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CHAPTER III

THE BITUMINOUS COAL ACT OF 1937

IT WILL be recalled that the Act of 1935 had attempted to stabilize the industry by establishing labor standards and by regulating the distribution of coal by producers. When the Supreme Court declared the Act unconstitutional because of its labor standards, proponents of control sought to attain their ends by writing legislation to regulate the sale and distribution of coal in interstate commerce. The resulting law, the Bituminous Coal Act of 1937, became effective on April 26 for a period of four years.[1] It was later extended for two years and four months.

A. *Objectives to be Attained under the Act*

In the preamble to the Act of 1937 Congress called attention to practices and methods of distributing and marketing bituminous coal that waste the nation's coal resources and disorganize, burden, and obstruct interstate commerce in such coal. It then declared that correction of these practices required the regulation of the sale and distribution of coal by means of price control and the elimination of unfair methods of competition. This preamble is not to be taken as a full statement of the framers' objectives, but rather as an expression of policy and purpose made in the hope (later fulfilled) of satisfying the courts that the objectives of the Act conform to the constitutional powers of Congress.

The primary purpose of the law was to establish minimum prices and maintain a "cost-floor" under the sale of bituminous coal at the mine so as to improve the position of the industry and enable it to pay the wages and meet the terms of employment arrived at under collective bargaining. The Act thus provided for the establishment of a minimum price structure for bituminous coal which would return to producers an income equal to their costs less capital charges.[2] The prices to be established were to apply not only

[1] The law is sometimes referred to as the Guffey-Vinson Act. It is identified as 50 U.S. Stat. at L. (1937), 72. Subsequent references in this study to "the Act" apply to this law. The Act is reproduced in Appendix G below.

[2] The costs used in price fixing included: ". . . 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." (Sec. 4-IIa.)

to competitive coals in interstate commerce but also to those in intrastate commerce directly affecting interstate commerce. Under this provision all the states producing bituminous coal except North Carolina (a part of District 8) were declared by the Commission to be subject to the terms of the Act.

The elimination of "unfair methods of competition" arising in the main from discriminatory trade practices was both an objective of the Act and an aid to the maintenance of minimum prices. Like many other producers anxious to obtain sales volume, coal operators or their agents frequently engage in practices which tend to undermine the price structure. Thirteen such practices were declared to be in violation of the Code to be established under the Act.[3]

Unlike the Coal Conservation Act of 1935, the 1937 Act did not make its objectives with respect to labor an inherent part of the mechanism of price control. It will be recalled that the earlier law prohibited certain labor practices on the part of employers, required operators to accept the principle of collective bargaining as a condition of code membership, and established a three-man Bituminous Coal Labor Board. These provisions were designed to maintain a union contract structure throughout the industry and to insure that the effects of the competitive struggle would not be passed on to the workers in the form of lower wages or less favorable terms of employment. Because these provisions were the basis of the old Act's nullification, the framers of the 1937 Act substituted a declaration of labor policy for the labor provisions of the earlier Act.[4]

[3] These practices may be listed as follows: predating and postdating of sales documents except in accordance with a bona fide agreement entered into on the predate; splitting commissions, paying rebates in any form, adjusting claims, and prepaying freight charges for the purpose of price discrimination; misrepresenting coal sold or purchased; using without authorization a competitor's trade mark or advertising; using brokerage commissions or those of sales agents to obtain business at prices below the minimum; inducing or trying to induce breach of a competitor's contract; extending to certain buyers services or privileges not extended to all; attempting to obtain preferment with buyers by employing a sales agent at a compensation disproportionate to the ordinary value of the services rendered; consigning unordered coal or forwarding unsold coal except as provided in the Act, and attempting to get business or obtain information about a competitor's business by concessions, gifts, or bribes. (Sec. 4-IIi.)

[4] The majority of the Court ruled that the labor provisions could not be regarded as "directly affecting interstate commerce," and concluded that the provisions on price fixing and trade practices were inextricably linked with the labor provisions. (*Carter* v. *Carter Coal Company* [1936], 298 U.S. 238.)

