IN THE

Supreme Court of the United States

October Term, 1932.

No. 504

APPALACHIAN COALS, INCORPORATED, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR APPELLANTS

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OPINION OF THE COURT BELOW

The opinion delivered by the Court below has not been published, but appears on pages 219 to 243 of the Record.

GROUNDS FOR JURISDICTION

This cause is a suit in equity brought by the United States of America for an injunction under Section 4 of the Act of July 2, 1890 (26 Stat. 209), commonly known as the Sherman Anti-Trust Act. An expediting certificate was filed in the District Court for the Western District of Virginia by the Attorney-General under the provisions of the Expediting Act of February 11, 1903 (32 Stat. 823; 15 U. S. C. A. Sec. 28), and thereupon this cause was heard before three circuit judges sitting as the United States District Court for the Western District of Virginia. The present appeal is from the final decree of the District Court entered October 17, 1932, ordering the dissolution of Appalachian Coals, Incorporated, and enjoining the defendants from proceeding further under the contracts entered into between Appalachian Coals, Incorporated, and the several defendant producers, and it is believed that the jurisdiction of the Supreme Court of the United States is sustained by the Expediting Act of February 11, 1903 (32 Stat. 823; 15 U. S. C. A., Sec. 29), which provides as follows:

> "Sec. 29. Appeals to Supreme Court. In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof" (Feb. 11, 1903, c. 544, Sec. 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)

See *United States* v. *California Co-operative Canneries,* 279 U. S. 553 (1929).

On October 17, 1932 the appellants applied for and were allowed an appeal to this Court. (R. 1091.)

STATUTE INVOLVED

The Act of July 2, 1890, c. 647; 26 Stat. 209, (U. S. C. A., Title 15, Sections 1, 2 and 4), known as the Sherman Anti-Trust Act provides in part as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Section 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have

been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

THE FACTS

The issue in this case is whether or not the defendant producers, by separately employing the defendant, Appalachian Coals, Incorporated, as the exclusive sales agent of each to sell the coal of each at the best market prices obtainable, have thereby violated the Sherman Act by unreasonably restraining trade in bituminous coal.

I.

THE PARTIES

The petitioner-appellee in this suit is the United States of America. The defendant-appellants are Appalachian Coals, Incorporated, a Delaware corporation, three individuals who are the President, the Vice-President and the Secretary, and Treasurer, respectively of that corporation and 135 corporate producers and one individual producer of bituminous coal. For convenience these producers are hereinafter referred to as the defendants or the defendant producers.

The defendant producers are engaged in the mining of bituminous coal in twenty-four counties of the States of Virginia, West Virginia, Tennessee and Kentucky. For convenience the precise area in which the mines of the defendants are located will be designated in this brief as "Appalachian territory." (Findings of Fact No. 2, R. 153.)

II.

INTERSTATE COMMERCE

The District Court found that each of the 137 defendant producers is engaged in mining coal and in shipping it in interstate or foreign commerce. (Findings of Fact No. 3, R. 153.)

III.

THE BACKGROUND OF CONDITIONS IN THE BITUMINOUS COAL INDUSTRY THAT RESULTED IN THE ORGANIZATION OF APPALACHIAN COALS, INCORPORATED

An understanding of the purpose and effect of the formation of Appalachian Coals, Incorporated depends upon a comprehensive and accurate knowledge of all the pertinent facts. For that reason the background of conditions in the bituminous coal industry is set forth in this brief at length.

The District Court made detailed findings as to conditions in the bituminous coal industry prior to the formation of Appalachian Coals, Incorporated. (Findings of Fact, No.'s 9 to 17, inc., R. 158 to 167.) The statements contained in this brief are largely a summary of those findings.

From 1880 to 1915 the growth of the bituminous coal industry had been rapid and uniform. During this period the demand for coal had approximately doubled every ten years. Freight rates were low. Coal was comparatively cheap and had a practical monopoly of the fuel market.

During the years 1915 to 1918, there was a sharp increase in the delivered price of coal. Three factors were primarily responsible for this condition, namely, (1) the demand for coal was greatly increased as a result of the World War, (2) the freight rates from the mines to the markets were materially increased, and (3) a shortage of coal was caused by a lack of sufficient freight cars to transport available coal to the markets. This shortage of transportation facilities continued until 1923. (Findings of Fact No. 9 R. 159.)

As a result of these conditions, it was generally true that in 1922 the consumer of coal was paying almost three times as much for his coal at the mine as he was before the war, and he was paying almost double the transportation charges. (Findings of Fact No. 9 R. 160.)

The high price of coal during the period from 1915 to 1923 stimulated the development of new mines. This did not then result in a surplus of coal on the market, for the reason that the amount of available coal was limited by lack of transportation facilities and not by lack of productive capacity. But, beginning in 1923 and continuing to date, there has been no shortage of freight cars; and so, since 1923, there has been released on the market the increased productive capacity of the coal mines which was developed during the World War. (Findings of Fact No. 9, R. 159.)

The depressing effect of this increased surplus productive capacity of the mines has been magnified by reason of the fact that the consumption of coal since 1923 has not kept pace with the growth of other industries but has in general declined. (Findings of Fact No. 9, R. 160.) The annual production of bituminous coal since 1922 was as follows:

1923—564,000,000 tons
1924—483,000,000 tons
1925—520,000,000 tons
1926—573,000,000 tons
1927—517,000,000 tons
1928—500,000,000 tons
1929—534,000,000 tons
1930—467,000,000 tons
1931—378,000,000 tons

(Findings of Fact No. 9, R. 158.)

