ately higher union scale was in effect in the northern states (Tr. 1187-1190; 1039-1042; Def. Exs. 32, 32-A, 21). On July 1, 1933, the average entrance rate for common labor in important industries requiring considerable numbers of common laborers in the South Atlantic Division as a whole was 42 per cent below the average for the Middle Atlantic Divisions as a whole. (Pl. Ex. 73.) The average rate for West Virginia was 8 per cent under the average for Pennsylvania. (Def. Ex. 53.) On the same date, the average rate for the East South Central Division as a whole was 53 per cent below the average for the East North Central Division as a whole. (Pl. Ex. 73.) The average for Kentucky was 28 per cent below Illinois, 6 per cent below Indiana, and 20 per cent below Ohio. (Def. Ex. 53.)

126. Between 1923 and 1933 there was also a shift and diversion of tonnage of coal loaded for shipment from certain groups of coal-originating railroads to other groups. The shift was due to the same causes discussed in connection with the preceding findings. The following statement shows the percentage of the total tonnage of bituminous coal loaded for rail shipment in the Appalachian district north of Alabama on the railroad system indicated:

Railroad System	1923	1926	1929	1933
Baltimore & Ohio R. R.	16.1%	14.0%	13.6%	11.1%
New York Central R. R., including P. & L. E.	6.9	4.9	4.4	5.6
Pennsylvania R. R.	22.2	17.9	16.2	15.3
Other North roads	18.4	15.6	16.5	16.4
Total North roads	63.6	52.4	50.7	48.4
Chesapeake & Ohio R. R.	11.6	16.9	17.2	19.4
Louisville & Nashville	6.8	8.6	8.8	8.1
Norfolk & Western Ry.	9.6	12.8	13.8	13.7
Other South roads	8.4	9.3	9.5	10.4
Total South roads	36.4	47.6	49.3	51.6
Grand Total	100.0	100.0	100.0	100.0

From 1923 to 1933 the Baltimore and Ohio, New York Central and Pennsylvania systems lost heavily in percentage of total coal loaded in the Appalachian area, and the Chesapeake & Ohio, Louisville and Nashville and Norfolk and Western systems correspondingly gained. (Def. Exs. 17, 18, 19.)

The Practice of the Industry with Reference to Collective Bargaining

127. It has been customary in the bituminous coal industry for large groups of producers operating in competing areas in several states to associate themselves for the purpose of bargaining collectively with representatives of their employees, organized in an industrial trade union on a national scale, namely the United Mine Workers of America, concerning wages, hours and other conditions of employment. The main purpose of negotiating such agreements to cover large producing areas has been to fix, stabilize and correlate wage rates and other conditions affecting the same throughout such areas and to avoid interruptions of work caused by labor disputes.

128. Beginning with the year 1898, the basic collective wage agreement of this character was negotiated between an association of practically all of the producers operating in the Central Competitive Field (Illinois, Indiana, Ohio and the western part of Pennsylvania) and representatives of their employees namely the United Mine Workers of America. Taking the wage rates fixed in this fashion in the Central Competitive Field, wage rates correlated to such basic rates on the basis of competitive conditions were then fixed by similar collective agree-

ments made between groups of operators and the United Mine Workers of America, as representatives of their employees, in adjacent unionized areas. (Tr. 368-70, 988-91.) This method of fixing and correlating wage rates was continued and expanded until 1922, when approximately 70% of the industry was operating under such agreements.

129. After the expiration of the Jacksonville wage agreement in 1927, this system of fixing wages was, because of price competion and wage rate cutting by non-union producers, broken down almost entirely excepting in the state of Illinois, a part of Indiana, and a few other areas of minor importance. (Tr. 617.) Between the years 1927 and 1933 practically the entire industry was engaged in a demoralizing competitive warfare in which cutting of wage rates followed price-cutting in a continually descending spiral. (Tr. 618.) Upon the passage of the National Industrial Recovery Act the system of fixing and correlating wages by collective bargaining agreements as formerly practiced, was established upon substantially a national scale. (Tr. 1039-41.) Since October, 1933, wage rates throughout practically the entire industry have been fixed, and correlated by a basic collective agreement (Appalachian) executed by and between representatives of the producers in the industry by tonnage on the one hand, and by representatives of over 70 per cent of the workers employed in the industry on the other, such agreement then being supplemented by similar agreements in practically all other producing areas. (Tr. 1039-40, 630.)

Labor Disputes

130. The strikes or other labor disputes which have occurred in the bituminous coal industry are of three general types: (1) strikes caused by attempts on the part of employees to bargain collectively concerning wages, hours and conditions of employment and the refusal of their employers so to bargain; (2) strikes or, more properly speaking, suspensions, such as those that have occurred at intervals at the expiration of existing wage contracts, the parties continuing to bargain collectively but unable to agree on the terms of renewal (Tr. 410-411); (3) strikes occasioned by either employers or employees breaching existing wage agreements. (Tr. 1014, 616-17.)

131. Strikes of the kind first mentioned have generally been basically caused by dissatisfaction of the miners with working conditions at the mines such as low wages, poor living conditions, disputes about the right to checkweighmen, by the various practices by means of which employers have sought to prevent collective action by their employees, and by and the desire of the miners' union to prevent undercutting of the wage rates previously established by collective bargaining in adjacent competing fields. (Tr. 1009-1010.) Such strikes have often been accompanied by acts of violence by both parties, in some cases necessitating the interference of state militia or Federal troops. Non-union employers generally have sought to prevent the unionization of their mines, and many of them in so doing have resorted to the use of individual or "yellow dog" contracts of employment, to anti-labor injunctions, to the employment of armed guards, and have attempted to prevent

their employees from taking any sort of collective action through the control of company-owned towns and company-owned houses. (Tr. 1000-01, 1950-51.)

132. Strikes or suspensions of the second type have been due to the failure of employees and employers to agree on the terms of renewal at the expiration of the term of wage contracts. (Tr. 1138.) A main cause of such strikes or suspensions have been the fact that unionized producers have felt themselves unable to meet the wage proposals of the employees because of cutting of prices and of wage rates by producers not bound by wage agreements. (Tr. 410-11.) Such strikes or suspensions amount to a cessation of employment while a new agreement is being negotiated and generally have not been accompanied by acts of violence.

133. Strikes of the third type have been occasioned more often by the abrogation of wage contracts by producers than by the breach of wage contracts by employees. The primary cause of such abrogations by producers has been the pressure put upon them by cutting of prices and wage rates by producers not operating under wage contract. (Tr. 768-70, 801, 1014-15 616-17.) Strikes of this type have often been accompanied by serious disorders and acts of violence and have at times necessitated the use of armed guards and troops. (Tr. 1015-17.)

134. Strikes of the first type, involving recognition of the union, are illustrated by the seven district strikes before the World War listed in finding 83 and by the strikes in Alabama (1920) and in Southern West Virginia (1920-21), both of which were accompanied by martial law and use of troops. (Pl. Ex. 66, U. S. Bureau of Mines Coal in 1919-20-21 p. 506-507.)

134. Strikes or suspensions of the second type, affecting simultaneously mines in several States, have occurred in 11 years out of the 35 years covered by the statistical record. The numbers of men involved and the time lost in labor disputes of all kinds, including local and district strikes, in these 11 years are shown below. (Pl. Ex. 66, 80. Def. Ex. 4A).

Year	No. of men on strikes, etc.	Man-days lost on account of labor disputes	Average days lost: Per man on strike	Average days lost: Per man employed in industry
1904	75,533	3,348,727	44	8
1906	211,304	13,242,905	63	28
1908	145,145	5,449,938	38	11
1910	215,640	19,234,785	89	35
1912	159,098	5,613,830	35	10
1914	135,605	10,833,924	80	19
1919	418,279	15,525,857	37	25
1922	460,589	53,874,017	117	78
1927	172,844	26,515,867	153	45
1928	50,742	4,204,404	83	8
1932	62,867	7,552,468	120	19

Another general suspension occurred October 1, 1935, involving 90% of the miners in the industry (419,000 in 1933) and lasting one week. (Tr. 629, 1047.)

135. Various other major industries, including building trades, clothing and textiles, have had as many or more labor disputes (in numbers) during the period 1919 to 1933 as the bituminous coal industry (Tr. 1578-1579; Pl. Ex. 75, 75A). The numbers of such disputes indicate nothing of their relative size, or their effects upon commerce.

136. During the period 1924-1933 only 3.1% of the possible 308 working days have been idle on account of labor disputes in the bituminous mining industry, whereas 36.7% have been idle for all other

causes (Pl. Exs. 76, 76A, 76B). During that period the proportion of days idle on account of labor disputes has been as follows: in 1924—7 out of 137; in 1925—2 out of 113; in 1926—1 out of 93; in 1927—45 out of 117; in 1928—8 out of 105; in 1929—less than ½ out of 89; in 1930—2 out of 121; in 1931—3 out of 148; in 1932—19 out of 162; in 1933—9 out of 141. (Tr. 1581; Def. Ex. 4A; Pl. Ex. 77, 77A).

137. During the period 1924-1933 while Ohio has had an average number of 33 days idle per year per man employed in bituminous coal mining, Illinois an average number of 26.6 days, Indiana 19.8 days and Pennsylvania 8.4 days, West Virginia has had an average number of only two days and all other states an average number of 4 days (Tr. 1581; Pl. Exs. 78, 78A). During this period many mines in West Virginia were operating under so-called "yellow-dog" contracts and anti-labor injunctions and were otherwise resisting attempts of union organizers to enter the West Virginia field. (Tr. 1164, 1161, 999, 1000.)

138. From 1921 through 1933 on the basis of a 308-day year the number of days lost per man on account of strikes as compared with the number of actual working days and the number of days idle for all other causes was as follows:

Year	Average number of days:* Idle on account of labor disputes	Idle on account of other causes	Worked
1919	25	88	195
1920	6	82	220
1921	3	156	149
1922	78	88	142
1923	2	127	179
1924	7	130	171
1925	2	111	195
1926	1	92	215
1927	45	72	191
1928	8	97	203
1929	less than ½	89	219
1930	2	119	187
1931	3	145	160
1932	19	143	146
1933	9	132	167

* Def. Ex. 4A.

139. Reductions in wages do not necessarily cause strikes (Tr. 1409-1410). Demands for reduction of wages by union employers who declared they could not meet competition of non-union employers were the immediate issue in the suspensions of 1922, 1927, 1928 and 1932 (Tr. 1012, 1014, 1015, 1018-27, 616-17, 890-91, 742).

139a. Strikes of all three types have frequently occasioned intervention, investigation or mediation by the Federal Government.

140. Generally strikes and suspensions have had the immediate result of closing the mines affected and preventing the shipment of coal therefrom. This has usually involved a diversion or dislocation of commerce, in that competition with other mines by the mines affected was stopped and the business formerly enjoyed by them was shifted, in part at least, to other mines or fields. It is in the public interest for the consumer to be able to obtain coal from mines not on strike when other mines are on strike. (Tr. 1381).

141. The carriers have been called on to maintain facilities sufficient to handle extraordinary peaks of demand in anticipation of suspensions, which facilities have been unused during the periods between suspensions. With respect to other effects of strikes see findings 83-89 and 110-111.

Conditions in the Mining Communities

142. A number of social workers who investigated the coal fields from 1931 to 1933 testified to the conditions observed by them. (Tr. 1427, 1448, 1430-31, 1349, 1350, 1446-1448.) This testimony covered observations and conditions in the five largest bituminous coal counties in Pennsylvania, ranked according to number of miners employed in 1931; in the first, fourth, fifth, sixth, seventh, and eighth largest counties of West Virginia; in the four largest counties of Kentucky; in the largest county of Tennessee; in the first, third, and fourth largest counties of Illinois; and in seven other coal-mining counties in these same States. (Def. Ex. 55.) The living standards of miners and families in these areas at that time were found to be very low. Diet was meager and a great many families were under-nourished. Milk was not available for the children. (Tr. 1432-33, 1456-57.) The clothing of many of the miners and their families was dilapidated and time-worn. (Tr. 1353-1354, 1433-1435.) House furnishings were paltry. (Tr. 1353.) The living conditions of the employes at the larger and better operated mines were upon a considerably better plane. (Tr. 1361, 1595-1599, 1605.), though many bituminous coal-mining communities were so impoverished as to be of particular concern to agencies engaged in relief and social work, and in

1931, two years before the Federal Government assumed responsibility for provision of depression relief, President Hoover asked The American Friends Service Committee to undertake a program of child feeding in the bituminous coal area. (Tr. 1346.) This child feeding program was conducted in 640 schools scattered through 40 counties in six coal mining states. In 1923 the United States Coal Commission caused detailed studies to be made of living conditions in 880 bituminous mining communities, as a result of which that Commission found somewhat similar living conditions to exist.

143. Over one-half of the miners engaged in the industry are piece workers and are paid on the basis of the weight of coal mined. It has been a common practice for non-union producers to pay on the basis of weights as estimated by them, and prior to October, 1933, a great many mines did not have scales with which coal loaded by the piece workers might be weighed. Among the mines where scales were provided for this purpose there were a large number of non-union fields where the mine workers were not permitted to check the weights as determined by the operators. Some operators took advantage of these conditions to short-pay their piece workers. As a result in some areas there was a general feeling on the part of the workers that they were unfairly treated and there was strong general demand on the part of the workers for adequate scales for weighing coal and for check-weighmen employed and paid by the workers to check the weighing. (Tr. 1280-1281, 1056-1058.) The evidence in this case does not justify a finding that said practice was general. (Tr. 1099, 1159,-1160, 1163.)

144. It was a not uncommon practice for operators in non-union areas to require their employees to trade at company stores and to live in company houses and to provide in the leases covering such houses that the employee would be subject to immediate eviction without notice in case of discharge. As a result there was a general feeling on the part of such employees that if they attempted to organize in opposition to the wishes of their employers, they might be evicted immediately from their houses. (Tr. 1059-1061.) It was also not an uncommon practice for operators in non-union areas to require their employees to sign individual contracts of employment containing provisions under which the employee undertook not to join a labor organization. (Tr. 1000-1001, 1060-1061.) All of these conditions have tended directly to cause unrest and dissatisfaction on the part of the mine workers. Just prior to the passage of the National Industrial Recovery Act, approximately only 20 per cent of the mine workers employed in the industry were organized for collective bargaining purposes. (Tr. 1199.) Within six weeks after the passage of that Act over 90 per cent of the mine workers had become members of a labor organization for such purpose. (Tr. 1039.)

Efforts to Improve Competitive Conditions and to Stabilize the Industry

145. As early as 1925, operators began to search for a method of avoiding the effects of the downward trend of prices and profits and a plan for a central sales agency was considered by the producers in the

smokeless fields. In 1927, these producers considered a plan for merging all of the operating companies in that field. (Tr. 975.) In 1929, a committee was appointed in this area to investigate the situation. (Tr. 975-976.) In 1931, the Governor of Kentucky called meetings of the coal operators and a meeting of the Governors of other coal producing states in an effort to stabilize conditions throughout those sections. (Tr. 813, 925-926.) These conferences achieved no tangible results. The Governor of West Virginia then asked the National Coal Association to consider the question. (Tr. 927.) As a result a plan for the formation of voluntary regional selling agencies was formulated and Appalachian Coals, Inc. was formed. (Tr. 672, 927.) At the time many operators hoped and believed that these selling agencies would stabilize the industry. (Tr. 874, 814.) No selling agencies went into operation until the middle of 1933, pending the decision of the Supreme Court in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. After that, Appalachian Coals, Inc., functioned and two additional agencies were set up in Ohio. In the short period of time during which these agencies functioned prior to the N.R.A., they succeeded in improving conditions somewhat but were unable to maintain prices because of competition from other producers in the same and other areas who did not become members. (Tr. 674, 815, 871, 929, 942.) Shortly after the passage of the National Industrial Recovery Act, producers of approximately 95 per cent of the national tonnage joined in the submitting of the Code of Fair Competition for the Bituminous Coal Indus-

try which was subsequently approved under that Act. (Pl. Ex. 59, p. 326.)

D. The Industry Under and Since the NRA Code

146. On September 18, 1933, the President approved the Code of Fair Competition for the Bituminous Coal Industry under the National Industrial Recovery Act. That Code provided for the fixing of minimum prices, prohibited certain unfair trade practices substantially the same as those listed in Part II of Section 4 of the Bituminous Coal Conservation Act, and guaranteed to employees the right to bargain collectively with representatives of their own choosing, to select checkweighmen, and to live and trade at other than company houses and stores. (Pl. Ex. 59.) Collective wage agreements were promptly negotiated to cover most of the coal fields and the terms of these agreements as to minimum wages and maximum hours were written into the Code. (Tr. 1041.) The NRA Code, with its amendments, was in effect until May 27, 1935. Up until January, 1935, it was generally observed. (Tr. 678-679, 957.) During that period the Code operated successfully and was responsible for a marked improvement in the condition of both the operators and the miners. (Tr. 341-346, 622-623, 867, 953, 942, 957, 1289-1290.) After that it began to break down, as violations increased. (Tr. 679, 693, 855, 866-867.)

147. In May, 1933, the average rate of pay (as shown by a survey by the Coal Section of the Division of Research and Planning of the National Recovery Administration) for trackmen (a skilled

occupation underground which takes the basic day rate) ranged from $1.50 to $4.00 in Pennsylvania, with most mines paying from $2.00 to $3.50, and from $1.40 to $4.00 in the high volatile fields in Southern West Virginia, Virginia, and Eastern Kentucky, with most mines paying between $1.75 and $3.25 (Def. Ex. 33.) The basic wage established by the Code, as originally approved, was $5.00 for Illinois, $4.60 for Pennsylvania and Ohio, and $4.20 for Southern West Virginia and Eastern Kentucky, on an 8-hour day basis. Correlated rates were established for all regions. (Pl. Ex. 59.) On April 1, 1934, the maximum number of hours per day was reduced to 7 and the basic wage rates raised to $5.00 in Pennsylvania and Ohio, and $4.60 for Southern West Virginia and Eastern Kentucky. (Tr. 1041.) Corresponding increases were made in piece work rates paid to tonnage men.

