable but relatively small amount carried beyond the State by the railroads in their operations.

Significance of Inclusion Under Guffey Act of Captive Coal.

The Guffey Act is popularly known as a "little NRA" as to the bituminous coal industry. The NRA coal Code was promulgated as a Code of Fair Competition. Competition being its organic and necessarily its constitutional basis, according to the recitals and legislative history and the frame-work of the Act, production of captive coal was not included under the NRA Coal Code at all.

The inclusion of captive production under the Guffey Act is, of itself alone, conclusive that a proxi-

mate aim and impact of the Act is to regulate production as well as commerce. The captive mine, which markets no coal, is obviously not interested in fair competitive sales practices or prices or the expensive machinery for the ascertainment of cost and establishment of prices, or in maintaining any part of the elaborate machinery of the Coal Code. The subjection of captive production to the Act is plainly directed at forcing captive mines into compliance with the *labor provisions* of the Code, since the producer of captive coal has no remote interest in any other phase of the Act.

The pending Alabama suits scheduled above include suits by producers of captive coal, which, produced and consumed wholly within the State, amounts to 16.1% (1935) of the total bituminous coal production in Alabama.

It is clear that regulation under the Commerce Clause has not even a putative relation to the mining of coal for final consumption by the producer at its own mill, begun and ended in a single county in the State of Alabama. The forced acceptance of the Code, forced contributions to its support, forced adoption of cost accounting systems, forced return of elaborate cost studies, all required of captive mines, alike compel the conclusion that a basic and inseparable purpose of the Act is regulation of production and employee relations and not interstate commerce. There is no interstate commerce in Alabama in captive coal, nor any commerce at all.

This violation of federal function by including the captive mine is a matter that, under the Guffey Act, vio-

lates the rights not only of the captive mines complaining but of the commercial producers, arising out of the mandatory basis of price determination established for commercial sales by the Act.

It is a matter of judicial knowledge that uniform running time is by far *the greatest* factor in the controllable cost of coal production. The manufacturing industry which mines its own coal adjusts its output so as nearly as practicable to admit of full time operation in the interest of economy. In the Alabama coal field the captive tonnage, as stated, was 2,800,000 tons for 1935, compared with 5,612,000 tons of commercial coal. The use of captive tonnage in the determination of the cost of production of the pricing area established under Section 4, Part II (a), is obviously a factor wholly abritrary to the fixation of prices for commercial operations, which only under rare conditions can manage full time.

The Arbitrary Fixation of Minimum Prices.

This vice in the Act, resulting from compulsion and arbitrary action, penetrates all of its provisions. The most glaring illustration is the extraordinary theory on which compulsory price fixing is required by the Act.

This memorandum does not argue the circumstances under which price fixing might be said to have some rational and positive relation to the regulation of interstate commerce. If, for example, Congress permitted in any particular industry a wholly voluntary combination of producers (unaccompanied by statutory compulsion or economic compulsion to force the combination, as was the

case in AAA), some form of public sanction or regulation of prices might be appropriate.

No such case is presented here. The combination is forced by the duress of the statute, by Sections 3, 13, 14, and not by the voluntary, uncoerced action of the members of the industry who acquiesce.

The fact that a large number of producers advocated the passage of the Act, asserted that *compulsory* price fixing was indispensable and now willingly and unconditionally yield to the fixing of prices for themselves and their competitors, makes the statute none the less compulsory as to all. It merely adds unwarranted compulsion of individuals to unconstitutional compulsion by the government.

Aside, however, from the lack of any rational necessity for regulating the prices for sales of bituminous coal, except as arising out of a combination in restraint of trade forced by the Act itself, there is the certainty that the rule of thumb adopted as the *basis* for price fixing by the Guffey Act (average cost per ton, run of mine, throughout the district) is wholly uneconomic and arbitrary.

As to the Alabama coal industry, that method is peculiarly and demonstrably inept; so arbitrary and unrelated to the urgent necessity of the industry in Alabama for a flexible price schedule related to the competitive necessities of the Alabama coal field as to force condemnation of the standard as a taking of property in violation of the Fifth Amendment. The same conclusion is obvious from the face of the statute. We refer to the con-

dition confronting the Alabama industry as a convenient factual illustration of the extraordinary economic sabotage assured by the statutory price mandate.

It is obviously no answer to the argument which forces the conclusion stated to say that it is only those who accept the Code who are required to abide by the minimum price and that they have consented to the sabotage of their business.

It is obvious that those who acquisce and become bound by the Code do so only because

(a) they yield to the tax penalty, to the boycott of Section 14 and to the threat under Section 13;

(b) or because they assume that their competitors will be forced either to become members and charge the same minimum prices, or be subjected to the addition to their legitimate cost of the tax penalty and thus prevented from underselling.

It would be incredible that any producer of coal would agree to a minimum price for his own coal while leaving his competitor free to take all of the business by cutting that minimum a nominal amount but enough to capture the business.

V.

The Arbitrary and Unworkable Basis of Compulsory Price Fixing has Forced all Producers of Bituminous Coal in the Alabama Field who Ship by Rail to Challenge the Validity of the Guffey Act.

The attitude of the producers in the coal field of Alabama is not one of abstract opposition as a matter of principle to public regulation by the state or federal governments, either as to the matter of sales or markets or employee relations. The producers in that field have no desire to perpetuate a status of freedom in order to be wasteful or unfair. The existing status of the industry in Alabama demonstrates, both as to labor and industry relations, that there is no such objective.

As to labor, it is notorious that wages and hours have been settled until April 1, 1937, by district agreements with the United Mine Workers of America, entered into by 39, that is, by all save one of the rail shippers of coal in Alabama and accepted by that one operator who has not adopted the district agreement with that union.