The District Court made findings of fact with respect to the causes of the decline in the consumption of coal since 1923. This condition was found to be due in large part to the great increase in the use of substitute fuels, such as fuel oil, natural gas and hydro-electric power, and to the increased efficiency in the use of coal. The increased efficiency in the use of coal was largely developed from the period from 1915 to 1923 when the price of coal was high. These findings are set forth at pages 160 to 162 of the record and will not be repeated here. At this point it is enough to say that the court found that the use of substitute fuels has displaced more than 200 million tons of coal annually and that the more efficient burning of coal by railroads, industrial users and public utilities has resulted in a decrease of about 101 million tons of coal used annually by these large consumers. (Findings of Fact No. 9, R. 161.)

The District Court also made detailed findings with reference to unfavorable market conditions which have contributed to the present distressed condition of the bituminous coal industry. These findings are set forth as paragraphs 11 to 17 inclusive, of the Findings of Fact, R. 162 to 167.

The court found that the production and shipment of distress coal "has caused one of the worst practices in the coal industry." (Findings of Fact No. 11, R. 162.) Today the demand is not for mine run coal but for coal of particular sizes, such as nut and slack, stove coal, egg coal, lump coal, etc. Different sizes are obtained by running the coal over a screen. In this screening process it is impossible to produce one size or grade of coal without producing several other sizes or grades. When a producer accepts an order for a particular size or grade of coal, he must, of necessity, produce other sizes for which he may have no orders. There are no storage facilities at the mines, so the coal for which no orders have been received must be loaded in railroad cars and placed on the mine tracks. When the tracks at the mine become filled the producer must either (1) close down his mines, or (2) ship his coal unsold to billing points or ship it on consignment to himself or his agent in the consuming territory. If the producer chooses to close down his mines, he becomes liable in an action for breach of a contract to sell the particular size of coal for which he has accepted orders. The other alternative is to ship the coal unsold to billing points or on consignment to himself or his agent. The court found that if such coal is not sold by the time it reaches its destination, "it is set on a sidetrack by the railroad, and, if not unloaded promptly, goes on demurrage. For the first two days the demurrage is at the rate of $2.00 a day per car. Beginning with the third day, the rate is $5.00, equal to ten cents per ton each day. With coal selling from fifty cents to one dollar and fifty cents per ton for different grades, if the shipper does not dispose of it very quickly, he will not get enough for the coal to pay the demurrage charges. This type of distress coal presses on the market at all times and includes all sizes and grades of coal. The total distress coal, from all causes, is of substantial quantity. For all railroads east of the Mississippi River, as of July 16, 1932, the total stagnant or no-bill coal amounted to 27,010 cars, equivalent to 1,350,500 tons of coal. In addition, the total amount of stagnant coal at tidewater as of August 6, 1932, amounted to 3,681 cars, equivalent to 184,050 tons of coal." (Findings of Fact No. 11, R. 162, 163.)

In its findings of fact (R. 164-165) the District Court summarized other practices and conditions which have contributed to the present condition of the coal industry as follows:

> "12. Pyramiding of coal is a destructive practice existing in the marketing thereof. It occurs when a producer authorizes several different individuals or agencies to sell the same coal. They in turn may offer the same coal for sale to other dealers with the result that a number of agencies in a particular market offer the same coal to the same purchasers, so that the impression is created that there is more coal for sale than is the case and the coal competes with itself, thereby resulting in abnormal and destructive competition which depresses the price for all coals in the market.

"13. Organized buying agencies and large consumers purchasing substantial tonnages of coal constitute unfavorable forces bringing about the present condition of the coal industry. The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past.

"14. Misrepresentation practiced by some producers in selling one size of coal and shipping some other size which they happen to have on hand has an unfavorable effect upon the market. The growth of grades and sizes of coal has been brought about to some extent by the efforts of some producers to persuade consumers that certain sizes of coal will be more efficient in certain types of equipment. The lack of standardization of sizes and the misrepresentation as to sizes have been injurious to tbe coal industry as a whole.

"The evidence, however, does not show the existence of any trade war or widespread fraudulent conduct in the industry.

"15. Credits and credit losses constitute another factor in the present condition of the industry. There are at the present time no agencies collecting comprehensive data as to the ability and willingness of retailers and wholesalers to pay for their purchases of coal. Producers are forced to take substantial losses because certain dealers buy from one producer until their credit is exhausted, and then buy from other producers until the total credit is greater than would otherwise be the case."

The effect of these conditions in the bituminous coal industry was summarized by the District Court in its findings of fact (R. 165) as follows:

"16. Except for periods of strikes or of lack of transportation facilities, the coal business in general has not been considered profitable by mine operators. There was a good market from 1916 to 1923. Since then there has been a downward trend of prices. * * *

"17. Defendants' Exhibit 4 is a table purporting to show the net income or deficit on the federal income taxes of the coal mining industry as shown by unaudited federal income tax returns. The industry's profit or loss, as the case may be, for a particular year is computed by deducting from the net income the federal income taxes; dividends received from domestic corporations and interest received which was not taxable, as for instance, interest on government honds, are not included in the computation. This table gives the number of companies reporting net income, the number reporting no net income, the amount of net income and deficit, the net income of the industry, the tax, and the industry's profit or loss for the year. Under the last caption, the result for the years 1917 to 1929 was as follows:

Year	*Industry*	*Industry's Profit or Loss*
1917	Bit.	$132,956.862
1918	Bit.	83,082,972
1919	Bit.	49,325,270
1920	Bit.	173,143,816
1921	Bit.	18,329,750
1918	Anth. and Bit.	94,313,966
1919	Anth. and Bit.	57,692,505
1920	Anth. and Bit.	238,925,281
1921	Anth. and Bit.	5,086,472*
1922	Anth. and Bit.	84,320,930
1923	Anth. and Bit.	61,927,331
1924	Anth. and Bit.	53,419,006*

Year	*Industry*	*Industry's Profit or Loss*
1925	Anth. and Bit.	27,994,942*
1926	Anth. and Bit.	27,067,491
1927	Anth. and Bit.	28,067,080*
1928	Bit.	27,950,190*
1928	Anth.	3,573,311
1929	Bit.	15,243,915*
1929	Anth.	1,082,444

* Deficit."

