

BITUMINOUS COAL AND THE PUBLIC INTEREST

By EUGENE V. ROSTOW†

ONE of President Roosevelt's most appealing intellectual claims for the New Deal was that it would experiment with policy, and would discard the experiments which failed to work. It is time to admit that the enterprise represented in the Bituminous Coal Act of 1937 is an experiment which has failed, and, in the nature of the coal industry, had to fail. On April 26, 1941, the Act ceases to be in effect.¹ It should not be renewed.

† Assistant Professor of Law, Yale University.

1. 50 STAT. 72 (1937), 15 U. S. C. § 828 (Supp. 1939), hereinafter referred to, by sections, as "the Act" or "the Coal Act." The constitutionality of the Act was upheld in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940).

Problems of competition among producers of anthracite coal, constituting a localized industry carried on by a relatively few corporations which operate in close association, will not be directly considered in this paper. The anthracite industry, organized for almost forty years under plans to maintain prices, has steadily lost ground to competing fuels. MEAD, *AN ANALYSIS OF THE DECLINE OF THE ANTHRACITE INDUSTRY SINCE 1921* (1935); BURNS, *THE DECLINE OF COMPETITION* (1936) 118-129, 216-217. Its characteristic difficulties are being met at present by a private production control scheme embracing 98% or 99% of the anthracite operators, large and small. The plan was set up under the wage contract between the United Mine Workers of America and the operators; a committee created by that contract, consisting of operators and miners, meets weekly with a representative of the State of Pennsylvania to determine how much anthracite coal the market will absorb at a "fair" price. Fractions of this tonnage are allocated to the individual participant mines, which are induced to abide by their allocations under threat of a penalty provision, requiring the deduction of excess output from future quotas. *N. Y. Times*, Jan. 14, 1940, p. 5, col. 1; *N. Y. Times*, March 15, 1940, p. 32, col. 5. *Black Diamond*, the coal trade journal, recently paid editorial tribute to the work of the anthracite control committee, which it described as an advisory body to suggest "production limitations which would prevent the former deplorable flooding of the market with indigestible volumes of tonnage. That job it has done with admirable courage and foresight, and we have today the nearest approach to a stable and self-regulated market, tidewater and rail, that has obtained for nearly a decade." Dec. 14, 1940, p. 27. No better illustration could be found of a trade union engaged in a restraint of trade, within the test of *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940).

It is a striking commentary on the operation of this scheme that in 1940, while bituminous production increased 15%, anthracite production actually fell by 3.7%. *BLACK DIAMOND*, Jan. 11, 1941, p. 22.

The Act, providing for the establishment of minimum prices in the coal trade, is one of a series of depression developments which radically changed our price policy. But the Great Depression of the thirties is over, and this is a favorable time to appraise the institutions which grew out of it. It is especially urgent to reconsider the statutes and habits which constitute price policy, for the success of present and future plans toward the development of the economy largely depend on the way in which industry is organized, and its product sold. During the last ten years the competitive forces in many areas of the economy have been restricted, and non-competitive arrangements have been created in the name of "stabilization" and other slogans. The machinery controlling the trade in soft coal is a case in point; the development of that institution offers material for studying the origins, the methods, and the consequences of many such schemes of restrictive regulation.

DEPRESSION DURING THE BOOM: 1923-1929

The bituminous coal problem is always with us. In its modern acute form of low profits and intense competition, it dates from 1923, the year in which wartime conditions in the industry were finally liquidated. The industry has been engaged ever since in a continuous effort to meet problems first sharply posed at that time, and both events and ideas about policy have been dominated by what happened in the period which followed.

Like many other phases of the coal problem, the war time crisis in coal was primarily a railroad crisis and a labor crisis. Soft coal is produced by many independent mines in several large areas of the country, but approximately 90 per cent of the coal comes from the eastern coal fields: the Ohio and Pennsylvania fields, the older center of production; the Southern Appalachian fields, including mines in West Virginia, Virginia, and Eastern Kentucky; and the midwestern fields of Illinois and Indiana.² Much of the coal from these areas is borne by rail during part at least of its carriage to the industrial markets of the East and Middle West. Coal is an important part of the freight carried on the network of Ohio, Pennsylvania, and New Jersey railroads, which were subjected to heavy strain during the war time boom. A shortage of coal cars developed, and a system of allocating cars to mines was employed which further reduced the capacity of the industry to deliver coal to the markets. The railroads were required to allocate cars to mines on the basis of capacity to pro-

2. In 1923, the percentage of soft coal produced west of the Mississippi was somewhat greater than 9%; in 1939, it was between 8% and 9%. BITUMINOUS COAL TABLES 1938-1939 (Bitum. Coal Div. 1940) 6.

duce, not actual orders, and the roads found it difficult to refuse cars to newly opened mines.³

The shortage of coal in many markets, and the consequent price rises, were accentuated by periodic labor difficulties. The northern mines, in Pennsylvania, Ohio, Indiana, and Illinois, were largely unionized both during and immediately after the World War; the southern fields, in West Virginia, Virginia, Kentucky, Alabama, and Tennessee, were held weakly by the unions, and for short periods only. After the war, they were entirely lost to the union. There were general strikes in the unionized coal fields in 1916, 1919, and 1922, which caused acute shortages and tended to stimulate production in areas unaffected by the strikes.⁴

In 1922, upon the settlement of the strike, a wage contract for the unionized northern fields was signed by the operators' associations and the United Mine Workers of America; this contract was extended in 1924 for three years as the celebrated Jacksonville agreement. With the coal car shortage ended, and a general wage contract in effect for the union mines, spokesmen for the unions and the industry expected stability and peace.⁵ Instead, there was a six-year period of intense strain.

The market for coal is extremely sensitive to the broad general changes in business conditions sometimes called trade cycles. Soft coal is sold chiefly to industry, and the demand for coal is largely derived from the demand for the products of the coal consuming industries. These industries are in large part producers of capital goods, or of electrical power used in manufacturing, and their business is directly affected by the forces which control cyclical fluctuations in trade.⁶ It is often remarked in this connection that the demand for coal is "inelastic," that is, that the quantity taken by most consumers is not exclusively a function of price.⁷ This is true only in the sense that a sharp drop in the price

3. 2 LYON & ABRAMSON, *GOVERNMENT AND ECONOMIC LIFE* (1940) 951-956. During the World War maximum prices for coal were set under the Lever Act until February 1, 1919, on a cost-plus basis. See GARRETT, LUBIN AND STEWART, *GOVERNMENT CONTROL OVER PRICES* (War Industries Board Price Bull. No. 3, 1920) 151-171, 177-183.

As to the car shortage problem, see 1 SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* (1931) 145-149; HEALY, *THE ECONOMICS OF TRANSPORTATION IN AMERICA* (1940) 17, 394.

4. *MINERAL RESOURCES OF THE UNITED STATES 1922, Part II* (U. S. Geol. Survey 1925) 443-451, 515-519; *MINERAL RESOURCES OF THE UNITED STATES 1923, Part II* (U. S. Geol. Survey 1926) 506-512; NAT. INDUSTRIAL CONF. BOARD, *THE COMPETITIVE POSITION OF COAL IN THE UNITED STATES* (1931) 239-240.

5. HAMILTON & WRIGHT, *THE CASE OF BITUMINOUS COAL* (1925) 237-239.

6. NAT. INDUSTRIAL CONF. BOARD, *THE COMPETITIVE POSITION OF COAL IN THE UNITED STATES* (1931) presents a full analysis of market factors in the demand for coal. See also NAT. RESOURCES COMM., *ENERGY RESOURCES AND NATIONAL POLICY* (1939) 69, 79-81.

7. Veenstra & Fritz, *Major Economic Tendencies in the Bituminous Coal Industry* (1936) 51 Q. J. ECON. 106, 108-109; Miller, *The Pricing of Bituminous Coal: Some International Comparisons* in FRIEDRICH & MASON, *PUBLIC POLICY* (1940) 144, 148-149.

of coal does not much increase demand. The obverse does not follow, for increases in the price of coal relative to the price of other fuels do cause a fall in the demand for coal.

Aside from factors associated with general industrial fluctuations, there are special forces at work which in recent years have tended to reduce the demand for coal, in the markets for both industrial and domestic fuel. The utility industry, for example, has been and remains a major consumer of coal. But the utility industry has fabulously increased its efficiency in the use of coal. It took 6.6 pounds of coal to produce 1 kilowatt hour of electricity in 1902, 3.2 pounds in 1919, 1.62 pounds in 1930, and 1.39 pounds in 1939.⁸ While the pace of the revolution in efficiency has slowed down, other factors in the utility business are working in the same direction. Formidable increases in the use of water power as a source of electricity in several regions of the country, coupled with more extensive long-distance transmission of electric power, indicate what may become a considerable threat to the utilities market for coal. Similar developments have appeared in other coal consuming industries. In the past, the railroads took approximately one-fifth of the output of bituminous coal. But they have greatly increased their efficiency in the utilization of coal—by 31.2 per cent between 1919 and 1937, with the process continuing steadily, although at a reduced rate.⁹ Furthermore, the use of Diesel locomotives is increasing, especially in the West, and so is the electrification of rail lines, a fact which represents a certain decline in coal consumption even when the electricity used for power is derived from coal. Oil as a source of energy has made great headway in shipping, in industry, and in the domestic market. Natural gas pipelines have permitted cheap transportation of that fuel to the large industrial markets. The same twin forces, increased efficiency and the competition of oil, gas, and electric power, have narrowed the market for coal in manufacturing industry, and coal has fallen sharply as a fraction of the total energy supply. In 1913 coal supplied 70.3 per cent of all energy used; in 1918 this fraction had fallen to 69.5 per cent, to 51.4 per cent by 1930, and to 41.8 per cent by 1939.¹⁰

This development, however, is sometimes misconstrued. A relative decline in the use of coal need not mean an absolute decline in the market demand for coal. In a society using more and more capital equipment in its processes of production, especially in its periods of great develop-

8. MINERAL RESOURCES OF THE UNITED STATES, 1927, Part II (Bureau of Mines, 1930) 417-419; MINERAL RESOURCES OF THE UNITED STATES, 1930, Part II (Bureau of Mines 1932) 679; BITUMINOUS COAL TABLES, 1938-1939 (Bitum. Coal Div. 1940) p. 2; *cf. id.* at 20.

9. MINERALS YEARBOOK (Bureau of Mines 1938) 716; see generally NAT. RESOURCES COMM., ENERGY RESOURCES AND NATIONAL POLICY (1939) 103-110.

10. MINERALS YEARBOOK (Bureau of Mines 1937) 810; BITUMINOUS COAL TABLES, 1938-1939 (Bitum. Coal Div. 1940) 22.

ment, the total consumption of energy expands. The demand for coal, as a smaller fraction of a larger total, may even increase. Despite advances in efficiency, and the increased use of water power, natural gas, and fuel oil in the generation of electric power, the utilities industry is growing so rapidly that the 1939 consumption of coal in this market was 46,223,000 tons, an all-time high for the industry.¹¹ On the railroads, to take another example, coal seems to be about holding its own. The use of Diesel engined locomotives is increasing rapidly, but in 1939 Diesel fuel constituted only about one quarter of one per cent of the total railroad fuel.¹²

Thus the total consumption of coal in the United States did not decline during the six year period between 1923 and 1929. It actually increased, from 518,993,000 tons in 1923, to 519,555,000 tons in 1929. The average annual consumption in the years 1924-1929 was greater, by more than six per cent, than the average annual consumption in the years 1918-1923. Total production was 564,564,662 tons in 1923, and 534,988,593 in 1929 — a fall of five per cent — but average annual production in the years 1924-1929 was almost four per cent greater than average annual production in the period 1918-1923.¹³

Over-all changes in consumption and production, then, do not correspond to the severe decline in prices and profits, and the great and genuine distress among operators and miners, which characterized this period. For during these six years — years of considerable activity for most parts of the American economy — coal prices fell one-third, the number of mines declined by 30 per cent, and the "capacity" index of the Bureau of Mines fell 22 per cent. With the faint light of all such data, the figures measure the effects of a bitter war, a war, be it said, that is not yet over. Like most wars, this one was fought with propaganda and with political and economic weapons, as well as with guns — in Congress, before the courts and the Interstate Commerce Commission, in the commercial markets of the country, and in the field. These were the years of the yellow-dog contract and the labor injunction, years when miners and deputies fought pitched battles in the hills. In that time many coal communities became depressed areas, where year-long unemployment was added to habitual squalor in a pattern of complete social degradation.¹⁴

11. BITUMINOUS COAL TABLES, 1938-1939 (Bitum. Coal Div. 1940) 4.

12. BITUMINOUS COAL TABLES, 1938-1939 (Bitum. Coal Div. 1940) 5. Locomotive fuel, Class I railroads, was approximately the same percentage of total consumption in 1929 as in 1938; there was less than 2% difference between the ratios. MINERALS YEARBOOK (Bureau of Mines 1939) 773. The same ratio was apparently maintained in 1940. Battle, *Annual Review of Bituminous Industry*, BLACK DIAMOND, Jan. 11, 1941, p. 18.

13. MINERAL RESOURCES OF THE UNITED STATES 1923, Part II (U. S. Geol. Survey 1926) 500; MINERAL RESOURCES OF THE UNITED STATES 1929, Part II (Bureau of Mines 1932) 685, 688.

14. HUNT, TRYON & WILLITS, WHAT THE COAL COMMISSION FOUND (1925) 135-251; "CONDITIONS IN THE COAL FIELDS OF PENNSYLVANIA, WEST VIRGINIA AND OHIO,"

If the over-all production and consumption of coal did not fall in this period, why was there depression and disorder in the coal industry?

One explanation is commonly offered—that the coal industry was “overexpanded,” and that its “excessive” production or capacity to produce led to its depressed condition.

“Overproduction,” said Mr. Justice Cardozo in the *Carter* case, “was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines. The hope of betterment was faint unless the industry could be subjected to the compulsion of a code. In the weeks immediately preceding the passage of this Act the country was threatened once more with a strike of ominous proportions. The plight of the industry was not merely a menace to owners and to mine workers: it was and had long been a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy.”¹⁵

“The evidence,” the Supreme Court had remarked earlier, “leaves no doubt of the existence of the evils at which defendants’ plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels.”¹⁶ Variations on the theme recur in all parts of the literature about coal: “If a single term is to be used in describing the ills of the coal industry, over-capacity probably serves better than any other.”¹⁷

As an explanation of what happened in the twenties, and as a guide to policy in the forties, this formula is inadequate in several particulars.

Hearings before Committee on Interstate Commerce on S. Res. 105, 70th Cong., 1st Sess. (1928); “STABILIZATION OF THE BITUMINOUS COAL MINING INDUSTRY,” Hearings before a Subcommittee of the Committee on Interstate Commerce on S. 1417, 74th Cong., 1st Sess. (1935); HAMILTON & WRIGHT, THE CASE OF BITUMINOUS COAL (1925) c. 4.

15. *Carter v. Carter Coal Co.*, 298 U. S. 238, 330-331 (1936).

16. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 372 (1933).

17. *Veenstra & Fritz*, *supra* note 7, at 106. See also Miller, *supra* note 7, at 150; F. E. R. A., *THE BITUMINOUS COAL INDUSTRY WITH A SURVEY OF COMPETING FUELS* (1935) 62-65, 71; Comment (1935) 45 *YALE L. J.* 293, 294. Compare HAMILTON & WRIGHT, *THE CASE OF BITUMINOUS COAL* (1925) c. 4; NAT. RESOURCES COMM., *ENERGY RESOURCES AND NATIONAL POLICY* (1939) 110.