148. The increase in earnings of the mine workers under the NRA Code is illustrated by the workers in West Virginia. At the rates prevailing in early 1933 before the Code, the average West Virginia trackman had earned $3.06 a day. At this rate his working time of 196 days in 1933 would yield an annual income of $600. (Pl. Ex. 82b.) Under the Code, his wage was increased after April 1, 1934 to $4.60 a day. Working time in West Virginia in 1934 again averaged 196 days. (Def. Ex. 51.) His income at the final Code wage would be $902 a year, an increase of 50 per cent in annual income over pre-code conditions. A similar increase in income was obtained by West Virginia piece workers or tonnage men.

149. The average mine realization under the Code rose as follows: (Def. Ex. 37.)

	Jan.-Sept., 1933	Nov., 1933-March, 1934	Apr., 1934 thru Jan., 1935
Division I (the entire Appalachian area)	$1.03	$1.639	$1.919
Division II (Ill., Ind., and Iowa)	1.36	1.509	1.629
Division III (Alabama)	1.49	1.91	2.254

150. During the period from October 1, 1933 to January, 1935, there was marked improvement in the financial position of coal operators. The losses characteristic of preceding years were reduced if not overcome. (Tr. 623, 811.) Cost determinations for the 10 month period April, 1934 to January, 1935, show the following result for Code Divisions I and II, which Divisions produce approximately 89 per cent of the Na tional output. (Def. Exs. 37a, 46.):

Average mine realization	$1.86
Average total cost	1.83
Margin	.03

The cost figures do not include interest on indebtedness.

151. The profits and losses of the Carter Coal Co. in 1934 and in the 5 years preceding are shown below: (Def. Ex. 47.)

Year	(1) Net profit or loss before interest and Federal Income tax*	(2) Deduct interest charges	(3) Net profit or loss before Federal income tax (1)-(2)*
1929	+$135,561	$704,184	—$568,623
1930	+117,611	766,269	—648,658
1931	—417,673	811,043	—1,228,716
1932	—595,487	851,980	—1,447,467
1933	—254,452	187,721	—442,173
1934	+401,949	24,961	+376,988

* A plus sign indicates profit; a minus sign, loss.

152. During this period there was a slight increase in capacity primarily due to the opening of a number of small wagon or truck mines. (Tr. 341, 543.) The amount of this increase in capacity was not significant. (Tr. 543.) An increase in price does not necessarily bring about an increase in mining capacity. Whether or not it does depends upon whether the price increase results in a profit and how substantial such profit is. This in turn depends upon whether prices rise more rapidly than costs. It is estimated that a minimum price schedule fixing average mine realization at average cost of production will not result in any increase in capacity. (Tr. 835, 638.) It is also estimated, based upon the NRA experience, that a profit margin of 5c a ton for the industry over a period of two or three years might cause an increase in capacity of 5%. (Tr. 543-547.)

153. The prices fixed under the Code began to break beginning about January, 1935, because of a lack of enforcement. (Tr. 678-679, 693, 855, 866-7, 957.) Noncompliance with the price provisions by some 10 to 20% was sufficient to cause the breakdown (Tr. 961-962). Prices began to decline before May 27, 1935. After that date, spot prices declined rapidly to levels as far below cost as the prices in the spring of 1933 (Tr. 834-835, 938-939). The average realization did not fall so rapidly and has not, as yet, reached such depths. This is largely because of pre-existing long term contracts made at Code prices, many of which will not expire until March 31, 1936. (Tr. 812-813.)

154. The cost of operation of the NRA Code were assessed upon the Code members. Under the

National Industrial Recovery Act the costs paid by the Carter Coal Company for administering the Coal Code under that Act were approximately $20,000, being equivalent to about $1,000 per month during the life of that Code (Tr. 261).

155. Prices were originally fixed under the NRA Coal Code for the coals produced at the Caretta mine of the Carter Coal Company which resulted in a substantial shrinkage of the volume of sales from that mine and in the loss of customers because the minimum set was so high that the company found it difficult to sell its coal in the opinion of Mr. Carter. Long-term contracts covering the sale of Caretta coal expired during the period of the National Industrial Recovery Act Code and the Company found it impossible to renew its contracts at the prices fixed under such Code. The prices were subsequently revised by the Code Authority to the satisfaction of the Company. Since the expiration of the NRA that mine has regained some of its customers but not all (Tr. 303-306).

156. While the NRA Code was being formulated in September, 1933, producers in the Appalachian area (from the states of Pennsylvania, West Virginia, Kentucky, Tennessee, Ohio, and Alabama), negotiated with the United Mine Workers of America a wage agreement, known as the first Appalachian Agreement. (Tr. 627-628, 1039-1041.) This Agreement was renewed on April 1, 1934 for a period of one year. (Tr. 629, 1042.) Prior to April 1, 1935, prices began to decline. (Tr. 957.) The operators and the employees were unable to agree on terms for a new agreement to become effective

upon the expiration of the prior one. A suspension of operations in almost the entire coal industry was threatened, but was postponed several times at the request of the President of the United States. (Tr. 1042.) When the representatives of the operators and employees finally found themselves unable to agree, a suspension took place in September, 1935, (Tr. 628-629) closing down practically all of the bituminous coal mines in the United States for a week, and reducing the amount of coal produced and shipped from approximately 9,000,000 tons during the preceding week to approximately 1,000,000 tons. (Tr. 762.)

157. Large sized or lump coal has no greater heating value than fine or slack coal. (Tr. 1147.) The costs of production of large and small sizes are the same, since they both result from the same producing and screening operations. (Tr. 875.) The cost of screening and cleaning coal is not more than 2 to 5 cents a ton. (Tr. 882.) Generally the large sizes are better fitted for domestic household use, and the slack is better fitted for industrial consumption. Generally slack is sold at prices below the average cost of production of all sizes, in part because of the buying power of the large industrial consumers purchasing in quantity as compared to that of the householder purchasing small amounts; in part because the producer is anxious to move the fine coal in order that he may produce more sized coal, and in part because of the relatively restricted market for the fine coal. (Tr. 306-309, 1147, 817.) Producers attempt to make up the differences by selling domestic coal at an increased price above the cost of producing

all the sizes. (Tr. 308.) In August, 1933, the differential between domestic coal and slack coal averaged $1.16 per ton. The fixing of minimum prices under the National Industrial Recovery Act narrowed the spread to $.94 per ton in August, 1934. (Tr. 1147-1148, 811.)

XV. Coal Resources

158. The total reserves of coal and lignite of all grades are placed by the Geological Survey at 3,535 billion tons. (Tr. 522, 1472.) At 1929 rates of production and losses in mining, without allowing for the possibility of increase in consumption, this would suffice for 3,500 years. At 1934 rates the period would be longer. (Tr. 523-525.) The great bulk of these reserves consist of coal so low in grade, so deeply buried, so inaccessible, or in such thin beds that it has no present value and could be produced only at a great increase over present cost. (Tr. 525, 569, 1472.)

159. The geological distribution of the estimated 3,535 billion tons of coal reserves of the United States, is given by the Geological Survey as follows: 560 billions in the Appalachian Fields stretching from Pennsylvania to Alabama; 526 billions in the interior provinces including Illinois, Indiana and a tier of states extending from Iowa south into northern Texas; 23 billion tons of low grade lignite in the Gulf States of Texas, Louisiana, Arkansas, and Mississippi; 1,294 billions in the plains from North Dakota west into Montana and other Rocky Mountain states, the great bulk thereof being lignite and sub-bituminous coal; 1,066 billions in the Rocky

Mountain states, largely low grade coal; 64 billions in the State of Washington with trifling amounts in other Pacific Coast states. (Tr. 559-560.)

160. Present mining generally is concentrated on the richest and most accessible deposits, many of which are relatively short-lived. It is estimated that at 1929 rates of production the life of the Connellsville coking coal is from 20 to 30 years (Tr. 1480); of the Pittsburgh bed in Pennsylvania, 100 years; of the beds of present workable thickness (36 inches or more) in the smokeless or low-volatile field of southern West Virginia, 85 years. (Tr. 525.) Veins of less than 18 inches are commonly mined in Europe today (Tr. 1493).

161. It is estimated that the total tonnage of 1,440 billions, classified by the Geological Survey as bituminous coal, at the 1929 rate of production, not including semi-bituminous and allowing for loss in mining, will last approximately 2,000 years and would last longer at the 1934 rate of production. (Tr. 528.) It is also estimated that the life of the bituminous coal of good quality and workable thickness and position which could be extracted at reasonable cost under present conditions is 300 years. (Tr. 1473.) It is estimated that the anthracite reserves are 29% exhausted but that they will last from 100 to 200 years (Tr. 528, 393). The real problem of conservation is not absolute exhaustion of the mineral, but increase in cost through the depletion of the richer deposits. (Tr. 1474-1475.)

XVI. Waste.

162. The intense competition in periods of low prices has caused a waste of coal resources (Tr. 1489-

1491, Def. Ex. 43B). Wastes of the beds now being mined are substantial. In Europe the average extraction is 90 per cent. In America, according to an engineering study by the United States Coal Commission and the Bureau of Mines in 1923, the average extraction was 65.3 per cent. The average loss was 34.7 per cent, of which close to 20 per cent was classified as avoidable and 15 per cent as unavoidable. At the 1923 rate, in a year of normal production of 500,000,000 tons, the avoidable loss would amount to 150,000,000 tons. (Tr. 1482-1483.) Mining methods have improved since 1923 despite decreased prices (Tr. 1495). Less wasteful methods are not necessarily more expensive. (Tr. 1501.)

163. In the State of Pennsylvania the average loss in the 1923 survey was 28 per cent, of which 13 per cent was unavoidable and 15 per cent was avoidable. (Tr. 1483-1486.) In the Pittsburgh Coal seam the avoidable losses range from 9 per cent to 15 per cent. (Tr. 1485.) Since 1923, however, there have been great additional losses not covered by the survey of that year, through the premature abandonment of mines before exhaustion. In many cases such abandonment results in the crushing and burying of the workings and the isolation of irregular areas of unmined coal in such way as to make subsequent recovery possible, if at all, only at very great increase in cost. (Tr. 1498.) Losses due to premature abandonment are not accurately known. Such wastes are largely connected with the financial condition of the industry. (Tr. 1489.)

164. In 1934, the Mineral Policy Committee of the National Resources Board, reported that: "The causes of the excessive waste attending the

mining of our coals are complex, but the great underlying cause is destructive competition . . . In many cases the prevention of loss, while entirely possible from the point of view of engineering, involves a substantial increase in cost . . . But there remain many other losses which can be avoided with slight additional expense as the practice of the better companies in normal times has already shown. Prevention of such losses depends on relieving the conditions of poverty which have surrounded the industry. The members of this committee who have given most thought to the question are convinced that the necessary first step in reducing the waste of coal in mining is to aid the industry in establishing itself on a stable and profitable basis." (Defendants' Exhibit 43B.; Tr. 708.)

XVII. Production and Distribution of Miscellaneous Commodities.

165. Iron ore is produced commercially in 10 States and 94% thereof is produced within 3 States (Minnesota, Michigan and Alabama) (Pl. Ex. 81 F-H); copper is produced commercially in 18 States and 79% thereof is produced within 4 States (Montana, Utah, Arizona and Michigan) (Pl. Ex. 81 I-K); salt is produced commercially in 13 States and 80% thereof is produced within 4 States (Kansas, Michigan, Ohio and New York) (Pl. Ex. 81L-N); oranges are produced commercially within 5 States and 98% thereof are produced within 2 States (California and Florida) (Pl. Ex. 810-Q); motion pictures are produced commercially within 16 States and 95% thereof (by cost) are produced within

2 States (California and New York) (Pl. Ex. 81R-T); motor vehicles (not including motorcycles) are produced commercially in 23 States (assembling plants being treated as manufacturing establishments) and 67% thereof (by value) are produced within 4 States (Michigan, California, Ohio and Indiana) (Pl. Ex. 81V-W).

166. The practices described in paragraphs 2 to 12, inclusive, of subsection (i) of Part II of Section 4 of the Bituminous Coal Conservation Act of 1935 existed throughout the bituminous coal industry prior to 1933 and now exist. Such practices, however, are not and have not been engaged in by the reputable firms, and are not and have not been the general practice. Similar practices existed and exist in other industries.

FINDINGS OF ULTIMATE FACT

From the foregoing facts, the Court concludes as follows as to the ultimate facts in the case:

167. This cause involves a substantial adverse controversy.

168. This proceeding was brought promptly on August 31, 1935; was brought in good faith; and plaintiff had reasonable ground to contest the regulatory provisions of the statute; and but for the time required by the Government officer defendants to prepare for trial, the case could have been heard and determined before November 1, 1935, the date on which the tax began to accrue.

169. Should the Carter Coal Company join the Code, it would be compelled to cancel existing contracts, and would be compelled to pay its proportionate share of administering the Code.

170. The production of bituminous coal is a local activity carried on within the borders of individual States.

171. Coal is an innocuous commodity, the transportation of which in interstate commerce is not harmful to that commerce or to the public health, safety, morals or general welfare.

172. Bituminous coal is the nation's greatest and primary source of energy. Its use is vital to the public welfare. It is of the utmost importance to the industrial and economic life of the nation and to the health and comfort of its inhabitants that the distribution of bituminous coal in interstate commerce be regular, continuous and free from interruptions, obstructions, burdens and restraints.

173. The production of bituminous coal in the United States at the present time is dependent upon the existence of adequate transportation facilities and the presence at the mine of sufficient railroad cars as the coal is produced. The operations of the existing railroads of the country are dependent upon the production and distribution of bituminous coal.

174. Bituminous coal is generally sold f.o.b. mine and the predominant portion of it is shipped outside of the State in which it is produced. Such sales of coal f.o.b. mine for shipment in interstate commerce are sales in interstate commerce and interstate commerce transactions.

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

176. Small variations in the mine price of bituminous coal as between mines in different producing areas and states may cause large variations in the shipments in interstate commerce of coal from such producing areas and states, and small variations in the mine price of bituminous coal as between mines in the same state may cause large variations in the shipments of coal from such mines to points of consumption in the same state or in other states.

177. The f.o.b. mine price at which bituminous coal is sold in interstate commerce directly affects interstate commerce in bituminous coal.

178. For many years the business of distributing and marketing bituminous coal in interstate commerce has been carried on under conditions of unrestrained and destructive competition.

179. For many years the competitive conditions existing in the bituminous coal industry have led to destructive price cutting, and such price cutting has been carried to such an extent that ever since the year 1924, with the exception only of the N.R.A. code year, 1934, and possibly of 1926, the average price realized by producers of bituminous coal throughout the United States has been less than the average cost of production.

180. Such destructive price cutting has directly burdened and restrained interstate commerce in bituminous coal and has caused substantial dislocations to and diversions of the normal flow of such commerce.

181. Such unrestrained and destructive competitive conditions have occasioned many unfair competitive practices including those set forth in finding 166, in the distribution and marketing of bituminous coal in interstate commerce, and such practices have served to further demoralize the industry and to place added burdens and restraints upon interstate commerce in bituminous coal.

182. Labor costs of mining bituminous coal are a much greater percentage of total costs than is the case in any other large industry. In the bituminous coal industry cutting of wage rates is the predominant and most effective method of gaining competitive advantages and under the conditions which have existed in the industry has proven to be a destructive method of competition and has tended to create a great disparity in wage rates between producers operating in different states and producers operating in the same states. Such disparities in wage rates have permitted disparities in price which have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce to such an extent as to substantially burden, obstruct and restrain the same and to give to producers employing such competitive methods an undue advantage in interstate commerce over producers of bituminous coal not employing the same.

183. The wages of persons engaged in the production of bituminous coal have a very substantial effect upon interstate commerce in the coal so produced.

184. Such unrestrained and destructive competition in the sale and distribution of bituminous coal in interstate commerce and the cutting of wage rates before described have been the cause of many strikes and suspensions of work which have closed down many mines, some for long periods of time, have caused violent and wide fluctuations in the price of bituminous coal to the consuming public, have caused hardship and put burdens upon many consumers of bituminous coal, have threatened to interrupt and obstruct, and have interrupted and ob-

structed interstate commerce in bituminous coal, and at times have even threatened to stop such interstate commerce for indefinite periods; have substantially dislocated and diverted the normal flow of interstate commerce in such coal, and have obstructed, burdened and restrained interstate commerce in such coal.

185. Said competitive conditions have caused the insolvency of very many coal producers, the abandonment of a great many mining properties before they were completely worked out with a consequent waste of coal resources, repeated and substantial reductions in wage rates, and, unless corrected, threaten to destroy the solvency of a great many of the existing operators and the premature abandonment of many of the existing mines. It is probable that the operation of the law of supply and demand will not serve to eliminate the destructive competitive conditions.

186. The business of selling and distributing bituminous coal in interstate commerce so nearly touches the vital economic interests of the United States that Congress may regulate the prices of the sales of such coal and may forbid unfair competitive practices in said business.

187. The establishment of minimum and maximum prices for bituminous coal sold in interstate commerce in the manner provided in the Act here involved is not arbitrary or unreasonable and is reasonably related to the regulation of interstate commerce in the manner sought to be accomplished by the said Act.

CONCLUSIONS OF LAW

1. This cause involves a substantial adverse controversy arising under the Constitution and laws of the United States.

2. The bill of complaint herein is not premature (Tr. 48).

3. Plaintiff is without any remedy in a court of law to prevent the defendant Company and its officers and directors from assenting to the Code and causing the Company to become a member thereof.