As to industry relations, the members of the industry are now and for several years have been considerate and constructive in their attitude and have exhibited to a minimum degree the reckless impulses toward wasteful competition to be expected in a market of rapidly diminishing demand and great excess in capacity, accompanied by heavy reserve investment. As to federal relations, it is significant that when the NRA Coal Code was pro-

mulgated and the wage scales were established by or under sanction of the Administration, the industry in Alabama cooperated, without exception, as a voluntary matter; as with a mechanism inviting industrial self-help under public sanction which, under the conditions then prevailing and because of its wholly temporary and emergency character held no threat of permanent disaster. It was recognized as an experiment which might well be tried. It was tried faithfully and sincerely by the entire district comprising the Alabama field, and it did not work.

The opposition of the Alabama producers to the compulsory system now established under color of the Guffey Act is based on that experience with federal control and upon the plain design of the Act to standardize production and marketing of bituminous coal on a national basis far beyond the practice under NRA and to apply illusory and wholly unworkable standards both to employee relations and the marketing of coal.

This purpose is being executed in all respects as if the industry were without competition outside of its own ranks. The Act is predicated, so far as the Alabama coal field is concerned, upon a false notion that regulation of the coal industry in all of its aspects by a federal Commission with admittedly arbitrary powers can suspend competition for the narrowing market and yet leave a private business an opportunity to survive. The assumption would be fallacious as to the Alabama coal field, even if the federal government had the power to regulate production, allocate output and fix prices within this in-

dustry. It is so fallacious from an economic standpoint as to be demonstrably arbitrary in a constitutional sense.

The Alabama coal industry has suffered great curtailment of its output, due in part to the depression common to all coal fields but principally to unsuccessful competition with other fuels and forms of energy. First there was hydro-electric power, developed with great energy and sound financial and engineering skill throughout the market area. Second, fuel oil for bunker use, followed by the introduction of natural gas into the heart of the industry's remaining market; and finally, the extraordinary casus of government competition through its vast TVA program.

The Guffey Act is, so far as this district is concerned, blind to the basic problem of the Alabama field. It takes no cognizance of the real competition which coal produced in Alabama must meet. It shackles the industry by leaving wholly out of consideration its basic necessity that, in order to survive it must fairly compete with the other fuels and forms of energy.

The illusory national synthesis as to wages and hours, the wholly fallacious theory of price fixing based on average cost rather than on the price in the market of competitive fuels and forms of energy, make it conclusive that from an economic standpoint the Guffey Act is hopeless. But that basic consideration is not alone fatal to the conception, both from an economic and a constitutional sense. The use of average cost of production as a statutory yardstick as applied to the coal industry in Alabama, without reference to external competi-

tion, is viciously stupid, reactionary and so unsound as to condemn any private industry to death which is strangled by the conception. This is demonstrable. Before that, we point out a basic factor relating to outside competition which makes plain that "average cost" has no remote relation to the problem of the industry.

VI.

The Government, by the Adoption of the Guffey Act, so far as the Market for Alabama Coal is Concerned, has Made it Impossible for the Coal Industry to Compete with the Government as an Electric Utility Proprietor in Direct and Permanent Operation in the Entire Market Area of the Alabama Coal Field.

The government in the guise of the Tennessee Valley Authority is now engaged in the exploitation of cheap electricity in the heart of the Alabama coal market. Space heating, heretofore a luxury at the rates which must be charged where investment and taxes are considerations, is now being offered on a four mill basis that brings it into laborless competition with coal.

Under the Guffey Act, a government board is engaged in making minimum rates for coal which make it impossible for the industry to compete effectively with another government board exploiting the endless output of the Tennessee River power dams.

What is true actually as to Alabama is true potentially as to the Appalachian fields to the north of Alabama, suspended only as to the time of the remorseless

extension of federal subsidy into the commercial business of utility distribution. TVA has publicly announced application from more than two hundred municipalities for the twenty year contracts for distribution of TVA power.

It shocks the conscience that the federal government, even if its agency were permitted a judicial discretion, should both regulate and compete. *Tumey v. Ohio,* 273 U. S. 510, denounces that sort of conception. The executioner, paid for his task and joyous in its execution, is the judge of the fate of the citizen. Nor is there anything in the Puget Sound Case (*Puget Sound P. & L. Co. v. Seattle,* 291 U. S. 619) which countenances it.

But however abstractly indefensible is this sort of dealing, the Guffey Act does not permit the Board regulating the price of coal any discretion to permit free competition with the government even by those units in the coal industry which might be able or disposed to make a last stand against federal collectivism now established forever in their market area. The Commission must establish as the minimum price which the industry may charge, a flat and inflexible district average, *in the aggregate.* The adjustments of that basis which are permissible are mere adjustments as between sizes or classifications, based not on external or federal competition but on considerations internal to the industry.

So as to fuel oil at the ports, and natural gas. The Guffey Act does not deal with those industries; but by fixing minimum prices for coal on a basis which has no remote relation to the effective competition, it prevents

the efficient producer of coal from competing with fuel oil or natural gas because the district average cost of productions is notoriously higher than the price necessary to compete with oil or natural gas or TVA.

The viciousness of this economic solecism is that it does not permit the efficient producer to compete with this external competitor; and thus throws the competition of the efficient producer back into the narrowing market for coal; precisely as the average cost goes up automatically as production contracts and under this amazing Act forces rising prices upon industry in a time of depression. The Act is a series of vicious circles.

The arbitrary economic result is equally disastrous within the industry, in that the average cost principle chains the steam coal producer and the high price, high-grade producer of specialty domestic coal to a common disaster. The yardstick is the "weighted average of the total costs, per net ton" of the district, run of the mine basis.

Classification of various grades, sizes, uses and market destinations based on competition and allocation of total cost among these classifications is a matter fairly within the reach of voluntary initiation and agreement. As a compulsory matter it is necessarily arbitrary and insoluble. We assert that it is a task that can be performed and can rest for its justification under the Constitution only in consent.

For the reasons stated, it is manifest that the machinery of the Guffey Act is hopelessly inflexible in per-

mitting the industry to meet the competition to which we have referred. This is no abstraction.

The government in this area is converting institution after institution to gas, before and until TVA has extended its tentacles into the streets and alleys and highways by direct or controlled agencies forced by the contract to undersell any private competitor. The central heating plants at veterans hospitals where natural gas is available at low rates, at the infantry base at Fort Benning, even at the Atlanta prison where the government has land grant rates to handle coal from the nearby coal fields, and free labor to handle it, attests the story.