It is significant that subsequent to 1923, when transportation facilities first became adequate for all purposes, the bituminous coal industry made a profit in one year only—1926—and this profit is explained by the fact that in that year a coal shortage was caused by the British and anthracite coal strikes. (R. 297.) An examination of Defendants' Exhibit 4, (R. 1009) from which these figures are taken, will also disclose that where losses of the anthracite and bituminous coal industry are shown separately, the great bulk of the loss was sustained in the bituminous coal industry and that the losses in the anthracite industry were insignificant.

Continuing its findings (Findings of Fact No. 17, R. 166) in regard to the heavy financial losses suffered by the Coal industry the Court found: "This unprofitable condition has existed particularly in the Appalachian territory because these coals are mined in a region where there is very little local consumption, because it is not industrialized. The great bulk of the coal there produced is sold in the highly competitive region east of the Mississippi River and north of the Ohio River under an adverse freight rate which imposes an unfavorable differential from 35c to 50c per ton.

"The results of the unfavorable condition recited have been that numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the states in which coal producing companies are located have found it increasingly difficult to collect taxes."

The court was in error in fixing the spread in differentials at "from 35c to 50c per ton." The real spread is from 25c to $1.84 per ton (Findings of Fact No. 41, R. 200; Defendant's Exhibit 3, pages 38, 39).

IV

EXISTING SELLING AGENCIES

The testimony in this case, and the Findings of the District Court, clearly establish that for more than sixty years a substantial part of the coal produced in Appalachian territory has been sold through common exclusive selling agencies. This was the usual and normal method of marketing coal in this territory. (Findings of Fact, No. 19, R. 168). These long established agency agreements usually provided that the selling agent should "use its own judgment on spot sales as to prices and quantities sold; that where the sale called for delivery for a period of more than 60 days, it was required that the producer be notified and his consent obtained as to quantity and price." (R. 168.)

V.

EFFORTS OF THE BITUMINOUS COAL INDUSTRY AS A WHOLE TO IMPROVE CONDITIONS IN THE INDUSTRY

The conditions in the industry described above became so serious in the coal-producing states that they resulted in active discussion among the Governors of these states, officials of the Federal government and coal operators. Governor Sampson of Kentucky held several meetings with coal operators from Kentucky and adjoining states. In October 1931, Governor Conley of West Virginia held a meeting with coal operators at Charleston, West Virginia. This meeting decided that while there was nothing that could be done by the Governors of the coal producing states, a meeting of the coal producers east of the Mississippi should be held to discuss the general conditions in the industry. (Findings of Fact No. 18, R. 167.)

Accordingly, meetings were held in New York City in October and December, 1931. These meetings were called by the President of the National Coal Association and were attended by about 100 persons, including coal producers, sales agents and attorneys, regardless of membership in the Association. A wide variety of plans was presented and discussed and the final action of the last meeting in New York was the adoption of a report of a committee appointed at the first meeting which recommended that consideration be given to two plans that seemed to offer the most hope in solving the problems of the industry: first, physical consolidations and mergers of properties wherever practical and, second, the formation of regional sales agencies where consolidations and mergers were not practical. (Findings of Fact No's. 18 and 19, R. 167, 168.)

The District Court, in its Findings of Fact, found that at the final New York meeting "it was agreed that the weak place in (the) industry was in the marketing and distribution of the coal in that it was not well advertised and there was no available machinery for economical and intelligent distribution. It was thought that the coal was generally mined economically." (Findings of Fact No. 20, R. 169, 170.) The District Court also found that at this meeting there was a general discussion of conditions in the industry, the necessity for demonstrating the advantages of coal as a fuel by effective advertising and engineering research, and the economies which might be brought about by sales agencies. (Findings of Fact No. 19, R. 168.) There was also considerable discussion of the fact that sales agencies have always played an important part in the distribution of coal during the past 60 years. Sales agency contracts, substantially identical to those entered into by the defendant producers with Appalachian Coals, Incorporated, were also discussed and considered. It was pointed out at this meeting that for a period of from 20 to 25 years one agency had sold substantially the entire output of the Pocahontas coal field on the Norfolk & Western Railroad. (Findings of Fact No. 19, R. 168.)

The second New York meeting directed that committees should be appointed in each bituminous coal producing district for the purpose of acquainting coal producers in such district with the discussions and recommendations of the New York meeting. Accordingly, such committees were appointed for the eight producing districts included in the Appalachian territory and for the remaining ten producing districts east of the Mississippi River, namely: Western Pennsylvania, Illinois, West Virginia Smokeless Field, Western Kentucky, Central Pennsylvania, Ohio, Northern West Virginia, Indiana, Alabama, and the Freeport Thick Vein District of Central Pennsylvania. (Findings of Fact No. 20, R. 169.)

VI.

THE ORGANIZATION OF APPALACHIAN COALS, INCORPORATED

The steps taken by the producers in Appalachian territory leading up to the organization of Appalachian Coals, Incorporated, are set forth in the Findings of Fact of the District Court. (Findings of Fact No. 21, R. 171.)