4. Plaintiff has established a standing in equity entitling him to the relief prayed in his bill, if the Code be invalid as an entirety.

5. R. S. §3224 (26 U. S. C. §154) is not a bar to the relief prayed against the Government officer defendants.

6. The suit is not one against the United States.

7. Section 4, Part III, par. (g) of the Bituminous Coal Conservation Act and the corresponding sections of the Code providing that agreements by two-thirds of the employers by tonnage and a majority of the employees as to hours and wages shall be binding upon other Code members is invalid for the following reasons—

(a) No standard is established by said statute.

(b) The power delegated is delegated to private individuals rather than to government officers.

(c) The effect upon interstate commerce in coal of the wages paid to miners is indirect as matter of law.

(d) The regulation of wages and hours of labor of persons engaged in the production of bituminous

coal is not a regulation of interstate commerce and constitutes an invasion of internal concerns of the states.

8. Section 4, Part III, pars. (a) and (b) of the statute and the corresponding sections of the Code do not constitute valid regulations of interstate commerce but are an invasion of the internal concerns of the state reserved to them by the Constitution.

9. The declaratory judgment act is not applicable to this case. The Revenue Act of 1935, approved August 30, 1935, in section 405, excepted from the operation of the Declaratory Judgment Act suits "with respect to federal taxes." The present is such a suit.

10. The provisions of the Act and Code with respect to the fixing of minimum and maximum prices for coal are valid.

(a) The price-fixing provisions of the Act contain no invalid delegation of authority.

(b) The fixing of prices for coal moving and sold in interstate commerce is a valid exercise of the power of Congress to regulate such commerce.

(c) Congress has the power to regulate the prices of coal sold in intrastate commerce since such prices are inextricably intermingled with interstate prices, and since such action is necessary to prevent discrimination against interstate commerce and to make regulation of the prices of coal sold in interstate commerce effective.

(d) The establishment of minimum and maximum prices for bituminous coal is not arbitrary or unrea-

sonable or unrelated to a proper congressional purpose, and does not violate the Fifth Amendment.

11. The regulation of unfair methods of competition in section 4, Part II (i) of the Act lies within the Federal commerce power and does not violate the Fifth Amendment.

12. The labor provisions are separable from the other provisions of the Act and Code.

13. Inasmuch as the provisions of the Act with respect to price-fixing and unfair methods of competition are valid, the taxing provisions of the Act are valid.

14. The plaintiff is not entitled to a permanent injunction to prevent the Carter Coal Company from joining the Code or to prevent the Government officers from collecting the taxes imposed by Section 3 of the Act.

JESSE C. ADKINS,
Justice.

December 10, 1935.

IN THE

SUPREME COURT
of the District of Columbia

HOLDING AN EQUITY COURT

JAMES WALTER CARTER,
Plaintiff,
v.
CARTER COAL COMPANY, *et al.,*
Defendants.

IN EQUITY
No. 59374

FINAL DECREE

This cause came on to be heard at this term, and thereupon, upon consideration thereof, it is by the Court this 10th day of December, 1935,

ADJUDGED, ORDERED and DECREED as follows:

(1) That the bill of complaint heretofore filed herein on the 31st day of August, 1935, by James Walter Carter against Carter Coal Company, George L. Carter, as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of said Company; Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of

Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, full hearing having been had on the issues raised by said bill of complaint and the answers thereto, be, and the same hereby is, dismissed, and the relief prayed for in said bill of complaint is denied and refused.

(2) The Court finds that this proceeding was brought promptly on August 31, 1935, was brought in good faith and that plaintiff had reasonable ground to contest the validity of the regulatory provisions of the statute involved; and that but for the time required by the Government officer defendants to prepare for trial the case could have been heard and determined before November 1, 1935, the date on which the tax began to accrue, wherefore

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, his agents, assistants, deputies or employees; defendant M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; defendant Clarence C.

Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; and defendant John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, and each and all of them, be, and they hereby are, permanently enjoined from in any manner, directly or indirectly, assessing or collecting from the defendant Carter Coal Company any taxes or penalties imposed by or accruing under the said Bituminous Coal Conservation Act of 1935 in excess of one and one-half percentum (1-½%) of the sale price at the mines on sales or other disposals of bituminous coal between November 1, 1935, and the date of this decree by the defendant Carter Coal Company; from causing any Collector or Deputy Collector of Internal Revenue of the United States, or any other Government officer or subordinate or assistant to assess or collect any such taxes or penalties for said period in excess of said amount from defendant Carter Coal Company; from seizing any of the property; from distraining, seizing, entering upon or attaching, or commencing any forfeiture proceedings against the property of said Company; and from enforcing any of the remedies provided for the collection of internal revenue of the United States against said Company, its property, officers or agents for the non-payment of such taxes or penalties in excess of said amount for such period.

AND IT IS FURTHER ORDERED that the defendants Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Solicitor General and Act-

ing Attorney General of the United States; and Leslie C. Garnett, individually and as the United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, be, and they hereby are, jointly and severally, permanently enjoined from, directly or indirectly, attempting to collect by suits or prosecutions, or otherwise, any such taxes or penalties from defendant Carter Coal Company or any of its officers or directors in excess of one and one-half per centum (1-½%) of the sale price at the mines on sales or other disposals of bituminous coal between November 1, 1935, and the date of this decree by the defendant Carter Coal Company.

(3) The plaintiff having announced in open court that he desires and intends to appeal from this decree to the United States Court of Appeals for the District of Columbia and having moved that a stay and injunction be granted restraining the Carter Coal Company and the company officer defendants from executing or filing an acceptance of the Bituminous Coal Code and from paying the tax imposed by the Bituminous Coal Conservation Act of 1935, and enjoining the government officer defendants from taking any action to collect the tax imposed by said Act,

IT IS ORDERED that, pending final determination of this cause on appeal, the company and the company officer defendants are enjoined from executing or filing any acceptance of the Bituminous Coal Code or paying the tax imposed by the Bituminous Coal Conservation Act of 1935, and the government officer defendants are enjoined from collecting or attempting to collect the said tax from the Carter Coal Company; but this stay is granted upon the ex-

press condition that on or before the 2nd day of January, 1936, and on or before the 1st day of each succeeding month thereafter, during the pendency of this cause on appeal, there shall be paid to a depository to be approved by this Court a sum equal to one and one-half per centum (1-½%) of the sale price at the mine on sales or other disposals of bituminous coal by the defendant Carter Coal Company during the period beginning with November 1, 1935, for which a tax payment under said Act shall be due, said sum to be held by the depository pending the final outcome of this litigation and subject to the further orders of this Court.

JESSE C. ADKINS,
Justice.

Exception of the plaintiff James Walter Carter is hereby noted to the entry of so much of the above decree as dismisses the bill of complaint and as refuses the relief prayed herein by the plaintiff, or any of such relief; and the plaintiff, by his attorneys, in open court petitions for and notes an appeal from the above decree to the United States Court of Appeals for the District of Columbia on this 10th day of December, 1935, which appeal is hereby granted and noted, whereupon the maximum undertaking for costs is hereby fixed at one hundred dollars ($100.00) with leave to deposit the sum of fifty dollars ($50.00) with the Clerk in lieu thereof.

JESSE C. ADKINS,
Justice.

Exception of the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, to the entry of so much of the above decree as grants an injunction against the said defendants, or any of them, being the portion of the above decree numbered (2) is hereby noted; and such defendants, by their attorneys, petition for and note an appeal from the above decree to the United States Court of Appeals for the District of Columbia on this 10th day of December, 1935, which appeal is hereby granted and noted.

JESSE C. ADKINS,
Justice.

[fol. 226] IN SUPREME COURT OF DISTRICT OF COLUMBIA

PLAINTIFF'S EXCEPTIONS TO FINDINGS AND CONCLUSIONS—
Filed December 16, 1935

* * * * * * *

Plaintiff excepts as follows with respect to the findings and conclusions of the Court:

A. With respect to evidentiary facts:

1. To that portion of Finding 43 to the effect that the use of bituminous coal in generating energy for the production of light, heat and power is vital to the public welfare, and that, in view of the present importance of bituminous coal as a source of energy, it is of great importance to the public welfare that the distribution and marketing of bituminous coal both in interstate and intrastate commerce be not subjected to interruptions, dislocations, burdens or restraints; as not supported by the evidence, and as indefinite and uncertain.

2. To that portion of Finding 54 to the effect that industrial consumers without convertible equipment, because of the cost of conversion, will not ordinarily shift from coal [fol. 227] to oil unless they are of opinion that the cost of coal will be considerably higher than that of oil over a considerable period of time, as not supported by competent evidence, as indefinite, uncertain and conjectural, and as inconsistent with other facts found.

3. To that portion of Finding 64 to the effect that as a result of wages in the coal industries being over 59% of the total value of the product in 1929, whereas the general average for the four other large mining industries was 21% and for the forty-eight large manufacturing industries was 18.2%, the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry, as not supported by the evidence.

4. To that portion of Finding 108 to the effect that operators necessarily cut their wage rates when they cut their prices, and to that portion of the same finding to the effect that the closing down because of the 1927 strike of many

mines in Illinois, Indiana, Ohio, parts of Pennsylvania and the organized states of the West substantially affected the distribution of coal in interstate commerce, on the ground that the finding is not supported by the evidence.

5. To that portion of Finding 110 to the effect that suspensions after that of 1922 laid upon consumers the burden of accumulating large stocks in anticipation of shortage, as not supported by the evidence.

6. To that portion of Finding 115 to the effect that price reductions forced wage rate cuts in a descending spiral, as vague and indefinite and as not supported by the evidence.

7. To that portion of Finding 129 to the effect that between [fol. 228] the years 1927 and 1933 practically the entire bituminous coal industry was engaged in a demoralizing competitive warfare in which wage rate cutting followed price cutting in a continually descending spiral, as vague and indefinite and as not supported by the evidence.

8. To that portion of Finding 140 to the effect that the closing of mines by reason of strikes and suspensions has usually involved a diversion or dislocation of commerce, as vague and indefinite and as not supported by the evidence.

9. To that portion of Finding 158 to the effect that the great bulk of the total reserves consists of coal so low in grade, so deeply buried, so inaccessible, or in such thin beds that it has no present value and could be produced only at a great increase over present cost, as not supported by competent evidence, as conjectural, and as inconsistent with other facts found.

10. To Finding 166 as irrelevant and immaterial.

11. To each and every of the findings above excepted to, upon the further ground that they are not supported by the evidence, and are inconsistent with other facts found.

12. To the refusal of the Court to find, in connection with Finding 131, that strikes caused by attempts on the part of employees to bargain collectively concerning wages, hours and conditions of employment and the refusal of the employers so to bargain, have been due in large part to the desire and purpose of the miners' union to increase its position and power among the mine workers, and its membership.

13. To the refusal of the Court to find, in connection with [fol. 229] Finding 109, that the strikes in 1928 and 1932 were local and sporadic.

14. To the refusal of the Court to find that since 1922, viewing the nation as a whole, there has been no substantial stoppage in commerce in bituminous coal as a result of industrial disputes (Tr. 555-556, 755, 918-920, 1405-1407).

15. To the refusal of the Court to find that none of the strikes which have occurred since 1922 have had any material effect on the total national supply of coal (Tr. 556).

16. To the refusal of the Court to find that any long continued application of price control in the bituminous coal industry would have to be accompanied by control of capacity of production in order to be permanently successful (Tr. 537-538, 691-693); and that price control alone would operate successfully only temporarily,—for about one year in the estimation of one witness (Tr. 692-693).

17. To the refusal of the Court to find that it is a fact of common knowledge that each of the commodities described in Finding No. 165 is used or consumed in every state of the United States, and that the use of such commodities, or any of them, is indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every state and of the District of Columbia.

18. To the refusal of the Court to find that the lowering of wage rates in connection with competition in the bituminous coal industry from 1923 through 1929 did not result, generally, in any lowering of the annual earnings of the men [fol. 230] employed in the industry (Pl. Ex. 82B and 88).

19. To the refusal of the Court to find in connection with Finding 118 that, in addition to wage differentials and freight rates, quality of the respective coals (Tr. 821) and natural conditions (Tr. 1545-1546) were factors in connection with the shift of shipments of coal from the fields north of the Ohio and Potomac Rivers to the fields immediately south thereof between 1923 and 1933.

B. With respect to ultimate facts:

20. To Finding 172, in respect of the use of bituminous coal being vital to the public welfare, and in respect of the

importance of regularity, continuity and freedom from interruptions, obstructions, burdens and restraints of distribution of bituminous coal, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

21. To Finding 173, in respect of the dependency of the existing railroads of the country upon the production and distribution of bituminous coal, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

22. To Finding 174 and severally to each sentence thereof, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and to the second sentence thereof upon the additional ground that it is erroneous in fact and law, and is a conclusion of law.

23. To Finding 175, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

[fol. 231] 24. To Finding 176, upon the ground that it is not the mine price but the delivered price in the market which is controlling in competition in bituminous coal sales, and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and as taking no account of evidence and facts found in respect of markets and freight rates.

25. To Finding 177 as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and upon the further ground that it is a conclusion of law and is erroneous in fact and law.

26. To Finding 178 as vague and indefinite in its use of "unrestrained and destructive," and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

27. To Finding 179 upon the ground of indefiniteness in respect of the terms "destructive," "price-cutting," "possibly" and "average cost of production," and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

28. To Finding 180 as indefinite in respect of the terms "destructive" and "the normal flow," as in part a conclusion of law, as erroneous in fact and law, and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

29. To Finding 181, upon the ground that it is irrelevant and immaterial; upon the ground of the indefiniteness of the use of the terms "unrestrained and destructive competition," "unfair competitive practices," and "demoralize"; [fol. 232] as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and upon the further ground that it is in part a conclusion of law and is erroneous in fact and law.

30. To Finding 182, and each and every sentence thereof, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

31. To Finding 183, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

32. To Finding 184 as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, as not supported by the evidence, as indefinite, as in part a conclusion of law and as erroneous in fact and law.

33. To Finding 185 as wholly conjectural and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

34. To Findings 178 through 185, inclusive, on the ground that the uncontradicted evidence establishes that it is overcapacity that is fundamentally responsible for the difficulties of the bituminous coal industry.

35. To Findings 178 through 185, inclusive, by reason of the failure and refusal to find in each and all of said findings, or to the failure and refusal to find independently thereof and as a separate finding, that the competition among producers of bituminous coal does not constitute or directly cause, and has not constituted or directly caused, a burden upon, obstruction to, or restraint of interstate commerce in bituminous coal, or interstate commerce generally.

36. To Finding 186 upon the ground that it is not a finding of ultimate fact but a conclusion of law, and is not in accord with law; as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence; and, to the extent that it constitutes [fol. 233] or includes conclusions of fact, to such conclusions as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

37. To Finding 187 upon the ground that it is not a finding of ultimate fact but a conclusion of law, and is not in accord with law; and, to the extent that it constitutes or includes conclusions of fact, to such conclusions as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

38. To the refusal of the Court to find as an ultimate fact that should the Carter Coal Company become a member of the Code and comply with its provisions, serious, substantial and irreparable injury to the liberty and to the property rights of the Company and of the plaintiff would impend in the following, among other, respects (to the refusal to find each of which separate exception is taken): (1) loss of liberty of the Company to make contracts with its employees upon mutually satisfactory terms as to wages and hours, and to make contracts with its customers as to mutually satisfactory prices for its products; (2) disclosure of the confidential records of the Company respecting all its contracts, invoices, credit memoranda and other information concerning the preparation, cost, sale and distribution of coal, to a district board composed of its competitors or representatives of its competitors; (3) subjection of the Company and of the plaintiff to a multiplicity of suits, either criminal or civil, either by private persons or by Governments, for alleged violation of the anti-trust laws of the United States or of the States; (4) subjection to suits for damages under contracts breached by the Company in compliance with the Code; (5) injury through surrender of the management of the Company to a Government commission [fol. 234] and to the competitors of the Company, and the possibility of minority stockholders' or quo warranto proceedings challenging such surrender as ultra vires the Com-

pany; (6) loss of business to competing fuels and through greater efficiency in the use of coal, should coal prices advance under the Code; and that such loss, if consummated, will lessen and diminish the equity of shareholders of the Carter Company, and that the interest of plaintiff as shareholder in said Company will be greatly and irreparably injured thereby.

39. To the refusal of the Court to find specifically and in terms as an ultimate fact that the tax imposed by the Act upon the sale or other disposal of bituminous coal by producers not assenting to and complying with the Code is, in point of fact, coercive and compulsive, and is a penalty to compel acceptance of and compliance with said Code.

40. To the refusal of the Court to find specifically and in terms as an ultimate fact that the said penalty will compel the defendant Carter Coal Company to accept and to comply with the said Code.

41. To the refusal of the Court to find specifically and in terms as an ultimate fact that the plaintiff and the defendant Carter Coal Company and each of them severally would suffer substantial, immediate and irreparable injury through the collection from the Company of the tax imposed by the Act upon producers failing to accept and comply with the Code.

42. To the refusal of the Court to find specifically and in terms as an ultimate fact that the wages, hours and work-[fol. 235] ing conditions of persons engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce.

43. To the refusal of the Court to find specifically and in terms as an ultimate fact that the wages, hours and working conditions of persons employed by defendant Carter Coal Company engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce.

44. To the refusal of the Court to find as an ultimate fact that the price at which bituminous coal is sold at the mouth of the mine does not directly affect interstate commerce and does not directly obstruct, restrain or impose any direct burden upon interstate commerce.

45. To the refusal of the Court to find as an ultimate fact that the prices at which Carter Coal Company sells the coals produced by it have no direct effect upon interstate commerce.

