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SOME PROBLEMS OF THE BITUMINOUS COAL INDUSTRY

BENJAMIN G. REEDER

The Bituminous Coal Act of 1937¹ presents many interesting questions of both a legal and economic nature. It is not possible to consider the legal aspects of this legislation without an understanding of the social and economic problems affecting the bituminous coal industry. Because of the fact that so many of the people of West Virginia are almost entirely dependent upon this industry it is believed that a consideration of the legal problems that have arisen or may likely arise may be of interest to the bar generally.

This law is essentially an experiment yet it is not without its precedents. That the law is an experiment is indicated by the fact that it was enacted to be in force for a period of only four years.²

The evils of the coal industry which are sought to be remedied by this legislation have been blamed upon the conflict between capital and labor. It is believed that too much emphasis has been placed upon this aspect of the case.

There are other factors which seem to be far more fundamental and important than those with which either capital or labor are blamable. The available supply of coal is greatly in excess of the demand. For the years 1923 to 1930 the annual production averaged 525 million tons, while the maximum capacity of the mines in operation during that period is estimated at 825 million tons, i.e., the producing mines were operating at only approximately 65% capacity.

In this connection must be considered the seasonal demand for coal, which, considered with the fact that it is not practically possible to store coal, necessitates an investment in capital and labor during the peak periods far in excess of the annual monthly average. In other words, since practical questions retard the storing of coal, production must follow closely the fluctuation in demand.

Another point, which is really a corollary of the first, is that idle capital and idle labor in an industry during the slack periods, greatly increase the unit cost (that is the cost per ton) of production to the industry. To this must be added the fixed charges

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¹ Public No. 48, 75th Cong., approved April 26, 1937.
² § 2 of the Act.
which accrue during shutdown periods, such as the cost of ventilation, drainage, and similar sustained activities, which often make it more economical to produce a reasonable amount of coal to be sold at an actual loss, rather than to suspend mining operations.

Another cause of the difficulty is the unusually high capitalization requirements of the industry in comparison with the value of the annual product. In most manufacturing industries, it is believed that the value of the yearly production is about equal to the capital investment. In the coal industry the capital investment is estimated at three to five times the value of the annual production. This of course, means high interest and amortization expense per unit of production.

Perhaps the most important factor contributing to the bad conditions existing in the industry and upsetting the balance of supply and demand, is the fact that in the mining of coal, slack is produced greatly in excess of the demand. The demand for lump coal is greater than the proportionate amount of lump coal produced, and in order to supply the demand for sized coal, an excess of slack is produced, which is a drug on the market. Since this slack cannot ordinarily be economically stored, it must be sold at sacrifice prices.

As a result of all the disturbing factors mentioned above the bituminous coal market has been greatly depressed.

Labor costs in the coal industry represent approximately 60% of the total cost, the other 40% of costs are for relatively fixed or stable charges. Therefore the operators, who have been compelled to cut prices on coal in order to exist, could only do so by a corresponding reduction in wages. It is true that the overproduction in the industry with the corresponding unemployment and low wages have made the miner's lot an unhappy one. He has been undernourished and unclad but this has been the result and not the cause of the problems of the industry. It must be remembered that at the same time the operators were fighting with their backs to the wall to avoid bankruptcy.

Between 1913 and 1935 inclusive, there were nineteen investigations by Congress or specially created commissions concerning the bituminous coal industry.

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4 These investigations are listed in Brief for Government Officers pp. 15-18, Carter v. Carter Coal Co., supra.
In 1932 there were introduced in Congress two bills for the regulation of the industry, one the Kelly-Davis Bill, and the other the Lewis Bill. Both these bills were opposed by an overwhelming majority of the producers, who expressed their bitter opposition to Federal regulation in any form. Neither of these bills passed. In June of 1933 the National Industrial Recovery Act\(^2\) was enacted, under which codes were set up for the regulation of the coal industry, by which prices were fixed which afforded to operators profits, in some instances profits which were very handsome, but had the effect of shifting tonnage from one field to another, or to different operations within the same field. The National Industrial Recovery Act was held unconstitutional by the *Schechter* case,\(^6\) decided May 27, 1935. However, the effect of the fixed prices by the coal codes as established under NRA, operated to save financially a great number of the operators. This experience under the NRA, however, cannot be used as a true criterion of the effect of later legislation, because, particularly towards the latter part of the time, the provisions of the code were avoided or violated by so-called chiselers, and the industry was rapidly reverting to the practice of cutthroat competition.

Before beginning the consideration of the efforts of Congress to regulate the coal industry, it may be beneficial to consider the efforts of the coal industry to regulate itself, to the end of correcting some of the evils, hereinbefore enumerated, which have brought the industry into disrepute. There are many practical problems which make self-regulation of the industry difficult. Among these may be mentioned the wide geographical spread of the industry; the great number of persons engaged in the industry; the natural desire of each producer to seek solution of his own problems to his own particular benefit; the distrust of the small producer for the large producer; the possibility of new operators entering the industry to reap the benefits obtained by established operators through self-regulation.