Immediately after the adjournment of the New York meeting of December 3, 1931, a meeting of the Property Owners Committee of the eight districts comprising the Appalachian territory was held to consider important pending transportation matters. Individuals from this territory appointed by the chairman of the New York meeting "to carry news of the proposed plan to their respective districts" were also present. (Findings of Fact No. 21, R. 171.) The question of meeting marketing conditions in the Appalachian territory came up for discussion and it was decided to call a meeting of persons interested in coal operating companies in the Appalachian territory. This meeting was held on December 10, 1931, at Cincinnati, Ohio. Notice of the meeting was sent to all coal producing companies in this region. The meeting was attended by from 200 to 300 persons interested in the coal industry, including producers, sales agents, mine owners, local bankers and attorneys. The proceedings of the New York meetings were discussed and a resolution was adopted approving in tentative form a regional sales organization covering the region described in this brief as Appalachian territory. A further resolution was adopted requesting each of the eight districts located in the Appalachian territory to appoint a committee of three to consider and work out the details of the plan of organization of Appalachian Coals, Incorporated.

Committees representing the eight districts were appointed in acordance with the resolution adopted at the Cincinnati meeting. These committees worked out many of the details of the organization of Appalachian Coals, Incorporated.

On December 31st, 1931, a second meeting of producers from the Appalachian territory was held in Cincinnati. This meeting adopted a resolution approving a regional sales agency plan as submitted to the meeting and appointed a committee with instructions to obtain a charter for Appalachian Coals, Incorporated, and to prepare and print a pamphlet outlining the purposes and principles of the organization so that the persons present at the meeting could take back to the companies which they represented an accurate and detailed account of the meeting.

Subsequently, on January 27, 1932, another general meeting of producers from the Appalachian section was held in Cincinnati. The committee appointed by the meeting of December 30 reported to this meeting that a charter had been obtained for Appalachian Coals, Incorporated, and presented the pamphlet entitled "Plan of Organization of Appalachian Coals, Incorporated" which is now Exhibit A to the answer. The plan outlined in this pamphlet was approved by the meeting. (Findings of Fact No. 21, R. 171-172.)

It was agreed by resolution that a minimum of 70% and a maximum of 80% of the tonnage of the territory (exclusive of captive tonnage) should be secured before the plan should become effective. (Findings of Fact No. 21, R. 172.) In fact, approximately 73% of the tonnage of this territory (exclusive of captive tonnage) has been obtained. This statement, however, does not properly reflect the competitive strength of Appalachian Coals, Incorporated, in the producing territory in which it is located because certain competitive tonnage and certain competitive producing areas were arbitrarily excluded from the area and tonnage to be used to determine the percentage of tonnage which must be secured before the plan became effective. (Findings of Fact No. 29, R. 181.) The relative size of the defendant producers is shown by the following percentages which were found by the court:

(a) Of the total production of bituminous coal east of the Mississippi River, the defendant producers, in 1929, produced 11.96%;

(b) Of the total production of bituminous coal in this producing territory, including the production of captive mines, which are in fact competitive (R. 724), the defendant producers, in 1929, produced 54.21%;

(c) Of the total production of bituminous coal in this producing territory, excluding the production of captive mines, the defendant producers, —1929, produced 64%. (Findings of Fact No. No. 29, R. 179.)

In this case the defendants, by affirmative proof, have shown their exact competitive strength in all consuming markets and for this reason the percentage of production in the territory where the mines of the defendant producers are located becomes of little importance in measuring their competitive strength and is only important to show the amount of non-defendant production in this territory. A detailed discussion of all the consuming markets in which Appalachian Coals, Incorporated will sell coal is contained in Appendix I, *infra,* page 131.

The District Court found that:

"the formation of Appalachian Coals was not made dependent upon the formation of other regional selling agencies and there is no evidence of a purpose, understanding or agreement among the defendants that in the event of the formation of other similar regional sales agencies there would be any understanding or agreement, direct or indirect, to divide the market territory between them or to limit production or to fix the price of coal in any market or to cooperate in any way. * * * *

"If other similar agencies are organized, there will result an organization in most of the districts whose coal is or may be competitive with Appalachian coal; but the testimony tends to show that there will still be substantial, active competition in the sale of coal in all markets in which Appalachian coal is sold. (Findings of Fact No. 24, R. 173-175.)

VII.

THE PLAN OF ORGANIZATION OF APPALACHIAN COALS, INCORPORATED

The plan approved by the Cincinnati meeting of January 27, 1932 contemplated the marketing of coal through a common exclusive selling agency. In accordance with this plan, each of the defendant producers has entered into a contract with Appalachian Coals, Incorporated constituting and appointing that corporation the exclusive selling agent of such producer. (Findings of Fact No. 4, R. 154-155; Exhibit A to Answer, R. 87-96.)

The essential provisions of each such contract are these:

(a) Appalachian Coals, Incorporated is constituted an exclusive agent for the sale of all coal produced at the mine or mines of the defendant producer, except deliveries upon outstanding contracts and coal used in the operation of defendant's mines or sold to defendant's employees.

(b) Appalachian Coals, Incorporated, agrees to establish a standard classification for all the coal which it sells as agent and to *"use its best efforts to sell all the coal produced by the producer at the best prices obtainable,"* and further *"to sell all the coal produced by other producers whose coal it sells at the best possible prices obtainable, or so much thereof as the market will justify."* The legal effect of this provision is to impose an affirmative duty upon the selling agency to sell all the coal of the defendant producers which the market will absorb. This duty is further affirmed by the provision that "the Selling Agent is hereby authorized by the producer to sell the coal of the producer * * * at the best price or prices obtainable under existing competitive conditions."

(c) Upon all contracts calling for future deliveries of coal after sixty days from the date of the contract of sale, the selling agent must obtain the prior written consent of the producer.