46. To the refusal of the Court to find as an ultimate fact that the prices at which Carter Coal Company sells the coals produced by it to consumers within the State of production do not directly obstruct, restrain or impose any direct burden upon interstate commerce.

47. To the refusal of the Court to find as an ultimate fact that the prices at which Carter Coal Company sells the coals produced by it by sales consummated at the mouth of the mine for transportation to other States do not directly obstruct, restrain or impose any direct burden upon interstate commerce.

[fol. 236] C. With respect to conclusions:

48. To the inclusion of the clause "if the Code be invalid as an entirety" in Conclusion 4, and to the refusal of the Court to conclude that plaintiff is entitled to the relief prayed in this cause if any provision of the Act or the Code challenged herein be invalid.

49. To the refusal of the Court to conclude that Section 4, Part III, pars. (a), (b) and (g), and the corresponding sections of the Code, are invalid for, in addition to the grounds set forth in Conclusions 7 and 8, the further reason of the Tenth Amendment and of the due process and just compensation clauses of the Fifth Amendment to the Conthat they and each of them are repugnant to and violative stitution of the United States.

50. To the refusal of the Court to conclude that Section 4, Part III, pars. (c), (d), (e) and (f), and the corresponding sections of the Code, are each of them invalid because not within the power of the Congress under the commerce clause of the Constitution of the United States and because repugnant to the due process and just compensation clauses of the Fifth Amendment and to the Tenth Amendment to the Constitution of the United States.

51. To Conclusion 9 upon the ground that said conclusion is erroneous in fact and in law.

52. To the refusal of the Court to conclude that the declaratory judgment statute is applicable to the controversy between the plaintiff and the defendant Carter Coal Company and its officers and directors; to its refusal to conclude that a declaratory judgment should be granted adjudging and decreeing that Section 4 of the Act and the Code do not [fol. 237] constitute a valid regulation of commerce among the States; to its refusal to conclude that the declaratory judgment statute is applicable in respect of the taxing provisions; to the failure to conclude that a declaratory judgment should be granted adjudging and decreeing that the tax imposed upon producers not assenting to and complying with the Code is likewise invalid and unconstitutional; and to the failure to make each or any of these conclusions.

53. To Conclusion 10, and to each and every subdivision thereof, upon the ground that they and each of them are erroneous in fact and in law; and to the refusal of the Court to conclude that the provisions of the Act and the Code with respect to the fixing of minimum and maximum prices are invalid upon each and all of the following several grounds (to the refusal to conclude each of which a separate exception is taken):

(a) because constituting an unauthorized delegation of authority in violation of Article I, Section 1 and of Article II, Section 2, Paragraph 2 of the Constitution of the United States, and of the due process clause of the Fifth Amendment thereto;

(b) because not within the powers conferred upon the Congress by the commerce clause of the Constitution of the United States;

(c) because attempting to regulate the prices of all coal produced and sold, whether to be transported in interstate commerce or not;

(d) because violative of the due process and just compensation clauses of the Fifth Amendment;

(e) because violative of the Tenth Amendment; and

[fol. 238] (f) because inseparable from the invalid labor provisions of the Act and of the Code.

54. To Conclusion 11 upon the ground that it is erroneous in fact and law.

55. To Conclusion 12 upon the ground that it is erroneous in fact and in law; and to the refusal of the Court to conclude that the labor provisions are inseparable from the other provisions of the Act and the Code, and each of them, and particularly from the price-fixing provisions thereof.

56. To the refusal of the Court to conclude that Section 3 of the Act is not severable in its application to Section 4 or to the Code, or to the several parts of each.

57. To Conclusion 13, upon the ground that it is erroneous in fact and in law; and to the refusal of the Court to conclude that the taxing provisions of the Act are invalid.

58. To the refusal of the Court to conclude that, inasmuch as the so-called "tax" sought to be imposed by the Act is a penalty and not a tax, the taxing provisions of the Act are invalid if any part of the regulatory provisions of Section 4 or the Code challenged herein are invalid.

59. To the refusal of the Court to conclude, specifically and in terms, that the so-called "tax" imposed by Section 3 of the Act upon producers of bituminous coal failing to accept and comply with the Code, is in reality a penalty and cannot be sustained as an exercise of the taxing power of the Federal Government.

60. To Conclusion 14 upon the ground that it is erroneous in law; and to the refusal of the Court to conclude to the contrary.

[fol. 239] 61. To the refusal of the Court to conclude that a permanent injunction should be granted preventing the defendant Carter Coal Company from accepting or complying with the Code and preventing the Government officer defendants from assessing or collecting any tax accruing during the period of the pendency in good faith of proceedings to review the decree herein in appellate courts.

62. To each and every conclusion of law hereinabove excepted to, upon the further ground that to the extent that they involve or are based upon conclusions of fact they are unsupported by the ultimate or evidentiary facts, are

inconsistent with facts found, and are unsupported by or inconsistent with the evidence.

Frederick H. Wood, William D. Whitney, Richard H. Wilmer, Reynolds Robertson, Attorneys for Plaintiff-Appellant.

The foregoing exceptions noted and allowed of record this 16th day of December, 1935.

Jesse C. Adkins, Justice.

Receipt of copy acknowledged this 16th day of December 1935.

Karl J. Hardy, Joseph Fitzgerald, Jr., Attys. for Carter Coal Co., et al. John Dickinson, Assistant Attorney General. WB.

[fol. 240] IN SUPREME COURT OF DISTRICT OF COLUMBIA

EXCEPTIONS OF DEFENDANT GOVERNMENT OFFICERS TO FINDINGS AND CONCLUSIONS—Filed December 16, 1935.

Defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, and each of them except to the following Findings and Conclusions of the Court:

1. To the Court's Finding of Fact No. 169 to the effect that the act of joining the Code by the Carter Coal Company would compel it to cancel existing contracts and to pay its proportionate share of administering the Code, upon the ground that said Finding is a conclusion of law and erroneous in point of law.

[fol. 241] 2. To the Court's Conclusion of Law No. 2 to the effect that the bill of complaint herein is not premature upon the ground that said conclusion is erroneous in point of fact and law.

3. To the refusal of the Court to conclude as a matter of law that plaintiff's bill of complaint as amended is premature on the ground stated in Par. 8, Part III, of the answer of these defendants.

4. To the Court's Conclusion of Law No. 4 to the effect that plaintiff has established a standing in equity entitling him to the relief prayed in his bill if the Code be invalid as an entirety upon the ground that said conclusion is erroneous in point of fact and law.

5. To the refusal of the Court to conclude as a matter of law upon the ground stated in Par. 2, Part III, of the answer of said defendants that the Act and Code afford to Code members, and to the Carter Coal Company should it join the Code, full, complete and adequate administrative remedies for all of the injuries of which plaintiff complains.

6. To the Court's Conclusion of Law No. 5 to the effect that Revised Statutes, Sec. 3224 (26 U. S. C., Sec. 154) is not a bar to the relief prayed against the Government officer defendants upon the ground that said conclusion is erroneous in point of fact and law.

7. To the Court's Conclusion of Law No. 7 and to subdivisions (a) and (b) thereof, upon the ground that said conclusion and each of such subdivisions are erroneous in point of law, and to subdivisions (c) and (d) thereof, upon the ground that said subdivisions are erroneous in point of [fol. 242] fact and law.

8. To the Court's Conclusion of Law No. 8 to the effect that Section 4, Part III, Par. (a) and (b) of the statute and the corresponding sections of the Code do not constitute valid regulations of interstate commerce but are an invasion of internal concerns of the state reserved to them by the Constitution upon the ground that said conclusion is erroneous in fact and in law.

John Dickinson, Assistant Attorney General. W. B. F. B. Critchlow, Special Assistant to the Attorney General.

The foregoing exceptions noted and allowed of record this 16th day of December, 1935.

Jesse C. Adkins, Justice.

Service acknowledged this 16th day of December, 1935. Reynolds Robertson, Attorneys for James Walter Carter. Karl J. Hardy, Joseph FitzGerald, Jr., Attorneys for Carter Coal Company, et al.

[fol. 243] IN SUPREME COURT OF DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS OF THE DEFENDANT GOVERNMENT OFFICERS—Filed December 16, 1935

Come now defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of their appeal in said cause from the decree of this Court entered on the 10th day of December, 1935:

1. The decree is erroneous in so far as it is therein ordered, adjudged and decreed that defendants Guy T. [fol. 244] Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Act-

ing Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, or any of them, be permanently enjoined from assessing, collecting or attempting to assess or collect from the defendant Carter Coal Company any taxes imposed or accruing under the provisions of the Bituminous Coal Conservation Act of 1935 in excess of one and one-half percent. (1½%) of the sale price at the mines on sales or other disposals of bituminous coal by the said Carter Coal Company between November 1, 1935 and the date of the decree.

2. The Court erred in making and entering all of that part of said decree contained in the portion thereof numbered (2).

3. The Court erred in permanently enjoining defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; defendant M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; defendant Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector [fol. 245] of Internal Revenue for Division No. 2 of the Collection District of Maryland; and defendant John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, from assessing or collecting from the defendant Carter Coal Company any taxes or penalties imposed by or accruing under said Bituminous Coal Conservation Act of 1935 in excess of one and one-half percent. (1½%) of the sale price at the mines on sales or other disposals of bituminous coal by the defendant Carter Coal Company between November 1, 1935 and the date of the decree herein, and from attempting in any way to collect or to enforce collection from the Carter Coal Company of any of such taxes or penalties.

This assignment is made jointly and severally by and on behalf of the defendants in this assignment named.

4. The Court erred in permanently enjoining defendants Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Solicitor General and Acting Attorney General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, jointly and severally, from attempting to collect by suits or prosecutions or otherwise any such taxes or penalties from defendant Carter Coal Company or any of its officers or directors in excess of one and one-half percent. (1½%) of the sale price at the mines on sales or other disposals of bituminous coal by the defendant Carter Coal Company between November 1, 1935, and the date of the decree herein.

This assignment is made jointly and severally by and on behalf of the defendants in this assignment named.

[fol. 245a] Wherefore, said defendants pray that the said decree in respect to the parts or portions thereof herein above specified or referred to be reversed and for such other and further relief as to the Court may seem just and proper.

John Dickinson, W. B., Assistant Attorney General.

Service acknowledged this 16th day of December, 1935.
Reynolds Robertson, Douglas L. Hatch, Attorneys for James Walter Carter. Karl J. Hardy, Joseph Fitzgerald, Jr., Attorneys for Carter Coal Company, et al.

[fol. 246] IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION WAIVING CITATION, ETC.—Filed December 16, 1935

It is hereby stipulated and agreed by and between counsel for all parties of record in the above entitled cause that:

1. The plaintiff James Walter Carter, hereby waives the service of citation upon him in the appeal taken by the defendants Guy T. Helvering, et al. on December 10, 1935, and

consents that he shall be regarded as having been cited as an appellee in that appeal.

2. That the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the Dis-[fol. 247] trict of Columbia, hereby waive service of citation upon them in the appeal taken herein on December 10, 1935 by plaintiff James Walter Carter, and agree that they shall be regarded as having been cited as parties appellee to said appeal.

3. The defendants Carter Coal Company, George L. Carter as Vice President and Director of said Company; C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter C. Denham as Vice-Presidents of said Company, waive service of citation upon them in the appeal of James Walter Carter and in the appeal of the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia; and agree that they shall be regarded

as having been cited as parties appellee to both such appeals.

Reynolds Robertson, Douglas L. Hatch, Counsel for James Walter Carter. John Dickinson, Counsel for Defendant Government Officers. W. B. Karl J. Hardy, Joseph FitzGerald, Jr., Counsel for Carter Coal Company.

December 16, 1935.

[fol. 248] IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM

December 16, 1935.—$50 deposited in lieu of undertaking on appeal.

[fol. 249] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed December 16, 1935

Now comes the plaintiff, James Walter Carter, by his attorneys and says that in the record and proceedings herein and in the decree entered herein on December 10, 1935, there is error in the following respects:

The Court erred:

1. In overruling and denying plaintiff's applications for permanent injunctions as prayed in the bill of complaint, as amended.

2. In failing and refusing to find, hold, adjudge and decree the relief prayed for by the plaintiff in his bill of complaint, as amended, as to each and every of the defendants severally.

3. In failing and refusing to find, hold, adjudge and decree the relief prayed for by the plaintiff in his bill of complaint, as amended, or any of such relief.

4. In failing and refusing to find, hold, adjudge and decree any part of the relief prayed for by the plaintiff in his [fol. 250] bill of complaint, as amended, as to each and every of the defendants severally.

5. In dismissing plaintiff's bill of complaint, as amended.

6. In overruling and denying plaintiff's application for a declaratory judgment in the controversy between the plaintiff and the defendant Carter Coal Company and its officers and directors.

7. In overruling and denying plaintiff's application for a declaratory judgment in the controversy between the plaintiff and the Government officer defendants.

8. In overruling and denying plaintiff's application for a permanent injunction restraining the Carter Coal Company and its officers and directors from accepting or complying with the Bituminous Code during the pendency of appellate proceedings taken in good faith to review the decree herein; and restraining the Government officer defendants from assessing or collecting or attempting to assess or collect from defendant Carter Coal Company the taxes accruing under Section 3 of the Act by reason of its failure to accept and comply with said Code during the pendency of such appellate proceedings.

9. In requiring as an express condition to the granting of the stay contained in paragraph numbered (3) of its decree, that on or before the second day of January, 1936, and on or before the first day of each succeeding month thereafter, during the pendency of this cause on appeal, there shall be paid to a depository to be approved by the Court a sum equal to 1½% of the sale price at the mine on sales or other disposals of bituminous coal by the defendant Carter Coal Company during the period beginning No-[fol. 251] vember 1, 1935, such deposits to be held by the depository pending the final outcome of this litigation and subject to the further orders of the Court.

10. In finding, holding, adjudging and decreeing that Section 4 of the Bituminous Coal Conservation Act of 1935 and the Code formulated and promulgated thereunder are constitutional and valid in part and, therefore, enforcible as against Carter Coal Company and its officers and directors by means of the so-called "tax" provided in Section 3 of the said Act.

11. In holding and concluding that the plaintiff is entitled to the relief prayed in his bill only if the Code be

invalid as an entirety, and in failing to hold and conclude that plaintiff is entitled to the relief prayed in this cause if any provision of the Act or of the Code challenged in this proceeding be invalid.

12. In refusing to hold and conclude that Section 4, Part III, pars. (a), (b) and (g), and the corresponding sections of the Code, are invalid for, in addition to the grounds set forth in conclusions of law numbered 7 and 8, the further reason that they and each of them are repugnant to and violative of the Tenth Amendment, and of the due process and just compensation clauses of the Fifth Amendment to the Constitution of the United States.

13. In refusing to hold and conclude that Section 4, Part III, pars. (c), (d), (e) and (f), and the corresponding sections of the Code, are each of them invalid because not within the power of the Congress under the commerce clause of the Constitution of the United States, and because repugnant to the due process and just compensation clauses [fol. 252] of the Fifth Amendment and to the Tenth Amendment to the Constitution of the United States.

14. In holding and concluding that the declaratory judgment act is not applicable to this case.

15. In refusing to hold and conclude that the declaratory judgment statute is applicable to the controversy between the plaintiff and the defendant Carter Coal Company and its officers and directors.

16. In refusing to hold and conclude that a declaratory judgment should be granted adjudging and decreeing that Section 4 of the Act and the Code do not constitute a valid regulation of commerce among the states.

17. In refusing to hold and conclude that the declaratory judgment statute is applicable in respect of the taxing provisions of the Bituminous Coal Conservation Act of 1935.

18. In refusing to hold and conclude that a declaratory judgment should be granted adjudging and decreeing that the tax imposed upon producers not assenting to or complying with the Code is invalid and unconstitutional.

19. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum

and maximum prices for coal are valid and in failing to hold and conclude the contrary.

20. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal contain no invalid delegation of authority, and in failing to hold and conclude that such provisions constitute an unauthorized delegation of authority in violation of Article I, Section 1, and of Article II, [fol. 253] Section 2, par. 2, of the Constitution of the United States, and of the due process and just compensation clauses of the Fifth Amendment thereto.

21. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal constitute a valid exercise of the power of the Congress to regulate interstate commerce, and in failing to hold that such provisions are not within the powers conferred upon the Congress by the commerce clause of the Constitution of the United States.

22. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal sold in intrastate commerce are valid, and in failing to hold that such attempt to regulate the prices of all coal sold and produced, whether to be transported in interstate commerce or not, is not within the power of the Congress under the commerce clause of the Constitution of the United States.

23. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal are not arbitrary or unreasonable or unrelated to a proper congressional purpose and do not violate the Fifth Amendment to the Constitution of the United States; and in refusing to hold and conclude that such provisions violate the due process and just compensation clauses of the Fifth Amendment to the Constitution of the United States.

24. In refusing to hold and conclude that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal are violative of the [fol. 254] Tenth Amendment to the Constitution of the United States.

25. In refusing to hold and conclude that the provisions of the Act with respect to the fixing of minimum and maximum prices for coal are invalid because inseparable from the invalid labor provisions of the Act.

26. In refusing to hold and conclude that the provisions of the Code with respect to the fixing of minimum and maximum prices for coal are invalid because inseparable from the invalid labor provisions of the Code.

27. In holding and concluding that the regulation of unfair methods of competition in Section 4, Part II(1) of the Act, lies within the Federal commerce power and does not violate the Fifth Amendment to the Constitution of the United States and in refusing to hold and conclude to the contrary.

28. In holding and concluding that the labor provisions of the Act are separable from the other provisions of the Act and in refusing to hold and conclude that the labor provisions of the Act are inseparable from the other provisions of the Act, and each of them, and particularly from the price-fixing provisions thereof.

