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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER, *Petitioner,*

v.

CARTER COAL COMPANY, *et al.*

REPLY BRIEF FOR THE PETITIONER

This brief will not attempt again to discuss the points covered in our main brief, but will only cover a few specific subjects which received no attention in our main brief (as we did not think them important), but which have assumed a great importance in the Government's brief. These are notably the subjects of prior Congressional investigations and of collective bargaining. First, however, we could say a few words as to the Government's criticism of our statement of facts.

1. THE GOVERNMENT'S CRITICISM OF PETITIONER'S REVIEW OF THE FACTS

The Government's criticism (Gov't brief, pp. 70, et seq.) is based primarily upon disagreement as to what constitutes pertinent and material

facts rather than upon controversy as to what the facts are. For example, we are criticized (p. 71) for saying that there have been "no material interruptions or stoppages to commerce calling for the exercise of Federal power." We also, both in our condensed outline of the evidence (Statement, p. 7), and in its more detailed review (pp. 30-35), refer to interruptions of production resulting from strikes. Obviously, the Government and we ourselves disagree as to the legal effect of such interruptions upon the power of Congress to assume control. But if the Government by its criticism meant to imply that we had endeavored to conceal from the Court the well known fact that there had been strikes in the coal industry resulting in stopping production at the mines at which they occurred, our own review of the evidence in our opening brief is a complete answer to this suggestion. Our statement of facts in respect of these interruptions as contained in our brief is correct, and we stand on it as we do on all other statements of fact therein contained, each of which is supported by the record references by which accompanied.

We are also criticized for our statement of price fluctuations (Government brief, pp. 77, 78). Our statement that there has been no violent fluctuation in prices since 1923 (Petitioner's opening brief, pp. 35, 36) is, as therein disclosed, based upon the defendant's own evidence and the findings of the court. The accuracy of this statement the Government does not and cannot deny, but takes refuge in the fact that during the abnormal war period and post war period (1916 to 1922) there were violent price fluctuations. The abnormality of these conditions, including the fact that prices rose to abnormal heights during this

period, was specifically noted at page 31 of our brief, but obviously this period is both too remote and abnormal to form a predicate of present day legislation.[1]

At page 78 of the Government Brief it is stated that our summary of the evidence relating to wage levels was "misleading." We have reviewed what we there said and stand upon it. It is not misleading. For example, the Government opens with the inference that it was "misleading" for us to take Illinois wages of trackmen as representative; but the answer is that the Government witness Tryon himself introduced the Illinois trackmen's wages and had selected them to show the trend. (R. 311, referring to Defts' Ex. No. 4, R. 1005.) We simply followed the Government witness.[2]

Similar answers could be made to each of the points in the Government's brief. We will rest upon the record and upon our summary of it in the opening brief in respect of this and all other criticisms of our treatment of the facts which the Government brief contains.

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[1] Throughout its brief, the Government lays great emphasis upon the decline in sales realization in bituminous coal during the period since 1923, and it attributes this all to so-called destructive competition. Yet it appears from the tables introduced into the records by the Government's own experts that the decline in coal prices since 1923 is merely a decline from the abnormally high war-time prices, and that prices since 1923, even during the depths of the depression, have remained substantially above pre-war levels. Defendants' Exhibit 3-A (R. 1003) shows average annual pre-war prices ranging between $1.06 in 1905 and $1.18 in 1913, and shows that the lowest annual average prices since the post-war period have been the depression prices of $1.31 in 1932 and $1.34 in 1933.

[2] As in respect of its discussion of price decline since 1923, the Government's discussion of wage decline since that date utterly ignores the fact that it is a decline from the abnormally high wages of the war and post-war period. See, e.g., Defendants' Exhibit 4-A (R. 1006), showing Illinois trackmen's wages at $2.85 per day in 1913-1915 and $5.00 per day in 1932-1934.

II. PRIOR LEGISLATIVE AND EXECUTIVE INVESTIGATIONS, FINDINGS AND OPINION, AFFORD NO BACKGROUND OR SUPPORT FOR THE PRESENT STATUTE.

At the opening of its brief, the Government refers to 19 instances of hearings or reports during the past 23 years, by the Congress or by commissions, upon the subject of coal; and these are stated to be "the legislative background" of the present Act (pp. 15-25). If the contentions as to the limitation of Federal authority made in our opening brief are sound, then no amount of legislative or executive investigation, findings and opinion can convert the Act from one which is unconstitutional to one which is constitutional. The material relied upon by the Government does not, however, afford any factual support or legislative background for the provisions of the present statute. The sketchy treatment given by the Government to these hearings and reports suggests that its conclusions in respect of them are mere generalizations, based solely upon the fact of the existence and bulk of these hearings and reports, and this is confirmed by examination of the hearings and reports relied upon. We shall briefly discuss them, first, considered as a whole, and second, considering each separate report and hearing seriatim.

1. The hearings relate largely to Federal powers other than the commerce power, and give no support, in respect of facts or in legislative opinion, for the present statute.