"Overproduction" may be defined as production at uncompensatory prices. If one examines the term from the point of view of the community at large, rather than that of the coal operators, it appears that "overproduction" in this sense has never been a significant problem in the coal industry.¹⁸ Most soft coal is produced after it is sold. Some coal is extracted before orders for it have been obtained, but mainly as a by-product of the process of grading and sizing coal produced to meet contracts. Storage costs are high, and many kinds of soft coal degrade if stored. Do coal operators take orders for coal at prices which the community can consider "uncompensatory"? One major public interest in the relationship between particular prices and costs can be simply put: the public is well served if existing resources are used in the cheapest possible way—cheapest, that is, in view of the size of the national income at the moment, and in view, too, of labor standards regarded as minimal. Concretely, this public interest in cheapness means that the price of coal cannot be regarded as uncompensatory, from the point of view of the community, as long as it covers the operating costs of producing coal, or causes less out-of-pocket loss for the operator than would follow from shutting down the mine.¹⁹ Any minimum price above that level, for any particular mine, would have one of two effects: it might cause the operator to forego orders at prices yielding more than the operating cost of mining, which would make the property prematurely idle; or, if customers had no cheaper source of fuel (and remember that the demand for coal is "inelastic"), it would require the community to

18. The business man regards prices as compensatory only if his revenue pays operating costs plus a "normal" reward for the entire sum spent on productive equipment in his mine: he expects, that is, that each year's output will pay not only the costs of its production, but also a "normal" annual return on an investment which might have been made in anticipation of a much larger output. Consideration of the interests of the economy as a whole suggests different views on the use and abandonment of such productive equipment; the economist does not regard it as essential or desirable that prices always be high enough to reward or even to maintain the sum spent for equipment. The strong prejudice of economists in favor of stocks rather than bonds rests on these opinions. See remarks of R. F. Harrod, quoted in STURGES, *CASES ON DEBTORS' ESTATES* (3d ed. 1940) 3-4; FOWLER, *THE DEPRECIATION OF CAPITAL* (1934) c. 6; ROBBINS, *THE ECONOMIC BASIS OF CLASS CONFLICT* (1939) 36-37; BUCHANAN, *THE ECONOMICS OF CORPORATE ENTERPRISE* (1940) c. 12; Rostow & Cutler, *Compelling Systems of Corporate Reorganization* (1939) 48 *YALE L. J.* 1334, 1374-1376; Caplan, *Premature Abandonment and the Flow of Investment* (1939) 54 *Q. J. ECON.* 152; HUTT, *THE THEORY OF IDLE RESOURCES* (1939) *passim*. For an interesting study of businessmen's behavior, based on a questionnaire, see Hall & Hitch, *Price Theory and Business Behavior* (1939) 2 *OXFORD ECON. PAPERS* 12.

19. MARSHALL, *PRINCIPLES OF ECONOMICS* (8th ed. 1930) 372-377; MEADE, *THE RATE OF INTEREST IN A PROGRESSIVE STATE* (1933) 33-35; MEADE, *INTRODUCTION TO ECONOMIC ANALYSIS AND POLICY* (1936) 109, 114-116; Comment (1935) 45 *YALE L. J.* 324, 335; materials cited *supra* note 18. A shut-down would involve a loss of the present value of anticipated future production, balanced by the chance of re-opening the shut mine, in the event of price rises. Re-opening a mine is an expensive operation.

pay more for its coal than it would have had to pay in the absence of the minimum price, a fact which gives the coal industry a subsidy at the expense of everyone else. More of the national income would go to the coal trade, leaving less for others to share. That the investment made to open the mine was a mistake, from the point of view of the investor, is no reason to deny the public the advantages of cheap coal involved in the exploitation of that investment. There may be special reasons in particular cases for state intervention to prevent a specific industry from becoming unprofitable; but it cannot be a general policy of government to guarantee the profitability of investments against the effects of competition. Physical resources have been put irrevocably into the mine; the only alternatives available are to abandon the equipment, on the one hand, or, on the other, to use it despite the fact that a complete return is not earned on the money spent for it. It cannot be transferred to another use and postponement of use by way of temporary shut-down is expensive and not often feasible. It seems fair to conclude that the public is best served if the fixed equipment of the mine is used under such circumstances rather than abandoned; that prices which cover the out-of-pocket costs of such a use are "compensatory"; and that coal is rarely, if ever, sold at "uncompensatory" prices, in this sense of the term.

It is more nearly descriptive to connect the problems of the coal industry during the twenties with "overcapacity" than with "overproduction," although this term too has been used misleadingly.

One preliminary connotation of the word should be distinguished. Overcapacity cannot be identified with unutilized capacity in any simple or unique sense, although it is common in discussions of the problem to do so. The Bureau of Mines index of capacity, the measure uniformly employed in these controversies, indicates how much coal would be produced from existing mines if those mines were worked one normal shift on every working day of the year, and if the further exploitation of the mines resulted in uniformly proportional increases in output. The index thus reports that in a particular period the existing number of mines could have produced more than was produced, if certain conditions had been fulfilled. If other conditions are chosen as significant — if, for example, one measures how much could be produced by working the mines two shifts a day, or on Sundays — the index would be quite different, but would have exactly as much or as little significance for prices as it has now.²⁰ We have coal underground, in reserves, and in existing mines, for several hundred years' consumption at present rates of use.²¹ All

20. See Miller, *supra* note 7, at 151-152; Reynolds, *Cutthroat Competition* (1940) 30 AM. ECON. REV. 736, 737; NAT. INDUSTRIAL CONF. BOARD, *op. cit. supra* note 6, at 237-239.

21. Estimates range from several hundred years to two or more thousand. NAT. RESOURCES COMM., *ENERGY RESOURCES AND NATIONAL POLICY* (1939) 63-64. The conservation problem in coal is not one of exhaustion of coal supplies, but of the exhaustion

that coal is "excess capacity" at any given moment, in a sense comparable to that of the Bureau of Mines index of capacity. The fact is that coal is left in mines, and in fields not yet mined, for the same reason: because it does not pay to extract it.²² Producers cannot contract to sell the coal at compensatory prices (using that term in the sense defined above), and therefore they leave it underground. The presence of large supplies of unmined coal, controlled by independent owners, and readily available under favorable conditions, means that any great increases in the profitability of mining will evoke fairly prompt increases in output, but it does not explain why mining in the twenties became unprofitable.

The existence of unutilized capacity in existing mines has been a perennial feature of the coal industry, and has characterized periods of rising prices as well as the years of coal depression. It does not account for the fall in prices and profits which make such depressions, nor does it prevent increases in prices and profits during booms. In part, the presence of unutilized capacity on a large scale in existing mines is technologically inevitable, since the expectation is that a mine once opened will be used for many years. In part, too, it is a consequence of seasonal variations in the demand for coal. Since coal cannot well be stored, the mines must be able to produce what is needed in the busy seasons. At the present time, production during the peak of the season is at a rate very close to the theoretical one-shift-day capacity of the industry measured by the Bureau of Mines index.

It is easy to exaggerate the effect of unutilized capacity on price. The unutilized capacity of existing mines is like the undeveloped coal reserves; it can be called into production if price conditions justify such an act. Of course, new mines are not opened unless anticipated revenue promises to cover operating costs, plus a reward for the funds needed to open them, whereas existing mines are exploited as long as revenue more than covers operating costs, without reference to the amount of the return earned for the capital invested in the mines. From this it follows that the market must be quite firm before new mines are opened, although even small increases in price will awaken the production of mines which are open but operating at less than capacity. But that fact again raises a basic question of public policy toward the use of productive equipment which cannot earn full overhead costs. Should such equipment be abandoned? Should it be used as long as the revenue earned through its use exceeds operating costs? Or should the state intervene to assure prices which give a higher reward to investors?

During 1923 and the years which followed, however, the industry, even during periods of peak demand, was operating far below the rate

of lower cost mines. Here, wasteful mining methods are running a race with cost-reducing technology in extraction and use.

22. See WATKINS, *OIL: STABILIZATION OR CONSERVATION?* (1937) 30-36.

which corresponded to theoretical capacity. At that time, the industry was experiencing "overcapacity" in a somewhat different sense; mining operations were becoming unprofitable in several regions, and severe price competition occurred. For many mines, revenue failed to cover operating costs, and neither available cash nor available estimates of future prices justified carrying the operating losses. There was overcapacity in the industry, in a very practical sense: experience was persuading investors that the funds they had spent to open and equip mines were mis-spent, and miners found that they were steadily unemployed, or that they could not earn a living comparable with that earned by their fellows in other jobs.²³ Overcapacity thus defined is to be distinguished from unused capacity. There is overcapacity if labor and capital associated with the industry find their rewards unattractive, when compared with rewards in other occupations. Thus there can be unused capacity, but not this kind of overcapacity, when earnings in the industry are high enough to pay wages and profits comparable with those in other industries. Contrariwise, there can be a tendency for capital invested in an industry to be abandoned, or transferred to other uses, even though it is fully engaged in unprofitable production. Of course, neither the capital supply nor the labor force of the coal industry is particularly mobile. Even during the twenties, when miners' wages were falling, it was difficult to persuade them to leave their isolated mountain towns for industrial jobs in distant centers.²⁴ Many did leave, of course, but only after their earnings fell drastically, until they were considerably less than the earnings of workers in other industries. This immobility of labor helped to make possible some of the more extreme forms of labor exploitation which marked the period.²⁵ Capital is even more irrevocably committed to the coal industry than labor. Expenditures once made for opening a mine and equipping it can be recovered only out of the earnings of the mine. There is no possibility of transferring the physical equipment to other uses, and the money spent in the mine can be withdrawn only if the management earns enough to make its maintenance or depreciation charges, but refuses to make them — a long, slow process, at best.

To say that the trouble with the coal industry was overcapacity in this sense is another way of saying that operations in the industry had become unprofitable, and that there was some tendency for mines, especially for small mines, to be shut down. As an explanation, this formula draws attention to the relative unprofitableness of the coal industry, but does not explain how this decline in profitability came about, or why it took the particular form it did. Lyon and Abramson suggest that coal mines

23. Miller, *supra* note 7, at 151. See also Reynolds, *loc. cit. supra* note 20.

24. THORNTON, INTERNAL MIGRATION IN THE UNITED STATES (1934) 28; FRITZ & VEENSTRA, REGIONAL SHIFTS IN THE BITUMINOUS COAL INDUSTRY (1935).

25. Reynolds, *supra* note 20, at 744-746.

take time to open, and that an undue number of such investments were made in the early twenties, under the stimulus of high prices and coal shortages. The operators collectively overshot their mark, and discovered that their market was limited only after they succeeded in opening the mines. Then it was too late; with the end of strikes and car shortages and in the presence of enlarged capacity, the market sagged badly: "The immediate source of the difficulties of the bituminous coal industry was the existence of a productive capacity so great that it led to prices inadequate to cover total costs. This was due to three factors: the great increase of investment that was stimulated by the high prices of the war and the post-war boom; the rather sudden flattening out of the growth of demand after 1920; and the methods of cutting, loading, and transporting coal in the mines."²⁶

The trouble with this view, despite its plausibility as a theory, is that it does not quite fit the facts. It treats the coal industry as a unit, reacting uniformly to uniform pressures. Statistics are considered in gross, with the trend in one region cancelling the trend in others. Such a treatment ignores vital issues in the pattern of coal competition. It is not realistic to say that the coal industry became generally unprofitable during the twenties because of excessive capacity built up by investments made in the anticipation that war-time demand (or the pre-war rate of increase in the demand for coal) would continue forever. On closer inspection, the fact that some fields reacted differently than others to the pressure of events after 1923 emerges as the most important single factor in the troubles of the industry during that period. The coal industry did not suffer from universal overcapacity; some fields profitably increased their production during this period, in the course of a violent and disturbing interregional struggle for business.

The main theatre of interregional competition was the eastern consuming centers: New York and New England, the industrial parts of Ohio and Pennsylvania, and the lake cargo ports in Ohio, whence coal is shipped to distribution points on Lake Michigan and Lake Superior. The main participants in the struggle were the northern fields of Ohio, Pennsylvania, and Illinois, unionized and well-established, on the one hand, and, on the other, the newer mines of West Virginia, Eastern Kentucky, and Virginia, not unionized, and served by enterprising railroads, which offered promotional freight rates to the chief markets. These producing areas all had different experiences during the twenties. In some, production, employment, and profits fell disastrously, and many mines were shut down. In others, production increased, the number of larger mines went up, and shut downs occurred only among small mines, ill-equipped with funds for cost-reducing mechanization, or for aggressive

26. 2 LYON & ABRAMSON, *GOVERNMENT AND ECONOMIC LIFE* (1940) 957; see HAMILTON & WRIGHT, *THE CASE OF BITUMINOUS COAL* (1925) c. 8.

sales competition in distant markets. Thus production in Pennsylvania, then nominally the chief source of bituminous coal, dropped 16.5 per cent between 1923 and 1929, while in West Virginia output rose 28.4 per cent. Ohio lost 41.6 per cent of its production in the same period, and Illinois 23.5 per cent, while Eastern Kentucky gained 35 per cent.²⁷

There were two major weapons with which the interregional war for coal markets was conducted: freight rates and wage rates. The tactics developed in the use of these weapons offer an instructive contrast. The fight over freight rates was carried on in the tradition of law and order, before legislative, administrative, and judicial bodies, and with the techniques of business; there was then no machinery, however, for regulating the competition in wage costs, and that phase of the struggle led to a collapse in the institutions of peace.

The railroads carrying West Virginia coal northwards had early established rates which favored their shippers, in competition with Pennsylvania and Ohio operators. Despite the greater distance from the southern mines to the markets, the freight rates were not greatly above the rates charged for northern coal. The persistent interest of the northern operators, in Western Pennsylvania and Eastern Ohio, was to reduce the freight differential in favor of their southern competitors, particularly on the routes from West Virginia and Eastern Kentucky to the Lake Erie ports. The earlier history of that struggle has been well told; it is a history of ineffectiveness, indecision and frustration.²⁸ The profitable lake cargo business see-sawed back and forth, while the contestants sought some decision from the Interstate Commerce Commission and the courts.

In July 1923, some operators in the Pittsburgh area, and in Eastern Ohio, asked the ICC to reduce the freight rates charged them for the northward haul to Lake Erie ports, on the ground that those rates were illegal under Sections 1 and 3 of the Interstate Commerce Act, as unreasonably high, and prejudicial, when compared with the rates of their southern competitors. After lengthy hearings and investigations, accompanied by the distant rumbles of political oratory, the Commission denied relief, in July, 1925.²⁹ But the 1924 and 1925 seasons had been disastrous for the northern operators, and they promptly sought to re-open the case before the Commission. The second attack began in July 1926; and in May, 1927, the Commission gave the operators half of the reduction they

27. MINERAL RESOURCES OF THE UNITED STATES, 1929, Part II (Bureau of Mines 1932) 699, 701. This report carefully analyzes the number and size of mines and of companies, and comments on the competitive advantages of the larger company. *Id.* at 710-733.

28. MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY (1932); Mansfield, *The Minimum Rate Power and the Control of Carrier Competition* (1936) 45 YALE L. J. 1406; Cavers, "Questions of Law" in *Lake Cargo Coal Rate Regulation* (1931) 37 W. VA. L. Q. 391; Arnold, *The Lake Cargo Rate Case of February 1928* (1928) 34 W. VA. L. Q. 272, 365.

29. *Lake Cargo Coal Rates*, 101 I. C. C. 513 (1925).

asked for, requiring the Pittsburgh lake rate to be cut from \$1.66 a ton to \$1.46, and the Eastern Ohio lake rate from \$1.63 to \$1.43. At the same time, the Commission warned the southern carriers against undertaking a competitive reduction in their rates.³⁰ The southern carriers, however, being largely dependent on coal traffic, announced a rate reduction of 20 cents per ton to take effect soon after the new northern rates were to be established; the Commission, on complaint of the northern shippers, suspended the rates for six months, and ordered a rate hearing. The thunder of political debate grew louder and more angry, as provinces saw their destiny at stake, and mobilized all their forces of defense and counter-attack.