29. In holding and concluding that the labor provisions of the Code are separable from the other provisions of the Code and in refusing to hold and conclude that the labor provisions of the Code are inseparable from the other provisions of the Code, and each of them, and particularly from the price-fixing provisions thereof.

30. In refusing to hold and conclude that Section 3 of the Act is not severable in its application to Section 4 or to [fol. 255] the Code, or to the several parts of each.

31. In holding and concluding that inasmuch as the provisions of the Act with respect to price-fixing and unfair methods of competition are valid, the taxing provisions of the Act are valid; and in refusing to hold and conclude that the taxing provisions of the Act are invalid.

32. In refusing to hold and conclude that inasmuch as the so-called "tax" sought to be imposed by the Act is a penalty and not a tax, the taxing provisions of the Act are invalid if any part of the regulatory provisions of Section 4 or of the Code challenged herein are invalid.

33. In refusing to hold and conclude, specifically and in terms, that the so-called "tax" imposed by Section 3 of the

Act upon producers of bituminous coal failing to accept and comply with the Code, is in reality a penalty and cannot be sustained as an exercise of the taxing power of the Federal Government.

34. In holding and concluding that the plaintiff is not entitled to a permanent injunction to prevent the Carter Coal Company from accepting or complying with the Code, or to prevent the Government officers from collecting the taxes imposed by Section 3 of the Act; and in refusing to hold and conclude to the contrary.

35. In making findings of ultimate facts which are not supported by the evidentiary finding, are inconsistent with facts found or concluded, and are not supported by the evidence, as follows:

(a) Finding 172 in respect of the use of bituminous coal being vital to the public welfare, and in respect of the importance of regularity, continuity and freedom from interruptions, obstacles, burdens and restraints of distribution [fol. 256] of bituminous coal;

(b) Finding 173 in respect of the dependency of the existing railroads of the country upon the production and distribution of bituminous coal;

(c) Finding 174, and each and every sentence thereof; (and in finding as a fact the matter contained in the second sentence thereof, upon the additional ground that it is erroneous in fact that in law and is a conclusion of law);

(d) Finding 175;

(e) Finding 176;

(f) Finding 177 (and in respect of this finding upon the additional ground that it is erroneous in fact and in law and is a conclusion of law);

(g) Finding 178 (and upon the additional ground that it is vague and indefinite in its use of "unrestrained and destructive");

(h) Finding 179 (and upon the additional ground of indefiniteness in respect of the terms "destructive", "price-cutting", "possibly" and "average cost of production");

(i) Finding 180 (and upon the additional grounds of indefiniteness in respect of the terms "destructive" and "the normal flow", and that it is in part a conclusion of law and is erroneous in fact and law);

(j) Finding 181 (and upon the additional grounds that it is irrelevant and immaterial, and of indefiniteness in the use of the terms "unrestrained and destructive competition", "unfair competitive practices" and "demoralize"; and that it is in part a conclusion of law and is erroneous in fact and law);

(k) Finding 182, and each and every sentence thereof;

(l) Finding 183;

(m) Finding 184 (and upon the additional ground that it is in part a conclusion of law and is erroneous in fact and law);

(n) Finding 185 (and upon the additional ground that it is wholly conjectural);

(o) Findings 178 through 185, inclusive, (and upon the additional ground that the uncontradicted evidence establishes that it is overcapacity that is fundamentally responsible for the difficulties of the bituminous coal industry);

(p) Findings 178 through 185, inclusive, (and upon the additional ground of the failure and refusal to find in each and all of said findings, or the failure and refusal to find independently thereof and as a separate finding, that the competition among producers of bituminous coal does not constitute or directly cause, and has not constituted or [fol. 257] directly caused, a burden upon, obstruction to, or restraint of, interstate commerce in bituminous coal, or interstate commerce generally);

(q) Finding 186 (and upon the additional ground that it is not a finding of ultimate fact but a conclusion of law and is not in accord with law);

(r) Finding 187 (and upon the additional ground that it is not a finding of ultimate fact but conclusion of law and is not in accord with law).

36. In refusing to make findings of ultimate facts as follows:

(a) That, should the Carter Coal Company become a member of the Code and comply with its provisions, serious, substantial and irreparable injury to the liberty and to the property rights of the Company and the plaintiff would impend in the following, among other, respects: (1) loss of liberty of the Company to make contracts with its employees upon mutually satisfactory terms as to wages and hours, and to make contracts with its customers as to mutually satisfactory prices for its products; (2) disclosure of the confidential records of the Company respecting all its contracts, invoices, credit memoranda and other information concerning the preparation, cost, sale and distribution of coal, to a district board composed of its competitors or representatives of its competitors; (3) subjection of the Company and of the plaintiff to a multiplicity of suits, either criminal or civil, either by private persons or by Governments, for alleged violation of the anti-trust laws of the United States or of the States; (4) subjection to suits for damages under contracts breached by the Company in compliance with the Code; (5) injury through surrender of the management of the Company to a Government commission and to the competitors of the Company, and the possibility of minority stockholders' or quo warranto proceedings challenging such surrender as ultra vires the Company; (6) loss of business to competing fuels and through greater efficiency in the use of coal, should coal prices advance under the Code; and that such loss, if consummated, will lessen and diminish the equity of shareholders of the Carter Company and that the interest of plaintiff as shareholder in said Company would be greatly and irreparably injured;

(b) That, specifically and in terms, the tax imposed by the Act upon the sale of or the disposal of bituminous coal by producers not assenting to or complying with the Code is, in point of fact, coercive and compulsive, and is a penalty to compel acceptance of and compliance with said Code;

(c) That, specifically and in terms, the said penalty will [fol. 258] compel the defendant Carter Coal Company to accept and comply with the said Code;

(d) That, specifically and in terms, the plaintiff and the defendant Carter Coal Company, and each of them severally, will suffer substantial, immediate and irreparable injury through the collection from the Company of the tax imposed

by the Act upon producers failing to accept and comply with the Code;

(e) That, specifically and in terms, the wages, hours and working conditions of persons engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce;

(f) That, specifically and in terms, the wages, hours and working conditions of persons employed by defendant Carter Coal Company engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce;

(g) That the price at which bituminous coal is sold at the mouth of the mine does not directly affect interstate commerce and does not directly obstruct, restrain or impose any direct burden upon interstate commerce;

(h) That the prices at which Carter Coal Company sells the coals produced by it have no direct effect upon interstate commerce;

(i) That the prices at which Carter Coal Company sells the coals produced by it to consumers within the State of production do not directly obstruct, restrain or impose any direct burden upon interstate commerce;

(j) That the prices at which Carter Coal Company sells the coals produced by it by sales consummated at the mouth of the mine for transportation to other States do not directly obstruct, restrain or impose any direct burden upon interstate commerce.

37. In making findings of evidentiary facts that are not supported by the evidence and are inconsistent with other facts found, as follows:

(a) Finding 43 to the effect that the use of bituminous coal in generating energy for the production of light, heat and power, is vital to the public welfare, and that, in view of the present importance of bituminous coal as a source of energy, it is of great importance to the public welfare that the distribution and marketing of bituminous coal both in interstate and intrastate commerce be not subjected to interruptions, dislocations, burdens or restraints; (and in [fol. 259] addition as indefinite and uncertain);

(b) Finding 54 to the effect that the industrial consumers without convertible equipment, because of the cost of conversion, will not ordinarily shift from coal to oil unless they are of opinion that the cost of coal will be considerably higher than that of oil over a considerable period of time; (and also as indefinite, uncertain and conjectural);

(c) Finding 64 to the effect that as a result of wages in the coal industries being only 59% of the total value of the product in 1929, whereas the general average for the other large mining industries was 21% and for the 48 large manufacturing industries was 18.2%, the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry;

(d) Finding 108 to the effect that operators necessarily cut their wage rates when they cut their prices, and to the effect that the closing down because of the 1927 strike of many mines in Illinois, Indiana, Ohio, parts of Pennsylvania and the organized states of the west substantially affected the distribution of coal in interstate commerce;

(e) Finding 110 to the effect that suspensions after that of 1922 laid upon consumers the burden of accumulating large stocks in anticipation of shortage;

(f) Finding 115 to the effect that price reductions forced wage rate cuts in a descending spiral; (and also as vague and indefinite);

(g) Finding 129 to the effect that between the years 1927 and 1933 practically the entire bituminous coal industry was engaged in a demoralizing competitive warfare, in which wage rate cutting followed price cutting in a continually descending spiral; (and also as vague and indefinite);

(h) Finding 140 to the effect that the closing of mines by reason of strikes and suspensions has usually involved the diversion or dislocation of commerce; (and also as vague and indefinite);

(i) Finding 158 to the effect that the great bulk of the total reserves consists of coal so low in grade, so deeply buried, so inaccessible, or in such thin beds that it has no present value and could be produced only at a great in-

crease over present costs; (and also as not supported by competent evidence and as conjectural);

(j) Finding 166 (and also as irrelevant and immaterial).

38. In refusing to make findings of evidentiary facts as follows:

(a) That strikes, caused by attempts on the part of employees to bargain collectively concerning wages, hours and conditions of employment, and the refusal of the employers so to bargain, have been due in large part to the desire and purpose of the miners' union to increase its power among the mine workers and its membership; (in connec- [fol. 260] tion with Finding 131);

(b) That the strikes in 1928 and 1932 were local and sporadic (in connection with Finding 109);

(c) That since 1922, viewing the nation as a whole, there has been no substantial stoppage in commerce in bituminous coal as a result of industrial disputes;

(d) That none of the strikes which have occurred since 1922 have had any material effect on the total national supply of coal.

(e) That any long continued application of price control in the bituminous coal industry would have to be accompanied by control of capacity of production in order to be permanently successful; and that price control alone would operate successfully only temporarily,—for about one year in the estimation of one witness.

(f) That it is a fact of common knowledge that each of the commodities described in Finding 165 is used or consumed in every state of the United States, and that the use of such commodities, or any of them, in indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every state and of the District of Columbia.

(g) That the lowering of wage rates in connection with competition in the bituminous coal industry from 1923 through 1929 did not result, generally, in any lowering of the annual earnings of the men employed in the industry.

(h) That in addition to wage differentials and freight rates, quality of the respective coals and natural conditions

were factors in connection with the shift of shipments of coal from the fields north of the Ohio and Potomac Rivers to the fields immediately south thereof between 1923 and 1933 (in connection with Finding 118).

39. In refusing to admit in evidence plaintiff's proposed Exhibits Nos. 84 and 85.

For which errors the plaintiff, James Walter Carter, prays that the said decree of the Supreme Court of the District of Columbia, dated December 10, 1935, in the above-entitled cause, be reversed to the extent herein challenged by this appeal, and that the cause be remanded to the said Supreme Court of the District of Columbia with directions to enter a decree in favor of the said plaintiff in respect of the matters complained of herein upon this appeal, and for costs.

Frederick H. Wood, William D. Whitney, Richard H. Wilmer, Reynolds Robertson, Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged this 16th day of Dec., 1935.
Karl J. Hardy, Joseph FitzGerald, Jr., Attys. for Carter Coal Co., et al. John Dickinson, Assistant Attorney General. W. B.

December 14, 1935.

[fol. 261] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER AS TO STATEMENT OF EVIDENCE—Filed December 16, 1935

Upon motion of counsel for the plaintiff, James Walter Carter, and the counsel for all of the defendants hereto consenting, it is by the Court this 16th day of December, 1935,

Ordered that the Statement of Evidence heretofore settled and filed on the 10th day of December, 1935, be, and the same hereby is, resettled and refiled as of December 16, 1935.

Jesse C. Adkins, Justice.

[fol. 262] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER TRANSMITTING ORIGINAL EXHIBITS—Filed December 16, 1935

On application of plaintiff-appellant, James Walter Carter, It is Hereby Ordered that Plaintiff's Exhibits Nos. 35-A to 35-H and 36 to 43, inclusive, offered and received in evidence in the above-entitled cause, being samples of various grades, kinds and sizes of coals, be transmitted by the Clerk of this Court to the United States Court of Appeals for the District of Columbia as original Exhibits in the above-entitled cause.

Jesse C. Adkins, Justice.

December 16, 1935.

[fol. 263] IN SUPREME COURT OF DISTRICT OF COLUMBIA

PRÆCIPE AND DESIGNATION OF RECORD—Filed December 16, 1935

The Clerk of the Court will please prepare the record on appeal in the above-entitled cause and include therein the whole of the record, that is, all pleadings, orders and documents of record, consisting of the following papers and proceedings:

1. Bill of Complaint for Injunction and Petition for Declaratory Judgment filed August 31, 1935.
2. Rule to Show Cause filed August 31, 1935.
3. Motion to Amend Bill of Complaint filed September 3, 1935.
4. Order filed September 3, 1935.
5. Return of Defendants Guy T. Helvering et al., to Rule to Show Cause filed September 16, 1935.
6. Return to Rule to Show Cause filed September 16, 1935.
7. Order Denying Preliminary Injunction filed September 19, 1935.
8. Motion filed September 19, 1935.
9. Order filed September 19, 1935.
10. Entry of Appearances filed September 19, 1935.
11. Stipulation filed September 19, 1935.
12. Stipulation filed September 20, 1935.

[fol. 264] 13. Joint and Several Answer of Defendants Guy T. Helvering et al., filed October 2, 1935.

14. Answer of Defendants Carter Coal Company and its Officers to Bill of Complaint, filed October 4, 1935.

15. Reply of Plaintiff to Separate Defense as set forth in Part II of Answer of Defendants Guy T. Helvering et al., filed October 5, 1935.

16. Motion to Advance and Specially Set Case for Hearing, filed October 5, 1935.

17. Memorandum of Points and Authorities in Support of Motion to Advance and Set Case Specially for Hearing, filed October 5, 1935.

18. Notice to Attorneys for Defendants that Motion and Memorandum of Points and Authorities will be Presented, filed October 5, 1935.

19. Memorandum of Points and Authorities on Behalf of Defendant Government Officers, Supporting Plaintiff's Motion to Advance but Opposing the Trial Date Requested by Plaintiff, filed October 9, 1935.

20. Order Advancing Case and Setting Specially the Date for Hearing, filed October 9, 1935.

21. Affidavit of James Walter Carter in Support of Preliminary Injunction, filed October 24, 1935.

22. Rule to Show Cause, filed October 24, 1935.

23. Return to Rule to Show Cause of Defendants Carter Coal Company and its Officers, filed October 28, 1935.

24. Return to Rule to Show Cause of Defendants Guy T. Helvering et al., filed October 28, 1935.

25. Order Continuing Rule to Show Cause, filed October [fol. 265] 28, 1935.

26. Order on Application for Preliminary Injunctions, Pendente Lite, filed October 30, 1935.

27. Order and Entry Showing Notation and Allowance of Appeal, filed October 30, 1935.

28. Docket Entry Showing Filing of Appeal Bond.

29. Assignment of Errors, filed October 30, 1935.

30. Præcipe and Designation of Record, filed October 30, 1935.

31. Memorandum of injunction undertaking, filed October 31, 1935, and memorandum of deposit of $15,000 as security.

32. Order approving additional security on undertaking filed November 14, 1935, and memorandum of deposit of $15,000.

33. Stipulation covering findings of fact and conclusions of law and statement of evidence, filed November 20, 1935.

34. Amendments to Bill of Complaint, filed December 10, 1935.

35. Order making amendments to Answer of Defendants Guy T. Helvering et al., of record, filed December 10, 1935.

36. Order making amendments to Answer of Defendants Carter Coal Company et al. of record, filed December 10, 1935.

37. Findings of Fact and Conclusions of Law, entered December 10, 1935.

38. Final Decree Denying Injunction, entered December 10, 1935.

39. Orders and entries showing notations and allowance [fol. 266] of appeals, filed December 10, 1935.

40. Plaintiff's Exceptions to Findings and Conclusions, filed December 16, 1935.

41. Exceptions of Government officer defendants to Findings and Conclusions, filed December 16, 1935.

42. Assignment of Errors of Government officer defendants, filed December 16, 1935.

43. Stipulation regarding citations on appeals, filed December 16 1935.

44. Docket entry showing Filing of Appeal Bond by James Walter Carter.

45. Assignment of Errors of James Walter Carter, filed December 16, 1935.

46. Order resettling and refiling Statement of Evidence.

47. Statement of Evidence, filed December 16, 1935.

48. Order transmitting original exhibits filed December 16, 1935.

49. This Præcipe and Designation of Record.

Frederick H. Wood, Richard H. Wilmer, William D. Whitney, Reynolds Robertson, Douglas L. Hatch, Attorneys for Appellant James Walter Carter.

Receipt of a copy of the foregoing Præcipe and Designation of Record is acknowledged this 16th day of December, 1935. The defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, indi- [fol. 267] vidually and as Acting Chief Field Deputy Col-

lector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, have no further præcipe or designation for record on appeal.

John Dickinson, Assistant Attorney General; F. B. Critchlow, Special Assistant to the Attorney General, Attorneys for Defendants Guy T. Helvering et al.

Receipt of a copy of the foregoing Præcipe and Designation of Record is acknowledged this 16th day of December, 1935. The defendants Carter Coal Company, George L. Carter, as Vice-President and a Director of said Company; C. A. Hall as Secretary-Treasurer and a Director of said Company; John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of said Company, have no further præcipe or designation for record on appeal.

Karl J. Hardy, Joseph Fitz Gerald, Jr., Attorneys for Defendants Carter Coal Company et al.

[fols. 268 & 268½] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 269] IN SUPREME COURT OF DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT.

In Equity. No. 59374

JAMES WALTER CARTER

v.

CARTER COAL COMPANY et al.