The Government's argument refers to no other grant of power than the Commerce Clause as support for the statute under review, yet there are a handful of other express powers of the Federal Government under which it may take action in respect of conditions connected with the bituminous coal industry. Of the 17 investigations referred to by the Government other than the House and Senate Hearings in 1935 upon the bill which became the Guffey Act, but 6 were held before congressional committees upon interstate commerce.[1] Some of the investigations referred to were undertaken with a view to the relief of war conditions in the industry,[2] and are related to statutory regulations enacted under the war power whose constitutionality we do not challenge and which form no possible precedent for the statute at bar.[3] Others were undertaken by committees whose existence is predicated upon the Federal spending

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[1] Hearings before Senate Committee, 65th Cong., 1st Sess., on S. 2354 and S. J. Res. 77; Hearings before Senate Committee, 66th Cong., 1st Sess., pursuant to S. R. 126; Hearings before Senate Committee, 67th Cong., 1st Sess., on S. 41, S. 42 and S. 824; Hearings before House Committee, 69th Cong., 1st Sess.; Hearings before Senate Committee, 70th Cong., 1st Sess., on S. Res. 105; Hearings before Senate Committee, 70th Cong., 2d Sess., on S. 4490.

[2] Hearings before Senate Committee, 65th Cong., 1st Sess., on S. 2354 and S. J. Res. 77; Hearings before Senate Committee, 65th Cong., 2d Sess., on S. Res. 163; Hearings before Senate Committee, 66th Cong., 1st Sess., on S. Res. 126.

[3] *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253, 261, 262.

power and not upon the commerce power.[4] Some were undertaken with a view to the possible exercise of the undisputed power of the Congress to take action in the rare instance where a particular strike in the industry involves a direct burden upon interstate commerce,[5] and those particular investigations resulted in reports to the Congress that the strikes investigated did not involve a direct burden upon interstate commerce.[6]

The reason for the Government's generality in dealing with these hearings and reports is apparent when examination shows that, in the majority of instances, the Congress was not investigating interstate commerce in bituminous coal, but was investigating some other problem in the industry with a view to its correction through the exercise of some Federal power other than the commerce power. In addition to powers already mentioned, the hearings establish that the Congress, in investigating conditions in the coal industry, has also been concerned in maintaining the freedom of the mails, and in enforcing the immigration laws.[7]

In short, examination of all the reports and hearings relied on by the Government (prior to those in 1935 relating to the present Act) discloses no basis for the view that any Congress has found facts to exist requiring Federal regulation of the bituminous coal industry of the type involved in the statute now

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[4] E.g., the Committees on Education and Labor. See Hearings, 67th Cong., 1st Sess., on S. Res. 80; Hearings, 63d Cong., 1st Sess., on S. Res. 37; Hearings, 67th Cong., 2d Sess., on H. R. 11022.

[5] *Coronado Co.* v. *U. M. Workers,* 268 U. S. 295.

[6] Senate Report 321, 63d Cong., 1st Sess.; House Document 1630, 63d Cong., 3d Sess. See discussion, pp. 9-11, *post.*

[7] See p. 9, 10, *post.*

at bar; nor do any of these hearings or reports afford ground for the view that any Congress up to that of 1935 considered that any such regulations were within the scope of the Federal authority under the Commerce Clause.

2. Actions and opinions of the Executive Department prior to 1935 afford no background for the present statute, but negative the existence of the power now claimed.

Nor has there been any suggestion from the Executive Department of the Federal Government, prior to 1935, that the Federal power under the Commerce Clause, or under any other clause of the Constitution, extends to the regulation of the bituminous coal industry in the manner provided in the statute presently under review. On the contrary, although Chief Executives of the United States have repeatedly been called upon to protect the States against domestic violence [1] in the case of strikes in the bituminous coal industry as well as in other industries, they have consistently taken the position that the Federal power stops far short of the provisions of the present statute.

Thus, President Theodore Roosevelt, speaking of Federal intervention in the anthracite strike of 1902, stated:

> "There was no duty whatever laid upon me by the Constitution in the matter, and I had in

[1] Const., Art. IV, Sec. 4:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

theory no power to act directly unless the governor of Pennsylvania or the legislature, if it were in session, should notify me that Pennsylvania could not keep order, and request me as commander-in-chief of the army of the United States to intervene and keep order." [2]

President Wilson, writing in relation to the Colorado coal strike of 1913-1914, pointed out:

> "It is not the duty of the United States to take the place of the State authorities as a police force but merely its duty to secure the State against insurrection until the State sees its way clear to resume its sovereign authority." [3]

In relation to the same strike, President Wilson wired the Governor of Colorado:

> "I shall not, by the use of troops, or by any attempt at jurisdiction, inject the power of the Federal Government into the controversy which has produced the present situation. *The settlement of that controversy falls strictly within the field of State power.*" [4]

President Harding, addressing representatives of operators and miners in connection with the proposed settlement of the coal strike of 1922, said:

> "I hold no specific authority under which to admonish you, but I do have the right to invite your immediate attention to a situation which deeply concerns the country, the solution of which you collectively owe to the American people * * *. The Government has no desire to intrude itself into the field of your activities." [5]

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[2] Roosevelt, Autobiography, p. 531.

[3] Letter to John D. Rockefeller, Jr., dated April 29, 1914, in Ray Stannard Baker, *Life and Letters of Woodrow Wilson,* Vol. IV, p. 389.

[4] *N. Y. Times,* April 29, 1914.

[5] *Coal Age,* Vol. 22, p. 27.