The Commission refused to accept the reduced southern rates and ordered them cancelled, in February, 1928.³¹ Appeal was promptly taken, and a three-judge court enjoined the enforcement of the Commission's order, thus permitting the southern carriers to make the 20 cent reduction they had announced.³² The 1928 lake shipping season was just beginning when the decision was announced, but no stay of the court order pending appeal could be obtained. The northern operators, desperate for their dwindling share of the lake cargo business, persuaded the northern carriers to announce another 20 cent reduction, raising the rate differential in favor of the north to 45 cents a ton. The carriers soon realized, however, that they were all losing as a consequence of the rate war, and settled on a 35 cent differential, at a somewhat higher rate level, by way of private compromise. The Commission refused to suspend the new rates, which then went into effect.³³ When the appeal from the decision of the three-judge court finally reached the Supreme Court, that tribunal avoided a decision, in a masterpiece of anti-climax, by dismissing the proceeding as moot.³⁴

This extraordinary story has a moral for administrative practice. The Commission had experimented with changing freight rates in order to effect competition among shippers. It had declared that certain low rates might be illegal, although compensatory, because they would unduly alter the pattern of competition among shippers, and thus the distribution of business among railroads. The theory of rates that might be cancelled as "relatively unreasonable" under Section 1 of the Interstate Commerce Act had been given a powerful impetus; it was to be used, however, in the light of the furore over lake cargo freight rates, to avoid the read-

30. Lake Cargo Coal Rates, 126 I. C. C. 309 (1927).

31. Lake Cargo Coal from Ky., Tenn., Va. and W. Va., 139 I. C. C. 367 (1928).

32. Anchor Coal Co. v. United States, 25 F. (2d) 462 (S. D. W. Va. 1928), *rev'd*, 279 U. S. 812 (1929). Judge Parker's district court opinion in this case was one of the barriers to his confirmation as Associate Justice of the Supreme Court in 1930.

33. MANSFIELD, *op. cit. supra* note 28, at 128-129.

34. United States v. Anchor Coal Co., 279 U. S. 812 (1929); 3-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1936) 661-667; see note 28 *supra*.

justment of intersectional disputes, and not to settle them. The Commission, badly scorched by its experience, has tended to employ its power in favor of the status quo, and to escape the charge that any of its decisions would be an autonomous force for change.³⁵

The wage structure, meanwhile, was destroyed by the same pressure of interregional competition. Wage differentials in favor of the southern fields had existed as long as those fields were open: the mines, although often better from the geological point of view than their northern competitors, were further from the markets, and their product was therefore worth less. Furthermore, there were innumerable differences in habit, mechanization, mine formation, and management which contributed to the wage differentials. Before and during the war, the southern mines received a mine realization between 10 and 15 cents a ton less than that earned in northern mines; but in the period of intense competition after 1923, that differential varied between 28 and 38 cents a ton.³⁶ Wage costs are between 60 and 65 per cent of the costs of producing coal, and the pressure of competition fell mainly on wages. The southern fields, anxious to protect one of their chief advantages, resisted unionism with tenacity and enthusiasm. Meanwhile, the northern operators, caught between a nether and an upper millstone, struggled to escape from the wage restrictions of their contract with the union. But the union clung stubbornly to the wage rates guaranteed by its contract. Membership fell off 10 per cent between 1923 and 1929,³⁷ and the wage scale was evaded more and more openly, as the northern operators sought to prevent the capture of their markets by the southern mines. In 1927, after a brief strike, the Jacksonville agreement was not renewed, and the northern operators were more free to force wage reductions. There began a period of competitive wage reductions, in which the northern fields sought to recover the ground lost to their southern competitors, and the southern operators attempted to retain their share of the markets. The differential in mine realizations, which was 38 cents a ton in favor of the south in 1924 and 1925, and 33 cents in 1927, began to fall irregularly. In 1929 the figure was 23 cents and it was 18 cents in 1930. Pennsylvania recovered her earlier position as chief coal producer from West Virginia, which had emerged in 1927 for the first time as the chief source of coal.

35. *United States v. Chicago, M., St. Paul & Pac. R. R.*, 294 U. S. 499 (1935); *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476 (1935); Mansfield, *The Minimum Rate Power and the Control of Carrier Competition* (1935) 45 *YALE L. J.* 1406. See also *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (E. D. Va. 1935).

36. I BERQUIST & ASSOCIATES, *ECONOMIC SURVEY OF THE BITUMINOUS COAL INDUSTRY UNDER FREE COMPETITION AND CODE REGULATION* (Work Materials No. 69, Industry Studies Section, NRA Rev. Div. 1936) 68-76. These calculations are necessarily estimates, since the coal statistics for that period are fragmentary.

37. *Id.* at 187.

The business moved towards an uneasy compromise, as it sought to adapt itself to the new circumstances of its competition.

UNIVERSAL DEPRESSION: 1929-1933

The industry met the first impact of the depression without substantial changes in its organization. The directions and the habits which characterized the earlier period persisted. Production fell disastrously — to 309,709,872 tons in 1932, a drop of 42 per cent from the 1929 figure — and union membership declined from 400,000 in 1929 to 150,000 in 1932. The number of mines was reduced from 6,057 in 1929 to 5,427 in 1932, and the Bureau of Mines index of capacity fell from 752,000,000 in 1929 to 653,000,000 in 1932.³⁸ The demoralization of prices, wage rates, and social conditions in the industry, noted earlier, was intensified. Interregional shifts of business continued, depending on the special strength of local forces.

As the Great Depression began, in 1929, the southern fields found themselves without some of the competitive advantage on which their striking successes of the post-war period had been based. Wage rates were no longer so badly out of line in relation to differences in the productivity of labor in the several fields, and the freight rate structure had been modified somewhat in favor of the northern mines, as the net product of tortuous legal strategy under the Interstate Commerce Act. The steady growth of the southern share of coal production slowed up, and the trend was actually reversed.

In 1930 and 1931, conferences everywhere sought a formula with which the operators might rescue the coal industry from the general depression. In the fall of 1931, a plan was proposed, chiefly by the enterprising southern high volatile producers, for the formation of regional sales agencies which would act as exclusive agents for the sale of the coal of particular market regions. The matter came before a meeting of operators held in New York during October, under the auspices of the National Coal Association, and a special committee was appointed representing producers in most of the eastern states. After full discussions, and a legal report from Colonel William J. Donovan, the Committee and the conference adopted the proposal. The conception of the conferees was quite clear: instead of intense competition by hundreds, if not thousands, of individual operators, sales would be conducted in each market by a limited number of exclusive sales agencies, representing the operators who could sell there. Mergers and consolidations were encouraged as desirable steps in the same direction; the basic policy — and from the

38. MINERALS YEARBOOK (Bureau of Mines 1938) 694. As to union membership, see LORWIN, THE AMERICAN FEDERATION OF LABOR (1933) 485; BERQUIST, *op. cit. supra* note 36, at 187.

operator's point of view, of course, a very sound one — was that competition among a few sellers would result in higher prices, and less agony, than unrestricted competition among many sellers.³⁹

Significantly, the Southern Appalachian operators were the first to establish such an agency. A representative group met in New York, and organized larger meetings in Cincinnati during December 1931. With the support of that body, Appalachian Coals, Inc., was promptly launched. All papers for the corporation were prepared for a meeting late in December 1931, and the enterprise was ready for business early in 1932.⁴⁰ Meanwhile, the Department of Justice announced an unfavorable opinion on the legality of the plan, and producers in other districts decided to hold their similar plans in abeyance until the legality of Appalachian Coals, Inc., should be determined. Suit was begun in July 1932, and the Supreme Court decision, in favor of the operators, came down in March 1933.⁴¹

The scheme considered in the *Appalachian Coals* case has two aspects: it is a typical contribution of business thought to the problem of industrial organization, and asserts a characteristic preference for monopolistic rather than competitive arrangements. In this choice it is to be identified with the trade association movement, which swept the country during the twenties, and with the NRA, which represented its ultimate flowering. The Appalachian Coals agency itself, however, had a more concrete function. For the specific group which organized it, the chief operators of the southern high-volatile field, the agency was more than an experiment in cartellization; it was a weapon of great promise in their struggle to reverse the trend against them in the interregional competition for coal business. It offered the southern fields an excellent chance to regain business which had been lost to Ohio and Pennsylvania after 1927.

The selling agency was organized as a Delaware corporation, each share of stock being issued to the member producers in proportion to their production during the preceding year. One hundred and thirty-seven operators belonged, but seventeen held a majority of the stock,

39. Here the operators were paying tribute to a form of organization which has proved profitable in many markets consisting of few sellers. See generally, CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (3d ed. 1938); Wallace, *Industrial Markets and Public Policy*, and Mason, *Price Policies and Full Employment* in FRIEDRICH & MASON, *PUBLIC POLICY* (1940) 59, 25; *Symposium on Monopoly and Competition in Industry and Labor* (1939) 18 ACAD. POL. SCI. PROC. No. 2; Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions: I* (1936) 45 YALE L. J. 1339, 1340-1348.

40. Record on Appeal, pp. 44-128, *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933).

41. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933). See HAMILTON & TILL, *ANTI-TRUST IN ACTION* (TNEC Monograph No. 16, 1940) 66-70; BURNS, *THE DECLINE OF COMPETITION* (1936) 151-152; GALLOWAY, *INDUSTRIAL PLANNING UNDER CODES* (1935) 167-168.

by reason of their size. Each operator contracted with the agency to make it an exclusive sales agent, on ten per cent commission, for the sale of all coal produced by it in the Appalachian territory. In part the scheme was illusory, since the operators could actually sell through their own regular sales agents, who would be designated as sub-agents of the agency, and would be subject to some restriction, under the plan, as to prices and contract terms. In the absence of such arrangements for sub-agents, the agency was to sell all coal at the best possible prices, to grade the coal of its members, and to apportion sales among them in a pro rata way, if all output could not be sold. The agreement was to come into effect after 70 per cent of the commercial tonnage of the territory had agreed to participate.⁴²

The Supreme Court upheld the plan under the Sherman Act as a reasonable effort to improve conditions in a depressed industry. It pointed out that the district court had found that the members would acquire power, by virtue of their combination, to "affect" prices in some consuming markets: that is,

"to stabilize market prices and to raise them to a higher level than would otherwise obtain. But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result."⁴³

Insofar as this passage means what it seems to mean, it must be taken cautiously, in the light of the clear argument of *United States v. Socony-*

42. Record on Appeal, pp. 87-110, *Appalachian Coals, Inc. v. United States*, 283 U. S. 344 (1933).

43. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 373-374 (1933).

*Vacuum Oil Co.*⁴⁴ Attention is thus directed to the passages in the *Appalachian Coals* opinion in which the Chief Justice emphasizes the importance to the decision of the absence of any real power in the sales agency to control market prices.⁴⁵ It was on this ground that the court distinguished the *Trenton Potteries* case:⁴⁶ the conspirators there, the Court pointed out, controlled 82 per cent of the national output of vitreous pottery, whereas in the *Appalachian Coals* situation, the combination lacked monopoly power in any market. Does the case thus mean, in the light of its successors, that business men can combine to save their sick industry only when they lack the power to do what they want to do — *i.e.*, to increase prices? The construction of the case is of more than academic interest at this time, since market agencies of the *Appalachian Coals* type have greatly increased in number and importance in recent years, and would present an anti-trust problem if the Coal Act were repealed.

As a practical matter, the Supreme Court was probably right in its premise that, under the circumstances of the coal industry, the combination at bar in the *Appalachian Coals* case lacked the ability to affect prices greatly. Unless a very large fraction of mine capacity were party to the scheme, price increases in this highly competitive industry would tend to invoke self-defeating increases in output. If the disease of the industry were overcapacity in relation to existing demand, cartellization along the lines of Colonel Donovan's scheme would not offer a hopeful cure, since it promised neither to cut capacity nor to increase demand. Higher prices, if achieved, would accelerate the shift to oil, gas, and other fuels; yet, at least over a period of years, they would call more and more capacity into active service by making the sale of coal more profitable. But so long as all districts were not equally well organized, the plan did offer one group of operators' a means of improving their relative position. They could use the improved distribution facilities of the agency, and its greater bargaining power, as a sales weapon through which members' sales could be increased at the expense of their competitors'. The *Appalachian Coals* sales agency should thus be regarded, in the end, not as a device for achieving "stability," but as a contribution to the interregional wars of the coal industry.

Sales agencies were not an important force in the coal business during the early years of the depression. *Appalachian Coals, Inc.*, did not itself

44. 310 U. S. 150 (1940), 49 YALE L. J. 761. See also Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions: I* (1936) 45 YALE L. J. 1339, 1355-1358.

45. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 373 (1933). Spokesmen for the Agency have claimed that it effected an increase of 10 to 15 cents per ton in the realizations of its members. Remarks of James D. Francis, reported in BLACK DIAMOND, Nov. 18, 1939, p. 14.

46. *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927).

begin operations until after the Supreme Court opinion was handed down, in 1933, and then the sales agencies were soon swallowed up in the NRA. Meanwhile, the industry met the depression as best it could. The net effect of depression was no worse in coal than in other trades connected with the capital goods industries. The highly competitive organization of the coal industry meant simply that individual operators met the decline in demand for their product by making maximal reductions in price, whereas more monopolistic industries retained some control over the prices nominally charged.

One significant development, apparent mainly in the period between 1923 and 1929, characterized this grinding process of deflation: an increase in the relative importance of large concerns. They had greater financial resources for survival, and a bigger investment to protect by taking immediate losses, and hanging on. In a contracting market, too, a premium is put on selling organization, and the larger firms, with better developed sales agencies, were able to hold or to improve their position at the expense of smaller mines. Whatever the causes, the percentages of output produced by the larger mines (those producing 100,000 tons or more a year) rose from 70.4 in 1923 to 83.1 in 1929; fluctuations in this trend occurred during the years of the depression, the percentages being 77.5 in 1932, 84.1 in 1937, and 81.1 in 1938.⁴⁷

THE NRA, 1933-1935

The NRA was one of the two or three major calamities of the New Deal. Its general theory was drawn from the trade association thinking of American business during the twenties; it was that recovery could be achieved by raising the wage costs of all industry, and by forbidding many forms of price competition. Favorite business institutions and ideas were utilized in projecting a new order of business organization under the Blue Eagle. In lieu of competition, there was to be a kind of industrial self-government in business; competing business men would meet in committee and legislate on prices, wages, and conditions of trade. The theory of the program followed simple lines: business depression is a period of low prices and low wages; then let's raise prices and wages, thus raising the purchasing power of the workers, and the depression will disappear.

Since this argument is still strongly urged as a major justification of the Coal Act, and as a reason for reviving NRA generally, some comment on its structure is pertinent here. Low prices and low wages were the symptom, and not the cause, of the depression. The depression represented a collapse of the financial institutions of society, not a destructive outburst of competitive forces. Events followed this pattern: The securi-

47. BITUMINOUS COAL TABLES 1938-1939 (Bitum. Coal. Div. 1940) 24.

ties markets and the commercial banks were greatly disorganized by the speculative crash of 1929. Their disorganization interrupted investment activity. New flotations declined, the cost of borrowing rose, and investors hesitated to buy. The Government failed to take adequate steps to offset the effect on incomes of the decline in investment expenditure, and the crash became a slump. As total income fell (by 50 per cent between 1929 and 1932) every market was forced to react—the monopolistic markets by cutting the volume of their business, the competitive ones by intensive competition resulting in low prices and wages. The NRA program worked in the direction of a proportional all-around rise in wages and prices (any general rise in wages would require a proportional rise in prices, since wages are a direct operating cost which in most business enterprise must be met out of current revenue). Such an increase in wages and prices would not increase the available amount of money income. If achieved, it could have given no one an extra shirt or trip to the movies; it would not have increased profits, real wages, or employment. The only consequence of such an event would have been to change the domestic significance of the dollar. A less than all-around rise in wage costs and prices, the actual experience under NRA, accompanied by a decline in competition, made many business enterprises unprofitable, and reduced their responsiveness to the inflationary force of lowered interest rates and public works spending. The net effect of the NRA in the economy at large was to choke off a promising recovery based on public deficit expenditure.⁴⁸

In the coal industry, the effects of NRA were more permanent, for the coal industry has not yet succeeded in throwing it off. The essential elements of the present scheme of coal regulation were formulated during NRA days, and subsequent events have failed to shake the faith of the U.M.W.A. and of many operators in the policy of the program.