Aside from the practical difficulties above mentioned, difficulties of a legal nature are encountered in the Federal Anti-Trust Act.

The most notable example of self-regulation is found in Appalachian Coals, Inc. This organization, composed originally of

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\(^2\) Public No. 67, 73d Cong. 1st Sess., approved June 16, 1933.

one hundred and thirty-seven producers in eight districts, called for convenience Appalachian Territory, lying in Virginia, West Virginia, Kentucky and Tennessee, controlled about 73% of the commercial production of bituminous coal in the field in which their mines were located.

These operators formed an exclusive selling agency, called Appalachian Coals, Inc., a corporation of which they owned all of the capital stock in proportion to their production. Their object was the marketing of their output at the best prices obtainable, to be fixed by the officers of the company, and the officers were to apportion orders among them upon a stated basis, with a view to eliminating (a) "distress" coal shipped and marketed without having been ordered, (b) the competition of coal with itself, arising from its being simultaneously offered by several selling agencies, (c) the lack of standardization of sizes and misrepresentation of sellers as to sizes, (d) loss due to lack of agencies for the collection of credit information, and for other similar purposes.

Suit was brought by the federal government in the western district of Virginia, to enjoin the combination as one in violation of the Federal Anti-Trust law. On appeal to the United States Supreme Court, the lower court was reversed, the Court holding that such an organization would not be enjoined as effecting a combination in violation of the Sherman Anti-Trust Act where limitation of production was not contemplated, and the end in view was the stabilization of prices in an industry suffering from over expansion and loss of markets through competition of other fuels, and greater efficiency in the use of coal, it appearing that the condition of the industry and the potential undeveloped capacity for production were such that wherever the selling agency operated, it would not be able to fix the price of coal in the consuming markets, but would find itself confronted with effective competition and the organized buying power of large consumers.

Chief Justice Hughes said:

"With respect to defendant's purposes, we find no warrant for determining that they were other than those declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and predictions of consequences. . . . The evidence leaves no doubt of the existence of the evils at which defend-

8 Mr. Chief Justice Hughes delivered the opinion of the Court.
The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself, — practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.\textsuperscript{9}

The Court found that the plan did not create an undue restraint upon interstate commerce, but since the case had in effect been tried in advance of the operation of defendants' plan, and it was conceivable that the actual operation of the plan might prove to be an undue restraint upon interstate commerce, the Supreme Court directed that the decree granting the injunction be reversed and the cause remanded to the district court, with instructions to enter a decree dismissing the bill of complaint without prejudice and with the provision that the Court should retain jurisdiction of the cause with the right to set aside the decree and take further proceedings if future developments in the operation of the plan should justify that course, in the appropriate enforcement of the Anti-Trust Act.

Thus we find this group of operators, who have formulated a plan seeking to cure the ills from which the industry has suffered, with their plan given the stamp of approval by the Supreme Court, but with the burden of taking the risk that the plan in its operation might run counter to the Anti-Trust laws, and subject the operators to the penalties thereof. This legal difficulty, together with the considerations of a practical nature hereinbefore pointed out, have made self-regulation of the industry impossible.

In 1935 Congress passed an act known as the Bituminous Coal Act of 1935,10 which act was to be in force and effect for a period of four years. This act was ardently supported in Congress by some producers, and bitterly opposed by others. With the exception of the wages and hours provisions, found in Part III of this act, the law was very similar in form to the 1937 Act, which will hereinafter be discussed.

The chief feature of the 1935 Act was to set up codes of fair competition for the regulation of the industry in the several districts which were established, and to provide a tax of 15% on the value of all coal produced, with a rebate of 13½% to all producers who joined and complied with the codes promulgated under the authority of the act. The National Bituminous Coal Commission of five members was provided for as a part of the Department of the Interior. Twenty-three district boards composed of coal operators with at least one labor representative, were organized. The National Bituminous Coal Commission as created, with the assistance of the district boards, was charged with the duties of promulgating and enforcing the codes, fixing the prices for kinds, qualities and sizes of coal produced in each district, and otherwise regulating the industry.

Subdivision (g) of Part III of the 1935 Act provided:

"Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts."11

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11 Part III of this Act, down to subdivision (g) is as follows:

"To effectuate the purposes of this Act, the district boards and code members shall accept the following conditions which shall be contained in said code:

"(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from inter-
This provision, like 7-a of the National Industrial Recovery Act, was a mandatory provision for all code members. 12 The act asserted that

"... all production of Bituminous coal and distribution thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce, and the national public service of bituminous coal and the normal governmental revenues derivable from such industry ... ; that practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce. ..."13

The 1935 Act was held unconstitutional in the case of Carter v. Carter Coal Company.14

This was a stockholders' suit in the supreme court of the District of Columbia, brought to secure an injunction upon the basis that the act was unconstitutional, against the company's paying the tax and accepting the code, and against the Commissioner of Internal Revenue from proceeding to collect the tax provided for