The Act declared it "to be the public policy of the United States" that employees in the industry "shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers." It was also declared to be contrary to public policy for producers to (1) interfere with, restrain, or coerce employees in the exercise of these rights, (2) to discharge or discriminate against any employee for the exercise of these rights, and (3) to require any employee or applicant as a condition of employment to join an association for collective bargaining in the management of which the producer has any share of direction or control.[5] This declaration of policy merely reiterated rights which are guaranteed by the National Labor Relations Act, the provisions of which are applicable to mine workers.

Still another objective of the Act, written into the preamble, was to eliminate practices and methods of distributing and marketing coal that, among other things, waste the coal resources of the nation. The Act, however, did nothing to effectuate this objective except to instruct the Commission to "investigate the economic operation of mines with the view to the conservation of the national coal resources." (Sec. 14a.)

In addition to the stated objectives of the Act, there was an implied objective. Undoubtedly, Congress in enacting this legislation sought to bring about stability within an industry which for a decade and a half had been characterized by virtual disorganization. Apparently, the impact of the prevailing economic forces and conditions (described in Chapter I) upon workers, investors, management, and indirectly the public, made such action advisable.

B. *Code and Agencies Created by the Act*

The establishment of some hundreds of thousands of individual mine prices was a gigantic task. The organizational framework created to carry out this and related objectives consisted of the Bituminous Coal Code with its district boards, the National Bi-

[5] The policy was indirectly implemented in the case of federal purchases of bituminous coal for which bids are required by a provision specifying that no coal produced at any mine in which the producer fails to accord these rights shall be purchased by the United States or its departments or agencies. Whenever violation of this provision was charged by any employee or interested party, the Commission might hold hearings to determine the facts and in case of noncompliance notify the agency involved which, in turn, had to declare the contract terminated.

tuminous Coal Commission and its statistical bureaus, and the Office of the Consumers' Counsel.

1. BITUMINOUS COAL CODE

The Act established a Bituminous Coal Code in which producers were invited to accept membership. Theoretically membership was voluntary; actually it was obligatory in that nonmember producers were subject to a tax of 19½ per cent on all coal sold.[6]

Code membership carried with it certain privileges and obligations. Coal producers who were Code members had a vote in the election of their respective district boards which had been given the opportunity to propose minimum prices for the coals produced in their districts and, after these prices had been approved or modified, to coordinate them "in common markets." Code membership, therefore, carried representation in the price-fixing procedure as well as in the formulation of rules and regulations pertaining to code members. Twenty-three district boards of Code members were to be created.[7] They were to be composed of an odd number of members (not less than 3 nor more than 17), all of whom had to be Code members except one who was to be selected by the miners' union representing the preponderant number of employees in the district.[8] Code members who were dissatisfied with coordinated or established prices or with the authorized marketing rules and regulations also had the right to petition and to be heard before the Commission. Moreover, producers who were Code members were permitted, under certain conditions, to establish producers' marketing agencies which would permit them to engage in the cooperative marketing of their coal.[9] Such agencies of Code members, when approved by the Commission, became exempt from the provisions of the antitrust laws.

[6] Experience under the Coal Code of the National Industrial Recovery Act had apparently convinced the framers of the Act that voluntary acceptance of the new Code would not be sufficient to insure its successful operation.

[7] The number was reduced to 22 when the Commission decided that the coal produced in District 21 (North and South Dakota) is lignitic and hence did not come under the Act.

[8] Half of the producers' representatives were to be elected by a majority vote of the Code members in the District, and half by the Code members voting on a tonnage basis. This method was designed to give representation to both large and small producers. The bylaws and procedures adopted by the district boards were subject to the approval of the Commission. (Sec. 4-Ia.)

[9] The members of such agencies had to accept membership in the Code, comply with the rules and regulations laid down by those administering the Act, and refrain from attempts to restrict unreasonably the supply of coal. (Sec. 12.)