The key importance of wage rates in the intersectional competition of the coal industry, and the public dissatisfaction with labor relations in the coal industry, made labor problems one of the first interests of the NRA coal administration. Perhaps the most important contribution of the NRA experience on the labor side of the coal problem was in encouraging unionization. A whirlwind campaign early in 1933 resulted in almost complete unionization of the mines. Within a few months the United Mine Workers of America had more than regained all the ground

48. See LYON & ASSOCIATES, *THE NATIONAL RECOVERY ADMINISTRATION* (1935) cc. 30, 31, 34 and 39; HAMILTON, *THE PATTERN OF COMPETITION* (1940) 98; ROBBINS, *THE GREAT DEPRESSION* (1934) c. 7; ROOS, *NRA ECONOMIC PLANNING* (1937); WHITNEY, *TRADE ASSOCIATIONS AND INDUSTRIAL CONTROL* (1934); THE EDITORS OF *THE ECONOMIST*, *THE NEW DEAL, AN ANALYSIS AND APPRAISAL* (1937) 46-52; BROWN, CHAMBERLIN, *et al.*, *ECONOMICS OF THE RECOVERY PROGRAM* (1934) cc. 1-5; CROWTHER, *ECONOMICS FOR DEMOCRATS* (1939); ROBBINS, *ECONOMIC BASIS OF CLASS CONFLICT* (1939) Part I.

they had lost since 1927, and they rapidly undertook the negotiation of new and improved wage contracts, which became an integral part of the Coal Code.⁴⁹

It became clear, however, both in negotiating the wage contract and in attempting to formulate the wage policies of the Code, that there were thorny barriers in the way of a complete solution. It was impossible to reach agreement upon a uniform wage for all areas, because wage differentials in favor of the southern operators were deeply inbedded in the history and the practices of the industry. Furthermore, such wage differentials were the consequence, in part at least, of differences in productivity based on geological factors, on the use of mechanical equipment, and on the greater cost of transporting coal from the more distant mines to the markets.⁵⁰ Late in March, 1934, when it was clear that negotiation would not achieve a universal wage policy, the central authorities of NRA put out a seven-hour day amendment to the Code. There was furious opposition within the industry, and in some places miners opposed by strike the resistance of the operators to the new rule.⁵¹

Both the original contract of 1933, embracing the eight-hour day, its subsequent amendment in March, 1934, and all the subsidiary wage agreements of that period, were based on an acceptance of a series of wage differentials. The drive of the NRA for wage uniformity broke down on this issue, too well established a part of the industrial machinery to be controlled by the loose and ineffective sanctions of the Code.

But the NRA period did greatly change the wage policy and the labor relations of the coal industry. The Code of October 1933, and the agreement of March, 1934, both worked in the direction of higher wage rates. Despite the irregularity with which the NRA wage provisions were enforced, they resulted in a considerable increase in labor costs. Since wage costs constitute more than 60 per cent of the total costs of producing coal, this change was a substantial burden to the coal industry. A careful study estimates that between January, 1934, and January, 1935, the cost of producing coal rose by 22.7 cents per ton, at a time when the price of coal rose approximately 29.5 cents per ton.⁵² The marked increase in national income and in business activity during that period, and the consequent hardening of the market for coal, permitted the industry to absorb the increase in its labor costs, although it should be noted that the increased costs remained, after 1937, when prices again fell.

49. BERQUIST, *op. cit. supra* note 36, at 188-192.

50. *Id.* at 357-417; F. E. R. A., *op. cit. supra* note 17, at 73-88; LUBIN, *MINERS' WAGES AND THE COST OF COAL* (1924) 69-80, Part III *passim*.

51. BERQUIST, *op. cit. supra* note 36, at 108-119. The text of the amendment appears in 9 NRA, *CODES OF FAIR COMPETITION* (1934) 665-668.

52. FISHER, *ECONOMIC CONSEQUENCES OF THE SEVEN HOUR DAY AND WAGE CHANGES IN THE BITUMINOUS COAL INDUSTRY* (1939) 94-95. See F. E. R. A., *op. cit. supra* note 17, at 84-86; Fisher, *Union Wage and Hour Policies and Employment* (1940) 30 *AM. ECON. REV.* 290.

In attempting to control prices, the NRA Code built directly on the foundation of the industry's experience with the Appalachian Coals agency. The original Code provided that selling coal below a fair market price was an unfair trade practice, forbidden to members. A fair market price was defined as one necessary to carry out the purposes of the NRA, to permit the payment of minimum wages, and to furnish employment to labor, consideration being given to the possibility of competition with other fuels.⁵³ In the light of the subsequent history of the effort to fix minimum prices for coal, it is interesting to note that this original minimum price provision contained no references to costs (other than minimum wages) or to preserving competition among producers in the several consuming market areas. Under the Code, the fair market price, as thus defined, was to be fixed in the first instance by representative market agencies, where they existed; where no such agencies existed, the local code authorities were given the same power, subject to some review by the central code authority. The January, 1935, amendment of the Code purported to clarify the process of price fixing.⁵⁴ It provided that the groups engaged in fixing minimum prices should give weight to a classification of coals based on physical structure, chemical analyses and salability. This declaration represented a response on the part of the regulatory authorities to difficulties which had already emerged as basic in the process of control. It was recognized from the first that the competing products of various coal mines must be uniformly classified if price controls are to regulate competition among them, yet the task of classification proved to be difficult, since everyone realized the economic consequences of each classification decision, and contests developed. Furthermore, the amendment provided that the price fixers were to consider "the customs and needs of the market, the interest of consumers in buying coal, and of producers in selling in their usual and normal markets."⁵⁵ Here again the code authority was acknowledging the emergence of what later proved to be a highly controversial issue: the effect of minimum prices on the producers' ability to reach markets in which they were currently selling. The relation of minimum prices to each other determines the possibility of competition between operators each attempting to obtain the business of a given market; the amendment of 1935 amounts to a declaration by the code authority that the minimum price schedule should not exclude a producer from a market in which he was currently selling. Of course, the amendment stipulated in favor only of "normal and usual" markets and thus seemed to permit the authority to exclude sellers who

53. BERQUIST, *op. cit. supra* note 36, at 500, 505, and generally 500-552; 1 NRA, CODES OF FAIR COMPETITION (1933) 323, 329, 332; 22 *id.* (1935) 169, 172-175.

54. BERQUIST, *op. cit. supra* note 36, at 123-128, 507-524, 526; Taggart, *Minimum Prices under the NRA* (1936) 7 MICH. BUS. STUDIES 282-290; TERBORGH, PRICE CONTROL DEVICES IN NRA CODES (1934).

55. 21 NRA, CODES OF FAIR COMPETITION (1935) 172-175.

were reaching too far afield for trade. In fact, however, it has proved almost impossible, under all the successive plans of coal regulation, for an administrative agency to undertake great changes in the distribution of coal business.

The NRA Code betrayed great weaknesses, both of political technique and of policy, in dealing with the problems of wage fixing and price fixing. In the first place, there were five local code authorities, and many sub-divisions, each having autonomous powers, loosely coordinated and inadequately supervised. Since it early became evident that price-fixing was accomplished with reference to prices in consuming markets, and not to prices at the mine, the absence of adequate machinery for coordinating the price policies of the several districts meant that the Code provided no control over the process of interregional competition, a basic factor in the disturbed conditions of the coal industry. Intense intersectional disputes developed both as to wage policy and as to price policy; the Code offered no procedure for arbitrating them. Secondly, the Code caused considerable worry on the score of undue delegation of power. Private corporations, called marketing agencies, were given the power to fix minimum prices which would be binding on all operators within the district. In the absence of such marketing agencies, code authorities almost equally private were given comparable power. Furthermore, the Code contained entirely inadequate enforcement provisions. Occasionally there was a weak threat of litigation; even more occasionally, the strike was mentioned or used as a sanction for enforcing the Code.⁵⁶

In fixing prices, it soon appeared that the main issue of controversy was not the absolute level of prices, but the effect of a minimum price scheme in changing the distribution of coal business. At one point, and very briefly, the Code experimented with a system of production control, indirectly fixing the share of each district in the business of the several coal markets. The plan was to allow a district to reduce its minimum price if it were losing ground to competing districts. Price reductions were to be permitted until the previous share of the district in the market was recovered.⁵⁷ This abortive experiment in the control of coal production was the only step in that direction taken under the NRA. In view of the basic problems of the industry, it is a step of great current interest, for it is now quite clear that no system of price control can serve its purposes unless it is accompanied by a plan for controlling production. Increasing prices result in increasing production, so long as entry into the business is entirely free.

56. BERQUIST, *op. cit. supra* note 36, at 114, 117, 128-129. For a general critique of the structure and administration of the Coal Code, especially in relation to wages, prices, production, and trade practices, see Hale, *The Bituminous Coal Mining Industry in GALLOWAY, INDUSTRIAL PLANNING UNDER CODES* (1935) 162, 172-183.

57. *Id.* at 524-525.

Owing to the inadequacy of the administrative system for the task in hand, the Coal Code began to crumble in 1934, and it was almost entirely in ruins by the time the Supreme Court finished the NRA in 1935.

Certain conclusions about the experience of the coal industry under the NRA seem to have been widely accepted. It was felt, for example, that minimum-price fixing, as distinguished from other possible remedies for the troubles of coal, was a desirable contribution to the problems of the industry, although it was quite clear that the Code did not provide suitable standards for the determination of minimum prices. The relation of local boards of operators to the central authority proved highly controversial as a matter of political technique, since the local boards were even more interested in preserving the competitive position of their districts than in raising their own prices. Furthermore, the operators failed to appreciate the paradoxical quality of price raising as a remedy for their industry. Raising prices hardly solves the problems of a declining industry. Over a period of time, price increases accelerate the loss of markets for coal to other fuels, but in the meantime they encourage increased production; they do not directly force operators out of business, or otherwise reduce capacity, yet they lead to declines in the demand for coal.

THE BITUMINOUS COAL ACTS OF 1935 AND 1937

After the demise of NRA, some of the political forces interested in coal problems persuaded Congress to reenact NRA for the coal industry. The Guffey Act of 1935, "the little NRA," was never fully operative, in view of the injunction proceeding in *Carter v. Carter Coal Co.*,⁵⁸ but the job of drafting and passing it bridges the gap between earlier experiments in coal control and the current Act. The first Guffey Act provided machinery for establishing minimum wages and minimum prices. The labor features of the 1935 Act were a cautious compromise with the wage differential problem. Producers of two-thirds of the tonnage of the industry, and a majority of the workers in the industry, could by their vote set maximum hours of labor for the entire industry; wage rates, however, were to be fixed separately for each district, by a vote of the same groups. In a decision which stands as an interesting memorial to an earlier period of constitutional law, the Supreme Court invalidated the Act as an attempt by Congress to control miners' wages and hours of work, matters thought not to be within the scope of its constitutional power over interstate commerce; despite a separability clause in the Act, the Court held

58. 298 U. S. 238 (1936). The Act was based on extended hearings, as well as on the NRA Code, and derived from a long history of Congressional agitation on the subject. See hearings cited *supra* note 14; Comment (1935) 45 YALE L. J. 293, 299.

that the control of prices was integrally connected with the control of wages, and that the scheme must be invalidated as a whole.⁵⁹

The 1937 Act does not represent a reconsideration of the whole problem of coal control. It enacted the price fixing features of the first Guffey Act, but omitted the labor provisions which the Supreme Court found objectionable. The matter of wage-bargaining and wage-fixing was thus left to private contract, an omission regarded as not dangerous to labor in view of the complete unionization of the fields by the United Mine Workers. Congress had refused to consider an alternative bill, which proposed to solve the problems of the coal industry by production quotas, on the model of the English Coal Mines Act of 1930;⁶⁰ in the perspective of the *Carter* case and of *United States v. Butler*,⁶¹ direct production control presented even more acute constitutional doubts than price fixing.

The Bituminous Coal Act of 1937 puts the task of administration and enforcement into the hands of an administrative body known until July 1, 1939 as the National Bituminous Coal Commission of the Department of the Interior, and now as the Bituminous Coal Division of the Department of the Interior.⁶² The Act is enforced by a staff of at least 1,013 people, on an annual budget of at least \$3,000,000.⁶³ One of the most interesting parts of this staff is the Consumers' Counsel Division, now part of the office of the Solicitor for the Department of the Interior, charged with the duty of representing consumers' interests in proceedings

59. The statistical position of the coal business after the *Carter* case is considered in Ryan, *The Future of the Bituminous Coal Industry* (1936) 14 HARV. BUS. REV. 325.

60. Introduced by Representative Lewis of Maryland, as H. R. 5856, 74th Cong., 1st Sess. (1935). The proposal of The United Mine Workers of America for a quota scheme based on English and German models is explained in "STABILIZATION OF THE BITUMINOUS COAL MINING INDUSTRY," *Hearings before Subcommittee of the Committee on Interstate Commerce on S. 1417, 74th Cong., 1st Sess. (1935)* 21-41, 151 ("We believe that no price-fixing system can maintain within the industry without being accompanied by a proper system of allocation.") See *Hearings before a Subcommittee of the Committee on Interstate Commerce on S. 1, 75th Cong., 1st Sess. (1937)* 11. "If the coal industry is to be made orderly, there must be a control of capacity." HAMILTON & WRIGHT, *A WAY OF ORDER FOR BITUMINOUS COAL* (1928) 95.

61. *United States v. Butler*, 297 U. S. 1 (1936).

62. Reorganization Plan No. 2, 53 STAT. 1431, 1433 (1939).

63. The chief agency is the Bituminous Coal Division, divided into three main branches: Economics, Marketing and Trial Examiners, and three administrative sections: Records, Administrative, and Information. The Consumers' Counsel Division is now separately established. As of the fiscal year 1941, the Division had 569 employees on its Washington payroll; there were 388 employees attached to the eleven statistical bureaus, and 56 in the Consumers' Counsel Division. This compilation does not include the staffs of the 22 District Boards, some of which are elaborately organized. For the 10 month period between July 1, 1940, and April 26, 1941, \$2,387,000 was appropriated for the Coal Division, and \$145,706 for the Consumers' Counsel Division. Communication from Abe Fortas, General Counsel, Bituminous Coal Division, Jan. 8, 1941.

before the Coal Division, and in other matters affecting the coal industry.⁶⁴ The statute also stipulates that research be done, and requires investigation of certain topics of importance to the future of the industry: increasing the uses of coal, problems of international trade in coal, mine safety and conservation, and the like.⁶⁵

The Act contemplates the setting of minimum prices, and permits the setting of maximum prices if the occasion demands. It forbids a series of trade practices, as being unfair, and encourages the development of regional sales agencies, which are to be exempted, upon investigation and approval by the Division, from the restrictions of the Sherman Act.⁶⁶ There is no provision for the direct control of output, no restriction on the entry of new mines into production, nor upon the expansion of old mines, and no direct method of wage control.

Two taxes are provided, one of 1 cent a ton, which all coal producers must pay, the other, of 19½ per cent of sale price, a penalty provision designed to require membership in the Coal Code.⁶⁷ The one cent a ton tax, which yielded something over \$4,000,000 in 1940, is a serious and regressive burden for an industry in which many units operate under deficit conditions, especially when it is recalled that Code members are subject to assessments to meet the expenses of the local district boards; these assessments, it has been charged, total more than the tax.⁶⁸

One of the principal reasons for the excessive delay which has characterized the process of price formulation under the Act is the cumbersome and dilatory price fixing procedure which it prescribes.

The Coal Code, organized under Section 4 of the Act, divides the country into 23 production districts, each of which is to have a District Board. Twenty-two such Boards have been organized. The Districts are grouped by the Act into ten minimum price areas, corresponding roughly to the scope of the several wage contracts between operators and the Union; minimum price areas 1, 2 and 3 include all fields east of the Mississippi, and thus embrace the major part of the industry.

The District Boards organized under the Code purport to fulfill the ideas of industrial self government characteristic of the NRA. Each Board has an even number of producer members, one-half chosen by a majority in number of the Code members present at the meeting at which they are elected, one-half by votes cast in proportion to annual tonnage.

64. BITUMINOUS COAL ACT OF 1937 §§ 2(b) (1), 16. For a description of the work of this agency, see ANN. REP. CONSUMERS' COUNSEL DIV. (1939); Nelson, *Representation of the Consumer Interest in the Federal Government* (1939) 6 LAW & CONTEMP. PROB. 151, 158; CAMPBELL, *CONSUMER REPRESENTATION IN THE NEW DEAL* (1940).

65. § 14. The Commission reported that it had decided to defer all such activities until after the establishment of prices. 2 ANN. REP. NAT. BITUM. COAL COMM. (1939) 19.

66. § 12.

67. § 3.