Statement of Evidence

At the hearing of the above-entitled cause, before Mr. Justice Adkins, begun on Tuesday, October 29, 1935, the

following proceedings were had, evidence offered and given, rulings made by the Court, and exceptions taken by the plaintiff and by the defendants and noted by the Court. Thereupon, to maintain the issues on their part joined, the plaintiff and defendants offered in evidence:

[fol. 270] (NOTE—Figures in parentheses indicate pages in the original transcript of the evidence.)

(160) JAMES WALTER CARTER, called as a witness in his own behalf, having been first duly sworn, testified:

Direct examination.

By Mr. Whitney:

(161) My address is Stevenson, Baltimore County, Maryland. I am a citizen of the United States and of the State of Maryland. I am the President and a director of Carter Coal Company, a corporation organized under the laws of Delaware in December, 1912. The capital stock of Carter Coal Company is composed of 30,000 shares of Class A Common Stock (of $1 par value), 10,000 shares of Class B Common Stock (of $1 par value) and 34,187 shares of Preferred Stock (of $100 par value). The Class A Common Stock and the Preferred Stock currently have voting rights and the Class B Common Stock is without voting rights. (162) I own 15,000 shares of Class A Common Stock and 9,733 shares of Preferred Stock.

The directors of Carter Coal Company are, and were on August 30, 1935, C. A. Hall, George L. Carter and myself. The officers of the Corporation are, and were on August 30, 1935, myself, President; George L. Carter, Walter C. Denham, John Callahan and Joseph W. Gorman, Vice-Presidents; and C. A. Hall, Secretary-Treasurer.

(163) [There were stipulated into the record the following exhibits: Plaintiff's Exhibit No. 1—Certificate of Incorporation of Carter Coal Company; Plaintiff's Exhibit No. 2—Certificate of Amendment of Certificate of Incorporation of Carter Coal Company, certified as having been filed [fol. 271] September 28, 1922; Plaintiff's Exhibit No. 3—(164) Certificate of Amendment of Certificate of Incorporation of Carter Coal Company, certified as having been

filed March 15, 1933; Plaintiff's Exhibit No. 4—By-laws of Carter Coal Company.]

Carter Coal Company is engaged in the business of mining and selling coal. It owns and operates mines in McDowell County, in southern West Virginia, and in Tazewell County, Virginia. It also owns coal mines in Knox and Bell Counties, Kentucky, which it is not now operating.

I have read the Bituminous Coal Conservation Act of 1935 and am familiar with it. The mines of Carter Coal Company in McDowell County, West Virginia, are located within District No. 7, as provided in the Act. The names of the mines of Carter Coal Company in McDowell County are Olga No. 1, Olga No. 2, Caretta and (165) Thelma, and the name of the mine in Tazewell County, Virginia, is Seaboard.

At the time the Act was signed by the President, on August 30, 1935, I addressed a letter to the directors of Carter Coal Company and caused a meeting of the Board of Directors to be held to act upon it.

[The original letter was identified and offered and received in evidence as Plaintiff's Exhibit No. 5.]

(166) The principal office of Carter Coal Company is located in Washington, D. C.

[There were stipulated into the record the following exhibits: Plaintiff's Exhibit No. 6—Certified copy of min-
[fol. 272] utes of meeting of Board of Directors of Carter Coal Company held August 30, 1935; and Plaintiff's Exhibit No. 7—Certified copy of minutes of meeting of stockholders of Carter Coal Company held August 30, 1935.]

(167) In my opinion the expense of the Bituminous Coal Code to Carter Coal Company will require the expenditure or loss by that company of upwards of $3,000, and the business of Carter Coal Company is such that if the Company does not accept the Code and is required to pay a tax upon all sales at the mine, this will require an expenditure of upwards of $3,000.

(170) After the stockholders' meeting on August 30, 1935, I consulted counsel and was advised that there was no recourse left to me as a stockholder to prevent the Corporation taking an action which I do not believe proper, other than to bring suit which I did bring and which is now

pending. I consulted with counsel on the same subject matter during the pendency of the Act in Congress and prior to its enactment on August 30, 1935.

Cross-examination.

By Mr. Critchlow:

I own 15,000 shares of Class A Common Stock of Carter Coal Company and the other 15,000 shares are held by George L. Carter, my father. (171) The 10,000 shares of Class B Common Stock have no voting rights and are held by the Consolidation Coal Company and/or its trustees or [fol. 273] receivers.

(172) I own 9,733 shares of Preferred Stock; Margaret Woolfolk Carter, my wife, holds 5,100 shares; George L. Carter, my father, holds 9,948 shares; Mayetta W. Carter, my mother, holds 9,406 shares. At the stockholders' meeting on August 30, 1935, my father held the proxy of my mother.

(173) In the case of Carter Coal Company, the Preferred Stock, pursuant to the Certificate of Incorporation, are entitled to voting rights when dividends have been in arrears for four quarterly dividend periods. (175) I believe the last dividend on the Preferred Stock was paid in August, 1932. At the aforesaid stockholders' meeting of August 30, 1935 the vote for the resolution was: George L. Carter, 15,000 shares Class A Common and 9,948 shares Preferred; and Mayetta W. Carter, 9,406 shares Preferred. (176) The vote against was: Myself, 15,000 shares Common and 9,733 shares Preferred and Margaret Carter, 5,100 shares Preferred.

On August 30, 1935, Mr. Hardy was counsel for Carter Coal Company. I consulted with reference to bringing this suit with the firm of Cravath, de Gersdorff, Swaine & Wood. I consulted with said firm prior to August 30, 1935. I prepared the letter to the directors (Plaintiff's Exhibit No. 5) upon the advice of counsel. The resolutions contained in the minutes of the directors' and stockholders' meetings held on August 30, 1935 were prepared by my counsel (177) on August 30 in the morning. The directors' [fol. 274] meeting was attended by all of the directors.

Mr. Hall is not related to me in any way nor does he own any stock in the Corporation. Prior to the meeting, there

had been discussion between myself and my father. (178) There had also been discussion between myself and my wife. My father's position was as reflected in the minutes. He agreed with me that the Act is economically unsound and unconstitutional but he was not willing that the Corporation should subject itself to the penalty tax provided for in the Act. Prior to the enactment of the Act, I did what I could to prevent its enactment and hoped that it would not be enacted. At all times while it was before Congress I discussed it with my father and with many other people. (179) After the Act had been passed by both Houses but before it was signed by the President, I discussed with my father what his action would be. He knew that I was going to discuss the situation with my counsel. I discussed the matter with counsel throughout the entire pendency of the legislation in Congress.

(182) I have been President of Carter Coal Company since March, 1933. (183) As President, I have been responsible for its management and have performed the duties imposed upon me. My father has been interested in the details of the management but has not taken as active a role as I have. (184) Before calling the meetings on August 30 I spoke to my father about them. The waivers of notice were prepared by my counsel shortly before prior [fol. 275] to the meetings, but do not know on what date. (185) My counsel advised, since I knew my father was not going to oppose joining the Code, I should cause these meetings to be held to properly record the differences of opinion that existed between my father and mother the controlling stockholders and myself. (187) The directors' meeting was held in the sales office of the Corporation in New York City. My counsel was present. No other counsel was present. I told my father about calling the meeting within 48 hours before. He lives in Washington, D. C. and came to New York for the meeting. (188) Mr. Hall lives in Washington, D. C. and I do not recall whether he made a special trip to New York for the meeting.

(189) I urged my theory to Mr. Hall but he was swayed by the opinions of my father. Mr. Hall is a salaried employee of the Corporation.

There were present at the stockholders' meeting, my father, myself, my wife, my counsel and Mr. Hall. The meeting was held in the sales office of the Corporation in

New York City. My wife did not make a special trip to New York for the meeting. (190) I did not have a proxy from her. (191) The meetings were held in the afternoon, commencing at 3 P. M., the stockholders' meeting one hour after the directors' meeting.

Walter C. Denham is one of the Vice-Presidents and owns no stock in the Corporation.

(192) There was no discussion at the directors' meeting other than as shows in the minutes. The same is true with [fol. 276] respect to the stockholders' meeting. It was not possible for me to get together with the other members of my family and determine the policy of the Corporation. It was necessary for me to come and ask the Court to determine the policy the Corporation should take. (193) Prior to August 30 I had discussed with my father the question of a lawsuit against the Corporation. He did not agree with me as to the course the Corporation should pursue. He was afraid to have the Corporation run the risk of paying the large amount of tax.

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(237) JAMES WALTER CARTER, a witness theretofore called in his own behalf, and who had been duly sworn, was recalled and testified further as follows:

Further direct examination.

By Mr. Whitney:

[There were offered and received in evidence: Plaintiff's Exhibit No. 8—Copy of Delaware statute in re management of Corporation by Board of Directors; (238) Plaintiff's Exhibit No. 9—Copy of mining laws of West Virginia, Plaintiff's Exhibit No. 10—Copy of mining laws of Virginia.]

Substantially all of the coal mined in Carter Coal Company mines is sold f. o. b. mines. Substantially all of the coal mined in the Carter Coal Company mines is sold and transported into states other than the state in which produced. (239) In the year 1934 something over 50,000 tons were sold by the Corporation in the state in which it was [fol. 277] mined. About 60% of the coal produced by Carter Coal Company moves into the inland western market and the ports on the Great Lakes; approximately 20% moves to tidewater ports on the Atlantic seaboard, and another 20%, approximately, moves into the southeastern

and the North Atlantic states. By "inland western market" I mean Illinois, Indiana, Ohio, Wisconsin and Michigan. The South Atlantic and the North Atlantic states would include Virginia, West Virginia, North and South Carolina, Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia. By coal moving to tidewater ports I mean that coal which would be shipped to ports along the Atlantic seaboard for dumping into vessels for trans-shipment to various ports.

(240) I have had prepared under my supervision a schedule showing the taxes paid by Carter Coal Company in the year 1934 to individual states. [This tabulation was offered and received in evidence as Plaintiff's Exhibit No. 11.] In addition, in 1934, Carter Coal Company paid to the State of West Virginia, to the State Compensation Fund, something over $78,000. The Corporation paid altogether to the State of West Virginia in taxes and workmen's compensation assessments approximately $170,000 in 1934.

(241) The business of Carter Coal Company is generally divided into two parts, that of producing coal at the mine and that of selling it. The men principally engaged in directing the activities in the one part are not engaged in [fol. 278] directing the activities in the other. The two operations are essentially different. One is a problem of production, the other of merchandising. I have been familiar with the coal mining business since about 1915. I have been President of Carter Coal Company since March, 1933. I served on a code authority during the National Industrial Recovery Act.

(242) As to mining problems, every mine is different from every other. The coal occurs in seams and mines are necessarily opened where coal exists and are operated under the conditions that are found. These conditions are not duplicated exactly in any two areas. Seams of coal might be visualized as layers of chocolate in a cake, the intervening strata being generally composed of slate, shales, sandstone or fire clay. The seams may occur either above the surface of the ground or below. In those seams that are above the surface, mining is simply going into the side of the cake (using the example) and extracting the coal. Where the seam of coal occurs below the surface, it must be reached by a shaft or shafts of some type. Another

class of mining, called strip mining, is used where the coal occurs very near the surface. The soil above the seam of coal can be removed by some stripping operation as with a steam shovel so that the coal can be scooped up with a steam shovel. (243) It is generally true that the opening of a mine where the coal has to be reached by a shaft would be more expensive than the opening of a mine where the coal is nearer the surface. In the case of a shaft mine, [fol. 279] the first problem is to reach the seam of coal. This is done by sinking shafts from the surface to the seam, through which the coal mined will be brought to the surface, the mines will be ventilated, and the men and supplies will be raised and lowered.

Carter Coal Company operates mines of all types except strip mines.

The process of mining the coal might be likened to the driving of tunnels through the seam of coal and then extracting the intervening blocks of coal. The pattern of the tunnelling and the method of extracting vary in accordance with the method of mining which will be determined by the peculiar conditions in the area in which the mine is located. Maps of the shafts and tunnels are prepared, some for the Corporation's purposes and others as required by state laws. There are many factors which will influence the determination of the method of mining. These include the character of the seam of coal, the structure of the coal, its thickness, the strata immediately above and below it, and any restrictions that may be imposed by the state laws. The tunnels vary in width and in character, (244A) the width being determined by the use and the purpose for which driven. In mining parlance, they may be designated as entries, cross-entries, break-throughs, or rooms. The tunnels vary as to size within each mine based upon the purpose to which put and vary in different mines in accordance with the conditions peculiar to those mines. State laws [fol. 280] require that on haulage ways in tunnels there be ample clearances for men passing so that they may not be injured by any cars carrying the coal from the place at which broken down to the mouth of the mine. State laws also impose regulations as to providing at specific distances safety places where men may stand. A constant circulation of air throughout the mines is necessary for ventilation and also in mines where dangerous or explosive gases may be

generated (245) in order that these gases may be diluted and swept away. State laws are exacting as to requirements for ventilating mines. They specify the amount of air necessary, and the number of men that may be permitted to work in any current of air. State officials check the adequacy of the ventilation at periodic intervals. State laws also require the employment of men to check the mines before any men may enter them to determine that there are no dangerous accumulations of gas. These employees must hold certificates from the state as to their competency. In addition, any well-managed company will take many other precautions that are not required by state laws. Carter Coal Company, in addition to complying with the state laws as to the adequacy of the ventilation, employs men to go into the mines every day and collect samples of the air so that chemical analyses may be made. (246) Coal dust accumulations in mines is a factor of danger in the mining process and the coal dust must be either removed or kept in a condition that will not be injurious. State laws require [fol. 281] that any accumulations of dust in mines be removed or made safe by wetting them down or by the application of rock dust. Every man who goes into the mine and every man who comes out is recorded. State laws require this. There are emergency exits from mines including those below the surface. These are required by state laws. (247) The states require that each mine employing in excess of a small number of men be under the direction and management of an experienced and qualified man who shall have taken examinations required by the state as to his competency and ability. This man is entirely in charge of all operations under ground. He has many duties to perform imposed by the state for the safety of the men. He sees that dangerous slate or rock or strata that might fall on the men is made safe or removed. He supervises the proper timbering of the mines, the general ventilation and generally all the other activities within the mine. Large mines are divided into sections under the direction of sub-foremen. The sub-foremen employed by Carter Coal Company are generally men holding certificates from the state as to competency as foremen.

(248) Within the mine there are many specialized activities,—for instance, timbers to be set and tracks over which small cars may travel to be laid. The coal is broken down before it can be put into the conveying device to take

it to the mouth of the mine. The coal must be physically lifted into the mine cars or other conveying devices. The [fol. 282] coal is cut in the seams by machines and after it is cut it is broken down by an explosive. The explosives used are transported and stored in accordance with state laws. After the coal is exploded, men called coal loaders or miners load the coal into small cars or other conveying apparatus by which it is carried to the mouth of the mine. (249) Approximately half the men employed in the mines are coal loaders or miners who are piece-workers and are paid a specified amount per ton. This is generally true throughout the industry. The description I have given is broadly true of the normal shaft mine.

After the coal reaches the mouth of the mine it may be put into railroad cars or will go into a screening plant where it will be prepared for market. The latter happens in the case of the majority of mines. The screening plant or treating plant is an apparatus in which there are a number of screens over which the coal passes from a hopper as it comes from the mines, and is screened into various sizes. These sizes may, in some cases, be washed. (250) In many cases, certain of the sizes of coal will be treated with chemical preparations to make them dustless and more attractive to buyers. The coal as it leaves the mine is usually referred to as run-of-mine coal or mine-run coal.

Carter Coal Company has different kinds of surface plants for preparing the coal for market. About 90% of all the coal produced by the Corporation comes from two [fol. 283] mines at which there are substantial preparation plants and at which the coal is sized into a number of different sizes. The smaller mines are operated with less elaborate plants for the preparation of the coal. The great majority of the men employed work under ground but a substantial number are engaged in operating the large preparation plants on the surface.

(251) Referring to the Bituminous Coal Conservation Act of 1935, which contains a provision that those who adhere to the Code provided for therein shall receive a 90% credit against a tax equal to 15% of the sales price at the mines, in my capacity as President of Carter Coal Company I consider that the Corporation could not afford to pay such tax of 15% and continue to compete with its competitors or remain in business if those competitors paid

a smaller amount of tax. I have prepared a statement giving the principal figures for the Corporation's activities in the year 1934. [The statement was then offered and received in evidence as Plaintiff's Exhibit No. 12.]

If Carter Coal Company could not remain in business it would be compelled to close its mines and to discharge those people who work for it numbering about 3,000. With their dependents this would amount to between 10,000 and 12,000 people.

(252) The Corporation has customers with whom it has been dealing with a degree of regularity. The closing of the mines would cause the loss of the good will and the [fol. 284] business of these customers which it would be difficult and costly to regain if the mine should ever be reopened. The corporation has been in business since 1912 and has always operated under the same name. At one period the Consolidation Coal Company owned all of the Common Stock of Carter Coal Company and during that period there was an operating agreement between the Consolidation Coal Company and Carter Coal Company pursuant to which Consolidation carried on certain of the operations of Carter Coal Company in the name of Consolidation. The books, records and the corporate life of Carter Coal Company always, however, continued in existence. (253) During that period the coal produced at the Carter Coal Company mines was sold at times under the trade names now in use by the Corporation and at other times under trade names employed by Consolidation. The registered trade names of Carter Coal Company now are Olga, Caretta and Thelma. These names are applied to particular coals produced at particular mines.

Referring again to the Bituminous Coal Conservation Act of 1935 and the 15% tax provision, in my opinion, in view of its cash and general working capital position, Carter Coal Company could not afford to pay such tax and continue operating without the funds that would be tied up during the period of time required to bring a suit for recovery. I have been advised by counsel that a very considerable amount of time would be required to secure the [fol. 285] determination of such a suit. The Corporation could not operate during that time.