In return for these advantages and to prevent infringements of the Code, certain obligations were imposed upon members. First, they were not to violate the Code by selling coal at prices lower than the declared minima or higher than the declared maxima should maximum prices be established; second, they were not to evade the price schedules of the Code by direct or indirect absorption of any transportation or incidental charge, or by free use of docks or other storage or transportation facilities; third, they could not engage in any of the 13 unfair methods of competition declared to be in violation of the Code;[10] fourth, they had to furnish the statistical data required by the Commission; and fifth, they were required to defray the expenses of the district boards by paying assessments computed on a tonnage basis.

The 1937 Code, it will be observed, contained two features which especially distinguished it from the 1935 Code. First, the tax provisions of the 1937 Code were quite different. The old Act had levied a tax of 15 per cent on all coal sales and provided that 90 per cent of this tax was to be automatically refunded to coal producers who were Code members. The new Act, in contrast, levied two taxes: a tax of 1 per cent per ton (except on coal sold to governmental agencies), and a separate penalty tax of 19½ per cent on the mine price of coal sold by producers who were not members of the Code.[11] The tax provisions of the new Act no longer directly linked the expenses incurred in its administration with the taxes levied on coal companies. These expenses were to be met by appropriations from the general Treasury. The separation of expenses and taxes, apparently made because of its possible bearing on the legality of the Act, did not obscure the relation between the revenue derived from the tax and the expense of administering the coal law.

The second important difference between the 1935 and the 1937 Codes had to do with the part played by the district boards in the establishment of minimum prices. Under the former Act each district board was to establish, in accordance with a prescribed formula, minimum prices for its district which were to be effective unless specifically disapproved by the Commission. This phase of the law had been criticized because it gave agencies of the producers too much control over minimum prices. The 1937 Act, however, definitely limited the district boards to proposals of minimum prices and vested the power to determine and establish such

[10] For statement of unfair competitive practices see note 3.

[11] In the case of coal disposed of by book transactions of one kind or another, the penalty tax applied to "the fair market value" of such coal.

prices in a National Bituminous Coal Commission, an agency of the Federal Government.

2. NATIONAL BITUMINOUS COAL COMMISSION

The Act provided for a Commission of seven members to be appointed by the President by and with the advice and consent of the Senate for a term of four years. Two of the members were required to have had past experience as producers and two as mine workers. The remaining three members represented the public.[12]

The Commission was responsible for the promulgation and administration of the Code, the compilation of cost data, the computation of weighted average costs for minimum price areas, and the establishment, review, modification, and maintenance of minimum prices. It had to pass upon the marketing rules and regulations proposed by the district boards as well as the marketing agency agreements which it could also suspend or revoke. It was instructed to study or investigate (1) new uses for coal, (2) problems relating to the import and export of coal, (3) conservation of national coal resources by more economical operation of coal mines, (4) reduction of working hazards in coal mining, (5) problems of marketing from the standpoint of reducing distributing costs to the consumers, and (6) the necessity for the control of coal production and the methods of such control, including allotment of output to districts and producers. Finally, it was required also to make a full report of its activities to Congress.

To carry out these duties and to safeguard the interests of the consumers and the public, the Commission was empowered to require reports from producers, to establish field offices with which operators had to file copies of sales contracts, invoices, and credit memoranda, and to which they had to submit spot prices and data on costs, sales, and distribution of coal as directed by the Commission. It could require operators to maintain a uniform system of accounting, could review all rules of district boards, and could make complaints to and be heard by the Interstate Commerce Commission with respect to rates and other matters relating to the transportation of coal. It was also authorized to compel persons to testify and produce records, to prescribe reasonable maximum

[12] None of the members was permitted during the period of service to engage in any other business or employment, or to have any financial interest in the mining, transportation, or sale of coal, oil, or gas, or in the generation, transportation, or sale of hydroelectric power, or in the manufacture of machinery for these competing fuels, or for the use of hydroelectric power. (Sec. 2a.)

discounts to distributors who resell coal in cargo or railroad carload lots, and to require such distributors to observe resale prices as well as marketing rules and practices established under the Code. The Commission, moreover, could hear complaints of Code violations and excessive coal prices and take action to correct such abuses, determine the extent of the interdependence of interstate and intrastate commerce in bituminous coal, and make all reasonable rules and regulations necessary for carrying out the provisions of the Act.