We know of no instance of any President acting contrary to these sound views, prior to the Spring of 1935.[6]

3. The hearings classified by the Government as relating to strikes and collective bargaining.

Of the 19 hearings listed by the Government, 5 are referred to as investigations of strikes arising from failure of producers to recognize the right of collective bargaining (see Government brief pp. 17-19; p. 19, footnote 1). Let us examine the nature of these 5 investigations and the conclusions of the committees who conducted them.

(1) The first of these is the investigation in 1913 of conditions in the Paint Creek District, West Virginia, by a subcommittee of the Senate Committee on Education and Labor pursuant to S. Res. 37. This resolution directed the Committee to investigate specific matters in the West Virginia coal fields. The Committee held hearings and reported (Senate Report No. 321) that it found (1) no system of peonage, (2) no attempt to prevent the usual distribution of mail, (3) no attempt to violate immigration laws in order to bring in or keep out strikebreakers, (4) a state of martial law which deprived citizens of liberty without due process of law, (5) importation of firearms, *but not for the purpose of excluding West Virginia Coal from interstate commerce,*[1] and (6) a general state of violence and unlawful disorder. The resolution did not authorize recommendations for legislation and none was made.

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[6] See p. 19, *post.*

[1] For quotations from the Report upon this point, see p. 27, *post,* n. 13.

It is thus apparent that this extensive investigation resulted in findings of fact contrary to those asserted to exist by proponents of the present statute. The evils which the Committee did find to exist were only those unquestionably within the domain of State power.

(2) The second of the hearings listed by the Government as having dealt with strikes is the 1914 investigation of conditions in the coal mines of Colorado by the subcommittee on Mines and Mining pursuant to H. Res. 387. This resolution was very similar to the one previously considered. It directed the Committee to investigate specific matters concerning the Colorado coal and labor strikes of 1913-1914. The Committee held hearings and reported (House Document No. 1630) that it found (1) no system of peonage, (2) some difficulty in getting mail at postoffices, (3) a state of martial law which deprived citizens of liberty without due process of law, (4) *no combinations in restraint of interstate commerce*, and (5) the importation of firearms, *but not for the purpose of excluding Colorado coal from interstate commerce.*[1]

This Committee, unlike the previous one, was authorized to recommend legislation. Its recommendations are highly significant. Despite the finding of the existence of great violence and despite the Committee's opinion that circumstances which it found were such as to justify the Federal Government in exercising its power to the full (pp. 31-32 of the Report), the Committee recommended as affirmative measures only the creation by the Federal Government of machinery for the voluntary arbitration of labor disputes,—taking pains to point out that it did

[1] For quotations from the report, see *post* p. 27, n. 13.

not recommend that either side be compelled to accept arbitration as a means of settlement (pp. 41-42 of the Report).

The Report of this Committee brings out strikingly the absurdity of relying upon the mere existence of previous investigations as affording an accumulation of evidence supporting the present Act.

(3) In connection with the same strike the Government cites the 1916 report of the Colorado Coal Commission appointed by the President. The Report of this Commission, like the report of the congressional investigation of the same situation, did not suggest the possibility of any Federal legislative intervention into the labor troubles but on the contrary described and commended private and State curative measures.

(4) The fourth of the strike investigations relied upon by the Government is the hearings in 1921 before the Committee on Education and Labor of the Senate pursuant to S. Res. 80, on conditions in the West Virginia coal fields. The Committee made its report in Senate Report No. 457. Chairman Kenyon stated that the investigation had shown that the fundamental difficulty was the clash between the right of an operator to discharge an employee if he belongs to a union and the right of an employee to join a union if he so desires, and the absence of machinery for adjusting these conflicting rights. The Senator proposed that a Board consisting of representatives of operators, mine workers and the public should be created to arbitrate disputes under broad principles to be suggested by Congress, the decree of the Board to have no force other than that of public opinion.

The other members of the Committee expressed

their acceptance of these proposals,—with the qualification, however, that Senator Kenyon had placed too much fault upon the operators.

There is no suggestion in the report that facts existed which warranted the exercise of the commerce power, and no proposal of any affirmative regulation of the coal industry was made.

(5) The last strike investigation relied upon by the Government is the 1928 investigation by the Committee on Interstate Commerce on conditions in the coal fields of Pennsylvania, West Virginia and Ohio. The resolution authorizing the investigation did not mention interstate commerce and did not direct the Committee to recommend any legislation. The Committee held hearings but made no report.

It seems impossible to draw any inference whatsoever from the mere existence of these hearings, especially in view of the fact that, as shown above, all the other strike investigations which did result in committee reports completely rebut the existence of the facts upon which the present act is sought to be sustained as an exercise of the commerce power. The inferences that may properly be drawn are that the Committee after holding its hearings felt either that the Federal power was exhausted by bringing the facts to light, or that the circumstances were not such as practically to require, or legally to permit, curative measures by the Federal Government.

4. Hearings and reports classified by the Government as relating to shortages and high prices of coal.

The second classification of hearings relied upon by the Government in its brief is that concerned with

shortages and high prices of coal. The irrelevance of these hearings is patent merely by the statement of their subject matter. The present bill is not concerned with shortages or high prices of coal. On the contrary it is concerned with conditions alleged to result from great excesses of coal and depressed prices in the industry. Nevertheless we will review these hearings briefly.

(1) The first of these, the 1917 hearings before the Senate Committee on Interstate Commerce, was on two bills (S. 2354 and S. J. Res. 77) both of which were expressly based upon the *war power* and were limited by their terms to the war period. The Committee made no report.