12 See n. 11 supra.
13 Enactment Clause, par. 2.
14 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).
in the act. The supreme court for the District of Columbia held that the labor provisions were unconstitutional, but that the provisions dealing with prices were separable and valid, and therefore sufficient to sustain the tax, and the court denied the injunction.\textsuperscript{15} Pending a hearing in the court of appeals for the District of Columbia, the case was taken to the United States Supreme Court on cross writs of certiorari. The Supreme Court held that the labor provisions as set forth in Part III were beyond the power of Congress under the commerce clause, that the price fixing provisions were inseparable, and therefore the entire law was unconstitutional.\textsuperscript{16} Chief Justice Hughes agreed that the labor provisions were unconstitutional, but was of the opinion that the price provisions were separable, and in so far as they were concerned with interstate commerce, were valid as a regulation of interstate commerce. Mr. Justice Cardozo dissented, being of the opinion that the statute set up a valid system of price fixing as applied to inter-

\textsuperscript{16} Mr. Justice Sutherland delivered the opinion of the Court. As an additional ground for holding the law unconstitutional, the majority opinion held that the power conferred upon the majority of producers, in subdivision (g) of Part III was an unconstitutional delegation of a power by Congress, and that the delegation was so clearly arbitrary as to be a denial of the rights safeguarded by the due process clause of the Fifth Amendment.
state commerce and to those transactions in intrastate commerce where interstate commerce was directly or intimately affected, and that the price fixing provisions were separable from the labor provisions, and there was no necessity of considering the constitutionality of the labor provisions as presented in the case. Mr. Justice Brandeis and Mr. Justice Stone joined in this dissenting opinion.17

In 1936 Congress adjourned after the House had passed a revised coal bill modified to conform to the decision of the Supreme Court in the Carter case. The first bill introduced in the Senate at the first session of the Seventy-fifth Congress was the Bituminous Coal Act of 1937, commonly called the Guffey-Vinson Coal Bill. This bill passed in Congress on April 12, 1937, and was signed by the President on April 26, 1937.18

The enacting clause of this law is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

Since the 1937 Act is now the law of the land, it is well to consider at least in outline, its provisions.

Section 2 establishes in the Department of the Interior the National Bituminous Coal Commission, composed of seven members appointed by the President with the advice and consent of the Senate, for a term of four years. Two commissioners are required to be experienced bituminous coal mine workers, and two to have had experience as producers. This commission is charged with the administration of the law. It is given power to make and promulgate all reasonable rules and regulations for carrying out the provisions of the act. It can make no order which is subject to review under Section 6 of the act without public notice of a hearing, opportunity to interested parties to be heard, and findings of fact.

17 For an interesting discussion of the Schechter and Carter cases see Note (1937) 50 HARV. L. REV. 307.
18 50 STAT. 72 (1938), 4 F. C. A. Tit. 15, §§ 828 et seq.
Such findings, if supported by substantial evidence, are conclusive upon review.

The commission is authorized to initiate, promote and conduct research designed to improve standards and methods of mining, preparation, conservation, distribution and utilization of coal.

There is created the office of consumers’ counsel of the National Bituminous Coal Commission. It is the duty of the consumers’ counsel to represent the interest of the consuming public before the commission.

By Section 3 there is imposed upon the sale or other distribution of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, an excise tax of 1 cent per ton. This section also imposes a tax of $19\frac{1}{2} of the sale price of coal at the mine. Code members as defined in the act, are exempt from the payment of this tax of $19\frac{1}{2}%. Clearly this so-called tax is not a tax, but a penalty imposed to enforce membership in the code.¹⁹

Section 4 provides for the promulgation of the Bituminous Coal Code. The producing bituminous coal areas are divided into twenty-three districts. A district board for each district is provided, which board is composed of not less than three nor more than seventeen members. All but one member of each district board are elected from among the bituminous coal producers who are code members, half of whom are elected by a numerical vote of the producers, and half of whom are elected by a tonnage vote, the purpose being to provide representation to the small operators, and yet give the large producers a proper voice in the conduct of the affairs of the board. No code member is entitled to more than one representative on the board. One member of each board represents the organized mine workers of his district.

The expenses of the district boards are borne by the code members, and are assessed on a tonnage basis.

The actions of the district board are exempted from the provisions of the anti-trust laws of the United States.

By Part II of Section 4, the commission is given power to prescribe for code members minimum and maximum prices and marketing rules and regulations. For each district board there is created a statistical bureau, and each code member is required to report to the statistical bureau full information concerning prepa-

ration, cost, sale and distribution of coal, as the commission may authorize or require.

The producing districts of the country are divided into ten minimum price areas. Arrangements are provided for the determination of the weighted average of the total cost per net ton of the tonnage of each minimum price area.

Each district board is required to propose to the commission minimum prices on each kind, quality and size of coal produced in the district in such amounts that the return per net ton for all coal produced in each minimum price area will equal the weighted average cost above referred to.

Each district is also required to propose classification of coals and price variations as to mines and consuming market areas, values as to uses and seasonal demands.

"Total costs" as used above, are defined as including all costs of production and "reasonable costs of selling", including depreciation and depletion. The act specifically provides:

"The minimum prices so proposed shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public."