Realizing that an emergency might arise which would lead to "unreasonably high prices," the framers of the Act also empowered the Commission to establish maximum prices for coal at the mine in any district. These prices were to "be established at a uniform increase above the minimum prices in effect" at the time, and had to be high enough in the aggregate to "yield a reasonable return above the weighted average total cost of the district" and insure the producers "a fair return on the fair value of the property." (Sec. 4-IIc.)

3. OFFICE OF THE CONSUMERS' COUNSEL

The interest of the consumers of coal was also to be represented by an agency in the Department of the Interior called the Office of the Consumers' Counsel.[13] The Counsel was given broad powers to appear in the interest of the consuming public in proceedings before the Commission, at which he could offer relevant testimony and argument, examine and cross-examine witnesses and parties to the proceeding, and require subpoenas and other processes of the Commission to be issued in his behalf. When necessary to safeguard consumers' interests he could conduct independent investigations of matters pertaining to the coal industry and the administration of the Act, and could require the Commission (1) to furnish pertinent information at its command, (2) to conduct any investigations of matters coming under its authority and place the results thereof at his disposal, and (3) to hear valid complaints of distributors and dealers. The Office of the Consumers' Counsel as well as the Commission was authorized to make complaints to and be heard by the Interstate Commerce Commission with respect to rates and other matters relating to the transportation of coal. The Counsel was instructed to make his annual report directly to Congress. (Secs. 2b and 16.)

[13] The Counsel was appointed by the President by and with the advice and consent of the Senate, and was subject under Section 2b-1 to the same restrictions on outside activities as were the Commissioners.

C. *Criteria and Procedure to Be Used in Establishing Prices*

Prices were to be determined initially by producing districts and then coordinated in common consuming markets. Since the basis for establishing prices was the weighted average cost, the first step became the compilation of cost data.[14] These were to be collected by the Commission's statistical bureaus and supplied to the producers' boards. Each producers' board working with the cost data was instructed to determine for its district "the weighted average of the total costs of the ascertainable tonnage produced" for the year 1936 and to adjust it for any subsequent changes in wage rates, hours, and other relevant factors (except seasonal changes) that had substantially affected costs. The weighted costs for the various districts were then to be forwarded to the Commission where they were to be reviewed (modified when necessary) and combined into weighted averages for each of the minimum price areas. These areas, generally speaking, brought together those producing districts that had approximately the same costs of production.[15] It was the weighted average cost of the minimum price area in which the district was located, and not the district cost, that was to be used in price fixing.

The second step in the price-fixing procedure was the proposal of uncoordinated minimum prices. Each producers' board was asked to propose for its district both a classification of its coal and a schedule of minimum mine prices. The prices for a given district were (1) to be for "kinds, qualities, and sizes of coal," (2) to reflect "variations as to mines, consuming market areas, values as to uses and seasonal demand," and (3) to yield a return per net ton that was "equal as nearly as may be" to the weighted average cost of the minimum price area to which the district was assigned. The proposed minimum prices for a district were to "reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal," were to "be just and equitable as between producers within the district," and were to "have due regard to the interests of the consuming public." (Sec. 4-IIa.) The schedule of minimum prices for each district, together with the supporting

[14] For items included in the costs used in establishing prices see note 2 in this chapter.

[15] Senator Neely, *Congressional Record*, 75th Cong., 1st sess., 81:3 (April 5, 1937), 3141. This principle was not, however, the sole consideration. Michigan, for example, was included in Minimum Price Area 1 in spite of that state's very high costs, probably because its tonnage was so small that the creation of a special minimum price area for Michigan was not thought desirable.

data including the factors considered in determining the price relationship, were to be forwarded to the Commission for approval, disapproval, or modification. With the Commission's action upon these proposed prices the second step would be concluded.