(2) In 1917-1918 the Senate Committee on Manufactures, pursuant to S. Res. 163, investigated the causes of shortage of coal and sugar. The resolution authorizing the investigation made no intimation of what might be done to remedy the shortages. However, since this investigation took place when the war had reached its peak and just at the moment when the United States was entering the war, we may be confident that the power which was relied upon was not the commerce power, but the war power. The Committee which conducted this investigation made no report, hence any inference opposed to the obvious one just mentioned would clearly require support from the hearings themselves.

(3) The 1919-1920 hearings before the Sub-Committee of the Senate Committee on interstate commerce pursuant to S. Res. 126, upon the subject of the increased price of coal, likewise resulted in no committee report. Since this investigation took place at a time when car shortages were exerting their

worst effect upon the transportation of coal from mine to market, it would be highly unreasonable to regard it as affording any support whatsoever for the regulations with which we are now concerned.[1]

(4) The 1920 report of the U. S. Bituminous Coal Commission appointed by the President is not of course a Congressional investigation at all, nor was it, like the reports of some Presidential commissions, printed as either a House or Senate document. However, the Commission's recommendations did not suggest any federal legislation and the entire tenor of the report is to the very contrary, emphasizing voluntary action by the industry, miners, and the consuming public.

(5) The 1920-1921 hearings before the Senate Committee on Reconstruction and Production were held pursuant to S. Res. 350 which directed the Committee to inquire into the general building situation. The Committee reported (Senate Report No. 829) that one of the primary factors affecting the construction industry was the fuel supply, which it found had recently been subject to artificial shortages and unconscionable profiteering. These in turn it found to have been due to no fault in the coal industry, but to the inadequacy of railroad car supply. The Commit-

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[1] The substantive portion of the resolution (S. Res. 126, 66th Cong., 1st Sess.) was as follows:

> "*Resolved,* That the Committee on Interstate Commerce or any subcommittee thereof, be instructed to make inquiry into the cause or causes which have brought about the enormous increase in the market price of coal, and to that end obtain full data regarding freight rates, wages, profits, and other matters bearing upon the question under consideration, with a view to determining who or what may be responsible for such increase in price, whether due to economic causes, and therefore proper and right, or whether due to manipulation or profiteering on the part of miners, shippers, or dealers in coal."

tee recommended that the Federal Government gather and analyze complete statistics concerning the coal industry and make this information available to the public in order to aid the Congress and State legislatures. The Committee recommended no regulation of the industry and did not suggest that any causes of shortages were of such a nature as to warrant the exercise of the power to regulate interstate commerce.[1]

(6) The 1921 hearings before the Senate Committee on Manufactures were upon S. 4828, a bill providing for the gathering of comprehensive statistics about the coal industry and providing that the President might fix maximum prices for coal in times of emergency likely to be detrimental to the *public health*. The Committee made its report in Senate Report No. 815, with a recommendation that the fact finding provisions of the bill should pass. The price fixing provisions were omitted without comment. The ground upon which the proposed price fixing provisions purported to rest, i. e., the "public health," and the failure of the Committee even to mention it in its report, indicate how little it was thought by that Congress that the fixing of prices was related to the regulation of interstate commerce or that the evi-

[1] On the contrary, the committee, in limiting its recommendations to fact finding, said (p. 56) "The committee believes that, following the American custom, private enterprize must be depended upon to meet the crisis which has been outlined in this report. The Government is an organization to govern, not to build houses or operate mines or run railroads or banks . . . The whole governmental power in the United States is not in the Federal Government. States and municipalities must carry a large part of the burden of devising ways and means of meeting the crisis."

dence there adduced was such as to justify regulations of the kind involved in the present statute.

(7) The 1921 hearings before a subcommittee of the Senate Committee on interstate commerce were upon three bills. S. 41 was a bill "To provide for seasonal rates for the transportation of coal." S. 42 provided for the appointment of a Federal coal commissioner whose duties were entirely investigatory. S. 824 was identical with S. 42 except that it made the director of geological survey the commissioner. The brief hearings on these bills (43 pages) cannot seriously be regarded as adding anything to the "accumulated experience and discussion" which the Government says (brief, p. 24) resulted in the present Act.

(8) The irrelevance of the hearings relied upon by the Government is particularly brought out by the 1922 hearings before the House Committee on Labor on H. R. 11022, included in the Government brief among hearings upon shortages and high prices. The bill under consideration was one to provide for the finding of facts. The report of the Committee (House Report No. 984) is confined entirely to a summary of the available sources of information concerning the coal industry, and does not purport to make any findings of fact. It is also interesting to note that this Committee, in its report, was very careful to point out that the proposed bill did "*not rest upon the power of Congress to regulate interstate commerce between the States*, but that it rests upon the constitutional power to obtain information as the basis for legislation." [1]

[1] The report said, in this connection (p. 6), "The agency created has no administrative powers except to obtain facts, and does not purport to regulate, control, or influence the industry in any way, and in any event can not fall within the class of cases where regulation is denied the Federal Government to matters purely intrastate."

It thus appears that the hearings which the Government refers to as hearings upon shortages and high prices of coal, not only are by reason of their classification concerned with factual situations the very antithesis of those with which the present Act is concerned, but are individually not appropriate to lend support to the factual conclusions or legal doctrines upon which the present Act is sought to be based.