Under these circumstances to chain the coal industry to an inflexible, non-justiciable yardstick based on an average cost which has never been adopted as a rule of progress or survival under any recorded economic system, is not defensible as a matter of economics or the Constitution.

Fron a Constitutional standpoint, it chains all producers together.

VII.

From the Standpoint of the Price Fixing Required by the Act, There is a Radical Distinction Between the Business of a Producer of Coal and the Business of the Common Carriers Performing the Service of Transportation.

The units in the coal industry do not present the case of a business, such as that of the common carrier,

which at common law, inherent in the devotion of the plant to the public service, has from time immemorial been accepted as having no right to receive and retain, either for its individual service or in terms of the aggregate more than a reasonable return upon the fair value of the property devoted to the service. It was because of this principle alone that Congress was held to be authorized to establish rates in competitive areas higher than particular carriers might of right demand; and might impress a trust upon the excess—not for redistribution by way of donation to the weaker carriers—but for collection and expenditure in trust by the government in furtherance of the transportation service of the shipping public which paid the excess and in order that the inter-related transportation machine, as a whole, might survive in their service. *Dayton-Goose Creek Railway Company v. United States,* 263 U. S. 456.

It would be fantastic to assert that this common law limitation upon carriers can be extended to individual producers of coal; that the government can seize their private ownership for public use in any such fashion (*Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393) or declare that plant to be a public utility which is not only dominating a market but is fighting a losing struggle to have the public purchase its wares below cost.

This is not the case of transportation agencies, which may be declared to be subject to regulation as carriers only where the nature of their business (rather than any act of Congress or the Commission) placed them in that category (*Pipe Line Cases,* 234 U. S. 548).

The business of mining coal is precisely the sort of business of which it was said in *United States v. Freight Association,* 166 U. S. 290 (1897), at page 320:

> "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

The public, except in time of war, has never been confronted with any lack of coal or a threat of shortage except from conditions which were wholly extraneous to the industry; such as car shortage or the failure of supply dealers to anticipate cold weather, or similar factors unrelated to the regulation of production capacity. So obvious was the excess capacity that the original Guffey Act draft proposed to take out of production $500,000,000 worth of excess mines and their personnel. In the face of these certainties, to urge that coal mining can be made a federal utility is wholly lacking in any rational basis.

It is for these reasons that the chaining together of producers of coal in an economic lock-step by adopting their average cost as the price of the product is arbitrary and indefensible.

It is the substantial equivalent of the subordination of the rights of ownership of property to the vote of

neighboring and competitive owners (*Eubank v. City of Richmond,* 226 U. S. 137; a principle applied in *Washington ex rel. Seattle Title & Trust Co. v. Roberge,* 278 U. S. 116).

It is more obviously arbitrary than the action and the power held invalid in *Southern Ry. v. Virginia,* 290 U. S. 190.

We therefore return to the facts shown on this record and on the fact of the Act, from which it is indisputable that the individual mines are by the inflexible basis of price fixing made mandatory by the Act, chained together in palpable violation of the Fifth Amendment.

VIII.

Arbitrary Interference with the Basic Function of Management in the Matter of Freedom to Fix Prices Necessary to Meet Normal Competition Results from the Minimum Price Standard Made Mandatory by the Act.

The basic principle of the Guffey Act, which is the standard declared by the Act for the compulsory establishment of minimum prices, destroys the primary essential of private management and ownership and necessarily confiscates a basic element of value in the property and developed business.

The well planned, highly mechanized mine must under the Act fix its prices based on the cost of the marginal mines reflected in the total. As we have noted, the original conception of the Act recognized that there

was an excess of capacity resulting in diffusion of the market demand and high cost. It is notorious that regulation of working time is the basic factor in cost reduction. It was for this purpose that the original draft of the Act provided that the government should invest $500,000,000 in taking excess mines out of production. As enacted, the statute tends to perpetuate the marginal mine by reflecting its cost sheet in the obligatory price of the coal required of all producers.

The abandonment of the proposed retirement, on a large scale, of marginal properties has, of course, increased tangibly and substantially the burden of the "average cost" requirement as conceived in the original draft of the Act.

These considerations are notoriously applicable to the Alabama coal field, which is now confronted with a grave struggle to retain a fair share of its diminished market against the powerful, well established, conservatively and adequately financed and intelligently directed competition of natural gas and the subsidized and relentless competition of the Tennessee Valley Authority.

IX.

The Act is Invalid in Delegating to the Commission Arbitrary Discretion Under Section 13 to Annul Reasonable Marketing Agency Agreements Which May be Necessary and Proper Within the Range Held Unobjectionable in the Appalachian Coals Inc. Case.

A number of the producers in Alabama are of the

opinion that extension of the principle underlying the federal trade commission act would be adequate to avoid any corrupt, wasteful or unfair practices in the industry which fall within the reach of the Commerce clause. Where the business is wholly intrastate, as is 86% of the business in Alabama, it is no legitimate concern of the federal government.

But as to one conclusion there is unanimity; and that is that the mechanism of logical association to avoid wasteful and destructive practices held unobjectionable in the Appalachian Coals Case is a method which in absolute good faith and within the basic requirement of a free market, should be tried before the industry is compelled to consent to control by the federal government plainly beyond its power to compel.

They assert their constitutional right to enter into limited arrangements of that character, subject to such sanction or regulation as may be enacted by Congress having a rational relation to the matter. But section 13 is no such regulation—it is an arbitrary delegation to the Commission to vote the marketing agency up or down according to the whim of the Commission.

The refusal of the Commission to approve the agency submitted on behalf of the producers of 70% of the commercial tonnage in Alabama followed on a memorandum by Henry T. Hunt, Esq., acting general counsel of the commission dated January 26, 1936, announcing in effect his opinion that the Act contemplates the approval of such agencies only when all members of the

agency have yielded to the Code and thus transferred the function of management to the federal government. We excerpt pertinent expressions from that memorandum:

"NATIONAL BITUMINOUS COAL COMMISSION

Washington, D. C.