(255) As President of Carter Coal Company I have received a notice from the National Bituminous Coal Com-

mission and several documents enclosed therewith. [The following exhibits were then offered and received in evidence: Plaintiff's Exhibit No. 13—Notice from Acting Deputy District Secretary of the National Bituminous Coal Commission calling meeting of members of District No. 7 to be held on October 30, 1935; (256) Plaintiff's Exhibit No. 14—Same as Plaintiff's Exhibit No. 13; Plaintiff's Exhibit No. 15—General Order No. 1 of Coal Commission; Plaintiff's Exhibit No. 16—General Order No. 2 of Coal Commission; Plaintiff's Exhibit No. 17—General Order No. 3 of Coal Commission.]

(257) I have read the Bituminous Coal Code and am familiar with it. I have prepared a map of the United States showing the approximate location of the minimum price areas and districts provided in the Code. [The map was then offered and received in evidence as Plaintiff's Exhibit No. 18.] The numbers upon the map represent the districts substantially as described in the Code. The principal mines of Carter Coal Company are located in District No. 7, which corresponds approximately with southern subdivision No. 1 of Division I of the old NRA code. The name of that district, for ordinary purposes, is the Smokeless District. Approximately 90% of the coal produced in the United States is produced in minimum price area No. 1, colored in yellow on the map.

[fol. 286] (258) I have received from the National Coal Association what purports to be a table prepared by the Bureau of Mines showing the production of bituminous coal by districts, as defined in the Act. [The table was then offered and received in evidence as Plaintiff's Exhibit No. 19.]

I believe that it would be disadvantageous to Carter Coal Company to join the Code. (259) There are a number of reasons why, in my opinion, it is disadvantageous to Carter Coal Company to join the Code. I do not believe it will be advantageous for the Corporation to place in the hands of boards composed of its competitors papers having to do with the most intimate details of the transactions of the Corporation, such as its contracts, copies of orders, invoices, and other similar papers that may be required. I do not believe it would be advantageous for the Corporation to enter into the new relationships that would be imposed upon it with respect to other members of the

Code. I do not believe it would be advantageous for the Corporation to subject itself to suits for damages which might accrue to other members of the Code from acts which the Corporation might commit or fail to commit as a Code member. (260) I do not believe that it would be advantageous for the Corporation to agree to limit its right of contract in the manner that it would agree to if it became a member of the Code. I do not believe the Corporation should subject itself to the risk of suits for violation of the anti-trust laws of the states or of the nation, which I [fol. 287] believe it would do if it became a member of the Code. I do not believe that it would be to the interest of the Corporation to agree to accept as the minimum prices of the products that it has to sell the prices that would be fixed by boards of its competitors or agencies of the Federal government. I do not believe that the Corporation should agree to limit its opportunities for profit by binding itself to accept as the maximum prices it might receive for products that it has to sell prices fixed by agencies of the Federal government or by groups of its competitors—groups composed substantially of and controlled by its competitors. I do not believe that the Corporation should sacrifice its good name by entering into an agreement under which it would pledge itself most certainly to breach existing contracts which it has entered into in good faith with people with whom it has dealt.

The payment of expenses by Code members is a material consideration in my mind. This would add to the cost of producing coal by the Corporation. (261) During the period of the National Industrial Recovery Act Carter Coal Company contributed as assessments something over $20,000. This covered a period of about 20 months. I believe the assessments under the proposed Code would be equally costly.

(267) Carter Coal Company is confronted with two distinct types of competition—competition within the indus- [fol. 288] try from other producers of coal, and competition from without the industry from competing fuels, such as natural gas, hydro-electric power and oil. The Corporation has competition from anthracite, which is simply one of the various kinds of coal produced in the United States. All kinds of coal in general compete to a certain extent with each other. Some bituminous coal producing areas are

more directly in competition with anthracite than are others. There is such direct competition in the case of Carter Coal Company and all other companies producing coal in the district where the Carter Coal Company mines are located.

(268) I have had prepared under my personal supervision a chart and also a supporting table of figures purporting to show production of coal in the United States from 1822 to 1934. [The chart was offered and received in evidence as Plaintiff's Exhibit No. 20. The table was offered and received in evidence as Plaintiff's Exhibit No. 21.] The decline in the production and consumption of coal in the United States since 1925-1926 is due primarily to two causes. (269) The first is increased efficiency in the burning of coal and in its use and the second is competing fuels and forms of energy. Increased efficiencies in the burning process and in apparatus with which coal is burnt or consumed causes decrease in consumption. I have had prepared under my supervision four exhibits. [The exhibits were then offered and received in evidence as follows: (270) Plaintiff's Exhibit No. 22—Table entitled "Electricity [fol. 289] Produced and Similar Coal Fuel Capacity of Generators in Public Utility Power Plants"; Plaintiff's Exhibit No. 23—chart entitled "Trends in Fuel Efficiency in the United States from 1917-1933, Showing Use by Railroad Fuel, Electric Power, Blast Furnaces and By-Product Coking"; Plaintiff's Exhibit No. 24—Statement entitled "Indicators of the Effect of Fuel Economy on Consumption of Coal Per Unit of Performance since the World War"; (271) Plaintiff's Exhibit No. 25—Photostatic copy of chart taken from page 64 of "Modern Combustion, Coal Economics and Fuel Fallacies" by Clarence V. Beck.]

Based on my experience as a coal operator, I believe that as the price of coal advances efforts to increase efficiency in its use to bring about a further decrease in its consumption will inevitably occur. (272) In my opinion, based on my experience as a coal operator and in addition on my experience as a member of a code authority under the National Industrial Recovery Act, the present Code will result in raising prices above their present levels and generally higher than the level of prices that prevailed under the NIRA. (273) Under the NIRA code the prices fixed were minimum prices and as a practical matter such

prices were fixed about as high as it was thought the traffic could bear.

By the Court:

NRA prices were higher than prior prices. There was generally an increase in price levels in the case of all com- [fol. 290] modities, including coal, at about the time the N. I. R. A. began to be operative. The operation of the code undoubtedly increased prices for coal. A part of the increase occurred as a result of advances in the wages of mine employees.

By Mr. Whitney:

In my capacity as a member of a code authority under the NIRA and in my business as a coal operator, I considered it a part of my business to follow the trend of prices generally in coal. (274) While the NIRA was in effect, in so far as I know, producers generally adhered to the prices and to the rules and regulations promulgated under the NIRA. That was true generally throughout the period of the act up to the day of the decision by the Supreme Court of the United States which invalidated it on May 27, 1935.

I have had prepared under my direct and personal supervision six exhibits with respect to the increased use of competitive fuels. [These exhibits were offered and received in evidence as follows: (275) Plaintiff's Exhibit No. 26—Chart showing "Percentage of Energy Supply of the United States derived from Coal, Oil, Gas, and Water Power, 1889 to 1933"; (276) Plaintiff's Exhibit No. 27— [fol. 291] Table entitled "Relative Rate of Growth of Coal and Other Sources of Power, for the years 1909 to 1933"; Plaintiff's Exhibit No. 28—Chart showing change in consumption of coal from 1917 to 1933; Plaintiff's Exhibit No. 29—Table entitled "Changes in United States Consumption of Bituminous Coal by such Classes of Consumers as Report Currently, and by all other Consumers, 1929 to 1933"; Plaintiff's Exhibit No. 30—Table entitled "Annual Supply of Energy from Mineral Fuels and Water Power in the United States"; Plaintiff's Exhibit No. 31—Map showing oil pipe lines and natural gas pipe lines in the United States.]

This increase in the use of other classes of power has made consumers of coal very much aware of the availability of other fuels for their uses.

(277) I have obtained from the National Coal Association a list of examples of coal tonnage lost to competing forms of fuels and energy which was compiled in 1934 by the National Coal Association, as an exhibit to the testimony of the Secretary of that Association for use in a hearing in which he represented the coal industry in connection with freight rate matters. Two supplements to that list were compiled at my request by the National Coal Association showing recent conversions from coal to oil or gas that had come to the attention of the Association. I do not suggest that the list covers all or necessarily any great percentage of the loss of business through competing fuels. [fol. 292] It only purports to represent specific instances that have come to the attention of the National Coal Association. [The statements containing the list referred to and two supplements thereto were marked "Plaintiff's Exhibit No. 32 for Identification". This exhibit was subsequently (514) offered and received in evidence, with the statement that the method in which the list was acquired was through inquiry made by the National Coal Association to a great number of producers and is a compilation of such reports by such producers.]

(278) Changes in the price of coal have a substantial influence on the use of these competitive forms of power. Minor changes in the price of coal have such an influence in certain classes of business, particularly by consumers of large quantities of coal for steam-raising purposes whose plants can be converted to some other form of fuel such as oil or gas. I have practical experience of my own that minor changes in the price of coal influenced customers in turning to other sources of fuel. The equilibrium between coal and oil prices is a very delicate one. A comparatively few cents change in the delivery price of coal would be enough to warrant a large buyer of coal to convert his plant to some other fuel, the burning of which would result in lower operating cost for his plant or business. (279) About half, perhaps more, of the business of Carter Coal Company goes to large users of coal, either for metallurgical purposes or for generating steam in comparatively large

plants. Roughly speaking, the proportion of the production of all bituminous coal that goes to such large users would be approximately half. The balance of the coal would go as sized coal to what is generally referred to as [fol. 293] domestic users, such as small householders, small heating plants and buildings generally.

(280) Anthracite coal and bituminous coal are not separate industries. They are simply varieties of coal. There are infinite varieties of coal, varying in their chemical structure and their physical structure, and anthracite is one variety. The products of Carter Coal Company and of many other bituminous coal companies as well, compete with anthracite coal in innumerable markets. Anthracite is sold in the northwestern area, in New York, and in the North Atlantic states, and in New England. In many of these areas the coals of Carter Coal Company are sold for the same purposes that anthracite is sold for. I have had prepared under my direct supervision a map purporting to show states in which 100,000 or more tons of anthracite coal were distributed from April, 1928 to March 1, 1929. I have obtained from the government department a tabulation entitled "Distribution of Pennsylvania Anthracite for the Coal Year April 1, 1928 to March 31, 1929" containing the figures relevant to the map. [(281) The map was offered and received in evidence as Plaintiff's Exhibit No. 33 and the tabulation relevant to the map was offered and received in evidence as Plaintiff's Exhibit No. 34.] More than 98% of anthracite coal is produced in the State of Pennsylvania.

(282) In the coal industry, captive mines are those that are owned or controlled by companies which themselves [fol. 294] consume a substantial part of the output of those mines. The principal types of companies owning captive mines are the steel companies, certain of the chemical companies, the railroads and in a few instances, public utility plants. It has been the experience of the coal industry that large consumers will buy and operate their own mines when the price of coal becomes so high that it is more profitable to them to produce at controlled mines the tonnages required by them. This is a substantial element in competition with coal producers such as Carter Coal Company because the users of coal who do operate captive mines and who, upon a rise in the coal market, would acquire and operate them

are the largest customers of the commercial producers. As their business is lost, further pressure is exerted on an already declining market for coal.

(283) Wagon mines are those mines that are operated by a few people in times of prosperity, or those mines that are operated by people whose primary occupation in life is something other than mining coal. For example, in Ohio there might be a farmer on whose land would occur a seam of coal near the surface or in a hillside from which coal might easily be extracted. If the demands of his farm did not interfere he might mine a small quantity of coal, put it in his own farm truck and take it to the nearest town to sell it. I myself did not come directly in contact with wagon mines in any appreciable degree under the NIRA but I [fol. 295] understand that in those districts where wagon mines are most numerous, that is, in those areas near the large consuming cities in the west and northwest, the problem of wagon mines was a very difficult one for the code authorities. As a practical matter, it is very difficult to control or regulate such operations.

There is competition between districts that produce coal. (284) Those districts that are nearest the points of consumption have an advantage in transportation costs that is denied those districts that are at a greater distance from such points of consumption. Competitive advantages accrue to those mining areas in which the natural conditions of mining are more favorable. Geological conditions determine the method of mining and the cost with which the coal may be extracted. There are great ranges and variations in the qualities of coal in different areas of the country. To a certain extent in any market that may be reached by coal of any particular type, that coal competes with all other coal. Coals of similar chemical and physical structure produced in different areas are most directly competing with each other. (285) Freight rates for carriage by rail have a substantial effect upon competition because generally about half the delivered price of coal is represented by transportation costs.

Within each district, even within mines themselves, there are variations in the character of the coal and in its chemical analysis. Competition exists between mines within each [fol. 296] district. Assuming that the same care is taken in the preparation and in the cleaning of the coal, and as-

suming further that the same methods for preparing the coal for market are followed, if substantially the same quality of coal is found inside two mines it will invariably be the case that that coal as finally produced and shipped will be of the same quality from the point of view of salability. There may exist variations in mechanical equipment at the preparation plants that would give one mine a competitive advantage in the quality of coal prepared for market as against another mine.

(286) I do not know how many different kinds and sizes of coal there are on the market in the United States, but under the NIRA code a tabulation was prepared of the coals being marketed in what was known as Division I and that was said to include more than 27,000 different sizes and varieties and prices of coal. Division No. I under the NIRA code was substantially smaller in area and in number of mines than price area No. 1 under the present Code. Coals are classified generally speaking upon their chemical analyses. The factors included in the chemical analyses upon which classification of coals would be based are generally the volatile content, the carbon content, the amount of ash and sulphur, and the heat-producing value of the coal. There is a very great range in those factors. The coal with the least volatile content and which is also the [fol. 297] firmest in structure is anthracite coal. At the bottom of the list would be lignites or peats, which are semi-coals. Between the lignites and peats and anthracite they are all variations. (287) Below the anthracite coals in volatile content come the so-called smokeless coals produced largely in southern West Virginia and in certain areas in Pennsylvania. The great bulk of coal in the country is of the higher-volatile character. To a degree, those very expert might identify particular coals from looking at them, but the real determination would be made upon chemical analysis. Coals vary in hardness, in fracture and in color. I have various samples of coal of different kinds, all in the same size, known in the coal trade as nut or chestnut size. [There were submitted and received in evidence the following eight exhibits, being samples of coal from various mines, including Carter Coal Company mines: Pennsylvania nut, anthracite, Wyoming District—Plaintiff's Exhibit 35A; Pennsylvania nut, anthracite, Lehigh District—Plaintiff's Exhibit 35B; West Virginia nut,

Winding Gulf Field, Beckley Seam—Plaintiff's Exhibit 35C; West Virginia nut, Olga, from Pocahontas Field, No. 4 Seam—Plaintiff's Exhibit 35D; West Virginia nut, New River Field, Sewall Seam—Plaintiff's Exhibit 35E; West Virginia nut, from Pocahontas Field, No. 3 Seam—Plaintiff's Exhibit 35F; Fairmont nut, from Fairmont Field, West Virginia, Pittsburg Seam—Plaintiff's Exhibit 35G; Logan nut, from Logan Field, West Virginia, No. 5 Block—[fol. 298] Plaintiff's Exhibit 35H.] (289) The purpose of introducing these is to show the general similarity and at the same time slight differences in the fracture of the coal and its shape.

I have also brought some samples of various sizes of coal from one mine, including mine-run coal, and the various sizes into which mine-run coal would be screened, including lump coal, egg coal, two sizes of stove, chestnut, pea and quarter-inch slack. [(290) These exhibits were offered and received in evidence as follows: Sample of run-of-mine coal—Plaintiff's Exhibit No. 36; sample of lump coal—Plaintiff's Exhibit No. 37; sample of egg coal—Plaintiff's Exhibit No. 38; sample of stove coal—Plaintiff's Exhibit No. 39; sample of stove coal—Plaintiff's Exhibit No. 40; sample of chestnut coal—Plaintiff's Exhibit No. 41; sample of pea coal—Plaintiff's Exhibit No. 42; sample of slack coal—Plaintiff's Exhibit No. 43.]

There is a difference in the amount of ash that various coals contain. (291) There is also a variation in the number of heat units contained in various classes of coal and in the amount of sulphur and the amount of water. Certain coals are adapted to certain uses and others to other uses.

The Carter Coal Company operates mines in the Pocahontas No. 4 Seam, the mines in that seam being known as Olga No. 1 and Olga No. 2. It operates a mine in the War Creek or Beckley Seam, called Caretta. It operates a mine [fol. 299] in the Davey Sewall Seam, called Thelma. All of these mines are in McDowell County, West Virginia. (292) It operates a mine in Tazewell County, Virginia, in the Lower Seaboard Seam, the mine being named the Seaboard. All those coals are sold under their own trade names which follow the names of the mines.

The various sizes of coal evidenced by Plaintiff's Exhibits No. 37 through No. 43 are sometimes combined and sold

two or more together. Mines having preparation plants prepare coal in those sizes for which a market demand exists. The sizes are generally as evidenced by the exhibits although sizing will vary at different mines and in different fields in accordance with local conditions. The sizes of coal being prepared at a mine may change even during the course of one day's operation to meet the demand of some particular customer. All of the different sizes of coal must be simultaneously marketed. (293) Generally speaking, very little coal is stored at the mines. Carter Coal Company has two storage yards at two of its mines at each of which yards between 50,000 and 100,000 tons of coal may be stored. It is not generally true that storage yards exist at mines. The necessity to market all the different sizes of coal produced at any one moment at a mine is less if there is a storage place in which any size may be kept until a demand for it exists. Generally speaking, all coal must be sold currently with its production.

There are perhaps in the entire United States 40,000 or more sizes, varieties and prices of coal. Under the [fol. 300] National Industrial Recovery Act the various code authorities under the Bituminous Coal Code made an effort to set different prices for each different kind, class and variety of coal. (294) Different prices were set for different mines and for the different sizes of coal produced by each mine. Variations in the quality of the coal produced in the same mine occurred in accordance with variations in its sizing. Different prices were attempted to be set to represent those variations.