5. Hearings classified by the Government as dealing "with the disastrous effects of the destructive competition in the industry."

Greater pertinence would perhaps be expected from the next classification of hearings cited in the Government's brief. These are investigations after 1923 which the Government states "dealt with the disastrous effects of the destructive competition in the industry." (p. 20)

(1) The first of these is the 1926 hearings before the Committee on Interstate and Foreign Commerce on coal legislation. Since these hearings were upon no particular coal legislation, and since the Committee which held the hearings did not find it fit to make any report, the only inference that is permissible from the mere existence of these hearings, if any be permissible, is that the Committee found the facts which would justify or which would permit action by the Federal Government to be lacking.

(2) The 1928 hearings referred to by the Government in this connection have already been discussed (supra, p. 12).

(3) The 1929 hearings before the Senate Committee on Interstate Commerce on S. 4490 for the first

time presented to Congress problems similar to those here involved. The bill provided for the licensing of interstate shippers of bituminous coal by a bituminous coal commission, and provided for comprehensive regulation of the licensees, similar to the present Act, by the commission. The bill, like the present statute, provided that licensees should permit miners to join unions. At the hearings upon this bill, four persons spoke on its behalf. These were three officers of the United Mine Workers of America (John L. Lewis, Henry Warrum and T. C. Townsend) and Secretary of Labor James J. Davis. The testimony of Henry Warrum consisted entirely of a legal argument in favor of the constitutionality of the bill. A great deal of the remainder of the testimony by all the witnesses was upon the same legal problems. Secretary of Labor Davis was interrogated by the commission regarding its constitutionality. He answered (at page 16 of the hearings):

> "Well, can we not amend the Constitution of the United States?"

The Committee which held the hearings made no report to the Congress.

By what conceivable method of reasoning can it be supposed that these hearings support the findings of fact upon which it is sought to sustain the present bill? On the contrary, they bring clearly to the fore that the motivating force behind legislation of the sort we are now considering is the interest of organized labor, and hence that the necessary object and effect of this statute is not incidentally, but primarily, to benefit the condition of miners as an end in itself, thus negativing the conclusion that the regulation of the intrastate matters reached by he Act is, as the

Government urges, a means of removing burdens upon interstate commerce with the incidental effect of helping the miners but rather compelling the conclusion that they primarily affect local matters and only indirectly and remotely affect interstate commerce.

(4) Next in this category, the Government relies upon the 1932 hearings before a subcommittee of the Committee on Mines and Mining on S. 2935. This bill was substantially the same as the one last considered. Again, the chief proponents were officers of the United Mine Workers. This bill was likewise not reported back.

(5) Last in this group, the Government cites hearings upon the present bill itself. While replete with conclusions of law, neither the Act nor the committee reports contain any findings of fact supporting the existence of the power asserted. The cautious discussion of law in the majority committee report does not conclude with a recommendation that the bill pass (H. Rep. 1800, 74th Cong. 1st Sess.), and the minority report states:

> "While the stabilization of all industry is a laudable objective and is much to be desired, we oppose the pending bill because the methods by which it presumes to stabilize the bituminous-coal industry are clearly unconstitutional.
>
> "Our judgment on this question is confirmed by the President of the United States in his letter to the chairman of the subcommittee of the Ways and Means Committee having this bill in charge, wherein he virtually admitted the invalidity of the bill by saying:
>
> > 'I hope your committee will not permit doubts as to the constitutionality, however reasonable, to block the suggested legislation.' "

The Government also relies upon the report of the United States Coal Commission in 1923. Part 1, pp. 255-278 contain the commission's final report with recommendations for legislation. Nowhere in these recommendations does the Commission suggest that the facts found by it made desirable, or brought within Federal power, regulations of the sort here involved. The Commission suggests neither price-fixing, wage-fixing, hour-fixing, nor enforcement of collective bargaining. On the contrary, the commission clearly recognized the limits of Federal power. It recommended "the use of the powers of the Federal Government over interstate commerce", recognizing the fact that

> "Under our constitutional system a substantial part of the responsibility rests on the State and local governments and should remain there, and that an even larger part rests on the industry itself and the public which it serves."

The commission's reference in the above quotation to the use of the commerce power related to its proposals with regard to Federal regulation of interstate carriers in such a manner as to cause interstate transportation services to be utilized with respect to the coal industry in a manner most likely to serve the public good. With respect to labor problems, the Commission proposed no more than voluntary arbitration backed by the force of public opinion.

6. Conclusion.

The number and bulk of these various reports and hearings does attest the importance of the bituminous coal industry, but *does not* attest the need of regulating *interstate commerce* in that industry. The Government has been misled by their very existence, and their bulk, into itself giving a misleading account of

them. But one who would descend from easy generalities into a particular appraisal of them, cannot find therein an "accumulated experience and discussion" relating to the subjects of *this* act, and cannot regard them as *its* "legislative background."

III. THE GOVERNMENT'S ATTEMPT TO SUPPORT THE COLLECTIVE BARGAINING PROVISIONS OF THE STATUTE AS MEANS FOR THE PREVENTION OF STRIKES.