The proposals of minimum prices and rules and regulations are made by the district boards to the commission, which has full authority to approve, disapprove, or modify the same, and such proposed minimum prices are to serve as the basis for coordination of all prices between the districts in the common consuming market areas. Some of the requirements of such coordinated prices are as follows:

"Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competi-
tive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities."

The Commission is also given authority to establish maximum prices in order to protect the consumer.

Lawful, bona fide written contracts entered into prior to June 16, 1933, are excluded from the operation of the law.

Practices constituting unfair methods of competition are specifically defined and described, and declared to be violations of the code. These provisions, thirteen in number, are intended to foreclose actions or practices which would give any producer an advantage over other producers—in other words, to use the language of the street, to prevent chiseling.

By Section 4a the commission is given authority to regulate intrastate transactions in coal which may "cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal."

Any intrastate producer or shipper, whose activities do not come within the prohibition contained in the preceding paragraph, may on application to the commission, supported by affidavit, secure an exemption from compliance with the coal code.

Section 5 provides for the promulgation of the coal code and the organization of the district boards, for the collection of the 19 1/2% tax in the event of violation of the code, makes arrangements for the hearing of charges of violation of the code and revocation of membership, and in the event of revocation of membership, provides for restoration of such membership, in which event the delinquent code member is liable for double the amount of the 19 1/2% tax. Any code member injured by the chiseling of a fellow code member, is entitled to recover triple damages, costs, and attorneys' fees.

Paragraph (a) of Section 6 provides:

"All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to
every producer and to all parties in interest, including any State or any political subdivision thereof. In the event that a district board shall fail, for any reason, to take action authorized or required by this Act, then the Commission may take such action in lieu of the district board. The Commission may also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive."

Provision is made for an appeal to the circuit courts of appeals from the orders of the commission. On appeal the findings of the commission as to the facts, if supported by substantial evidence, is conclusive, and no objection will be considered by the court unless such objection has been made before the commission. Additional evidence may not be adduced without showing of reasonable grounds for failure to adduce such evidence before the commission.

Provisions are made for application by the commission to the courts for the enforcement of its orders.

Section 7 provides for collection of the taxes including penalties and refunds, in accordance with the Revenue Act of 1932.

Section 8 authorizes the commission to take evidence, require attendance of witnesses, production of evidence, etc.

Section 9 is a declaration of the public policy of the United States concerning organized labor in the coal industry, and is ineffectual except as to coal sold to the United States where no bid is required by law.20

20 Because the decision in the case of Carter v. Carter Coal Co., declaring the 1935 Act unconstitutional, was based upon the wages and hour provisions, (see supra n. 11), a comparison of the provisions is interesting. Sec. 9 of the 1937 Act is as follows:

"(a) . . . . It is hereby declared to be the public policy of the United States that —

"(1) Employees of producers of coal shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers.

"(2) No producer shall interfere with, restrain, or coerce employees in the exercise of their said rights, nor discharge or discriminate against any employee for the exercise of such rights.

"(3) No employee of any producer and no one seeking employment with him or it shall be required as a condition of employment to join any association of employees for collective bargaining in the management of which the producer has any share of direction or control.

"(b) . . . . No coal (except coal with respect to which no bid is required by law prior to purchase thereof) shall be purchased by the United States, or by any department or agency thereof, produced at any time where the producer failed at the time of the production of such coal to accord to his or its employees the rights set forth in subsection (a) of this section.
By Section 10 the commission is given authority to require reports from producers, and to require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of the act. The producers, however, are protected by the following provision:

"No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer, and, as so compiled, may be published by the Commission."

Section 12 provides that marketing agencies such as those set up by Appalachian Coals, Inc., hereinbefore referred to, are unlawful as a restraint of interstate commerce within the anti-trust laws, unless such producers have accepted the code and comply with its provisions. Such marketing agencies, however, are subject to the following provision:

"Subject to the approval of the Commission, a marketing agency may, as to its members, or such marketing agencies may, as between and among themselves, provide for the cooperative marketing of their coal, at prices not below the effective minimum prices nor above the effective maximum prices prescribed in accordance with section 4: Provided, That no such approval shall be granted by the Commission unless it shall find that the agreement under which such agency or agencies propose to function (1) will not unreasonably restrict the supply of coal in interstate commerce, (2) will not prevent the public from...

"(c) .... On the complaint of any employee of a producer of coal, or other interested party, the Commission may hold a hearing to determine whether any producer supplying coal for the use of the United States or any agency thereof, is complying with the provisions of subsection (a) of this section. If the Commission shall find that such producer is not complying with such provisions, it shall certify its findings to the department or agency concerned. Such department or agency shall thereupon declare the contract for the supply of the coal of such producer to be canceled and terminated.

"(d) .... Nothing contained in this Act or section shall be construed to repeal or modify the provisions of the Act of March 23, 1932 (ch. 90, 47 Stat. 70), or of the Act of July 5, 1935 (ch. 372, 49 Stat. 449), known as the National Labor Relations Act, or of any other Act of Congress regarding labor relations or rights of employees to organize or bargain collectively, or of the Act of June 30, 1936 (ch. 891, 49 Stat. 2036)."
receiving coal at fair and reasonable prices, (3) will not operate against the public interest, and (4) that each such agency and its members have agreed to observe the effective marketing regulations and minimum and maximum prices from time to time established by the Commission and otherwise to conduct the business and operations of the agency in conformity with reasonable regulations for the protection of the public interest, to be prescribed by the Commission.”