68. Remarks of Representative Allen, 84 CONG. REC. APPENDIX 2389, 2390 (1939).

One member of the District Board is selected by a union representing the preponderant number of the employees of the industry in the district in question. For each District, there is also a statistical bureau, operated and maintained as an agency of the Division.

So far the main (and almost only) occupation of those responsible for enforcing the Act has been the fixing of minimum prices, and of correlative marketing rules and regulations. Schedules of minimum prices went into effect on October 1, 1940, almost three and one-half years after the passage of the Act, and at this moment the Division is struggling with a flood of petitions by operators, consumers, and the Consumers' Counsel Division, for relief from specific provisions of the price schedules.⁶⁹

According to the Act, the process of price making starts with a cost determination involving three separate stages. The operators file data as to costs and sales with the relevant statistical bureaus. These bureaus then present some appropriate compilations to the District Boards, which "determine" "the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936." The Act specifies what costs are to be considered in making such a computation: they include "the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration."⁷⁰ Each District Board is required to adjust its figure for "average costs," in any way "necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1936." The District Boards "promptly" submit these determinations to the Division, which puts together the cost figures for all the districts in a minimum price area as "the weighted average of the total costs of the tonnage for each minimum price area in the calendar year 1936, adjusted as aforesaid," and returns that figure to all the district boards in each minimum price area.

"Said weighted average of the total costs shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices. Thereafter, upon satisfactory proof made at any time by any district board of a change in

69. From October 1, 1940 to January 1, 1941, 536 petitions for relief were received. Temporary relief was granted in 261 cases. Communication from Abe Fortas, General Counsel, Bituminous Coal Division, Jan. 8, 1941.

70. § 4 II (a). This subsection and § 4 II (b) are the source of the statutory references in this paragraph, and in the next three following.

excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public."

The second step in establishing minimum prices, the classification of coals and the proposal of f.o.b. mine prices, also involves three separate stages. First the Division establishes rules and regulations to guide the District Boards in the actual work of classifying coals and proposing minimum prices. Then the Boards "propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said District, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area . . .

"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 prices and classifications of coal proposed by the District Boards are subject to scrutiny by the Division, which must pass on the schedules of proposed prices in the light of the standards of the Act:

"A schedule of such proposed minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify such proposed minimum prices to conform to the requirements of this subsection, which shall serve as the basis for the coordination provided for in the succeeding subsection (b): *Provided*, That all minimum prices proposed for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: *And provided further*, That no minimum price shall be proposed that permits dumping."

The final act in minimum price making is the most important. It is called the process of "coordinating" proposed minimum prices and regulations, and it is nominally to be done by the District Boards and the Division, pursuant to rules laid down by the Division. The object of the coordination is to consider the proposed f.o.b. mine prices in the light of conditions in the various consuming market areas, and to revise

them on what can be described as "a fair competitive basis." Section 4II(b) of the statute sets forth Congress' ideas on the subject at length:

"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 competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of part II of this section."⁷¹

The first thing to be said about this extraordinary farrago is that even if the stated objective of the Act — an equivalence between average return and weighted average cost for each minimum price area — could be achieved, it would be most undesirable to do so. The Act calls for minimum prices, supposedly not below a cost average figure, which is weighted on the basis of tonnage, and includes depreciation allowances, maintenance, royalty charges and taxation, as well as operating costs. For each individual mine, the cost average of the minimum price area is entirely meaningless; it may be above or below average or marginal costs for the mine at its prevailing rate of production. The minimum price areas are very large, and include all kinds of mining regions; minimum price area number 1, for example, covers districts in Pennsylvania, West Vir-

71. The price-fixing provisions of the Act are described in ATT'Y GEN'S COMM. ON ADMINISTRATIVE PROCEDURE, BITUMINOUS COAL DIVISION (1940) 8-12; Miller, *supra* note 7, at 171-172; LYON & ABRAMSON, *op. cit. supra* note 26, at 973-974; Smith, *The Attempted Stabilization of the Bituminous Coal Industry* (1939) 17 HARV. BUS. REV. 177.

ginia, Ohio, Michigan, and Tennessee. A particular mine may be well located, or well run, or well endowed with geological advantages as compared with the average mine within that area. For one reason or another, it may be entirely possible for that mine to sell coal at compensatory prices below the minimum prices set for it, in contemplation of the cost averages of the whole minimum price area. Yet the statute would prevent such a result. Insofar as the minimum prices worked an all-around price rise, they would make the same coal cost more. Insofar as they would prevent distant low-cost mines from selling in certain markets, they would transfer business to higher cost mines. In either case, they would not be serving the public's chief interest in the way resources are utilized. The public is interested in the relation between prices and the average costs of *each mine*, and in the relation between prices and the marginal costs of *each mine*; such relations measure the efficiency of operations, or the impulse of the operator to expand or contract.⁷² The public interest requires resources to be used as long as their use brings in more than the actual costs of production, or causes less loss than the loss of shutting down. The satisfaction of these interests requires no reference to cost averages for large districts. It calls for consideration only of the relation of prices to the internal cost conditions peculiar to each mine.

Furthermore, the statutory cost standards are decidedly undesirable in that they include royalties, taxes, depreciation, and depletion allowances in the cost figure which is to be "the basis for the proposal and establishment of minimum prices." If such payments are considered as costs, why not include interest on bonds, or dividends on stock? The inclusion of these items as "costs" makes preservation of the value of the capital invested in the mines, and payment of royalties for the use of the coal property, an objective of the minimum price scheme. But there is no public interest in assuring prices which permit capital to be

72. The standard argument is that the individual producer continues to expand production so long as the net increase in revenue occasioned by additional sales covers the additions to cost occasioned by increased production. In a competitively organized market, this relationship between incremental costs and revenues tends to result in a larger output, and a lower price, than in a more monopolistic environment. These problems of applied economics are sharply put in a recent lively literature about the price objectives of a socialized industry. See PIGOU, *SOCIALISM VERSUS CAPITALISM* (1938) 102-121; DICKINSON, *ECONOMICS OF SOCIALISM* (1939) 105-118; Lange, *On the Economic Theory of Socialism* (1936) 4 *REV. ECON. STUDIES* 53; (1937) *id.* at 123, with comments at 72, 143; Lerner, *Statics and Dynamics in Socialist Economics* (1937) 47 *ECON. J.* 253; Lerner, *Theory and Practice in Socialist Economics* (1937) 6 *REV. ECON. STUDIES* 71; Taylor, *The Guidance of Production in a Socialist State* (1929) 19 *AM. ECON. REV.* 1. Cf. Hayek, *Socialist Calculation: The Competitive "Solution"* (1940) 7 *ECONOMICA* (N.S.) 125; DOBB, *POLITICAL ECONOMY AND CAPITALISM* (1937). Similar considerations have long been familiar in discussions of railroad and public utility rates. See, e.g., DANIELS, *THE PRICE OF TRANSPORTATION SERVICE* (1932) 57-62; HEALY, *THE ECONOMICS OF TRANSPORTATION IN AMERICA* (1940) 194-198, 283-286.

maintained, or royalties paid, in the whole industry. Such a purpose would have at least two undesirable effects. Insofar as prices were successfully raised for a period of time, the price rise would prevent a reduction of "excess" capacity, which was regarded as a major need of the industry at the time the Act was enacted. And if it proved impossible to sell the same amount as before at higher prices, that fact would prevent a full exploitation of existing resources—*i.e.*, would increase "excess" capacity—for, as has been pointed out, it is often desirable to use capital equipment rather than to abandon it, even though the amount earned through its use covers only operating costs, and contributes nothing towards overhead.

But such considerations are relatively academic, since the cost average figure, which took many months to determine, has played little or no part in the establishment of minimum prices. The process of coordination has guaranteed that the prices established are not f.o.b. mine prices, but delivered prices, set for each market, and with reference to conditions in each market. The cost averages for a minimum price area include so many thousands of items that their presence in the background of the price fixing process has not interfered in the least with the indefinite revision of the prices for each mine subject to competitive pressure; if the cost criterion were of any practical importance in price making, one would expect it to limit the possibility of subsequent changes in prices, each of which would affect the supposed equivalence between costs and returns. Actually, the Division has felt free, in its lengthy price proceeding, to revise prices and price relationships at will, and without reference to the impact of such changes on the averages of return.⁷³ While the cost determination might have been significant in justifying an increase in the general average of realizations, it had no concrete place in the haggling which fixed the level of individual prices.

73. The cost hearings conducted by the Division and its predecessor body, the National Bituminous Coal Commission, were marked by a dispute as to the propriety of disclosing cost data. While that dispute was being litigated [*Mallory Coal Co. v. Nat. Bitum. Coal Comm.*, 99 F. (2d) 399 (App. D. C. 1938); *Utah Fuel Co. v. Nat. Bitum. Coal Comm.*, 306 U. S. 56 (1939)] prices were proposed and coordinated on the basis of a cost average figure compiled by the statistical bureaus from producers' cost data; thereafter another series of cost hearings was held, at which operators were permitted a limited cross-examination of witnesses as to cost data. The Carter Coal Co., an active participant in the hearings, has contended that the cost form questionnaires were inadequately prepared, and improperly checked and verified, and that the cost hearings did not permit even a sampling of the data on which the final cost figures were based. *In re* the Establishment of Minimum Prices, General Docket No. 15, Brief of Carter Coal Co. to the Secretary of Interior, on Exceptions to Findings of Director, Aug. 30, 1940, pp. 57-172. The position of the Director was that the use of interim cost figures did not in fact affect the result of the price proceedings, since a variation of as much as 25c. per net ton in the cost average would have had no effect on the proposal and coordination of minimum prices. *In re* Establishment of Minimum Prices, Bituminous Coal Div., Gen-

Problems of Price-Fixing Procedure. The procedural side of the Act is an epic in itself and is significant for the future of all large scale schemes of industrial regulation. The first three years of the campaign to carry out the commands of the statute were a period of unrelieved confusion, in part attributable to the bewildering and inconsistent terms of the Act, in part to sabotage of the proceedings by litigious operators, and in part to difficulties of personnel. In 1937, under political pressure, and in the shadow of the sudden depression of that year, the Coal Commission then in charge of administering the Act hastily undertook to fix prices.

In July, 1937, producers were ordered to file cost data with the statistical bureaus, in preparation for a determination of the weighted average of total costs, as required by the Act. A month later, the Commission ordered various of the District Boards to propose minimum prices with reference to a "tentative" weighted average cost figure fixed by it, and then to coordinate the proposed prices at a meeting in Washington.⁷⁴ On the failure of the District Boards to complete the coordination, the Commission itself took over the job.⁷⁵ A statement was issued on September 28, announcing that a general hearing would be held before the Commission established minimum prices. But on November 11, 1937, the Commission determined the weighted average cost figure for Minimum Price Area No. 1; and on November 30, and December 1, 1937, prices were established.⁷⁶ There were hearings with respect to classifications, but none on costs or coordinations, no supervision of the "proposed" prices, no disclosure of the Commission's policy with respect to coordination, either by publication of rules and regulations or otherwise. The Commission then put an end to the matter, in its order No. 111, dated December 7, 1937, by decreeing that in any proceeding instituted under Section 4II(d), seeking specific relief from the provisions of an order of the Commission, "any minimum price or marketing Rule and Regulation complained of, shall be presumed to have been established and prescribed in conformity with the provisions of the Act, and the burden of proof shall be upon the party so complaining."

Appeals, claiming fatal irregularities of procedure, were promptly taken from the price order under Section 6(b) of the Act, which provides a form of appellate review for "any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party." The Commission retorted that the appellants were not "parties" to the

eral Docket No. 15, of Director, Aug. 8, 1940 (hereinafter called Director's Findings) 57; CR-1-7.

74. Order No. 15, July 15, 1937; Order No. 39, Aug. 17, 1937.

75. Order No. 60, Oct. 22, 1937.

76. 2 FED. REG. 2992-3088 (1937).

proceeding in which the price order was issued, and that they could attack the order only by first filing a petition with the Commission, under Section 4II(d), complaining of specific injury to them in the price order. Appeals under Section 6(b) could be taken from the order disposing of such petitions. Appellants were outraged at the thought that the general price order, affecting the competitive position of every producer, could be made effective before any hearings on it were held, especially in view of Section 2(a) of the Act, providing that "no order which is subject to judicial review under Section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact." "The Commission could not prevent judicial review of its price orders," argued one irate operator, "merely by its error in refusing to hold a hearing."⁷⁷ It became clear, in hearings on preliminary injunctions, that several Circuit Courts of Appeal shared the views of the appellants on this issue,⁷⁸ and the Commission withdrew its minimum price order in February, 1938, planning to start over from the beginning.⁷⁹

After lengthy conferences, the Commission now decided that three series of public hearings were required by the Act before it could establish minimum prices — one on the determination of costs, a second on the process of "proposing" minimum prices, which results in a classification of coals within each district, and a third for "coordination." Such hearings then were held, though not without adventures,⁸⁰ the coordination

77. Brief of Petitioner on Application for Stay and Temporary Injunction, p. 35, *Carter Coal Co. v. Nat. Bitum. Coal Comm.* (C. C. A. 2d, 1938).

78. *Saxton Coal Mining Co. v. Nat. Bitum. Coal Comm.*, 96 F. (2d) 517 (App. D. C. 1938); *Truax-Traer Coal Co. v. Nat. Bitum. Coal Comm.*, 95 F. (2d) 218 (C. C. A. 7th, 1938).

79. Order No. 230, 3 FED. REG. 469, Feb. 23, 1938.

80. The long hearings were marked by conflict over many issues, involving both personalities and interpretations of the Act's language. See note 73 *supra*. *Carter Coal Co.* moved at one point for the disqualification of H. A. Gray, the Director of the Division, on grounds of prejudice, and Mr. Gray denied the motion. General Docket No. 15, Order of May 10, 1940, approved by the Secretary of the Interior, May 21, 1940. As is indicated by the discussion in the Examiners' Report and in the Findings of Director and the Secretary, almost every phrase in the price sections of the Act was subjected to intensive debate. Much attention was given, for example, to the price relationships between different grades and kinds of coal, and to values for different uses. The Director urged that to accept the price relationships existing under open competition "would be to abandon the purposes of Congress and to perpetuate conditions and practices which Congress in the preamble of the Act and elsewhere has directed were to be eliminated or rectified." Director's Findings 19. The Consumers' Counsel Division remarked sharply: "Just how destructive competition could have created unfair *price* relationships without at the same time creating unfair tonnage distribution we cannot see, and the Director has

problem being submitted first to three trial examiners, who took evidence for a period of seven strenuous months and then, on exceptions, briefs and oral arguments from the Examiners' Report, to the Director of the Division, and finally to the Secretary of the Interior.⁸¹ Both the Director and the Secretary filed findings, although the Secretary's order, finally establishing prices, made few substantial changes in the elaborate structure built by the Examiners and the Director.

As a matter of technique, the price fixing procedure developed under the Act seems hopelessly inadequate. It takes so long to establish prices, under the best possible circumstances, that a cost determination reached at the beginning of the proceeding is out of date at its conclusion.⁸² The procedural parts of the price-fixing process cost at least \$20,000,000,⁸³ a sum which should be compared to the net deficit of \$51,000,000 for the industry reported to the Treasury for 1932, the industry's worst year, and a net deficit of \$3,000,000 reported to the Treasury for 1936.⁸⁴ It is quite likely that the industry would have gained more from \$20,000,000 judiciously distributed as a subsidy than from the price fixing activities of the Coal Commission. Moreover, the standards of the Act, requiring deference both to cost criteria and to market conditions, add unnecessarily

nowhere indicated." General Docket No. 15, Exceptions of Consumers' Counsel Div. to Findings of Director, Aug. 30, 1940, 57. Other objections raised the same issue.

The Consumers' Counsel Division also opposed the practice in classifying coals as to use. "While the Consumers' Counsel Division never objects to a classification of a particular coal based upon its value for particular uses, it opposes multiple pricing of the same coal based on the type of consumer or type of use to which the coal goes. Such a device is not justified by past market practices; it fails to reflect relative market values; it defeats conservation by encouraging the consumption of high-value coal for low-value uses; it disregards the inherent characteristics of coal; it creates an unnecessary administrative burden of policing the use of coal as well as its production and sale; it leads to the demand for more and more 'use classifications'; it is utterly unfair to consumers; and it is contrary to common sense, experience, and the standards of the Bituminous Coal Act." *Id.* at 53.