In our opening brief we showed that the labor provisions of the Act, including those providing for collective bargaining, are beyond the reach of the commerce power because an attempt to regulate local relationships. The Government expresses surprise that in this discussion we devote but one page to collective bargaining. It seemed to us then, and it seems to us now, that if Congress is without power to fix the wages at which employees in productive industry shall work because their labor is not performed in interstate commerce, it is equally without power to regulate the manner in which the employer and the employee should agree how such wages are to be determined. We still think so; but, in view of the amount of space devoted to collective bargaining in the Government's brief, it seems appropriate to take just a little more time to prove what we had assumed to be the obvious.

The collective bargaining requirement of the statute is even more remotely connected with interstate commerce, and even more indirect in its effect thereon, than the attempted regulation of wages and hours. The theory initially advanced in support of the provisions of the statute on this subject was that collective

bargaining, particularly if conducted on a national scale, as, for example, by the United Mine Workers, will result in both adequate and stabilized wages,—hence prevent wage-cutting, and thence by indirection remove a means for price-cutting. This, so runs the argument, would result in preventing shifting and reshifting of tonnage from one mine or district to another, and thereby would affect the flow and distribution of interstate commerce. Assuming that collective bargaining would produce these results, it is self-evident that it is even more remotely connected with interstate commerce, and affects it even more indirectly, than wage-fixing. (Petitioners' opening brief, p. 125).

Collective bargaining is now sought to be supported (Govt. brief, pp. 238-253) as something within the power of the Federal Government to impose upon productive industry for the prevention of strikes and disorders and hence of those obstructions to interstate commerce which may follow in their wake. The same argument was made in the *Schechter* case in support of the power of Congress to regulate wages, and was there rejected.[1] Of course the primary purpose of collective bargaining is to keep up or raise the standard of wages and hours and thus improve the economic well-being of the workers. To say that it has any direct relation to or effect upon interstate commerce, is idle. If, for the purpose of improving purchasing power, social security and contentedness of workers, Congress is without authority to regulate wages and hours of workers in productive industry, it would seem to follow naturally and as a matter of course that it may not for the same purpose prescribe

[1] 295 U. S. at p. 514.

the manner in which such wages are to be determined, whether by collective bargaining or otherwise.

Were the matter one of first impression, the argument would have to be rejected, first, because of the remoteness of its subject matter to interstate commerce; second, because of its indirect effect thereon; and, third, because it has for its purpose the accomplishment of objects not entrusted to the Federal Government but reserved by the Tenth Amendment to the people and the States. It is no answer to say, as the Government does, that unless collective bargaining is required as a matter of national policy, its beneficent results—if they be beneficent—cannot be secured by the independent action of the States. This is but a repetition of the argument made in support of the wage-fixing provisions discussed in our opening brief.

But the matter is not one of first impression. In the *First Coronado Case*[2] and in other cases,[3] the Court has held that the prevention of obstructions to or interference with interstate commerce arising from labor disputes is not on that account alone within the reach of the commerce clause but, to be brought thereunder, must be accompanied by a direct and positive intent to interfere and obstruct; and in no case has it ever been held that a strike in productive industry has had a direct effect upon interstate commerce in the absence of proof and finding of such

[2] *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344.

[3] *United Leather Workers* v. *Herkert*, 265 U. S. 457; *Industrial Assn.* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. See *Schechter Corp.* v. *United States*, 295 U. S. 459, 548.

intent.[4] While these cases arose under the Sherman Act, they were held by the *Schechter* case to be equally expressive of limitations upon Constitutional authority.[5] Prevention of obstructions and interruptions resulting from strikes or other labor disputes is thus not within the power to regulate interstate commerce.

Nor is this case distinguishable by reason of the fact that collective bargaining is in this case sought to be imposed in respect of the production of an article of common necessity produced in different States, engaged in severe competition with each other, and as a result of which uniformity of labor relations is deemed desirable because of the controlling effect upon labor costs, upon prices and hence upon price competition. As shown by the decision in the *First Coronado Case*,[6] these were precisely the conditions that gave rise to the labor dispute involved therein. Fundamentally, the dispute was over the right to bargain collectively, that is, over the refusal of the plaintiff operator to recognize the union and agree to a

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[4] The "necessary effect" cases upon which the Government seems to rely (Brief, p. 246) relate to combinations, contracts or conspiracies which by their "inherent nature" result in monopoly or restriction of competition. See *Nash* v. *U. S.*, 229 U. S. 373, 376; *U. S.* v. *Patten,* 226 U. S. 525, 534; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 341; *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 360, and cases cited. In *Industrial Association* v. *United States,* 268 U. S. 64, 81, cited by the Government on this point (Brief, p. 246), it was found there was no direct effect upon interstate commerce, since the objects of the combination were confined to a local matter and interference with interstate commerce was neither intended nor desired.

[5] 295 U. S. at pp. 547-548.

[6] 259 U. S. 344.

closed shop. As appears from the decision in that case, his reason for not so doing was that he was in competition with non-union mines in other fields in which collective bargaining did not obtain. Moreover, it appeared in that case that substantially the entire product of the mine moved in interstate commerce. These facts, as appears from the opinion, were pressed upon the Court as evidence of an intent upon the part of the miners not merely to prevent an obstruction of production but to prevent an obstruction of interstate commerce as the obvious result of the former. The Court held, however, that this was not enough; that a positive and direct intent to interfere with interstate commerce must be shown.