January, 26, 1936.

Memorandum:

To: Mr. N. W. Roberts

From: Henry T. Hunt, Acting General Counsel

Re: Alabama Coals, Incorporated

"The forwarding letter of the President of Alabama Coals, Incorporated, dated January 21, 1936, with documents attached as listed by him, constituting application for provisional approval of the said corporation as a 'marketing agency' was referred by your memorandum dated January 24. . . .

"The powers of the Commission to enforce its rules and regulations is limited to action against code members. Section 6(c) provides 'if any code member fails or neglects to obey any order of the Commission while the same is in effect the Commission * * * may apply to the Circuit Court of Appeals for the enfrocement of its order'. If marketing agencies may be composed of others than code members the Commission would be without power to enforce the rules prescribed by it. Nor could the Commission enforce its rules with regard to marketing agencies through its power to revoke code mem-

bership rules unless the members of the agency were members of the code.

"The opportunity for exemption of marketing agencies from the scope of the Sherman Act is a privilege which Congress intended should be limited to code members. It is one of the means of inducement to bring coal producers into membership. To extend this privilege to others than code members would be to destroy the privilege intended by Congress. . . .

"The Sherman Act may be held to be an Act regulating industries. By this Section Congress has further expressed its intention that combinations of producers in the form of marketing agencies should be subject to the Sherman Act unless approved by the Commission and also further expresses its intention that the members of marketing agencies which may be approved by the Commission must be code members.

"The membership in Alabama Coals is not limited to code members nor do the papers submitted show whether or not its members are members of the Code. . . .

"I must conclude and recommend that the application of Alabama Coals, Incorporated, for provisional approval as a marketing agency be denied for the following reasons: . . .

"Second: The Act requires that members of marketing agencies which may be approved by the Commission shall be members of the code. The documents submitted do not show that the 'members' of the corporation are members of the code."

Whether the Commission yielded to this plain suggestion of duress or not, it is certain that section 13, in

delegating uncharted discretion to the Commission to act for the coercive purpose suggested by its general counsel delegated discretion legislative in character.

X.

The Boycott Notices of the Federal Government Constitute an Unmistakeable Effort to Coerce Acceptance of an Unconstitutional Statute and is not in Furtherance of any Lawful Federal Function.

The fact and purpose of compulsion and the lack of relation to any federal end reflected in section 14 of the Act has been argued in other briefs and will not be extended here. It is proper to point out however that a substantial part of the market for Alabama coal is to industries manufacturing supplies or performing service for the government. The coercive nature of the order is obvious.

Forms in which the boycott has been made effective are set out in the appendix. Their intent is obvious.

Approximately 48% of the commercial coal marketed in Alabama is railway fuel. Railways have postal contracts. The enforcement of this boycott as to this railway service of the government would face the bituminous coal industry in Alabama serving the railways with immediate disaster unless those mines should avoid the death sentence of the boycott by accepting the inflexible, arbitrary and expensive mechanism of the Act.

CONCLUSION.

All of the consequences asserted in this brief are potential on the face of the Act. They are potential or inevitable as to all producing fields. As to Alabama producers they are in motion, under overt action and the results have already begun to be realized. The minimum prices filed for the Alabama District (District 13), alone of all districts, are now effective; leaving producers, both those who have accepted the code voluntarily or involuntarily and those who are challenging its validity under protection of the court, in other districts free to make prices which will take the business from the Alabama mines. The bill (section 16, infra. p. 34) sets out specific instances.

These are not abstractions. They are concrete illustrations of the working of the Act and have been presented for that reason.

Respectively submitted,

Forney Johnston,

As Amicus Curiae,
representing the
producers stated above.

Jos. F. Johnston,
Of Counsel.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

ALABAMA BY-PRODUCTS CORPORATIAN, a Corporation,
Plaintiff,

vs.

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue of the United States for the District of Alabama;

JIM. C. SMITH, Individually and as United States District Attorney for the Northern District of Alabama;

ALEX SMITH, Individually and as United States Marshal for the Northern District of Alabama;

H. T. DeBARDELEBEN, et al., Individually and as Members of District Board of District No. 13, under color of the Bituminous Coal Conservation Act of 1935;
Defendants.

In Equity, No. 896.

BILL OF COMPLAINT

* * * * * *

(16) Plaintiff is able to obtain credit for the drawback only in the event that plaintiff shall continuously yield obedience to the Code and to the orders of the Commission, notwithstanding plaintiff's conviction of the manifest invalidity of the ACT. This status is accompanied by grave consequences arising out of the fact that plaintiff and all other producers in Alabama are confronted with discriminatory enforcement of the ACT resulting from the action or inaction of the Commission in the administration of the Code. They are also confronted with lack of ability under the ACT to enter into fixed contracts at stable prices for sale of coal.

Under their acceptance of the provisions of the Code, plaintiff and other producers of coal in Alabama have yielded obedience to a schedule of minimum prices promulgated by the district board for the various classifications and sizes of coal for which the establishment of minimum prices is contemplated by the ACT. Other districts, however, have not established prices, nor has the Commission required their establishment if it has any authority under the ACT to require action. It has made an order requiring the filing of prices, by Price Area No. 1, but such prices have not been filed or established, nor is there any assurance that they will be established or observed. A substantial number of producers in said Price Area No. 1 have publicly denied the validity of the ACT, have declined to accept or yield obedience to the Code, and under the ACT would not be bound

to minimum prices even if they were established under the Code.

The result is that producers of coal not within Southeastern District No. 13 are at the present time offering coal for sale within the area or to customers normally and logically supplied from the Alabama coal field at prices materially below the reasonable price at which the coal can be produced and sold within the State of Alabama. For illustration, lump coal produced in the so-called Harlan district of Kentucky (Southern No. 2) is being sold at a mine price resulting, with the addition of freight paid by the purchaser, in the delivery of the coal at Anniston or Gadsden, in the State of Alabama, at $4.71 per ton, as compared with the f.o.b. mine price for the same quality and classification of coal prescribed by the Board for District No. 13, plus freight to Gadsden, resulting in a delivered price of $4.95 per ton.