(d) To insure fair and equal treatment to all producers, Appalachian Coals, Incorporated agrees to give each producer as nearly its *pro rata* share of available orders as possible. The percentage of participation to which each producer is entitled under the contract is that percentage of the total sales "that the total car allotment of the producer for the three months preceding bears to the total car allotment of all the producers whose coal is sold by the selling agent." Car allotments are made pursuant to the provisions of Section 1, Par. 12 of the Transportation Act of February 28, 1920 (41 Stat. 476) upon the basis of the daily installed productive capacity of the mines. This productive capacity may change from day to day dependent upon such factors as physical conditions, increased mine development, enlarged tipples, increased sidings, past production, etc. The percentage of the participation to which a defendant producer is entitled under this provision of the contract may, therefore, be increased or decreased by the independent action of the producer in enlarging or decreasing the productive capacity of his mines. (Exhibit A to Answer, R. 87 to 96; Findings of Fact, No. 4; R. 154-155.)

(e) For the services to be rendered by Appalachian Coals, Incorporated, each producer agrees to pay to it a commission of 10% of the gross selling price f.o.b. at the mines. (Exhibit A to Answer, R. 92.)

The contract runs until April 1, 1935, and continues thereafter from year to year unless and until either party shall elect to terminate it upon six months notice. (Exhibit A to Answer, R. 95-96.)

Appalachian Coals, Incorporated has an authorized capital consisting of 1000 shares of common stock with a par value of $1. each, and 9000 shares of 7% Cumulative Preferred stock with a par value of $100. The common stock has exclusive voting powers. (Findings of Fact No. 8, R. 157.)

With reference to the issued and outstanding stock of Appalachian Coals, Incorporated, the District Court found that "at the time of the filing of the petition in this case, to-wit, July , 1932, there were issued and outstanding 439 shares of common stock, all of which was issued at par for cash to the 137 defendant-producers. Said stock was subscribed for and issued upon the basis of one share for each 100,000 tons of coal, or major fraction thereof, of the producers' 1931 production, but in no case less than one share. The defendant-producers have also subscribed at par for 5,206 shares of the corporation's preferred stock upon the basis of one share for each 666 2/3 tons, or major fraction thereof, of the subscriber's average monthly production during 1931. Said stock subscriptions have been accepted by the corporation, but at the time of the filing of the petition the purchase price had not been paid and the preferred stock had not been issued. The par value of the common and preferred stock thus issued or subscribed is $520,499.00." (Findings of Fact No. 8, R. 157.)

Under the contract the producer is given the right at any time to designate one or more persons, firms or corporations, to act as the sub-agent of Appalachian Coals, Incorporated in the sale of coal. The terms of the sub-agency contracts are substantially identical. The sub-agent agrees to sell such coal as it is authorized to sell in such amounts and in accordance with such classifications and upon such terms and conditions as the selling agent may determine and at the price or prices established by the selling agent from time to time. (Findings of Fact No. 5, R. 155-156; Exhibit B to Answer, R. 97-100.) One reason for giving to each producer the right to designate a sub-agent of Appalachian Coals, Incorporated was that it would not be possible for that agency to enter the market at once with an efficient and effective sales organization; but it was also hoped and believed that the long established good will and personal contacts with consumers which existing agencies have could be retained by designating such agents as sub-agents of Appalachian Coals, Incorporated. (Findings of Fact No. 6, R. 156.)

For the services to be rendered by the sub-agent, Appalachian Coals, Incorporated agrees to pay to the sub-agent a commission of 8% of the selling price f.o.b. at the mines. (Findings of Fact No. 5, R. 156; Exhibit B to answer, par. 6, R. 99.)

The term of the sub-agency contract is one year and thereafter for terms of one year until either party shall elect to terminate the contract on three months' notice, or until the termination of the contract between the pro-producer and Appalachian Coals, Incorporated, or until the cancellation by the producer of the designation of the sub-agent as such, as provided in the agreement between the producer and Appalachian Coals, Incorporated.

(Findings of fact No. 5, R. 156; Exhibit B to Answer, par. 10, R. 100.)

At the present time 43 out of 137 defendant producers have designated sub-agent of Appalachian Coals, Incorporated. Most of the other defendant producers have indicated that they will appoint sub-agents for the sale of their coal. (Findings of Fact No. 7, R. 157.)

VIII.

THE PURPOSE AND INTENT OF THE DEFENDANT PRODUCERS IN THE ORGANIZATION OF APPALACHIAN COALS, INCORPORATED

The primary purpose of the defendant producers in the organization of Appalachian Coals, Incorporated was to sell more coal. This one thought runs like a thread through the record and the findings of fact of the District Court.

At the outset of this discussion the following statement is quoted from the opinion of the District Court:

> "Although, for the reasons hereafter stated, we think the plan violative of the Sherman Act, it is but due to defendants to say that the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from over-expansion, destructive competition, wasteful trade practices and the inroads of competing industries." (R. 222-223.)

The first document to be considered is the pamphlet entitled "The Regional Sales Agency Plan approved at the New York Conference, December 3, 1931." This appears in the record as Exhibit B to the Answer (R. 104). This pamphlet was published following the New York meeting of coal producers and others from all sections of the country east of the Mississippi River. The statements in the pamphlet necessarily relate to the general principles involved in any physical consolidation of properties or in the establishment of any sales agency plan in the coal industry generally, and are really statements of the problems that must be met in the organization of such agencies, together with suggestions as to the manner in which such agencies might operate and become effective marketing organizations. (R. 108-113.) This pamphlet is, therefore, only important as showing the genesis of the idea that resulted in the organization of Appalachian Coals, Incorporated, and it was in this light that it was regarded by the lower court.