The case chiefly relied upon on this branch of the case is the *Railway Clerks Case.*[7] But that case is clearly distinguishable, involving, as it did, the labor relations of interstate railroads and their employees. In that case, therefore, both owners and workers were engaged in interstate commerce, of which the defendant railway company was an instrumentality clearly subject in its activities to Federal regulation.

Apparently conscious of the lack of either authority or reason to support the collective bargaining provisions of the statute,[7a] the Government in its brief

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[7] *T. & N. O. Ry. Co.* v. *Ry. Clerks,* 281 U. S. 548.

[7a] The statement in Sec. 1 of the Act as to the reasons which moved the Congress to enact the collective bargaining provisions contains no "finding" that either strikes or refusals collectively to bargain constitute *direct* burdens on interstate commerce. The Government's reference to *Board of Trade* v. *Olsen,* 262 U. S. 1, and to *Stafford* v. *Wallace,* 258 U. S. 495, 521 in relation to Congressional findings as to recurring practices "in" the current or stream of commerce, is therefore beside the point. Moreover, no Congressional finding in respect of recurring practices in intrastate activity not "in" the stream or flow of interstate commerce can serve to change the character of the effect thereof on interstate commerce from direct to indirect, (See *Schechter Corp.* v. *U. S.,* 295 U. S. 495, 547, 548), and in the present Act the Congress has not attempted to make any such finding.

brings forth a parade of strikes, disorders, violence, bloodshed and destruction of property in the bituminous coal-mining industry over a period of many years. In respect of these, it may be said that none are of recent date. In painting this picture, the Government draws liberally and chiefly from prior Congressional investigations of such strikes and disorders in the more or less far distant past. It suggests [8] that a substantial proportion of strikes have in fact had a direct effect upon interstate commerce within the meaning of the Second Coronado Case. It has failed to inform the Court, however, that both specific evidence with respect to those strikes it most relies upon, and statistics covering all strikes, negative such a conclusion. Substantially all of the strikes which the lower court considered of sufficient importance to describe in its findings of fact are there demonstrated to have occurred in areas where the principle of collective bargaining was accepted and were therefore clearly not for the purpose of affecting interstate commerce but to accomplish a local result of enforcing the union's demands.[9] The Government refers with special emphasis to three strikes for the purpose of enforcing the recognition of the union with the obvious intent to suggest to this Court that these were strikes of the character which directly affect interstate commerce within the previous rulings of this Court.[10] Yet one of these strikes [11] was by the Government's own account a "spontaneous strike * * * against intolerable working conditions," obviously engaged in with no purpose to affect interstate commerce but to accomplish a local result of bene-

[8] Government's Brief, pp. 203, 210, 214, 219, 243, 245, 246, 250.

[9] FF. 80, 84, 85, 108, 109, 110, 111, 120, 134, 139, and 156.

[10] Government's Brief, pp. 210, 216.

[11] The 1927 Colorado strike, described in Government's Brief at p. 216.

fitting the striking miners. The other two of these strikes [12] were investigated by Congressional committees, each of which reported back that the strike it investigated had not been for the purpose of affecting interstate commerce.[13]

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[12] The 1913-1914 Colorado strike and the 1912-1913 West Virginia strike, referred to in the Government's brief at page 210.

[13] In 1914, the House of Representatives (63d Cong. Third Sess.) adopted a resolution directing the House Committee on Mines and Mining to make a thorough and complete investigation of the conditions existing in the mine fields in certain counties in Colorado for the purpose of ascertaining, among other things:

> "Fifth. Investigate and report whether the conditions existing in said coal fields in Colorado and in said copper fields in Michigan have been caused by agreements and combinations entered into contrary to the laws of the United States for the purpose of controlling the production, sale, and transportation of the coal and copper of these fields.
>
> "Sixth. Investigate and report whether or not firearms, ammunition, and explosives have been shipped into the said coal and copper fields, with the purpose to exclude the products of the said fields from competitive markets in interstate trade; and if so, by whom and by whom paid for."

The Committee, after holding hearings (cited in Government's brief at page 15) reported (House Document No. 1630)

> "We did not find there were any combinations in restraint of trade by limiting the production of coal in the mines of Colorado.
>
> "As to firearms and explosives having been shipped into the State, we beg leave to report the facts are conclusive that firearms and ammunition were shipped into the State, but not with the idea, so far as we were able to determine, to exclude the products of the said coal fields from competitive markets in interstate trade, but for the purpose of being used in the strike."

In 1913 the Senate directed a Sub-Committee of the Committee on Education and Labor (63rd Congress, 1st Session) to investigate conditions in the Paint Creek and Cabin Creek districts in West Virginia. The Committee in its report (Senate Report No. 321) refused to find that the strike had involved any violation of the anti-trust laws and did expressly find that

> "(VI) Sixth. The investigation disclosed that large quantities of ammunition, pistols, shotguns, rifles, and machine guns were brought into the district by both parties to the controversy and freely used. There is no evidence to prove that these shipments were made by competitors for the purpose of creating conditions in this district so as to exclude its coal from the competitive markets in interstate trade."

Again, the Government misinterprets the findings of the lower court by suggesting that they support the conclusion that many strikes have directly affected interstate commerce. It lists [14] several strikes found by the lower court to have been for the purpose of obtaining union recognition, with the obvious inference, as shown by the context, of suggesting that they were for the purpose of affecting interstate commerce. Yet there is no evidence to this effect whatsoever.