81. General Docket No. 15, Order with respect to Minimum Prices, 5 FED. REG. 3829 (Sept. 24, 1940).

82. The prices established for the period beginning Oct. 1, 1940, are based on cost data for the year 1937, somewhat modified in the light of events during 1938. Director's Findings 53-57. Since production in 1937 was substantially less than in 1940, and since the cost figures used under the Act include many elements of fixed cost, statutory average costs for 1940 were certainly less than those for 1937. Furthermore, the rapid mechanization of the mining process [see W.P.A. NAT. RESEARCH PROJECT, MECHANIZATION, EMPLOYMENT AND OUTPUT PER MAN IN BITUMINOUS COAL MINING (1939)], stimulated by the high wage rates of the whole period, has resulted in great cost changes. Both § 4 II (a) of the Act and general notions of fairness in administrative action [see *Atchison, Topeka & S. F. Ry. v. United States*, 284 U. S. 248 (1932)] suggest an impropriety.

83. ATT'Y GEN'S COMM. ON ADMINISTRATIVE PROCEDURE, BITUMINOUS COAL DIVISION (1940) 71.

84. STATISTICAL ABSTRACT OF THE UNITED STATES 1939 (1940) 201.

to the burdens of administration, and may well tempt stubborn litigants to call for judicial determination whether the Division has satisfied all the tests imposed on it by the statute. Such proceedings before the courts could easily hold up a given price order until it becomes out of date.

A preliminary monograph presented to the Attorney General's Committee on Administrative Procedure contends that some improvement might be achieved in the administrative procedure of the Coal Division by substituting "conferences" for "hearings" and thus reducing both the time and the bitterness of the price fixing process.⁸⁵ The thought of the monograph is that the conference should be used as a pre-hearing device to narrow the issues before a final, more or less formal public hearing. The recommendation seems to offer no real hope for speed. The monograph concedes that the bitterness of the competitive struggle in the coal industry may make the development of pre-hearing procedure a rather empty reform, adding one more occasion for violent controversy to the proceeding. This is not to deny that some reforms can be accomplished even under the Act as it stands; the new Coal Division has been a tremendous improvement over the old Commission in efficiency and effectiveness, and dilatory tactics may be expected to disappear, if the Act becomes permanent. But the basic reason for the lengthiness of the procedure is the scope of the job imposed on the Division by the Act. There is no way of fixing thousands of coal prices in a hurry, if all the standards of the Act are to be served. Nor can hearings and the right of participation in them be generally denied; each operator has too big a stake in seeing that the standards of the Act are complied with.⁸⁶

Price Policy Under the Act. But delay and expense, and the rich opportunity for interminable litigation, are not the worst problems presented by the administration of the Coal Act. The policy towards coal prices embodied in the minimum price schedules, and expressed both in the opinion of the Director and in his subsequent decisions in a variety of proceedings for the revision of the price schedules, has substantive disadvantages of a serious and progressive nature. Considering only the contributions of the Secretary and the Director, the minimum price

85. ATT'Y GEN'S COMM. ON ADMINISTRATIVE PROCEDURE, *op. cit. supra* note 83, at 71-76.

86. The application of the rules of constitutional procedure elaborated in utility rate cases to a proceeding of this kind involves some trying choices between efficiency and "due" process. The job of fixing prices for each grade of soft coal at each mine, with reference to each market, and to each of the available means of transportation, is so complex, and involves so many interests, that usual formulae as to notice, rights of intervention, etc., are worn thin. Compare *West Ohio Gas Co. v. Public Utilities Comm.*, 294 U. S. 63 (1935); *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294 (1933); *Interstate Commerce Comm. v. Louisville & N. R. R.*, 227 U. S. 88 (1913); *Morgan v. United States*, 298 U. S. 468 (1936); *United States v. Illinois Central R. R.*, 291 U. S. 457 (1934).

schedule is a formidable document of several hundred pages, accompanied by numerous appendices, a thousand pages of findings and opinion—all of this now supplemented by hundreds of piece-meal revisions announced in subsequent cases before the Division. The schedules fix a minimum mine price for each grade and size of coal produced in each mine, depending on its destination, and on the vehicle which will carry it from mine to market. Thus, to take a random example, all the sizes of coal produced by the Antrim Coal Co. are classified, physically, as "H" grade, a fact which simplifies its price schedule. They are assigned minimum prices ranging between \$2.35 and \$1.90 a ton, depending on their size, for sales in all except three market areas, for all uses except railroad, vessel and bunker fuel, and for all means of delivery except truck shipment. For sales in certain market areas, these minima must be increased by 67 cents a ton, and in others by 10 or 20 cents a ton. Separate schedules, containing material variations, are set for market areas 3 and for movement via lake ports, and prices ranging between \$3.02 and \$2.57 are set for truck shipments to all markets.⁸⁷

A single policy dominates the minimum price schedules: to effect or to permit an all-around increase of prices, without requiring any shift in the distribution of business. The statutory requirement that minimum prices "preserve as nearly as may be existing fair competitive opportunities" is one of a dozen standards enumerated in the statute with equal emphasis. The Division has made it the touchstone of propriety in every phase of its control, overriding all others in case of conflict, and it has construed the phrase "existing fair competitive opportunities" as if it were written "existing competitive opportunities."⁸⁸ To fulfill this purpose, a study was made of the distribution of coal business in 1937, and that distribution was apparently used as a guide to decision in the many circumstances where efforts were made by producers to change the markets which they reached. The Coal Division has proved anxious, over and over again, not to deny a producer access to any market in which he has been selling coal; conversely, it is reluctant to allow a producer to increase his share of any market, if competing producers protest.

87. Price Schedule No. 1, District No. 1, Appendix A-1 and A-1-T.

88. This emphasis is the more remarkable in view of one of the few changes in the 1935 Act made at the time the 1937 Act was enacted. Section 4 II (b) of the 1935 Act provided that minimum prices should be coordinated with reference to the several standards now included in the subsection—the kind, quality and size of coal, the relative market values of coal at points of delivery, the absence of prejudice or preference among districts—"to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed." 49 STAT. 991, 997 (1935). In the 1937 Act, this language was abandoned for the formula: "and shall preserve as nearly as may be existing fair competitive opportunities." § 4 II (b). There was a controversy as to whether the Commission should pick the distribution of one year as a guide to decision, rather than longer-term trends in the distribution of business. Director's Findings, 16.

The 1937 price order had established a basing point system, designed to exclude some operators from distant markets, on the ground that they were reaching too far for business.⁸⁹ Although the structure of the present minimum price order would permit such a result, the policy of the Division has been different.

The issue is presented in many guises, but the response of the administrators has so far been uniformly in favor of freezing the status quo.

Consider, for example, *In re Wheeling Township Coal Mining Co.*,⁹⁰ a typical individual petition for relief from the effects of the minimum price schedules. The petitioning mine, which is located in District 4, in Ohio, charged that the price order had caused it to lose about half its business, in 19 markets, and especially its sale of coal to the Canadian National Railways and the Canadian Pacific Railroad. There were two basic reasons alleged for its loss of business. Its coals were improperly classified, in view of their low B.t.u. content, when compared with other Ohio coals; and in any event the minimum prices set for Ohio coals were too high, compared with the prices for coals in competing districts. A conference was held on the petition, attended by representatives of District Board Number 4, four other District Boards, two competing coal companies, and the Consumers' Counsel. One competitor urged that it be given the benefit of any change in the classification of Wheeling Township coals; the request was denied "in view of the absence of a full and proper showing of the necessity therefore," a ground which invites a further hearing at some future date, affecting the present participants, and perhaps other competitors of the intervener as well. The petitioner had asked for reclassifications of three sizes of its coal, involving price changes of 10, 15, and 5 cents a ton. In view of the evidence about the B.t.u. content of the coal, temporary reclassifications were granted which permitted reductions of 5, 10, and 5 cents a ton. But the reductions were allowed on conditions which are significant even in an order granting temporary relief: pending a final determination, which might take many months, they were to apply only in sales for industrial steam use to the particular consumers, in certain specified markets, to which petitioner had shipped its coals of these sizes from January 1 to September 30, 1940; "provided, however, that none of such shipments shall exceed in tonnage per month the average monthly tonnage shipped to each said particular consumer during said period; and, provided that within 10 days after the date of this order the petitioner shall supply the Division with a list of all consumers to whom it sold coal in Size Groups 5, 6, and 7 during the first nine months of 1940, showing the tonnage in each Size Group sold to each consumer in each of the nine months and the particular destination; and, further, provided that petitioner shall

89. See, e.g., Order No. 95, 2 FED. REG. 3036 (1937).

90. Docket No. A-3(7, 5 FED. REG. 5067 (Dec. 10, 1940).

furnish to the Division on the 15th day of each month a report of the amounts of all shipments of coals in Size Groups 5, 6, and 7 made during the preceding month, the consumers purchasing such coals, and the prices paid therefor."⁹¹

The policy foreshadowed in the temporary relief of the *Wheeling Township Coal Co.* case is applied in the important series of pronouncements by the Division involving the effect of transportation costs on the market price of coal. Since transportation costs form a larger fraction of the ultimate price of coal than mine prices, the problem is one of the most vital aspects of the price structure established by the schedules.

The policy of the price schedules favors all-rail transportation against competition based on cheaper forms of carriage. This has come about because, in most cases of competition involving the use of different methods of transportation, the existing distribution of business, which is to be preserved, is based on the more expensive rail transport, and is on the defensive against newly expanded water-borne or truck-borne coal. The Consumers' Counsel, in forceful briefs before the Examiners, the Director and the Secretary, has attacked the treatment of transportation costs in the price schedules, both in general and in particular.⁹² He takes the view that under the Act the Division should have established f.o.b. mine prices, requiring a mine to abide by the same minimum price for the same coal, whether the coal was going to one market or another, and whether it was going there by train, truck, barge, or camel back. If exceptions to such a policy were kept to a minimum, the price schedules would have reduced cross-hauling and other wastes of transportation, and would have permitted the full development of economies attendant on the expansion of trucking and river shipping. Furthermore, he contended, such a scheme of regulation would allow the industry to adapt itself freely to future developments, both of market conditions and of cost.

The Division decided, however, upon the complex system of multiple prices described above. One hundred and eighty-five areas were identified as "common-consuming market areas" within the meaning of the Act.⁹³ The price system within each market was ascertained, in the light of the particular uses of coal there, the availability of competing fuels, trade practices, and so on. F.o.b. mine prices were then set with reference to each market for all the producers who competed in that market; in setting such prices, the Division took into account the transportation charge which each producer must pay in order to reach the market, and set his mine price in such a way as to preserve his access to it.

91. *Ibid.*

92. General Docket No. 15, Brief for Consumers' Counsel Division, Feb. 14, 1940, pp. 7-88; Exceptions, May 23, 1940, pp. 11-60; Exceptions, Aug. 30, 1940, pp. 17-46.

93. Director's Findings, Appendix B, Schedule of Common Consuming Market Areas, Market Area Schedule No. 1 and Supp. No. 1.

The problem was easy where all producers reached the market by an all-rail route. Prices were fixed in relation to freight charges in such a way as to permit coals to reach the market from all the operators competing in it "at prices reflecting their relative market values, size for size and class for class."⁹⁴ This policy frequently resulted in an f.o.b. mine price for a coal lower than the f.o.b. mine price for the same coal when shipped to a different market. The Director's Findings explain his decision thus:

"Consumers' Counsel Division argues that these adjustments should be rigidly restricted. It suggests that the adjustment of f.o.b. mine prices to cancel out differences in freight rates constitutes an 'un-economic policy' tending to divert from consumers the coals which can reach them most economically. This consideration would be more forceful if the Coal Division were granted power to set prices in the light of those standards thought most efficient in the public interest. But the Division is specifically instructed to set prices which will preserve existing fair competitive opportunities, and that standard is controlling."⁹⁵

The problem of controlling access to the market is somewhat different where the competitors reach the market by different forms of transportation. Operators who can ship by river f.a.s. to destinations on the river — that is, to consumers with docks, who would not require a further haul by rail or truck — have been allowed the economic advantage of their location. Such coals are given "the same minimum f.o.b. mine price as for all-rail movement from the same district to important market areas served by such river coal."⁹⁶ At least where the all-river operator has had such an advantage in the past, he has been allowed to retain it. If, however, the coal is sold ex-river — that is, if it moves to its destination by water and then by rail or truck — the operator who can use water transportation is not permitted to benefit from his location. The minimum f.o.b. prices have been so arranged as to nullify the advantage of cheap transportation; the all-rail and ex-river delivered prices are equalized, in order to protect the "fair competitive opportunities" of the all-rail operator. The justification of the policy is obscure:

". . . In many markets, all-rail coal has maintained a substantially competitive position against ex-river coal and the assignment of the same f.o.b. mine prices for coals moving by river as for coals moving all-rail would permit the former coals to assume delivered prices lower than those of the rail coals and so broaden their fair competitive opportunities. This was demonstrated by the movements to a destination, such as Cleveland, Ohio, where there has been a very

94. Director's Findings 30.

95. *Id.* at 31.

96. *Id.* at 32.

small movement of ex-river coal and a tremendous movement of all-rail coal. During previous periods of governmental price fixing, when ex-river coals were not subject to the same price restrictions as all-rail coals, the ex-river coals were able to move to Cleveland to an extent to which they had not done and apparently could not do, under free and open competition. Accordingly, prices have been set up so as to accomplish an equalization of the all-rail and ex-river delivered prices, taking into account the actual river transportation charges."⁹⁷

But wasn't the change in the distribution of business, during earlier periods of control, based on the fact that the all-rail shippers were prevented from competing with ex-river shippers, because the minimum prices fixed for the former were too high? The solution adopted by the Division was to raise the minimum price for ex-river coals, not to lower it for all-rail coals. The price schedules thus forbid operators to sell the ex-river coal more cheaply than the all-rail coal, in the name of preserving the "existing fair competitive opportunities" of the all-rail operators.

The Division is already meeting difficulties in carrying through the policy of its ex-river ruling, because the New Deal's enlarged federal waterways program has begun to result in great pressure for increased use of the cheap river rates. Nine-foot channels have recently been opened on the Kanawha, the Illinois, and the upper Mississippi, and river traffic has grown enormously in the last three years. In the face of this development, it seems hopelessly difficult for the Division to attempt to restore the 1937, or even the 1940, distribution of business.

The issue is dramatized in *In re Sahara Coal Co.*, a recent final order on petitions under Section 4II(d).⁹⁸ Two producers in District 10, in Illinois, petitioned for permission to sell to certain consumers in Minneapolis, St. Paul and LaSalle, Illinois, at not less than the f.o.b. minimum prices established for river f.a.s. deliveries. The consumers were in fact ex-river consumers, and the schedules required that they be charged not less than the ex-river rate, which was "equalized" with the all-rail minima. The price schedule provides that in "special cases" ex-river consumers can on petition obtain the benefit of f.a.s. prices, if such consumers purchased coal in the past "at such prices and under such conditions that the coal moving by river was not competitive with coal of comparable quality moving by rail, truck or ex-lake dock, or . . . in the past regularly purchased coal moving by river at a savings over available prices for comparable coal moving by rail, truck or ex-lake dock."⁹⁹ District Board

97. *Id.* at 32-33.

98. Order, Findings of Fact, Conclusions of Law and Opinion of Director, Docket Nos. A-82, A-83 and A-91. The Order appears at 5 FED. REG. 5146 (Dec. 13, 1940).