The illustration stated is typical of like invasion of the logical Alabama market under the operation of the Code.

Plaintiff and other producers in Alabama are, moreover, confronted with like grave problems and threatened expense in the administration of the Code which will continue so long as their acceptances are in effect, and which make continued acceptance of the Code of the most doubtful expediency. Yet, so long as producers in the Alabama field are confronted with the threat of the tax penalty provided by Section 3, they are in effect compelled to yield obedience to

the Commission and the Code and thus to a substantial extent surrender the functions of management and of the ownership and operation of their private businesses, and to accept domination of their business by the federal government.

* * * * * *

(20) Plaintiff avers that all functions of the industry proposed to be regulated by the Act are beyond the lawful power of the Federal Government.

As to the coal consumed by plaintiff in its own operations, whether consumed in the production of coal or in the manufacture of coke and other by-products, the said coal never at any time enters directly or indirectly into or affects interstate commerce.

As to the coal mined by plaintiff for commercial sale, sales are uniformly made and the price determined f.o.b. railroad cars at the mine in Alabama where the coal is mined. Plaintiff is not concerned with and has no control over the use by the purchaser of such coal. The matter of its destination, use or consumption by the purchaser within the State of Alabama or beyond is subject to the exclusive control of the purchaser and does not enter into plaintiff's acts or contract.

As to coal produced and sold in Alabama and routed by the purchaser in interstate commerce, the volume thereof amounts to less than ten per cent (10%) of the production in Alabama. The sales, even as to that fraction of the production, are not

sales in interstate commerce or subject to regulation as such. The interstate commerce in such coal begins after the sale f.o.b. mine.

If the sale of such fraction of the Alabama production as eventually moves out of the State were a transaction in interstate commerce, the regulation of such sales as proposed by the ACT was and is plainly beyond any legitimate function of Congress:

a) The regulatory provisions are inseparably related to and dominated by the purpose of regulating wages, working conditions and other elements of production and not commerce.

b) The provisions plainly violate the Fifth Amendment in that they force all producers, under heavy penalty, to enter into a combination to fix prices.

c) The provisions of the ACT force producers, in order to continue their business, to accept conditions of federal control and, in effect, to acknowledge utility status which Congress could not directly impose.

d) The price fixing provisions are plainly arbitrary based upon supposed average cost of production, do not take into consideration investment or fair return, and are based upon an illusory synthesis of coal production as a national problem.

e) The areas on which the supposed district costs are based are plainly arbitrary. There is no

uniformity in conditions either as a basis for wages or prices.

f) The purpose and effect of the ACT is wholly to displace economic laws and to substitute an illusory federal control which in its essentials must be based upon arbitrary decision.

g) The ACT lays down no workable or intelligible standard for the determination of prices either within the arbitrary districts or as between districts and necessarily substitutes an arbitrary conclusion of a board for that discretion and forbearance which is an essential element of the function of ownership.

h) No standards are laid down and none are practicable, except as a matter of individual agreement, for the distribution of the aggregate district cost of production as between sizes and classifications of coal. The percentage and the market for lump, nut, and slack are variant at every operation and dependent largely upon the market and the quality or characteristics of the particular seam. Prices distributed over all grades and sizes to produce the average total run of mine cost of a district supply no standard by which the Board of another District or the Commission or the Courts could establish a fair relationship.

i) The matter of price fixing necessarily involves a judicial inquiry as to reasonableness; yet by this ACT Congress has purported to delegate to the Commission an arbitrary authority which effectively

excludes judicial review based upon the investment and circumstances of the particular producer.

j) The ACT expressly and necessarily condemns a sale of coal below cost under any circumstances where the proposed sale price is below the so-called district average.

k) The ACT expressly and necessarily condemns a sale of coal by any producer, though made at cost plus a reasonable profit, if the proposed sale price is below the minimum price promulgated by a Board or Commission without reference to the cost or circumstances of the particular producer.

l) The ACT is necessarily based upon an erroneous idea that the production and sale of coal can be declared a federal public utility.

m) This is not a case where Congress has permitted a combination of producers and thereupon, in order to avoid an unreasonable burden upon interstate commerce, undertakes to subject the price fixing of a voluntary association to some form of public approval or sanction. This is a case where Congress attempts unlawfully to force all producers into a combination in order to regulate the prices of the combination.

(21) The recitals of fact upon which the regulation of the bituminous coal industry by the ACT is predicated are inaccurate in so far as the industry in Alabama is concerned, and are palpably inaccurate in so far as any national public interest is concerned:

a) Plaintiff's business and the business of producing and marketing coal in Alabama is in all respects a private business. The State of Alabama has not at any time undertaken to declare the business of production or sale of coal to be a public utility, or to require any certificate of convenience and necessity or other public approval for the conduct or discontinuance of coal mining.

The State of Alabama has, through its laws and decisions, uniformly regarded and dealt with the ownership and transmission of coal properties, their development and operation, as a private function, and has never undertaken to regulate the business of production or sale except in relation to the safety of the workers, with reference to the liability to employees of producers of coal, along with other employers in Alabama, and with reference to the compensation of employees sustaining injury. As to regulations of that character, the laws of Alabama have dealt with the mining of coal for many years as a function of the police power of the State. That it is a function of the State and not of the Federal Government has by affirmative action by the State and by uniform decisions of the Supreme Court of the United States (in the matter of mining and production of coal) become established as a rule of property upon which the business has been developed by plaintiff and others engaging in the business in Alabama.

b) There is no threatened shortage in the production of coal within the State of Alabama to supply

any possible market, intrastate or interstate, for coal produced within the State of Alabama.