More strikingly, the Government suggests [15] that a particular finding of the Court supports the proposition that strikes have been to a large extent of the type which are engaged in for the direct purpose of preventing interstate movement. Yet the finding relied upon does not involve the effect of the absence of collective bargaining, does not suggest that any strikes have been for the purpose of preventing coal entering into interstate commerce, and does not state, as the Government claims, that any strikes whatsoever have "directly" affected interstate commerce. To the same effect, the Government refers to "a number of instances" [16] and "repeated" occasions [17] in which federal courts have found that strikes have directly affected interstate commerce. Yet for all that appears in the Government's brief, and for all that petitioner is aware, only one strike has been finally ad-

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[14] Government's Brief, p. 210.
[15] Government's Brief, p. 249.
[16] Government's Brief, p. 214.
[17] Government's Brief, p. 243.

judicated to have directly affected interstate commerce.[18]

Most conclusive in this respect, however, is, not the evidence of individual strikes, but the statistics in the record which establish beyond question that strikes, both in absolute numbers and in proportion to the number of men employed or the amount of coal produced, have been negligible in non-union areas as compared with union areas.[19]

Moreover, aside from the failure of the facts to support the Government's argument in this respect,

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[18] *International Organization* v. *Red Jacket C. C. & C. Co.,* 18 Fed. (2d) 839. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, was only a ruling that the trial court erred in holding as a matter of law that the evidence offered at the trial would not have permitted the jury to find such a direct effect. *Pittsburgh Terminal Coal Corp.* v. *United Mine Workers,* 22 F. (2d) 559 (W. D. Pa.) proceeded no further than the issue of a preliminary injunction on the pleadings. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, was at common law, the Federal jurisdiction being based upon diversity of citizenship, and the Court was not called upon to consider, and did not purport to discuss, whether the acts there involved directly affected interstate commerce.

[19] Plaintiff's Exhibit 78A (R. 960B) reveals in graphic form that the average number of days lost on account of strikes per year per man employed in the bituminous coal industry from 1924 to 1933 was eight times as much in the heavily unionized areas of Pennsylvania, Illinois, Ohio and Indiana as it was in the non-unionized area in West Virginia. Plaintiff's Exhibit 79 (R. 962B) reveals in graphic form that whereas from 1924 to 1933 the same four unionized states accounted for only 46.2% of the total production of bituminous coal, they accounted for 82.6% of the total man days idle on account of strikes. On the other hand the same exhibit shows that while West Virginia accounted for 25.7% of the total production of bituminous coal, it contributed only 4.2% to the total man days idle on account of strikes in those years. See also Plaintiff's Exhibit 79B, R. 964A. Although all strikes in non-union areas are thus of negligible proportions, yet, as shown by the previous discussion, even of this number, only a small part can be reasonably supposed to have been for the purpose of directly affecting interstate commerce.

there is nothing in the legislative history of the bill nor in the record in this case that the Congress had any intention to bottom this exertion of power upon the existence of any number of strikes of the character which have in previous rulings of this Court been held directly to affect interstate commerce. Recognizing this, the Government rests its argument primarily upon the effect of strikes regardless of their particular character. Yet, even from this approach, the evidence shows that strikes have had not only no direct, but no substantial, effect upon interstate commerce.

So far as the record in this case is concerned, it discloses that, coming to more recent times, the loss in the number of days worked on account of labor disputes over the last ten years has been negligible and that at no time since the combination of the miners' strike, the outlaw railway strike, the car shortage and other abnormal conditions immediately following the War, has the country ever experienced a national coal shortage as the result of labor disputes or the existence of any other conditions in the industry, and that the effect of strikes when they have taken place has merely been to divert tonnage from the striking mines to those in which no strike was in progress.

Moreover, it was quite unnecessary for the Government to go back to ancient history or to resort to Congressional investigations or even to the record in this case to paint for the Court a vivid picture either of the violence sometimes attending miners' strikes or of the resulting obstruction to the interstate commerce of the mine involved. That picture was quite as vividly painted by the late Chief Justice Taft in the opinion of this Court in the *First Coronado Case,*

supra. The opinion in that case discloses the existence of a bitter dispute between the operator and the union, and resort by the former to the use of armed guards, followed by the importation of arms by the strikers. Violence, riots, bloodshed, disorder, loss of life, and complete destruction of the mine followed, resulting not only in obstruction to the interstate commerce of the mine but in the destruction of the mine itself. There are thus to be found in that case every fact by reason of which this provision of the *present* Act is sought to be supported,—the interstate character of the operators' business, the inter-relation between his labor relations and those of his competitors, the effect upon his business of the failure of competitors to agree to collective bargaining, violence, disorder, destruction of property and obstruction to interstate commerce. But this Court held that these resulted in no restraint or obstruction to interstate commerce within the meaning of the Sherman Act, and, in the *Schechter* case, said that this and other cases of similar character were equally controlling upon the question of Federal power. This because the result, however substantial, was indirect and not direct, and because so to construe the Commerce Clause as to bring such a situation within it would be, as said in the *Schechter* case, to convert the Federal Government from one of limited powers into a central government of unlimited authority.

The collective bargaining provisions of the Act, like the wage and hour provisions, are not within the delegated powers, but constitute an invasion of the reserved rights of the States and the people.

Respectfully submitted,

FREDERICK H. WOOD
WILLIAM D. WHITNEY
Counsel for Petitioner