The district boards were also required to prepare reasonable rules and regulations incidental to the sale and distribution of coal by Code members in the district. The proposed rules and regulations submitted by the several districts, after they had received the approval of the Commission, were to be coordinated with those of other districts before receiving the Commission's final endorsement. This process, although it was carried out while the boards were engaged in classifying and determining uncoordinated minimum prices, may be regarded as the third step in the price-fixing procedure.

The fourth step was the coordination of the price schedules submitted to the 22 district boards. The Act gave the district boards the opportunity, under rules and regulations established by the Commission, to coordinate their prices "in common consuming markets," the establishment of which was left to the Commission. If the district boards failed to accomplish this task within an allotted time, it became the responsibility of the Commission. In either case the prices thus determined ". . . 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 relationship between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities." (Sec. 4-IIb.) The resulting prices had to yield a return per net ton upon the entire tonnage of the minimum price area which approximated the weighted average of the total cost per net ton of the tonnage of the minimum price area.

The fifth step consisted of hearings to be held by the Commission at which all matters pertaining to the determination of coordinated minimum prices could be considered.

The final step of the process occurred when the coordinated minimum prices, as proposed, modified, and approved, were put into effect. The Commission's price-fixing activities, however, were not

wholly terminated by this step. From time to time it might review and when necessary revise the established minimum prices. Revision became compulsory when any district board could show that costs in the minimum price area had moved up or down more than 2 cents a ton.

D. *Provisions for Enforcing the Act*

In bituminous coal, as in any highly competitive industry, there is always a temptation to sell or otherwise dispose of products below prevailing prices or to grant discounts or to use other subterfuges which would give those engaging in such practices a competitive advantage. The widespread evasion of the Coal Code of the NRA indicates how extensive this practice may become when adequate checks do not prevail.

To ensure that the Commission would be in a position to compel Code members to comply with the provisions of the Act, Congress granted it two specific powers. It authorized the Commission, after public hearing, to issue cease-and-desist orders for violations of the Act and, in cases of noncompliance with its orders, to apply to a circuit court of appeals for enforcement. It also empowered the Commission, after a hearing and 30 days' written notice, to suspend Code members guilty of a violation of the Code and thereby make them subject to the 19½ per cent tax on the price of the coal thus sold.[16]

Other provisions of the Act also had a bearing on enforcement. Contracts for periods longer than thirty days (except with governmental agencies) were prohibited prior to the establishment of minimum prices. As a result, evasion of the price schedules by long-term contracts was precluded. Through its power to prescribe maximum discounts or price allowances that could be made by Code members to distributors who purchased coal for resale in cargo or railroad carload lots, and by its authority to compel such distributors to maintain and observe both the prices and the marketing rules and regulations established under the Act, the Commission had two additional controls to prevent widespread evasion of the price schedules. Moreover, because copies of sales invoices, contracts, spot orders, etc. had to be filed with its statistical bureaus, the Commission was in a position to verify the price, quantity, qual-

[16] In order to receive reinstatement, producers whose code membership had been revoked had to pay to the United States double the amount of the 19½ per cent tax on all coal sold in violation of the Code or regulations established thereunder. (Sec. 5c.)

ity, destination, etc. of all sales by Code members. This information could be helpful in locating and verifying Code violations. In investigating complaints of violations of the Code or of the rules and regulations prescribed under it, the Commission might require necessary reports from and have access to books and records of Code members.[17] Finally, enforcement was also aided by the provision which permitted any Code member sustaining injury from another member by reason of failure to comply with the Act to sue in any court of competent jurisdiction where the defendant resided or did business and to recover threefold damages and the cost of the suit including a reasonable attorney's fee.

[17] Producers who failed to file a report required by the Commission within the time prescribed and who after notice of default continued such failure for 15 days, were subject to a "forfeit" of $50, payable to the Treasury of the United States, for each and every day of the continuance of such failure.