There has been no waste of natural resources of coal within the State of Alabama. Coal is mined and slod only as the market has required its production and sale.

c) From the public standpoint there is no crisis or emergency in relation to the production of coal. Except in cases, at long intervals, of shortage in railway cars and during time of war, there has existed no shortage or threatened shortage in the supply of coal within the market area of the Alabama coal fields. The problem of the industry in that field is a problem of overcapacity and of a diminishing public demand and not of shortage.

As a result of the introduction of the extensive use of hydro-electricity within the area and of electricity from steam plants located in the coal fields, of the vastly increased use of fuel oil and the introduction of natural gas generally throughout the market area of the Alabama coal field, the tonnage of the Alabama field has steadily decreased from a peak of approximately 21,000,000 tons in 1923 to less than 10,000,000 tons during 1935. There is no indication of any substantial increase in the market demand for Alabama coal. Approximately 86% of the production of coal in Alabama is consumed within the State. The Departments of the Federal Government, such as the Atlanta Federal Prison, with land grant freight rates and convict labor for handling and fir-

ing, have found it more economical to use natural gas. Like conclusion has been reached by other governmental facilities in Alabama's former market area, all enjoying land grant freight rates which favor coal, such as Fort Benning (War Department), the Tuskeegee Veterans Hospital (Veterans Administration), the Pensacola Naval Air Station (Navy), the Tuscaloosa Veterans Hospital (Veterans Administration).

Beginning in 1903, fuel oil became a competitor with Alabama coal. The Southwest railroads began conversion from coal to oil in 1915; and in 1920 the use of oil in ship bunkers became a reality. Hydroelectricity became a factor beginning in 1914, and natural gas beginning in 1928.

In 1923 there were employed in the coal mining industry in Alabama approximately 29,690 men, in 255 mines. In July, 1934, this figure was 17,706, in 76 mines.

According to the estimate of the Bureau of Mines, the recoverable coal in the Alabama coal field amounts to over 60 billion tons. At the peak rate of production in Alabama (which is plainly not to be anticipated because of the above mentioned shrinkage in market demand), there is recoverable coal in sight to supply the requirements of the peak market for 3000 years. As a predicate for any such long range nationalization of coal it is incumbent that the Federal Government should take over the ownership of

the properties and supplement its present powers of the Constitution.

There is no justificataion in the facts existing in or presently confronting the business of production, utilization and sale of coal in Alabama, for characterizing the industry or the business as a public utility even if that action were contemplated by the laws of Alabama.

(22) In so far as interstate commerce is concerned the production and sale of coal from the Alabama coal field has an even more remote relation to the public interest in the supply and marketing of coal.

There is no such nation-wide uniformity in physical or economic conditions in the production and sale of bituminous coal as underlies the theory of the ACT. Physical conditions and the cost of production, as well as competitive and market conditions, distinguish in material respects the Alabama coal field from the coal fields in other areas.

Alabama's entire production of the national bituminous coal tonnage amounts to only 2.63%. Only about three tenths of one per cent (0.3%) of the national production is mined in Alabama and consumed outside of the State. Coals from other producing areas are marketed freely within the State of Alabama, and throughout a substantial part of its market area.

Producers of coal in the Alabama coal field have not at any time so conducted their business as to undersell or dump coal in a manner or with the ef-

fect of encroaching upon any legitimate market area of any other producing field.

There is upon the facts no sound economic basis for the assumption that the production and marketing of coal can, so far as the Alabama coal field is concerned, be dealt with on any uniform national synthesis relating either to the regulation of hours or wages or prices.

The commercial coal seams in Alabama vary greatly in thickness, ranging from 24 inches up to 6 or 7 feet, interspersed with a wide variety of partings, accompanied by variations in dip, from self-draining mines to adverse pitches of 60 degrees. The seams are frequently accompanied by rolls and faults, necessitating heavy grades, and frequently three or four systems of transportation. Varying amounts of water have to be pumped from the working faces, reaching a maximum of 16 tons of water required to be pumped for every ton of coal produced.

The inherent impurities in the coal uniformly require the washing of the coal in preparation for the market. This fact, together with the thinness and character of the seams, results in a high capital investment per ton of capacity, and high maintenance and operating costs in the Alabama coal field.

The conditions in that field require informed and intelligent local consideration and a high degree of individual discretion, consideration and forbearance. The problems of the industry in Alabama can not be met by arbitrary standards, remote federal control,

or illusory national rules of thumb, such as proposed by and inevitable under the ACT.

* * * * * *

(25) In addition to the compulsion of the Code provisions set out in Section 4 of the ACT and made mandatory upon plaintiff and other producers in Alabama by the tax-penalty, there are a series of regulatory provisions which have no legitimate relation to any function of Congress, are inseparable from the regulatory purpose of the ACT, and are plainly illegal and invalid.

a) Section 10 purports to authorize the Commission to require an elaborate series of statistical reports, to subject producers to heavy cumulative penalties for failing to file same, the validity of which can not be determined, in case of bona fide dispute, except after they had accrued in a flat and arbitrary amount.

b) Section 12 suspends the right to make contracts.

c) Section 13 purports to deny to producers the right to enter reasonable agreements, lawful as to all industries under the principle of *Appalachian Coals, Incorporated, v. United States,* 288 U. S. 344, except as to members of the bituminous coal industry, subjects their reasonable agreements to arbitrary approval or disapproval by the Commission, has been interpreted by the Commission, by General Order No. 4 (Exhibit C) as making agreements eligible for its approval only when all parties to the agreement are Code mem-

bers. Said section and its arbitrary interpretation by the Commission as proposed by its orders already promulgated are so arbitrary as to be violative of the Fifth Amendment, depriving plaintiff and other producers who desire to enter into reasonable agreements for the avoidance of wasteful and unfair methods and practices of their right and duty to that end.

Said Section 13 also unlawfully delegates to the Commission both the legislative duty of Congress to prescribe legislative standards and the judicial duty and authority of the courts to determine what is or is not an unfair practice subject to denunciation in the ostensible regulation of commerce.