The pamphlet entitled "Plan of Organization of Appalachian Coals, Incorporated Approved at the Cincinnati Meeting of Appalachian Coal Producers December 30, 1931," which appears in the record as Exhibit A to the Answer, (R. 50) was published by a committee of Appalachian producers following the meeting at Cincinnati on December 30, 1931. As stated in the findings of fact of the District Court,

> "A committee was appointed to prepare and print a pamphlet outlining the purpose of the selling agent, the causes which had brought it about, and the results it was expected to accomplish, so that the perons present at the meeting might have accurate

information to take back to the companies which they represented." (Findings of Fact No. 21, R. 172.)

This pamphlet is then the primary source for a statement of the purpose and intent of the defendant producers. The following statement of purpose is quoted from this pamphlet:

> "The Cincinnati meeting, in recommending the organization of the Appalachian Coals, Incorporated, did so with the hope of bringing about a better and more orderly marketing of the coals from the region to be served by this company and better to enable the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general markets for a fair share of the available coal business. *At present the producers of this region are greatly handicapped by the lack of substantial, well equipped and well managed selling agencies with sufficient organizations and funds at their command properly to develop the markets and demand for coal from this region, and properly to sell and merchandise it in competition with the coals from competing fields, as well as with the rapidly increasing competition coal is meeting from the large and powerful gas and oil companies.* As individual units the producers in this region have been and are now *unable to carry on proper and extensive advertising campaigns and other means of holding and developing the markets for coal from this region.* This inability is one of the contributing causes to the great decline in tonnage in this region during the past two years." (Italics ours, R. 55-56.)

There follows a summary statement of the conditions in the industry that had led to the New York meeting, a statement of the action taken at the New York meeting and at the Cincinnati meetings and a brief summary of the plan itself. The pamphlet then describes the position of the Appalachian producers and the purposes of Appalachian Coals, Incorporated. It states in detail the ills from which the industry suffers and stresses the need of a more economical and scientific method of advertising, selling and distributing coal in order to remedy these ills. It sets forth the particulars wherein the sale of coal through the proposed sales agency, Appalachian Coals, Incorporated, will inure to the benefit of producers, consumers and the public generally. A proper understanding of these matters can be had only by reading the pamphlet itself, but this brief summary gives its general import.

The findings of fact of the District Court, in general, support the statements of purpose outlined in this pamphlet. Attention is directed to the finding that Appalachian Coals, Incorporated was designed so that "the producer should produce and the selling agent should sell as much coal as possible." (Findings of Fact No. 48c, R. 211.)

The importance of increasing the sale of coal lies in the fact that the cost of production is directly related to the actual running time of the mines (Defendants' Exhibit No. 40, R. 1079-1080) and that more regular running time substantially reduces the cost of production, whereas uneven or irregular running time substantially increases the cost of production. For example, "Taking a month of 25 working days as full-time operation, it is found that when the mine works 16 days, 4 days per week, the cost per ton is increased to 8 to 9 per cent over full-time operation; when working time is 12 days per month or 3 days per week, that is, half time, the unit cost is 21 to 25 per cent over full-time or minimum cost; and when but 8 days per month or 2 days per week are worked, costs increase 48 per cent. Four days per month or 1 day per week of operation raises costs 104 to 120 per cent over the minimum. If but one day is worked per month, the increase is 474 to 549 per cent over full-time operating costs." (Defendants' Exhibit No. 40, R. 1079-1080.)

Other purposes are set forth by the court as follows:

"IMPROVEMENTS IN MARKETING CONDITIONS.

48b. Among the purposes of the organization of the Selling Agent, is to remedy, so far as defendants are concerned, the destructive practice of shipping coal on consignment without prior orders for the sale thereof, which results in the dumping of coal on the market, irrespective of the demand; and also to eliminate the pyramiding of offers for the sale of coal. (See paragraphs 11 and 12, supra)." (Findings of Fact No. 48b, R. 210.)

The dumping of distress coal and the practice of pyramiding is described in detail in the pamphlet referred to above.

The findings continue, as follows:

"Other purposes include the systematic study by a department of the Sales Agent of the marketing and distribution of coal, the demand and the consumption and the kinds and grades of coal made and available for shipment by each producer in order to improve conditions.

"An inspection and engineering department would be maintained to keep in constant contact with customers in order to demonstrate the advantages and suitability of Appalachian coal in comparison with other competitive coals.

"An extensive advertising campaign would show the advantages of using coal as a fuel, and the advantages of Appalachian coal particularly. Advertising is expensive, as now conducted by individual operators and is, moreover, ineffective. Substantial economies would be effected in this respect by the Selling Agent.

"A research department employing combustion engineers would demonstrate the proper and efficient methods of burning coal in factories and in homes, and thereby the use of coal by the present users would be retained and increased in competition with such substitutes as oil and natural gas.

"Appalachian Coals, Inc. would operate a credit department which would collect credit information from sub-agents and employees and build up a record that will constitute a good index of reliability of purchasers.

"Defendants believe that the result of all of these activities would be the more economical sale of coal, and the economies would be more fully realized as the organization of the Selling Agent is perfected and developed.

"Since practically all the defendants have indicated that they would designate sub-agents for the sale of coal, it would be only after a year or so of operation that economies could be introduced by the Selling Agent to lessen selling expense." (Findings of Fact No. 48b, R. 210-211.)

At an earlier point in its findings the District Court found that:

"The reason for giving to each producer the right to designate a sub-agent of Appalachian Coals, Inc., for the sale of the coal produced by the producers was that it would not be possible for Appalachian Coals, Inc., to enter into the market at once with an efficient organization, and also that the present agencies for the sale of coal have long established good will and personal contacts with consumers, and it was felt that it was desirable to maintain this good will and these valuable contacts so as to retain all possible channels for reaching the consuming public." (Findings of Fact No. 6, R. 156.)