99. This provision for the reclassification of ex-river consumers as f. a. s. consumers appears in the Special River Price Instructions and Exceptions as follows:

2, representing Pennsylvania operators, appeared in opposition to the petition, on the ground that the relief sought would deprive its members of "fair competitive opportunities," and District Boards 6 and 7, from West Virginia, pointed out the bearing of the case on the interests of their members. The eastern coals arrived in the Twin Cities by rail from Lake Superior docks, after a voyage on the Great Lakes from an Ohio port. Consumers' Counsel supported the petition, and two operators appeared, one to join in the prayer, the other to oppose it. The Division found that one consumer, a utility, had received low prices for ex-river coal as soon as navigation to Minneapolis became practicable, in 1938, 1939 and 1940, and that the relief sought was justifiable because it would tend to preserve what had become an existing pattern of competition. The other consumer, the University of Minnesota, had bought some river coal in 1940; if required to build a dock, in order to get the advantage

"3. *Special Cases*

A. Any code member or Consumers' Counsel Division, on behalf of any consumer or retail dealer (which consumer or retail dealer falls within the definition of a purchaser of ex-river coal, as defined in Item 2 above, but who (a) in the past customarily purchased coal moving by river at such prices and under such conditions that the coal moving by river was not competitive with coal of comparable quality moving by rail, truck or ex-lake dock, or (b) in the past regularly purchased coal moving by river at a savings over available prices for comparable coal moving by rail, truck or ex-lake dock), may file a petition requesting that such consumer or retail dealer be enabled to purchase at the minimum f. o. b. mine prices for free alongside delivery; and the Division shall, after hearing and upon satisfactory showing, authorize the sale of river coal to such purchaser by one or more code members at minimum f. o. b. mine prices for free alongside delivery, subject to such conditions as may be necessary to accomplish the objectives of the Act and to maintain the prescribed minimum prices. Any such petition filed by a code member or Consumers' Counsel Division, as herein provided, and the procedure subsequent thereto shall be governed by the rules and regulations governing the procedure in respect to applications under Section 4-II-(d) of the Bituminous Coal Act of 1937.

Similarly, any code member or Consumers' Counsel Division may file a petition requesting appropriate relief on behalf of any consumer or retail dealer, who in the absence of established minimum f. o. b. mine prices and by virtue of some future development would have customarily purchased coal moving by river at such prices and under such conditions that the coal moving by river would not be competitive with coal of comparable quality moving by rail, truck or ex-lake dock, or would have regularly purchased coal moving by river at a savings over available prices of comparable coal moving by rail, truck or ex-lake dock. Such future development may pertain to the location of the plant or facilities of the consumer or retail dealer, the cost of river transportation or other similar matters.

Any State or political subdivision of a State, which is a consumer of ex-river coal, may, on its own behalf, file petitions such as those which

of f.a.s. prices, it would install cheaper natural gas facilities. The requests were granted, and generalized for all District 10 operators who could ship by river.

One extraordinary consequence of the Division's rule is that only one kind of ex-river consumer can get any benefit from the cheapness of river transportation. Large consumers, who in the past were able to insist on very low prices, can claim the benefit of the Division's policy of favoring the status quo. Such price differentials, the Division says, must be perpetuated as "existing fair competitive opportunities" for the seller; weaker ex-river consumers are to be forced to pay the higher all-rail prices, because they lacked power in the past to insist on discriminatory treatment. But some large consumers, who cannot claim to have taken river coal at a low price in the past, may be able (like the University of Minnesota, in the *Sahara Coal Co.* case) to force concessions in their interest, because of their bargaining power and their threats to use other fuel. As the Consumers' Counsel pointed out, "The practical effect of this 'Special Case' provision would be that a few large inland consumers rich enough to stand the not inconsiderable expense of an administrative proceeding might join their brethren on the river front in the favored class of f.a.s. purchasers, while the remainder of the millions of consumers in Ohio, Indiana, Kentucky, Tennessee, Missouri, Illinois, Iowa, Wisconsin, and Minnesota who hope to reap some benefits from our inland waterways will be required by law to pay a tax, to the coal industry, for the privilege of using them . . ." ¹⁰⁰

a code member or the Consumers' Counsel Division may file, as above provided." Schedule of Effective Minimum Prices for District No. 10, Appendix A-10, Price Schedule No. 1, pp. 52-53.

The Consumers' Counsel commented on this type of provision as follows:

"However simple the standards might be, the immensity of the administrative job of trying to fix the price of coal for consumers individually should be enough to discourage completely any thought of effective administration of such a provision. But the requirements of proof are not simple. The petitioner must show not only what the consumer has paid for coal but the prices asked by every producer in the vicinity for some years back. Under the 'future developments' clause, the petitioner would somehow be responsible for proving what prices all producers would have quoted if there were no Coal Act. It would seem easier to measure the whiskers of the progeny of the ghost of the fabulous Cheshire cat. The absurdity of requiring such elaborate ectoplasmic demonstrations, in the usual setting of a formal public hearing, for permission to use a free public waterway, is exceeded only by the absurdity of having a license or permit system at all. Surely the bituminous coal regulatory agencies have had enough difficulty in attempting to work out a set of general rules for fair price competition without embarking upon the enterprise of passing upon each sale of coal separately." General Docket No. 15, Exceptions of Consumers' Counsel Div. to Director's Findings, August 30, 1940, pp. 30-31.

100. CONSUMERS' COUNSEL DIV., *op. cit. supra* note 99, at 31.

The Division faces comparable problems in every sector of the price schedules. The competition for mid-western markets depends on the competition between carriers for coal business, and on the use of lake cargo shipping; in the eastern markets all-rail coals compete with coal carried by ship from Newport, Hampton Roads and other southern points. Trucks are an important market fact in St. Louis and other market centers. Strip mining operations and the increased use of machinery raise similar issues of conflict between established industrial patterns of competition, on the one hand, and the public interest in cheapness, on the other. In establishing the price schedules, the Division's response to these problems was quite uniform and closely related to the policy of its ex-river rulings. This policy is beginning to take on shape in the myriad decisions, made every week, on individual petitions for relief from specific provisions of the price schedules.¹⁰¹ Over and over again the Division repeats its basic view of its function under the Act: "The Division is specifically instructed to set prices which will preserve existing fair competitive opportunities, and that standard is controlling."¹⁰²

Of course, the policy of the Coal Division in favoring the status quo could be nullified by the Interstate Commerce Commission, through its control of the rate structure for transportation service. But the Commerce Commission has proved to be even more devoted to the past than the Coal Division. In two recent cases, involving intersectional competition among coal producers and coal carrying railroads, it has refused rate relief, in the interest of protecting the existing distribution of business, although the decisions required it badly to stretch its earlier doctrine of "relative unreasonableness" under Section 1 of the Interstate Commerce Act. One case arose on the proposal of low rates for coal by certain railroads operating in Illinois, Indiana and Western Kentucky, in order to permit shippers using those roads to transship coal at Chicago for lake ports, there to be sold in competition with coal coming from the East via lake steamer.¹⁰³ The other came up on a request by shippers for a reduction in the rates of certain roads operating between points in Virginia, Kentucky and West Virginia and Hampton Roads; the coal went to New England by water, in competition with coal that reached New England from northern mines by rail. In the first case, the Commission found the proposed rates too low, and in the second, it refused to find existing rates too high.¹⁰⁴

101. See, e.g., *In re* Old Quaker Co., Docket No. A-352, Order Denying Relief, 5 FED. REG. 5161 (Dec. 14, 1940). See also Findings, Conclusions of Law and Order of Director, Docket No. 15-A, 5 FED. REG. 3984, Sept. 30, 1940; *In re* Maumee Collieries Co., 5 FED. REG. 4491, Nov. 8, 1940.

102. Director's Findings 31.

103. Lake Cargo Coal from Ill., Ind. & Ky. to Chicago, 238 I. C. C. 633 (1940).

104. Property Owners' Comm. v. Chesapeake & Ohio Ry., 237 I. C. C. 549 (1940).

The Interstate Commerce Commission and the Coal Division together control many factors in the coal trade, and they tend to operate along parallel lines. But they do not completely control the forces of competition in coal. The prices of competing fuels are less stringently regulated than the price of soft coal, and Secretary Ickes has strongly indicated that federal regulation of the price of oil and gas is needed in order to fulfill the purposes of the coal control plan.¹⁰⁵ Meanwhile, their competition limits the scope of the coal price schedules. The oil industry, despite its complex system of state and federal regulation, offers active price competition in many centers of production. And natural gas is threatening to come east, via a large pipe line, to disturb comfortable markets now parcelled out among coal producers.¹⁰⁶ Finally, of course, the Coal Division has no control over coal production, and very little over the opening of new mines,¹⁰⁷ a fact which may in time make every price raising activity under the Act something of a boomerang.

Within the limits set by the effectiveness of its control, the Coal Division is working to preserve the status quo. Occasional concessions are obtained, and modifications of policy appear from time to time, but the basic course of the Division's policy is what it says the Act compels its policy to be. Prices are to go up, so as to permit high wages to be paid; "unfair" competitive practices are forbidden, which might permit sellers to evade the minimum prices fixed by the price schedules;¹⁰⁸ and every

105. Address before National Coal Ass'n, Oct. 25, 1939 (reprinted in *BLACK DIAMOND*, Nov. 4, 1939, p. 11).

The charge was made by R. B. Brown, a representative of petroleum trade associations, that the Department of the Interior, in educational broadcasts, sought to develop sentiment in favor of federal oil regulation by dramatizing the dangers of an oil shortage. *PETROLEUM INVESTIGATION, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. Res. 290 and H. R. 7372, 76th Cong., 3d Sess. Part 4 (1940) 1866-1876.*

106. "Coal Groups Fight Pipe Line for Gas," *N. Y. Times*, Nov. 16, 1940, p. 31, col. 2; "Madeira Discusses Natural Gas Menace," *BLACK DIAMOND*, Nov. 16, 1940, p. 12.

The coal industry has also violently criticized the activities of the TVA. See, *c.g.*, 84 *CONG. REC.* 3054, 3157, 4047 (1939).

107. For problems presented by opening of a new mine, see *In re* Petition of District Board 11 for Coals of Chinook Mine of Ayrshire-Patoka Collieries Corp., Docket No. A-383, 5 *FED. REG.* 5108 (Dec. 12, 1940). As the coals have to be classified with reference to hypothetical future competition against coals presently extracted, a warm contest over such classifications is normally to be expected. If the Division wanted definitely to discourage the opening of new mines, it could consistently grant adverse classifications of coals.

108. The regulation of trade practices—discounts, contract terms, extensions of credit, etc.—is obviously as important to the price structure as the fixing of prices itself. Such problems are not directly discussed in this paper, although they may be considered hereafter; it is believed, however, that the issues thus presented are essentially those implicit in the general effort to fix a price structure. The purpose of the Division is to make merchandising practices uniform, and to control them, in the interest of preventing the evasion of minimum prices. Director's Findings, 59-61, MR-1-27.

mine is protected in the market opportunities open to it at some vague point in the recent past.

What's wrong with this program as a policy for the coal industry?

In the first place, it is a costly policy. If a price rise of ten cents a ton can be attributed to the price fixing schedules,¹⁰⁹ the experiment costs the American public at least \$45,000,000 a year, without counting in the one cent a ton tax imposed by the Act, the assessments paid by code members for the expenses of the District Boards, the cost of hearings, lawsuits, administration costs not covered by the tax, and filling out returns. This is an object, be it said, which might have been achieved simply, and without the maladroit procedural confusion of the Act, by providing in the statute that each mine should have a minimum price some fixed percentage above its actual average price during a base year.

In the second place, why the status quo? Why protect investors in coal mines against the risk of insolvency? The state was not consulted when they decided to open the coal mines. Investors take profits, when there are any — and even in coal, there are profits unknown to the Bureau of Internal Revenue.¹¹⁰ Is there any reason for the state to prevent their taking losses when it appears that the ventures were mistaken? The question is not simply part of the ethic of capitalism; it represents an urgent lesson in economic policy. The success of future programs of expansion requires that the price arrangements of industry be made as competitive as possible. And if we have not yet learned how to engineer a program of expansion, we have indeed suffered the depression in vain. With reference to such goals, the status quo is not an appropriate objective for industrial policy, especially in a dynamic industry whose future should be determined by the development of the industries and districts it serves. Our economy is, or should be, a growing economy, working under the stimulus of public and private initiative to serve progressive social purposes. Those purposes require the development of new

109. Manifestly, it is difficult to be convincing in any estimate of what caused the price changes which did occur. But certainly the establishment of prices under the Act is one factor among others in a complex market, highly responsive to changes in business conditions; certainly the Coal Commission took credit for part of the firmness of the market in earlier periods of price control. It has suggested that the 1937 order resulted in a rise of \$0.08 per ton in the f. o. b. price of railroad fuel. 2 ANN. REP. NAT. BITUM. COAL COMM. (1939) 5. Fisher's study (*op. cit. supra*, note 52) indicates that the NRA Code did tend to increase coal prices. The Commission has estimated that in 1937 the industry was earning \$37,000,000, or 11 cents per ton, less than its operating costs as defined in the Act. 2 ANN. REP. NAT. BITUM. COAL COMM. (1939) 2. The present price schedule is designed to make good at least these losses. Director's Findings, R-1-13. See also 84 CONG. REC. 2573 (1939).

110. Coal companies make profits in running company stores and houses, and in associated coal town enterprises, which in part offset supposed losses in mining operations. Furthermore, Internal Revenue figures are not always a reliable guide to actual profitability, especially in coal mining.

and cheaper methods of extraction and of transportation; if the Coal Division seriously means to protect the existing distribution of business, it must adjust prices so as to offset economies based on mechanization of mining or improved organization.¹¹¹ Great regional shifts in industry and in population are taking place, as new industries and new centers of power develop; the Coal Division wants to keep competitive opportunities open as of the year 1937. New uses for coal appear, both on a large scale, as in Nylon manufacture or the putative extraction of gasoline or rubber from coal, and on a small scale, in the development of uses for waste coal, or other technological improvement; the Coal Division appears suspicious of novelty which involves price reduction.¹¹²

But the final objection to the price policy represented by the Act is that it is not adapted to the particular needs and circumstances of the coal industry. If the industry has suffered from what can be called over-expansion, or is exposed to the dangers of such overexpansion, the Act is therapy to make the disease worse. It promises to hold prices up, and thereby attracts new money into the industry. By holding prices up, it delays the shutting down of mines once considered redundant. If the future market for coal is circumscribed by the onward thrust of gas, oil and water power, the Act does not help the coal operators to hold their own in that market, for it undertakes to raise the price of coal in relation to that of other fuels. If there is public concern over wasteful methods of extraction, and a public interest in preventing mining practices which leave undue amounts of coal unrecovered, the Act does nothing to meet that concern. True, it offers operators higher profits, and some commentators feel that higher profits may encourage better mining methods. But the assumption is gratuitous. Higher profits mean higher managerial salaries and, perhaps, higher dividends; they make no obvious contribution to the conservation problem. If the Federal Government wants better mining practice to be pursued in coal mining, it should prescribe and enforce appropriate mining regulations. That end cannot be achieved by indirection.

What should be done? The present system of coal control is expensive and cumbersome. It has been suggested that if the policy of the Act is desirable, it can be attained more economically and efficiently by proration of output to existing mines, without direct price fixing.¹¹³ Output restriction has been the basis of the subsidy given the British coal industry,

111. One of the most important recent developments in the coal industry is the growth of strip operations, the practice of extracting coal by surface excavation rather than by mining proper. Stripping operations accounted for almost 9% of all coal production in 1939. BITUMINOUS COAL TABLES, 1938-1939 (Bitum. Coal Div. 1940) 1. Are minimum prices for strip mines, and especially for new strip mines, to be fixed at a level which will preserve the existing competitive opportunities of other mines?

112. See, e.g., Director's Findings, Price Schedule, Appendix A-7, 22.

113. Miller, *supra* note 7, at 175.

hard hit by the loss of its export markets after the World War.¹¹⁴ Direct restriction of output is used in this country under the agricultural statutes, and the state oil control laws, and it is the basis of the extraordinary contract pursuant to which trade conditions in the anthracite industry are determined.¹¹⁵ An alternative proposal with the same end in view was made by Representative Allen of Pennsylvania and the operators' Committee to Amend the Coal Act.¹¹⁶ It follows the model of the German cartel experience¹¹⁷ in proposing to grant an exemption from the anti-trust laws to marketing agencies of the kind first considered in the *Appalachian Coals* case, as private control groups.¹¹⁸

But these pre-war restriction schemes have been thoroughly tested in practice, and they have been universally discredited, except as subsidies to be defended for their own sakes. Nothing in the history of the control plans for rubber, tin, sugar, copper, or anthracite coal offers reason for hoping for better things from the Bituminous Coal Act of 1937.¹¹⁹ Contrariwise, the abandonment of the Act, if made part of

114. LUCAS, *INDUSTRIAL RECONSTRUCTION AND THE CONTROL OF COMPETITION* (1937) cc. 4, 11-15; NEUMAN, *THE ECONOMIC ORGANIZATION OF THE BRITISH COAL INDUSTRY* (1934); MACGREGOR, *ENTERPRISE, PURPOSE AND PROFIT* (1934) cc. 5-6; STRASSER, *THE EFFECTS UPON OPERATING EFFICIENCY OF THE BRITISH EXPERIMENT IN PRODUCTION CONTROL IN THE COAL INDUSTRY* (1936); Miller, *supra* note 7, at 154-159; Roberts, *The Marketing of Coal under the Coal Mines Act, 1930* (1938) 9 *MANCHESTER SCH.* 78; *Comments on the Coal Act of 1938* (1938) 130 *ECONOMIST* 214, 277, 334, 382, 679; (1939) 48 *Mo. LAB. REV.* 135.