Section 13 of the act is the usual separability clause, providing that if any section, subsection, paragraph or proviso is held invalid, the remainder of the act shall not be affected thereby.21

Section 14 authorizes the commission to study and investigate the matter of increasing the uses of coal, the problem of its importation and exportation, and other problems of the industry.

Section 15 authorizes the commission, upon complaint or of its own initiative, to conduct hearings and make findings so that the consumers may be protected from excessive and oppressive prices on coal.

By Section 16 the commission or consumers’ counsel is authorized to make complaint before the Interstate Commerce Commission concerning the distribution of coal.

Having considered the provisions of the law let us now look at its operation. As hereinbefore pointed out the commission, as established, was required to sail in more or less uncharted seas with at least four members of the crew of seven who could reasonably be expected to be divided in their opinions and approaches to the problems confronting them, since the law required two of the members to have been producers and two of the members to have been miners and who in fact were drawn from the ranks of organized labor. Without intending to criticize any member of the commission or disparage to any extent their abilities, it must be honestly

21 The separability clause of the 1935 Act was as follows:

“Sec. 15. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.”

The separability clause of the 1937 Act is as follows:

“Sec. 13. If any provision of this Act or the code provided herein, or any section, subsection, paragraph, or proviso, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act or code, and the application thereof to other persons or circumstances, shall not be affected thereby; and if either or any of the provisions of this Act or code relating to prices or unfair methods of competition shall be found to be invalid, they shall be held separable from other provisions not in themselves found to be invalid.”
admitted that they were not trained or experienced in performing the duties that were thrust upon them. This, of course, is the stock criticism of all new administrative tribunals. Mr. Justice Cardozo in his dissenting opinion in the Carter case says:

"Certainly a bench of judges, not experts in the coal business, cannot say with assurance that members of a commission will be unable, when advised and informed by others experienced in the industry, to make the standards workable, or to overcome through the development of an administrative technique many obstacles and difficulties that might be baffling or confusing to inexperience or ignorance."

It is believed that the process of "the development of the administrative technique" has tremendously hurt the industry which the law was supposed to protect. When there is considered the "kinds, qualities and sizes of coal produced" in each district "and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand" and the other requirements of the law, it will be realized that the commission was charged with the performance of a Herculean task. The district boards whose memberships were drawn from among the producers and who were charged with the initial proposal of prices were likewise inexperienced in the duties they were to perform. The commission and district boards, however, had in many instances the benefit of such experience as could have been attained under the Bituminous Coal Code as set up under the National Industrial Recovery Act and the 1935 Bituminous Coal Act.

To add to the confusion and complexity there was the attitude of a considerable number of producers opposed to any regulation and the efforts of almost every producer to secure for himself situations or conditions in the administration of the law which would be to his own peculiar advantage.

As hereinbefore pointed out "values as to uses" was one of the elements to be taken into consideration in the classification of coal. There seemed to be a very marked difference of opinion among members of the commission as to the meaning of this provision. Did it mean classification as to uses depending upon the chemical analysis of the coal, i.e., as to whether it was a steam coal or by-product coal, or did it mean that consumers of large quantities of coal such as the railroads should be treated different-

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ly from the small consumers? Was it intended that this classification of coal was to be made for any other purpose than the purpose of fixing prices?

The commission by its orders 38 and 43 provided for the classification of coal and set up therein three elements of the standards of classification; namely, approximate analysis and ultimate analysis of coal, physical characteristics and characteristics of performance.

The district boards spent weeks trying to classify coal. Hearings for the classification of coal were held in Washington commencing on the 27th day of September, 1937. The National Commission seemed very reluctant to indicate why the classification was being required and what purpose it would serve. Since the standards of classification of coal and the elements considered in accordance with the provisions of orders 38 and 43 were very narrow, and did not take into consideration all of the elements which were to be considered by the express provision of the act and of the commission as set forth in order 39 for price fixing, many producers who were vitally concerned with the administration of the law were confused because they did not understand the purpose of the proposed classification.

The value of a classification not based upon the standards prescribed by the law is not apparent. Such classification could not be used for price fixing and could serve no apparent useful purpose. The efforts of the district board and of the commission in this classification of coal must be considered as love's labor lost unless the procedure served as a part of "the development of the administrative technique."

On September 28, 1937, Chairman Hosford, during the hearings with respect to orders 39 and 43, made an announcement concerning the procedure to be followed in the establishment of prices within Minimum Price Areas No. 1 and No. 2. This announcement set up the procedure proposed to be followed, setting forth the opportunities for protest and hearings.

23 Order No. 38 issued August 14, 1937, 2 FED. REG. No. 159 (Aug. 18, 1937); Order No. 43 issued Sept. 10, 1937, 2 FED. REG. No. 177 (Sept. 14, 1937).