Plaintiff and other producers of coal in the State of Alabama conceive that it is essential that the principle of just and fair trade agreements, voluntary in character and adapted to the conditions of particular marketing areas, within the principle heretofore approved by the Courts, are indispensable both in the interest of major industries and the public. Plaintiff and other members of the industry in Alabama desire the privilege and opportunity to enter into such voluntary arrangement, free from the regulations national in scope, necessarily unrelated to the problems intended to be met by the agreement and subject to approval or disapproval by the Commission on a basis which must necessarily be arbitrary.

d) Section 14 of the ACT penalizes those who shall not subject their business to federal control by loss of all opportunity to supply coal to agencies or

even privies of the federal government. The procedure to bring about this penalty is sufficiently shown by Exhibit D hereto. The provision is obviously arbitrary and in violation of the Fifth Amendment and has no legitimate relation to the regulation of commerce. The Commission has taken effective steps to make the provision effective and the members of the District Board propose to make it effective against producers not accepting and complying with the Code and otherwise.

(26) Plaintiff avers that the ACT in its entirety is necessarily violative of the Fifth Amendment, in that it subjects the business of the coal producer and the use of his property and investment to arbitrary regulation by a Commission of the Federal Government which is not and can not possibly be informed of or exercise the flexibility necessary to meet the constantly changing problems of the business. No member of the present Commission has lived in or has had any experience with the problems of the Alabama coal industry. However earnest their desire to inform themselves, it is inevitable that under this ACT, in order to obtain measurable consideration of its problems, the producers in Alabama would not merely be obliged to become and remain members of the Code but to maintain constant representation in Washington. It was only by chance that the defendant members of the Board for District 13 ascertained that because of some misunderstanding the Commission had determined to request the Attorney General to proceed against the Alabama producers for un-

known departures from the Code or the ACT, referred to in Section 23, *supra.*

The experience of the Alabama producers under the NRA Bituminous Coal Code demonstrated the continuing necessity of representation in Washington. The cost of the NRA was excessive, necessitating contributions amounting during the period of its life to over $100,000 by producers for Division 3 (Division 13 under the present ACT) under the Bituminous Coal Code. In addition to the heavy cost of administration by the District Boards, producers are confronted with the tax imposed by the ACT, which in District 13 can not be passed on without further loss of market.

For these reasons plaintiff avers that the underlying conception of the ACT, the severe penalties intended to force compliance, the basis of regulation, and all substantive provisions of the ACT are, as above stated, transgressions of any legitimate function of Congress, are violative as to plaintiff and producers in Alabama of the Fifth Amendment, are void as delegations of legislative authority and as an attempted limitation upon judicial functions.

* * * * * *

EXHIBIT D

TENNESSEE VALLEY AUTHORITY

Knoxville, Tennessee.

Notice to Bidders:

The following paragraphs of the Bituminous Coal Conservation Act of 1935 (Public No. 402, 74th Congress) will be made a part of all contracts entered into with the Authority:

> "(a) Any coal to be furnished to the Authority under this contract shall have been produced at a mine where the producer has compiled with the provisions of the Bituminous Coal Code set out in accordance with Section 4 of said Act.
>
> "(b) Furthermore, the Contractor agrees that he will buy no Bituminous coal to be used on or in the carrying out of this contract from any producer except such producer be a member of the Bituminous Coal Code set out in accordance with Section 4 of said Act as certified to by the National Bituminous Coal Commission."

TENNESSEE VALLEY AUTHORITY

(C. H. GARITY)

C. H. Garity,

Director of Purchases.

October 10, 1935.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

ALABAMA BY-PRODUCTS CORPORATION, a Corporation,
Plaintiff,
vs.
HARWELL G. DAVIS, ET AL.,
Defendants.
} In Equity

ORDER OF COURT

And now on, to-wit, this 14th day of January, 1936, this matter having come on to be heard upon petition of sundry interveners this day filed to be permitted to intervene as parties plaintiff, and upon motion of the plaintiff and of interveners for a temporary restraining order and for a preliminary injunction in the above entitled cause, upon consideration thereof and of the verified bill of complaint filed herein:

1. It is ADJUDGED, ORDERED AND DECREED that a rule issue herein requiring the defendants individually and in the various capacities in which they are acting as set forth in the bill of complaint to show cause why a preliminary injunction should not be issued against them as prayed for and set forth in the bill of complaint herein until the final hearing of this cause or until further order of this Court, said rule to be returnable on January 21, 1936, at ten o'clock A. M.

2. It is further ADJUDGED, ORDERED AND DECREED that the defendants, Harwell G. Davis, individually and as Collector of Internal Revenue, Jim C. Smith, individually and as United States District Attorney, and Alex Smith, individually and as United States Marshal be and they are severally enjoined and restrained until this Court shall have heard and disposed of the aforesaid rule to show cause from collecting or attempting to collect or taking any steps to collect or enforce, directly or indirectly, by notice, suit, information, distraint, demand, levy, attachment, forfeiture or otherwise from the plaintiff or any of the said interveners or any others who may be permitted to intervene herein as parties plaintiffs any tax, penalty, forfeiture, fine or imposition levied, assessed or accruing under or under color of the Bituminous Coal Conservation Act of 1935, either for the amount of any tax or penalty or interest appearing to be due as a result of any return made under color of said Act or for failure to make or delay in making any such return.

3. It is further ADJUDGED, ORDERED AND DECREED that the plaintiff and any of said interveners and any others who may be permitted to intervene as parties plaintiffs and coming within the terms of this order shall deposit with the Clerk of this Court on or before January 20, 1936, and from time to time thereafter, on or before the beginning of each calendar month until further order herein, a return in the form prescribed for the making of returns for the payment of the tax prescribed by Section 3 of said Bituminous Coal Conservation Act, together with the amount of money

shown on said return to be due after the application of the draw-back authorized by said section upon acceptance of the Code provided for by said Act, said returns and money as deposited pursuant hereto to abide the further order of this Court. A duplicate of all such returns shall also be filed with the defendant Collector of Internal Revenue. In lieu of depositing moneys accompanying said returns, the plaintiff and said interveners may at their election execute a bond with surety to be approved by a Judge of this Court in a principal amount equivalent to six times the amount of cash which would be payable under the first return filed as provided for herein, conditioned upon the payment of such sum in respect to said tax as this Court may direct to be paid herein to the said Collector or Marshal by reason of such tax or any penalty or interest thereon.