115. See note 1 *supra*.

116. H. R. 5119, 76th Cong., 1st Sess. (1939); 84 *CONG. REC. APPENDIX* 1194, 2389 (1939). See *N. Y. Times*, Oct. 26, 1939, p. 13, col. 1.

117. See Miller, *supra* note 7, at 159-165.

118. See PARKER, *THE COAL INDUSTRY* (1940) c. 10. Professor Hamilton considers the pros and cons of proposals for monopolization and for government-cartellization in his *WAY OF ORDER FOR BITUMINOUS COAL* (1928) at 142-152, and of proposals for supervised cartellization or monopoly at 152-163. He criticizes plans of these two types as dangerous to the public interest.

Socialization of the industry, in one form or another, is also a possibility for policy. As usually proposed, it would serve the same object as price control, production control, or overt private monopoly: it would validate existing investments in the coal industry, through purchase or condemnation of the mines at a "fair" value. The mines thereafter would be conducted either by a Government monopoly, or by a series of corporations. Such a transfer would not alter the problems of price policy which would have to be met. The question of determining an appropriate level of price and output for a socialized industry is a challenging one, but raises the same issues of judgment about the relation of costs and prices, and the prices of competing fuels, which are to be canvassed in judging the efficiency of a privately owned enterprise. See notes 18, 72 *supra*; PIGOU, *SOCIALISM VERSUS CAPITALISM* (1938) cc. 3, 7. See HAMILTON & WRIGHT, *op. cit. supra* at 164-306, and comments of Hardy, dissenting, at 312-318.

119. There are many studies of the operation of particular control schemes. See, e.g., ROWE, *MARKETS AND MEN* (1936); ELLIOTT *et al.*, *INTERNATIONAL CONTROL IN THE NON-FERROUS METALS* (1937); DAVIS, *ON AGRICULTURAL POLICY 1926-1938* (1939); COHEN,

a comprehensive program of expansion, both for the war and the post war periods, is a step which promises great dividends of economic welfare.

What would happen to the coal industry if the Act were allowed to expire in April, 1941? Insofar as one can guess even two months in advance, business in April, 1941, will be rising on the tide of the preparedness boom, with capital goods industries working at full capacity. Upon the removal of the Act, the industry would not be substantially disturbed, except that costs would be reduced by the amount of the taxes and assessments under the Act, and the profit position of the industry thereby improved. No more propitious time to abandon the Act could be imagined. The minimum prices fixed by the price schedules are in some cases already below market prices, and the chief coal problem of the near future is likely to be the prevention of excessively high prices, not the salvation of distressed coal operators and investors.¹²⁰ Furthermore, the steady increase in the number of coal marketing agencies, and the putative increase in their market significance, may make it desirable to consider invoking the Sherman Act in order to work for lower prices, not for higher ones.

But the pressure of military spending may cease. Would it be necessary or desirable to recreate the Coal Act of 1937 in a peace time economy? Would it be desirable to keep it in working order, during the war, as an indispensable agency of peace?

The main factor in the disorder of the coal industry during the last twenty years appears to have been interregional competition based on

THE CONTROL OF MILK PRICES (1938); HAMILTON *et al.*, PRICE AND PRICE POLICIES (1938) §§ 2, 3, and 8; WATKINS, OIL: STABILIZATION OR CONSERVATION? (1937).

In an admirable essay, *Rationalization in the Tin Industry* (1936) 4 REV. ECON. STUDIES 13, 32, Eastham concludes:

"In the tin industry as elsewhere, the term rationalization must be interpreted as the process of maintaining the value of malinvested capital at the expense of the consumer. There may well be cases where the maleffects of a drastic decline in the prosperity of an industry might be considered entirely to outweigh the stimulus which would arise from the purchasing power released by the lower price level and that, in consequence, State intervention would be justified. There is, however, nothing to suggest that the tin industry falls into such a category, and it is pertinent to enquire why the cloak of State authority should be given to activities, which, however profitable they may be to those who participate in them, are detrimental to the consumer and calculated to acerbate international relations."

120. Section 4 II (c) of the Coal Act gives the Division power to establish maximum f. o. b. prices, when it deems it necessary to do so in the public interest. The maximum prices contemplated by this subsection are to be set at a uniform increase above the minimum prices in effect at the time, "so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided*, That no maximum price shall be established for any mine which shall not yield a fair return on the fair value of the property." If it took several years to set minimum prices, how long would be necessary for the valuation of each mine required by the use of § 4 II (c) ?

striking disparities of wage rates, and on the immobility of the labor force of the industry when confronted with sharp declines in wages. It is extremely unlikely that these problems would reappear in the industry in the foreseeable future, even in the event of a post-war depression.

In the first place, there are now no non-union fields whose competition could demoralize the arrangements of the industry. The development of machinery under the Wagner Act for protecting union organizations seems adequate now, in ordinary times, to repel most employer attacks; during periods of extraordinary pressure, like the early years of the depression, or the cycle during and after the Jacksonville agreement, even the present system of control could not possibly sustain the price levels, or the wage rates. It follows that one of the main elements in the recent disorganization of the coal industry has been reduced in significance, or removed. If it were felt that further protection is required for the wage standards achieved in the coal industry through collective bargaining, that protection could easily be secured by direct wage-fixing action, either under the Fair Labor Standards Act, or under a special Labor Standards Act for the coal industry. It would be a good deal cheaper for the community to deal with the wage problem directly, rather than pursue further the present policy of paying the coal operators a large subsidy, in order to encourage them to abide by their union contracts; and a wage fixing statute would certainly be easier to administer and to enforce than one for fixing prices.

Furthermore, there has been an improvement, though not nearly an adequate one, in the organization of the labor market generally. More information about opportunities for work is now available through the state and federal employment services than was ever available in the past. Informational agencies of this kind, especially when linked to the social security system, can effect important improvements in the mobility of labor, thus combating the tendency towards extreme exploitation of labor conspicuous in the recent history of isolated, one-industry communities like the mountain coal villages. Information services are not enough; they should be supplemented by transfer-wage payments and other devices to offset the relative immobility of the labor supply. But such reforms are generally needed to protect labor, and are not specifics for the coal industry.¹²¹

121. The vital importance of labor mobility in all plans for economic expansion is highlighted by the current war experience, where the retraining of workers has emerged as one of the crucial production problems. See *THE ECONOMIST*, Nov. 16, 1940, 599-600.

For more general discussion, see Stead, *The Role of Public Employment Service in the Unemployment Compensation Program* (1936) 3 *LAW & CONTEMP. PROB.* 100; CHEGWIDDEN & MYRDDIN-EVANS, *THE UNEMPLOYMENT EXCHANGE SERVICE OF GREAT BRITAIN* (1934); Reynolds, *supra* note 20, 746-747; Kaldor, *Wage Subsidies as a Remedy for Unemployment* (1936) 44 *J. POL. ECON.* 721.

And even if one accepts the popular thesis that overproduction and overcapacity are what caused the troubles of the coal industry, it by no means follows that a return of peace would see a return of disaster. Many mines were shut down between 1923 and 1933, — almost 4,000 mines, representing more than 32 per cent of the theoretical capacity measured by the Bureau of Mines index — and in 1938 (before the war boom started), operations during the most active weeks of the year represented a rate close to 82 per cent of theoretical one-shift capacity; and in 1939, a rate of 92 per cent.¹²² Even if the present boom should develop what would later turn out to be excessive capacity, the industry is now so organized that it should be able to effect an orderly liquidation of unprofitable units, without involving the coal regions of the country in a civil war.

But excess capacity has meaning only in relation to the demand for coal at a given time. Coal capacity was excessive in 1932, but not in 1940. If industrial activity were to continue at its present rate during peacetime, there would be no problem of declining profits and general distress in the coal industry, and no special sentiment in favor of continuing the Coal Act of 1937. Government can and should do something to cure the recurring insolvency of the coal industry; but it does not follow that a restriction scheme is the appropriate vehicle for such a policy. The best contribution the Government could make to the coal problem would be to assure a high level of employment in coal consuming industries after the war is over. It is a fair inference from the economic history of the last ten years that such assurances can be given, and fulfilled.

The analysis of depression policy has proceeded far enough to permit some rather dogmatic conclusions about what has happened, conclusions which affect the relevance of all arguments for the renewal of the Act.

Governments attempting to offset the depression of the thirties have generally attempted to use two kinds of policy. The first is restrictionism, by higher tariffs, quotas, and arrangements for the suppression of competition; in all countries, and for the same reasons, these devices have not secured any results beyond a subsidy to the affected groups.¹²³ In many cases the restriction schemes have resulted in dangerous over-building induced by inadequate production control in the face of higher prices. The second class of recovery remedies can be described as expansionist, and it includes deficit financing, public works expenditure, lowering of

122. BITUMINOUS COAL TABLES, 1938-1939 (Bitum. Coal Div. 1940) 28, 7, 2, 24.

123. See ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940); ROBBINS, *The Economics of Restrictionism* in *ECONOMIC BASIS OF CLASS CONFLICT* (1939); CROWTHER, *The New Feudalism* in *ECONOMICS FOR DEMOCRATS* (1939) 59-86. See also materials cited *supra* note 119; Marjolin, *Reflections on the Blum Experiment* (1938) 5 *ECONOMICA* (N.S.) 177.

interest rates and of tariffs.¹²⁴ For all the fumbling and hesitancy with which they have been applied, it may be said positively that these techniques have worked. The relative success achieved in the development of such remedies for unemployment now offers democratic and capitalist societies their greatest opportunity: the opportunity to secure social advances and a high level of employment, without sacrificing either capitalism or democracy. The techniques in question are those of monetary policy and direct investment by the state, designed to maintain a steady flow of income, and a high level of profit, in the economy as a whole. These techniques have not always been well used during the last seven years, but the mistakes came from want of skill in the employment of new procedures and do not weaken the case for relying on the same weapons again. The renewed experience of a war boom confirms all the claims ever advanced for government spending as a recovery device, and makes it imperative to plan a great public works program for the peace.

A program of expansion and employment, in the light of our experience, rests on the volume of investment, which government can influence by its budgets, its monetary policy, its tax policy and its control of banks and securities markets. But such a program can be hampered, and seriously hampered, by monopolistic barriers to expansion.¹²⁵ The NRA was at war with the PWA in the early days of the New Deal; a system like that now in force for the coal industry affects recovery on a smaller scale, but in the same way. The same amount of coal will now cost more; profits will be enhanced, but not output or employment, and efforts will be made to restrict any responses in output to the increased profits, for such responses tend to defeat the price rise achieved by the Act.

The general object of economic policy is a steady increase in economic welfare—that is, in the total output of the goods and services people want. We now have a clearer conception than we had ten years ago of

124. A clear and forceful statement of this view appears in the testimony of Professor Hansen and of Lauchlin Currie before the Temporary National Economic Committee, 9 TNEC *Hearings* 3495-3559, 3837-3859 (1940), and in Hansen's book, *FULL RECOVERY OR STAGNATION?* (1938). Introductory presentations can be found in Keynes' famous pamphlet, *THE MEANS TO PROSPERITY* (1933); CROWTHER, *ECONOMICS FOR DEMOCRATS* (1939); GILBERT *et al.*, *AN ECONOMIC PROGRAM FOR AMERICAN DEMOCRACY* (1938); ROGERS, *CAPITALISM IN CRISIS* (1938); BAUER, *NATIONAL WELFARE AND BUSINESS STABILITY* (1940); NAT. INDUSTRIAL CONF. BOARD, *THE ECONOMIC DOCTRINES OF JOHN MAYNARD KEYNES* (1938); ROBINSON, *INTRODUCTION TO THE THEORY OF EMPLOYMENT* (1938). A somewhat different gloss on closely related attitudes emerges in ROBBINS, *THE ECONOMIC BASIS OF CLASS CONFLICT* (1939) Part 2; SIMONS, *A POSITIVE PROGRAM FOR LAISSEZ-FAIRE* (1934). Of the more recent technical literature, see ROBERTSON, *ESSAYS IN MONETARY THEORY* (1940) cc. 7-11; Samuelson, *The Theory of Pump-Priming Re-examined* (1940) 30 *AM. ECON. REV.* 492. See also Book Reviews (1938) 48 *YALE L. J.* 917, (1938) 47 *YALE L. J.* 498, (1940) 8 *U. OF CHI. L. REV.* 169.

125. Edwards, *The Relationship of Price Policy to Fluctuations of Investment* (1938) 28 *AM. ECON. REV. SUPP.* 56; Mason, *Price Policies and Full Employment* in FRIEDRICH & MASON, *PUBLIC POLICY* (1940) 25-58.

the things that government can do to serve that policy. Government spending and an imaginative enforcement of the anti-trust laws; these two together are twin weapons of great power in the struggle for expansion. Either one alone is of little effect. Spending in a monopolized society must be done in huge volume before it is effective in increasing employment; and the monopolies, always restrictionist, do not meet the pressure of higher profit with a sustained impulse to expand. Anti-trust enforcement alone gives society no affirmative stimulus for expansion, since it results in no direct increase in income.¹²⁶ Anti-trust enforcement may set the stage for an expansion; it cannot start one.

Against the background of these propositions, the Bituminous Coal Act of 1937 seems a chance survivor of an earlier and more confused period of the New Deal. If the lessons of that experience are what they seem, the Coal Act should be abandoned in favor of the more general policy of competition and full employment. There is every reason of public policy for devoting the limited energies of government to fostering boom conditions when peace comes rather than to cushioning competitive industries against the consequences of stagnation. The best thing that government can do for the coal industry is to see to it, by a judicious use of its powers over finance, that other industries are fully employed. In a society dominated by such a program, there would be no special need for a coal control act. And if, in such a society, coal did turn out to be really a declining industry, in the absolute sense, slow liquidation could be accomplished without self-defeating subsidies by keeping wages uniform, helping labor move to other centers, and facilitating the closure of mines whose use no longer paid. That problem is not now with us, and it may never arise, if a policy of expansion is pursued. It is enough to say that a program of price maintenance, under the Bituminous Coal Act, unaccompanied by control of production, would contribute nothing to the solution of such a problem, if it should appear.¹²⁷

126. See Sweezy, Book Review (1941) 54 HARV. L. REV. 530.

127. But strong forces are working for a renewal of the Act. The Democratic Party platform in 1940 pledged "continuation of the Federal Bituminous Coal Stabilization Act, and sympathetic consideration of the application of similar legislation to the anthracite coal industry." WORLD ALMANAC (1941) 815. It has been announced that the Department of Interior recommends a two-year extension of the Act, and that Senator Guffey will introduce such a bill. BLACK DIAMOND, Nov. 30, 1940, p. 7. It was announced at the same time that the Department also favors the Cole Bill [H. R. 7372, 76th Cong., 1st Sess. (1939)] for the regulation of the oil industry, a measure which President Roosevelt expressly favors. OIL & GAS J., Dec. 26, 1940, p. 75. An editorial in BLACK DIAMOND comments, apparently with favor, "It now seems inevitable that the Bituminous Coal Act of 1937 will be extended at the next session of Congress." Dec. 28, 1940, p. 21.

The comments of Geoffrey Crowther on the British coal control scheme are germane (ECONOMICS FOR DEMOCRATS (1939) 76): "It is difficult to know which to find more astonishing—the fact that the community has thus encouraged the industry supplying its most vital fuel to hold it up to ransom, or the fact that the industry needed a very great deal of encouragement before it would fully use its legal powers."