25 The announcement of Chairman Hosford was as follows:

"As soon as all District Boards have complied with these requirements, the Commission will then have before it complete schedules of minimum prices proposed and coordinated as required under the Act, and before the Commission proceeds to further hearing these schedules will be printed.
The Union Wage Agreement between the United Mine Workers and the operators entered into effective April 1, 1937, to March 31, 1939, had been made in contemplation of fixed prices. This wage agreement materially increased wages and correspondingly increased production costs.

Each producer was trying to do everything possible to maintain his position in the market and to hold all old customers and to obtain every new customer possible with the hope that the customers would continue as customers after prices were fixed. This created a very distinct buyer’s market and depressed to the bottom the prices on coal.

Unfortunately the procedure outlined by Chairman Hosford was not followed.

and made available for inspection by all interested parties in the following manner:

“1. Copies of all proposed minimum prices for every District within Minimum Price Areas No. 1 and No. 2 will be placed on file at the office of all District Boards and at all statistical offices of the Commission, and will be available for inspection by any interested person at any time during business hours.

“2. Copies of schedules of such proposed prices will also be available for inspection at the office of the Secretary of the Coal Commission.

“3. A reasonable number of copies of such price schedule, to be determined by the Commission, will be printed and made available at the office of the Commission for distribution to persons who prove a proper interest therein.

“4. Notice of the fact that such proposed price schedules are on file and available for inspection and fixing a time for further hearing, will be given by publication in the Federal Register and in a newspaper of general circulation in each of the districts within Minimum Price Areas No. 1 and 2, as well as by mailing a copy of such notice to all code members in the two Minimum Price Areas.

Before proceeding to the completion of the hearing on the matter of proposed coordinated minimum prices, the Commission will allow a period of five (5) days, or such further time as the Commission may determine, within which inspection of such prices may be made and protests or objections filed with the Commission.

“Each such protest must comply with the Rules of Practice and Procedure established by the Commission and must clearly show:

(a) The interest of the protestant;
(b) The precise prices or price relationships which are protested against;
(c) The facts upon which such protest is based;
(d) Any alternative proposal which the protestant desires to submit to the Commission.

Immediately following the close of the period allowed for inspection and protest, the Commission, on the date prescribed in its notice, will proceed with its hearing on the matter of such proposed minimum prices and in the course of such hearing reasonable opportunity will be afforded each District Board and each protestant to appear and make a proper presentation before the Commission or an examiner thereof.
Tremendous pressure from all sources was brought upon the commission to establish prices at the earliest possible date. By its orders 89 to 10026 inclusive, issued November 30, 1937, effective December 16, 1937, the commission established minimum prices for all of the districts in Minimum Price Areas No. 1 and No. 2, covering the states of Pennsylvania, West Virginia, Ohio, Michigan, Indiana, Illinois, Kentucky, Iowa and certain counties in Tennessee. By these orders special prices were fixed for railroad locomotive fuel coal, recognizing a use classification. Similar orders were entered establishing minimum prices for the other minimum price areas. These orders were entered by the commission without the hearings provided for by the act. The minimum prices established in the price fixing orders were in practically every case substantially higher than the current contract prices.

At least ten cases were filed in the United States Court of Appeals for the District of Columbia, asking review of the Coal Commission orders establishing prices, and injunctions against the enforcement of minimum prices. In five of these cases stay orders were issued on February 11, 1938.27 In two other cases stay orders were issued on February 21 and February 23, 1938.28 In the

26 Orders Nos. 89-100, 2 FED. REG. No. 234 (Dec. 3, 1937).
Saxton Coal Mining Co. v. National Bituminous Coal Com'n: as in above case, following per curiam opinion of Feb. 10, 1938, stay order issued Feb. 11, 1938.
Enos Coal Mining Co. v. National Bituminous Coal Com'n: in accordance with per curiam of Feb. 10, 1938, stay order issued Feb. 11, 1938.
St. Louis & O'Fallon Coal Co. v. National Bituminous Coal Com'n: in accordance with per curiam of Feb. 10, 1938, stay order issued Feb. 11, 1938.
memorandum opinion handed down on February 10, 1938, in the
five cases in which the stay order was issued on February 11, 1938,
the court found that the price orders were issued and made effective
without notice of hearing, without affording a hearing to interested
parties, and without the making of findings of fact by the commis-
sion.

In the Seventh Circuit Court of Appeals a code member
brought a suit against the national commissioner\(^{29}\) to enjoin the en-
facement of prices on locomotive fuel. The court held on Febru-
ary 17, 1938, that since the act imposed penalties on the code mem-
ber for violation of the price orders, the code member was not pro-
tected by the injunction orders of the court of appeals for the Dis-
trict of Columbia, and entered the *pendente lite* order granting the
injunction.

These injunction orders affected such a large number of con-
sumers that the commission on February 25, 1938, revoked all of
the orders theretofore entered fixing prices.

This procedure of the fixing of prices, the resulting court ac-
tions and the revocation of prices can only be considered as an-
other step in "the development of the administrative technique."