4. It is further ADJUDGED, ORDERED AND DECREED that the plaintiff and the said interveners shall be authorized to file or continue their acceptance of the Code as contemplated by said statute or yield obedience to said Act without being held to waive any right to challenge the validity of said Act or of said Code or of any order or requirement of the Commission established under said Act, or to terminate their acceptance without prejudice, and that the making and filing of returns as required hereby shall be wholly without prejudice.

5. It is further ORDERED that the petition for leave to intervene is granted and that the several interveners be and they are hereby admitted as parties plain-

tiffs, their intervention to be allowed in subordination to the maintenance of the suit by the plaintiffs.

GIVEN, this 14th day of January, 1936.

C. B. KENNAMER,
United States District Judge.

UNITED STATES
DEPARTMENT OF INTERIOR

NATIONAL BITUMINOUS COAL COMMISSION

Washington, D. C.

Name of Producer.....

Post Office Address.....

District No.....

ACCEPTANCE OF MEMBERSHIP IN THE BITUMINOUS COAL CODE

The undersigned, bituminous coal producer, hereby accepts the Bituminous Coal Code, formulated and prescribed October 9, 1935, by the National Bituminous Coal Commission, in General Order No. 1 of said Commission, pursuant to and under the provisions of an Act of Congress, entitled "Bituminous Coal Conservation Act of 1935".

Neither this acceptance, nor compliance with the provisions of said Code, nor acceptance of the drawback provided by said Act, shall be held to preclude or estop the undersigned from contesting the constitutionality of any provision of said Code or of said Act, or the validity thereof as applicable to the undersigned, in any proceeding authorized by said Act or any other appropriate proceeding at law or inequity.

Date this.....day of....., 193.....

.....(*Seal*)

.....(*Seal*)

.....(*Seal*)

(Note: The above form of acceptance may not be altered by the acceptors in any respect whatsoever and must be signed and acknowledged before an officer qualified to administer an oath. When in behalf of a partnership it must be signed and acknowledged by a partner thereof, and in behalf of a corporation, by the president or vice president, and attested by the secretary or assistant secretary. A form of acknowledgement conformable to the laws of the state in which the acceptance is executed shall be thereto attached.)

Attention is called to the fact that, pursuant to Paragraph 12 of General Order No. 3, an executed and acknowledged duplicate original of the above form must be mailed to the Commission at Washington, D. C., and an executed and acknowledged duplicate original thereof must be filed with (actually in the possession of) the acting deputy district secretary at least 48 hours prior to the date and hour fixed for the District Board meeting.

FORM OF LETTER TRANSMITTING THE ACCEPTANCE OF MEMBERSHIP IN BITUMINOUS COAL CODE.

Bituminous Coal Commission
Washington, D. C.

We are in receipt of form of acceptance of membership in the Bituminous Coal Code prescribed by your General Order No. 2, dated October 9, 1935.

In view of the tax penalty prescribed by Section 3 of the Bituminous Coal Conservation Act, we have no option, notwithstanding the fact that we are advised and submit that the Act is unconstitutional in its entirety, save to execute the acceptance if our property is to operate except at the risk of confiscation. We understand that it is the meaning and intent of the Commission that by accepting and yielding obedience to the Code, or participating in its functions temporarily, or by accepting drawback on the tax-penalty, we do not waive any right which we would otherwise have to contest or challenge the validity of the Act or the Code, or any provision thereof, or any order or finding of the Commission, or of any other agency established by or under color of the Code or Act and are not to be understood as entering into privity or agreement of any nature or consenting to any action, or as estopped from taking any position whatever in the matater in the future; also that we may at any time by notice to you in writing terminate and withdraw the acceptance. We are,

on that understanding, and under the compulsion stated, executing and forwarding the acceptance in accordance with General Order No. 2.

This acceptance and letter of transmittal are consistent with the conclusions and interpretation stated in order entered on October 26, 1935, after notice to the United States District Attorney and Collector of Internal Revenue from the District in the matter of DeBardeleben Coal Corporataion, Debtor, in reorganization proceedings No. 38513, in the District Court of the United States for the Southern Division of the Northern District of Alabama.

Very truly yours,

COMPTROLLER GENERAL OF THE
UNITED STATES

Washington

February 24, 1936.

A-70217

The Honorable,
The Secretary of Commerce.

Sir:

* * * * *

The requirement of section 14(b) is only for a provision to the effect that the contractor for any public work, or service, will buy no bituminous coal for use on or in the carrying out of his contract from any *producer* except a code member. Accordingly, said provision would not preclude purchases of bituminous coal by the contractor from a dealer, that is, a *bona fide* broker, jobber, commission merchant, wholesaler or retailer, as distinguished from a producer or producer's agent or subsidiary, marketing agency of producers as provided for under part I(a) of section 4, or other intermediary or instrumentality of a producer. In the case of such purchases by contractors from dealers, it will not be necessary for the Government to require that the coal be produced by a member of the code.

* * * * *

The provision in every Government contract for any public work or service to the effect that the contractor

will buy no bituminous coal to use on or in carrying out such contract from any producer except such producer be a member of the coal code as set out in the act is a requirement of law. It may not be made conditional and there are no exceptions provided in the statute. There is no legal authority for qualifying the required provision. Appropriated funds are not available for making payments under contracts for any public work or service which do not contain the provision required by section 14(b) of the act. The provision may not be modified to satisfy the desires or demands of prospective contractors.

The purchase of supplies, material, or equipment is not a contract for a public work or service within the meaning of section 14(b) of the act but a contract providing specifically for the manufacture or production of equipment where the work is to be performed in accordance with Government specifications and under Government supervision would be a contract for a "public work or service" within the meaning of the section.

You are advised accordingly.

Respectfully,

(signed) J. R. Mc CARL,
Comptroller General of
the United States.