As these findings of fact of the lower court indicate, the designation of sub-agents is a temporary expedient and as time goes on and as Appalachian Coals, Incorporated, develops its own selling organization, it is expected that the great bulk of the coal will be sold by its own sales staff. Any savings in selling expense resulting from this development will be passed on to the producers in the form of dividends.

In the petition it is alleged that one of the purposes of the defendant producers was "to limit production to the quantities fixed and determined by their common selling agent" and "to control the supply . . . of Appalachian coal sold or offered for sale" in interstate commerce. (Petition, par. XIII, R. 20.) This allegation is denied in the Answer. (Par. XIII, R. 41.) The Findings of Fact fully sustain appellants' position. They are as follows:

"48c. The question of the limitation of production was discussed at the New York meeting, but it was decided that production could not be legally limited and, in any event, it could not be limited practically. *There was no purpose either at the New York meeting or the Cincinnati meetings which resulted in the formation of Appalachian Coals, Inc. to limit the production of coal. On the contrary, it was designed that the producer should produce and the selling agent should sell as much coal as possible.* Paragraphs 4 and 6 of the contract between the producers and the selling agent required the latter to sell all the coal of the producer that could be sold in the markets at the best possible price obtainable. (Italics ours.)

"The only agreement which looks towards the curtailment of production is contained in paragraph 4 of the contract wherein provision is made for participation in sales between the various producers when the demand is not sufficient to absorb the output of all of them. In such case it is provided as follows:

'In the event the demand at the time of this contract becomes effective is not sufficient to operate the mines of all producers represented by the Selling Agent upon a full time basis, then the participation of the Producer in the total sales of the Selling Agent for the first calendar months after this contract goes into effect shall be such percentage of the total sales made by the Selling Agent for that month that the total car allotment of the Producer for the three months preceding bears to the total car allotment of all the producers whose coal is sold by the Selling Agent for the same period; and thereafter the monthly participation of the producer in the total monthly sales made by the Selling Agent shall be a percentage equal to the percentage the Producer's car allotment for the second preceding calendar month bears to the total car allotment of all the producers whose coal is sold by the Selling Agent for the second preceding calendar month; it being understood, however, that these percentages are subject to variation due to variations in the sale of the different sizes, grades and qualities of coals, as above set out; but that it is the purpose of this and all similar agreements that the Selling Agent will, over each annual period, as nearly as conditions will permit, all factors considered, give each producer's mine or mines producing the same or interchangeable grades of coal as nearly its pro rata part of available orders as is reasonably possible. All coal shipped by the Producer under contracts shown in "Exhibit B," filed herewith, shall be counted against the Producer's proportionate tonnage of coal sold by the Selling Agent, as determined in this paragraph.'

"It will be noticed that the percentage of total sales to which each producer would be entitled under this arrangement is fixed with reference to the producer's car allotment. It is shown that car allotments are made on the basis of the mine rating. Section 1, par. 12 of the Transportation Act of Feb. 28, 1920, (41 Stat. 476), requires all railroads to maintain mine ratings and to distribute cars equitably on these ratings. The mine ratings are fixed in accordance with the regulations of the Interstate Commerce Commission, which were promulgated as the result of an investigation that extended for some years and until 1926. The rating is based on installed productive capacity, that is, on physical conditions of the mine, the past performance in production, the labor supplied, and all other factors that might influence production. *A producer may increase his rating by increasing his productive capacity.* The quoted paragraph from the contract does not limit the total production of all the defendant producers, but restricts the proportionate amount which any one producer may sell." (Findings of Fact No. 48c, R. 211-212, Italics ours.)

The statement that the contract restricts "the proportionate amount which any one producer may sell" is obviously an error. By the provisions of the contract all sales are made by the selling agent. The selling agent is obligated to use its best efforts to sell *all* of the coal of all of the producers at the best prices obtainable. (Findings of Fact No. 48c, R. 211.) The provisions of the contract quoted by the court relate to the *distribution* of sales that have actually been made by the selling agent and are in no sense a limitation upon the sale of coal of any one producer. It is obvious that some provision must be made among the contracting parties for the participation of each in the actual sales by the selling agent in the event that the demand is not sufficient to absorb the capacity output of all producers, and that is the only purpose of the paragraph of the contract quoted above, and the District Court so found. The Court also found that this provision did not make for a static condition as between producers. Each producer is free to increase his car rating and therefore his participation by increasing his productive capacity. (Findings of Fact No. 48c, R. 212.)

It is no mere coincidence that the analysis of the troubles in this industry set forth in this brief, together with the purposes of the defendants in organizing this selling agent, find expression in the recent publication of the National Industrial Conference Board entitled "The Competitive Position of Coal in the United States" (published in November of 1931). For the convenience of the Court there are included as Appendix II of this brief, certain pertinent excerpts from this book.

The statements of the purpose and intent of the defendand producers that appear in the pamphlet published after the Cincinnati meeting (Defendants' Exhibit A to Answer, R. 50) and in the Findings of Fact of the District Court are not the result of the efforts of this group of coal producers to give an appearance of legality to their plan or to distract attention from some sinister purpose. They coincide with the findings and conclusions of a reliable and non-partisan research organization. This is earnest of the thoroughness of the coal operators in analyzing their troubles and of their sincerity in advancing their plans for either (1) physical consolidations of properties or (2) the formation of regional selling agencies. The former was found to be impracticable at this time of depression and financial stringency, so the latter was adopted by the Appalachian producers. It is significant that Appalachian Coals, Incorporated, has for its purposes the accomplishment of all of the improvements in marketing set forth by the National Industrial Conference Board. The purposes of the defendants as set forth in this brief represent the best thought and effort of a group of practical and experienced coal men, conversant with the practical problems of their indutsry and united in a common purpose to take every lawful step to improve the marketing of their product and thereby to sell more coal.