As hereinbefore pointed out, the price of coal was to be fixed
to yield a return as near as may be to the weighted average of the
total cost per net ton of the tonnage of each minimum price area.
This minimum average was to be determined from the record of
cost of production for the year 1936, adjusted to meet the changes
after 1936. Accordingly the commission by order dated July 15,
1937, ordered each producer, whether or not a code member, to file
complete reports showing the total cost of tonnage production and
realization prices derived from the sale of coal. By Section 4, Part
II, Paragraph (a) this information was filed with the statistical
bureau as hereinbefore pointed out. Paragraph (a) of Section 10
provides that

"No information obtained from a producer disclosing cost
of production or sales realization shall be made public without
the consent of the producer from whom the same shall have
been obtained, except where such disclosure is made in evidence
in any hearing before the Commission or in Court, and except
that such information may be compiled in composite form in
such manner as shall not be injurious to the interest of any

\(^{29}\) Truax-Traer Coal Co. v. National Bituminous Coal Com'n, 95 F. (2d) 218
(C. C. A. 7th, 1938).
producer and, as so compiled, may be published by the Com-
mission.\footnote{50}

On March 30, 1938, the commission issued a ruling that in the
immediate future it would give public notice of a hearing to be
held to determine the weighted average of the total costs of the
tonnage for each minimum price area in accordance with the pro-
visions of the act. At this hearing the information obtained from
the producers with respect to individual cost of production of coal,
would be made available for introduction in evidence to support
the findings of the district boards of the total costs of coal produced
in their respective districts in the calendar year 1936, and the
necessary adjustments thereto by reason of changed conditions in
cost of production; to support the commission's determination of
the weighted average of the total cost of the tonnage for each mini-
mum price area in the calendar year 1936, adjusted as required.

The commission was evidently of the opinion that the intro-
duction of such individual cost data was necessary evidence to sup-
port the findings of the commission.

This cost information is regarded by most producers as inform-
ation of a very confidential nature, and had been furnished to
the commission on forms published and provided by the commission,
which forms recited the provisions of the act that all such infor-
mation was to be kept confidential. That the publication of such
information might be injurious, was recognized by the explicit
language of Paragraph (a) of Section 10 above quoted.

The Mallory Coal Company, acting in accord with many other
producers, on May 11, 1938, filed with the commission a petition
praying that the commission vacate its ruling concerning making
individual costs public, and revoke its construction of Section 10 (a)
of the act. The commission conducted a hearing on this petition, and
on June 1, 1938, entered an order that the individual cost returns of
the producers be made available for inspection by interested parties
in the final hearing in the establishment of minimum prices and
marketing rules and regulations. The Mallory Coal Company and
the other petitioners then filed their petition for review in the
court of appeals for the District of Columbia, under the pro-
visions of Section 6(b) Part II of the Act. The court, on August
1, refused to take jurisdiction of the case on two chief grounds: first,
that the order complained of was a procedural order of general ap-
lication, and second, that the petitioners had not exhausted their

\footnote{Italics supplied.}
administrative remedy. It would seem that this case is not in
accord with the right and justice of the matter, but since the mat-
ter in controversy is being tested in another suit, no further discus-
sion of this case will be made.

By orders of the commission dated August 31 and September
9, 1938, the individual cost data were ordered made available for
inspection on September 15th. The Utah Fuel Company and
others, code members, brought suit in the district court of the
District of Columbia, asking that the commission be enjoined
from making public the individual cost returns of the producers.
The district court held that the proposed action of the commission
was not in violation of the law, denied the injunction, and dismissed
the bill of complaint. Appeal was taken to the United States Court
of Appeals for the District of Columbia, and on September 14 an
injunction order was issued prohibiting making the cost data pub-
lic, and on the same day the Coal Commission rescinded its orders
of August 31st and September 9th.

On December 5, the court of appeals dismissed the tem-
porary injunction, held that the lower court was without juris-
diction, and dismissed the case. The opinion of the court handed
down by Judge Miller, says:

"The jurisdictional question whether the order complained
of is reviewable is basic and cannot be waived by the parties;" Congress "intended judicial review of the Commission’s orders
to be given exclusively by the’’ United States appeals courts;
"injunctive relief is not a proper remedy in the present case;
... the issuance of an injunction in the present case would
require a determination that the Commission’s order was plain-
ly and palpably erroneous and violative of a ministerial duty
imposed by law, beyond preadventure clear. Although it may
be argued that such a duty appears to have been imposed by
Section 4(a) of the Act, requiring that the cost data and sales
realization reports solicited by the Commission be kept secret,
it may be just as persuasively argued that the provisions of
Section 10(a) permit the introduction of such material into
evidence at any hearing before the Commission. The question
may be properly reviewed and determined when it comes to us
on appeal from a final order, but it is not before us at this
time. The statute being ambiguous, and the construction
placed thereon by the Commission being a possible one, in-
junctive relief at this time is not a proper remedy in any
event.''