In any particular consuming market the prices for coal of the same size and the same quality would be generally the same. There may and will exist considerable variations in the delivered price of coal in various markets based and determined largely upon the transportation cost from the mines to those markets. The principal factor in determining the variation of prices as between different markets would be the cost of transporting the coal from the mines, since the f. o. b. mine price would be the same.

(295) A similar effort to the direction in the Bituminous Coal Conservation Act that the district boards and the Coal Commission should coordinate prices was made under the National Industrial Recovery Act, pursuant to which it was called correlating prices. As a practical matter, it is very

difficult of achievement to secure a perfect or even equitable price relationship between all the different sizes and varieties of coal at all the points of consumption in the United [fol. 301] States as of any particular moment. Trade journals carry prices of coals that may be charged in different consuming markets which are somewhat indicative of the level of prices in those areas. These prices in trade journals are simply indexes of a general price structure. (296) Actual transactions would normally fluctuate either above or below such listed prices. Most buyers of coal from Carter Coal Company are well-informed with respect to coal. Most buyers have their own ideas of value and that part of the Corporation's business with respect to marketing coal after it is mined is devoted to securing the best prices obtainable for such coal. Buyers of large quantities of coal with whom I have come in contact have been very much interested in the price and in bargaining as to the price of the coal.

(297) I believe that under the NIRA a sincere attempt was made to see that each one of the producers got a fair minimum price for his coal. The practical difficulties to any one accomplishing that are, I believe, almost insurmountable. The constant shifting economic conditions are so vast and changing that any rigid price structure that does not permit of some leeway becomes cumbersome and makes adjustments difficult. In my opinion, under the NRA code, provision for each particular mine of a price in respect of its particular coal which satisfied all concerned as being fai-ly proportioned to that of the other mines was not achieved. I do not believe as a practical matter such a result [fol. 302] can be achieved by the best intentioned people.

(300) It was my experience under the National Industrial Recovery Act that an attempt was made to classify coals as to various mines. The problem of classifying coals and the problem of pricing them is very much one and the same thing, since the price would apply to the particular class of coal. Under the NIRA difficulties were encountered in agreeing upon any suitable basis of classification, just as difficulties were encountered in agreeing upon a price that was agreeable to the many interests involved for any particular class of coal. Where a group of men undertake to classify and price coals, particularly if they undertake to classify and price coals of one of their competitors, errors of judgment may occur. Unconscious discrimination may result.

It is possible that deliberate injury could be caused. We are all of us human and our judgments are naturally swayed by self-interest. (301) Under the NIRA, prices were fixed per ton. For a company like Carter Coal Company sales of 25,000 tons and more would be regarded as large sales. They would vary from that amount to 200,000 or 300,000 tons. Carter Coal Company has contracts with different customers for varying amounts of coal, some for substantial tonnages. A change of a few cents per ton in the price would have a material effect on the customer's decision as to whether or not to buy from a particular mine when he is buying 50,000 or 100,000 tons, and would determine where the business would be placed, assuming that we are talking about two or more coals which would compete for the sale.

(302) In my judgment, based on my experience, if the [fol. 303] Corporation were negotiating for a contract covering 100,000 tons, the purchasing party would not await the period of time sufficient for the Corporation to have a hearing and appeals if it were dissatisfied with the price it must offer under the Bituminous Coal Conservation Act.

As long as prices are competitive for coals of the same general quality customers continue to deal with their regular suppliers of coal. They could not afford to do so however if prices were so varied as to penalize them for continuing to deal with the producers who have supplied them with coal in the past. (303) It is customary for large consumers to buy on long-term contracts. The coal business is seasonal.

Under the NRA code the coals of one of the mines of Carter Coal Company were so priced that it was not, as a practical matter, possible for the Corporation to market the coals in the normal volume. (304) That was the Caretta mine. Coals from the Caretta mine had been sold in substantial volume until prices upon those coals fixed by the NRA code brought about a substantial shrinkage in the volume that could be sold. Prior to the NRA, the prices received had for the Caretta coal compared favorably with the prices received at other mines, although the realization obtained from the Caretta over a period of time would be less than the realization from some of the other mines of the Corporation. There had been long-term contracts covering the sale [fol. 304] of Caretta coal and some of these expired during the period of the NRA. It was not found possible to renew them at the prices fixed under the NRA. (306) Since the

end of the NRA the Corporation has secured some of its former customers for Caretta coal who were lost during the NRA but not all of them. Many of the customers so lost by the Corporation had entered into contracts with other producers and until those contracts expire they will not be open to any tender from Carter Coal Company. The NRA prices for Carter Coal Company have not been retained.

About half of the Corporation's total production is fine or slack coal (of which Plaintiff's Exhibit No. 43 is a sample). The users of that coal are steel and by-product companies and large steam users. To find outlets for this substantial part of the Corporation's output is a difficulty confronting the Corporation. The sized coals are generally consumed by domestic users, individual householders, people operating hotels, apartment houses or other buildings. The larger sizes are generally marketed in rural areas and the smaller sizes in the cities. (307) This statement is general because there may be particular instances when a large market for the large sizes will exist in a city. (308) In speaking of prepared coal I exclude fine coal. Consumption of fine or slack coal by household users is negligible. This has an effect on the price which can be obtained for fine coals, which are sold at lower prices than are the prepared sizes. The fine [fol. 305] coals are more difficult to sell because the number of users is limited. The marketing of the prepared sizes is generally a more simple problem. It is generally true that the fine sizes of coal would be sold at less than the average cost of producing all the coal and the prepared sizes, being more desirable and more readily salable, will command a larger price. The ability of many mines to continue in existence has been predicated upon that very fact because by being able to sell a part of the coal at less than the cost of production (309) the mines have been able to retain as consumers of coal large users who would otherwise have been lost. Different mines have different proportions of fine coal. There are variations between different mines and between different fields as to the percentage of fine coal in the run-of-mine coal as it leaves the mine.

(315) I have had prepared under my direction two charts showing the week-by-week production record of the Carter Coal Company mines for the years 1933-1935. [The two charts were offered and received in evidence as Plaintiff's Exhibit No. 44.]

(316) Carter Coal Company has long-term contracts which are at prices below those in effect under the NRA coal code. It has contracts at prices below what the Corporation believes to be its cost of production. Those contracts relate particularly to fine coal which it is difficult to sell.
[fol. 306] (317) At times, Carter Coal Company sells its coal at prices which are very substantially higher than the average price over a period of years. It sometimes makes sales at prices which are very substantially above cost. At other times it makes sales at prices which are very substantially below the average price. (318) At other times it makes sales at prices which are very substantially below cost.

The Corporation has entered into long-term contracts since the enactment of the Bituminous Coal Conservation Act. These contracts run for more than thirty days. Some of these contracts are now in effect. These contracts in some cases provide a return of less than cost of production as estimated by the Corporation. (319) They relate principally to fine coal.

It is not the practice of Carter Coal Company to make available to the public its spot orders or copies of any of its contracts, invoices or credit memoranda. It is not the practice of the Corporation to make those available to any of its competitors, except that it did to a certain extent during the period when the NIRA code was in existence.

The establishment of hours and wages is an important problem confronting the management of Carter Coal Com-
[fol. 307] pany. It is one of the most important problems. More than 60% of the costs of Carter Coal Company at the mine are labor costs.

The Corporation has been in business since 1912 and during that period there have been no periods of long interruption of production at the Corporation's mines, except that at one time during the history of the Corporation for approximately a year one of its mines was closed and not in operation. (320) Exclusive of that period, shipments have been steadily made according to market demands.

Since the Carter Coal Company has been in business there have been two strikes at mines of the Corporation in West Virginia. One occurred in the early part of October, 1933, and the other occurred as a part of a nation-wide strike very recently, at the end of September, 1935. The

first strike was purely local. It lasted at two of the mines one week and at two of the other mines two days. The circumstances of the strike were these: Representatives of operators in the Appalachian region and representatives of the mine workers in that area had entered into an agreement pursuant to the provisions of the NIRA code. (321) No demands were made upon the Corporation by the men who did not work. No official explanation was given to the Corporation as to why they did not work but we were unofficially told it was as a protest of the action that had been taken by the representatives of the miners in signing the [fol. 308] agreement. The more recent strike lasted for about seven working days. It was a suspension of work at the conclusion of the recently entered into agreement between representatives of the miners and representatives of the operators.

The mine of Carter Coal Company which was closed for a period of about one year during the so-called depression period, when demands for coal were at a very low ebb, was Olga No. 1. The Corporation was at that time being managed by Consolidation Coal Company.

(322) [There were offered and received in evidence three exhibits, as follows: Plaintiff's Exhibit No. 45—Chart entitled "Trend of Wholesale Prices of All Commodities and Raw Materials Compared with Trend of Carter Coal Realization per Net Ton f. o. b. Mine"; (323) Plaintiff's Exhibit No. 46—Chart entitled "Trend of Wholesale Prices of Specified Commodities Compared with Trend of Carter Coal Realization per Net Ton f. o. b. Mine, 1926 to 1934"; and Plaintiff's Exhibit No. 47—Table entitled "Index Numbers of Wholesale Prices of Specified Commodities and of Carter Coal Realization per Net Ton f. o. b. Mine, 1926 to 1934".]

[There were offered and received in evidence four exhibits, as follows: (324) Plaintiff's Exhibit No. 48—Chart entitled "Average Hourly Wage Rates Paid Common Labor in Important Industries, separately for United States and for South Atlantic States, Compared with Wage Rate Per Hour for Common Labor Employed by Carter Coal [fol. 309] Company, 1926 to 1934, as of July 1 of each year"; (325) Plaintiff's Exhibit No. 49—Table entitled "Average Hourly Entrance Wage Rates for Adult Male

Common Labor, July of each Year, 1926 to 1934"; Plaintiff's Exhibit No. 50—Table entitled "Wage Rates Per Hour of Specified Types of Labor, Carter Coal Company, 1926 to 1935, as of July 1 of each Year"; Plaintiff's Exhibit No. 51—Chart entitled "Wage Rates Per Hour of Specified Types of Labor, Carter Coal Company, 1926 to 1935, as of July 1 of each Year".]

Cross examination.

By Mr. Critchlow:

[(326) It was stipulated that the distribution of the production of Carter Coal Company during the years 1927 to 1934, inclusive, was substantially the same as the distribution of the coal produced during those years throughout the area known as the West Virginia Smokeless Fields.]

[There was offered and received in evidence as Defendant's Exhibit No. 1 a table of distribution of West Virginia Smokeless Fields, 1927 to 1934.]

(328) There would be variations in the different years in the amount of coal that was sold by Carter Coal Company within the state in which produced. Those variations with respect to the total percentage of coal produced might be small but as to the percentage moving into the state in which produced might be substantial. Other than saying that the distribution of coal by the Corporation in the [fol. 310] period mentioned (1927-1934) was substantially that of the Smokeless fields, I would rather not say that it was a specified percentage. (329) I testified that substantially all of the coal sold moved out of the state in which it was produced.

Carter Coal Company maintains a sales organization for the purpose of selling the coal produced by it. The Corporation has offices outside the State of West Virginia where orders are solicited and taken for coal produced by the Corporation. (330) The Corporation has sales offices in Washington, D. C., New York, N. Y., Cleveland and Cincinnati, Ohio, Chicago, Illinois, Norfolk, Virginia, and Detroit, Michigan. A subsidiary has an office in Boston, Massachusetts. The Corporation has one or more representatives who are in an agency capacity in certain areas.

The Corporation mines coal through its operating department. The coal is put into cars at the mines. (331)

That coal is sold by the sales department of the Corporation, operating through salesmen, some of whom are in offices and others of whom move about the country soliciting orders for the coal. Some of the coal is sold as what we term in the trade "spot", that is, for delivery within a comparatively short time. Other sales are made for delivery over a period of a considerable number of months. It frequently occurs that coal is produced and loaded into railroad cars before the order for the sale of the particular coal may be obtained. Generally, however, the substantial part of the tonnage produced from a mine will be that to [fol. 311] be applied upon contracts calling for the delivery of coal over a period of months.

Substantially all the coal sold by Carter Coal Company is upon an f. o. b. mine basis, by which I mean that the coal is delivered to the purchaser free on board the cars at the mines. The purchaser, having acquired title to the coal, pays the transportation charges to whatever destination he may take his product. (332) The subsidiary operating in Boston is a corporation the capital stock of which is owned by Carter Coal Company. Carter Coal Company sells coal to the subsidiary which in turn markets that coal or coal that it may purchase from any other producer in the markets it can reach.

A statement furnished to the Government defendants by Carter Coal Company with respect to its production and realization by states, 1923 to 1934, purports to show the production in net tons of Carter Coal Company for the years indicated thereon, the mine realization and also the operating expenses, (333) insurance, taxes, etc., including mine depreciation and depletion, as provided on the books of the Corporation. The statement also shows the average mine realization per ton in dollars and cents. In so far as I know the figures on the statement are as shown by the books of the Corporation. I myself have not examined all the entries on the books of the Corporation but the statement is accurate so far as I know. [The statement was marked Defendants' Exhibit No. 2 for Identification.]

[fol. 312] (334) In the statement in the column containing the figures for the year 1934 the mine realization price for that year is given as $3,918,266. The figure there given, as the note on the bottom of the exhibit explains, is the realization received by the Corporation from the coal sold

by it. There is an adjustment for inventory that takes place at the end of each year in the management of the Corporation which is included in that figure. The operating expenses given in line D for that year are $3,334,446. (335) In my bill of complaint I allege that for the year 1934 Carter Coal Company made a net profit of $323,998, which figure is correct as shown by the books of the Corporation. The items that were deducted from the figure of approximately $527,000 (the difference between mine realization and operating expenses in 1934) in arriving at the net profit figure of $323,000 were the expenses of administering the affairs of the Corporation, the expenses incident to the marketing of the coal, and interest charges, in general. There were added to that any other income that the Corporation might have derived from other sources. The figure given in line D does not include selling expense or general administration or items of that sort—Capital charges. (336) Carter Coal Company's method of accounting, which is not unusual in the coal industry, is to divide the total cost of the Corporation generally into three divisions, namely, cost of producing coal, cost of selling coal, and general and administra- [fol. 313] tive expense. The figure given on the statement is the cost of producing coal.

[The plaintiff then offered in evidence the statement theretofore marked Defendants' Exhibit No. 2 for Identification and it was received in evidence and marked Plaintiff's Exhibit No. 52.]

The mine-realization figure for the year 1933 was $1,750,480 and the operating-expense item for that year was $1,964,549, which figures are correct. (340) Carter Coal Company was under the control and management of Consolidation Coal Company during the period from February, 1922 to March 15, 1933. (341) I was not employed in any capacity nor did I have anything to do with the Carter Coal Company during that time. During those years I made myself generally useful in such ventures as my father might be involved in. Prior to that time I was engaged actively as manager of or as an employee of Carter Coal Company. I was so employed from about 1915 to 1922 with the exception of a period of time when I was in the Army.

I believe that the profits of the industry as a whole during the period of regulation under the NRA bituminous coal

code were greater than they had been for a number of years and that, measured by profits, the industry was benefitted. I believe, however, that those benefits brought certain injuries and perhaps delayed the solution of some of the problems that may confront the industry. For example, that [fol. 314] period lifted prices to a point high enough to invite the opening of mines which had been closed and perhaps the opening in some instances of mines that had not operated before. (342) I have many times stated that I would prefer temporary regulation of industry under an emergency statute, under a code to be changed from the one that was in effect, over having fixed regulation of the industry by Congress. I testified before the Senate Committee when it was holding hearings on the present Act that:

"Those of us in the coal industry may differ as to the protection of the code. I believe that there is substantial agreement in the industry that the code has been of benefit to the coal industry, and that part which you played (addressing Senator Davis) and to which you have just referred in connection with the N. I. R. A. has been fruitful of results in the bituminous-coal industry."

That was in connection with an exchange between the Senator and me in which the Senator was seeking to imply that his interest in furthering the enactment of the NIRA had had in mind the coal industry and that I might be an ungrateful recipient of the favors that had accrued to me as a member of the industry. (343) I was trying to disabuse the Senator's mind and to assure him of the opinion expressed by me there. I also testified that I favored a continuation of the bituminous coal code under the then existing NIRA. I did so as the lesser of two evils. That was the thought I had in mind when I testified. I believe that was the thought that I expressed to the subcommittee of the Senate during that hearing at some time during the proceedings.

[fol. 315] (It was stipulated that the testimony quoted was given on February 27, 1935.)

I also testified before the subcommittee on Ways and Means of the House. I testified as is stated on page 315 of the printed report of those hearings as follows:

"Mr. Vinson: What is your attitude toward a 2-year extension of N. R. A.?

"Mr. Carter: I took no part actively in the N. R. A. legislation. I was in sympathy, in common with a great many other operators, with an extension of the N. R. A. Act.

"Mr. Vinson: Did it benefit you?

"Mr. Carter: It did.

"Mr. Vinson: You did not hesitate to take its benefits?

"Mr. Carter: I welcomed them."

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

I testified before the subcommittee of the Committee on Interstate Commerce of the United States Senate as follows:

"Mr. Carter: Senator, I do not believe that without the minimum wage and maximum hour provision, any degree of stability could have been achieved in the coal industry. I believe that is the base upon which the coal industry must rely to solve its problems, some base, fixed base of wages and hours, keeping in mind of course that there are equitable differentials and changes in districts that must be preserved in order to prevent a dislocation of the industry and that [fol. 316] would injure the operators and all the men concerned."

That was my opinion and it is now.

(346) I also testified as follows:

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

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