31 Mallory Coal Co. v. National Bituminous Coal Com’n, 99 F. (2d) 399
On December 6 the commission again issued two orders on General Docket No. 15, ordering that the individual cost data be made available to inspection on and after December 15. A petition for a writ of certiorari in the Utah case was made to the United States Supreme Court. On December 15 the commission again postponed the making available of the individual costs. On December 19 the United States Supreme Court granted the writ of certiorari, granted the motion for an injunction pendente lite, and set the case for argument on Tuesday, January 3, 1939.

By far the most far-reaching litigation with respect to the 1937 Act is an action brought by the City of Atlanta, Georgia, against the National Bituminous Coal Commission and the individual members, in the district court for the District of Columbia, filed on October 6, 1938. This suit is for an injunction and declaratory judgment asking that the court adjudge that the act is unconstitutional; that the commission is without authority to fix prices; that if prices are fixed generally, they shall not apply to the plaintiff; that the commission be restrained permanently from fixing prices as against the plaintiff and for costs. No temporary relief was asked for.

The bases for the attack on the constitutionality of the law are that Congress is without authority to fix prices; that the enactment of prices will deprive the plaintiff of property without due process of law; that the promulgation of minimum prices for coal will deprive the plaintiff of property without due process of law in that the establishment of prices will compel the plaintiff to abandon valuable property for the reason that such property can no longer be profitably used; that the promulgation of minimum prices will deprive plaintiff of its right to contract with whom it pleases on such terms as might be agreed upon; that the promulgation of minimum prices will constitute a burden on and be an undue and unauthorized interference with the essential governmental functions of the city of Atlanta, and contrary to the Tenth Amendment to the Constitution of the United States; that the promulgation of prices based upon findings of fact determined upon confidential information (the individual costs data of each producer) which is not and cannot be tested by cross examination, will be in violation of the due process clause of the Fifth Amendment; that the promul-

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32 On December 12 the Circuit Court of Appeals denied a rehearing in the Utah case, but granted a stay of the mandate and continued the injunction until the 10th of January, 1939, conditioned upon the filing in the Supreme Court of a petition for certiorari and stay order within ten days.
gation of prices will be for the benefit of the producers and not the general public, and that such promulgation will tend to obstruct and will obstruct the free flow of commerce; that the act is void as an unconstitutionally enacted delegation of legislative power without sufficient standards.

Counsel for the commission made a motion to dismiss the bill of complaint, and the case was argued on November 18, the commission arguing that the plaintiff as a consumer has no legal standing to sue; should avail itself of the administrative remedies provided; that the suit is premature; that no declaratory judgment should issue because no justiciable issue has been raised, and the administrative remedy has not been exhausted.

No decision has yet been reached in this cause.33

There remains to be considered the present economic situation of the industry. In testimony presented to the Interstate Commerce Commission by Dr. W. H. Young, economist for the National Bituminous Coal Commission, in the freight rate case in October, it appeared that for nine months during 1937 the average cost of production for 74% of all coal produced was $2.077, and that the average realization was $1.963, or a loss of 11.3c per ton, which means a loss of approximately 50 million dollars to the industry for the year. It is believed that the loss for 1938 will be very much greater. The present union wage agreement was agreed to by the operators on the supposition that they would be operating with fixed prices. Dr. Young testified that the labor cost per ton in May of 1933 was approximately 63c in the Appalachian Territory, as compared to $1.347 per ton under the present wage and hour scale.

As hereinbefore shown, the prospect of fixed prices, coupled with the desire of each producer to obtain and hold as large a market as possible, has given the buyers of coal distinct advantage, and greatly depressed prices. The law has now been in effect for twenty months, and according to the best information obtainable, the prospect of the establishment of fixed prices is yet remote.

It is believed that there is developing throughout the industry, as well as among the general public a strong opinion that the law should be repealed.

Instead of helping the industry, the law in its operation has very greatly hurt the industry. In all fairness, the commission must not be too harshly criticized. It has had presented to it some of the most complex economic and legal problems which have con-

33 December 30, 1938.
fronted any administrative body during the history of our nation. We may disagree with the commission as to its methods or accomplishment, but no one can question the sincerity of its purposes or the honesty of its endeavor.

The commission may have, and in our opinion does have authority to relieve the situation temporarily. Paragraph (d) of Part II of Section 4 is as follows:

"If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act."

It is believed that under this provision the commission would have full right and authority to enter a preliminary or temporary order that pending the establishment of minimum prices and rules and regulations, no producer should sell his monthly output of coal at less than his total cost as defined by Section 4, Part II of the Act.

If the law is not repealed, it undoubtedly will be bitterly attacked in the courts. It may be that the interpretation of the courts will have a very salutary effect and in the end be the means of saving rather than destroying the aims sought to be attained by this legislation, i.e., that the regulation of the coal industry may be worked out along constitutional lines.

It may appear that this process of trial and error is wasteful, but it is the only process by which a democracy and a government of laws, rather than a government of men, can function.

The answer to the question whether this planned economy is for the best interests of our nation, is locked in the breast of the future.\footnote{Italics supplied.}  \footnote{For a similar discussion of price fixing under N. R. A., see Burke, "Price-Fixing" in the Bituminous Coal Industry — A Legal-Economic Problem (1935) 41 W. VA. L. Q. 225.}