IX.

THE METHOD OF OPERATION OF APPALACHIAN COALS, INCORPORATED, IN THE COMPETITIVE MARKETS AND THE COMPETITION OF COALS WITHIN THE ORGANIZATION

The defendant producers who have contracted to sell coal through the agency of Appalachian Coals, Incorporated, will have nothing to do with the determination of the price at which the selling agent will offer coal in the competitive markets. As to this the District Court found that

> "The price of coal sold by the Selling Agent would be fixed by a staff of Vice Presidents, in conjunction with the President of the corporation at the central office in constant contact with the principal consuming markets. The central office would be located at Cincinnati to which information as to competitive conditions will be relayed. The one restriction is that contract sales calling for delivery over a period of more than sixty days will be submitted for approval to the producer as to price. (Findings of Fact No. 48a, R. 209.)

It should be stated at this point that the officers and executives of the company will be full time paid executives and will not be either producers of coal or directors of the corporation. The present officers were chosen from among the producing companies, but when the organization commences the actual selling of coal it is expected that the present officers will be replaced by officers having no connection with the coal producing companies. (R. 427.)

In the pamphlet published by the Appalachian producers following the Cincinnati meeting, the statement appears that under the selling agency plan "it is not expected that competition will be eliminated, even between the coals sold by the general agency." (Defendants' Exhibit A to Answer, R. 61.) The practical explanation of this competition between coals sold by the agency was given by the witness J. D. Francis, President of Appalachian Coals, Incorporated, as follows:

> "Appalachian coals won't all be sold at the same price even for the same size of coal. We have numerous grades of coal to sell in the market, and a coal that is sold for steam purposes from this region, that will be sold by this agency, that has five per cent ash and less than one per cent sulphur naturally would and should bring and does bring in the market a better price than a steam coal that could be used in the same boilers, that has eight per cent ash or ten per cent ash and one and a half or two per cent sulphur. So this agency for steam purposes, for domestic purposes, for by-product purposes will be offering to customers different qualities of coal of the same sizes at different prices. The customer will have his choice as to which coal he will take, price considered, through this agency. A by-product plant may say 'I would like to have a coal running four per cent in ash and one-half per cent sulphur, but if I have to pay 5 cents more per ton I would rather take a five per cent ash coal and a three-quarter per cent sulphur.' And there will be as between the coals sold by this agency a competition there based upon value in accordance with the use to which it is put.

> That will create a competition between the coals sold by this agency, and it was recognized that there would be times when there would be a greater demand for coals of one quality, or suitable for one purpose, than at other times, and that would vary from time to time, and that mines where the demand was greater for their quality of coal would run to a greater extent than mines having a coal for which there was a less demand. That would have to be worked out day by day and week by week by the officers and employees of the selling agency; but there would be substantial competition, really, between the coals offered by the agency, depending upon the character and the use and the quality of the coals." (R. 347-348.)

The District Court found that these sales of various grades of coal at different prices, in the manner described above, would not constitute competition among defendant producers. (Finding of Fact No. 48a, R. 209). This finding was assigned as error. (Assignment of Error No. 20, R. 1095). The testimony of the witness, J. D. Francis, stands uncontradicted in the record. Added force is given to the contention of the appellants in the opinion of the District Court that "It is understood that coal sold to be delivered by a certain producer is to be delivered by him." (R. 222). As a result of this situation, there will be constant pressure from the producers upon the agency to sell their coal and enable them to operate their mines and it is the duty of the agency to sell all coal at the best price obtainable, no matter what that price may be.

X.

THE COMPETIVE STRENGTH OF APPALACHIAN COALS, INCORPORATED IN THE MARKETS IN WHICH IT WILL SELL COAL.

The opinion of the District Court in this case states that there is "substantial competition to be met in each market and defendants will not through their sales agency be able to exercise monopolistic control of the market, * * * The selling agency will not be able, we think, to fix the market price of coal; * *" (R. 238). The Court also found that even if similar coal selling agencies should be established in other producing districts the evidence indicates "that there will still be substantial, active competition in all markets in which Appalachian coal is sold." (Findings of Fact No. 24, R. 175.) The testimony also shows that the defendant producers are finding it increasingly difficult to maintain their relative position in all substantial markets, and the District Court so found. (Findings of Fact No. 9[e] and 9[f], R. 160-162; R. 629, 630, 321, 322, 632-647, 552-554; Defendants' Exhibits, 27, R. 1056; 28, R. 1057; 29, R. 1059; 30, R. 1060; 31, R. 1062.)

It is therefore apparent that notwithstanding the formation of Appalachian Coals, Incorporated, the price of bituminous coal will continue to be set in an open competitive market. The discussion of conditions in each of the consuming markets is necessarily long and for that reason the details are set forth in Appendix I to this brief. In this Appendix there are discussed each of the markets in which Appalachian coal will be sold, the inroads on coal made by substitute fuels, the loss of tonnage due to the more efficient burning of coal by consumers, the developed productive capacity of defendant and non-defendant producers in the Appalachian territory, the potential capacity of undeveloped coal lands not controlled by the defendant producers in this territory, the effect of an adverse freight rate differential, and all other factors that may have a bearing on the competitive strength of the defendant producers.

From the facts which are discussed in detail in Appendix I of this brief it appears that the principal markets in which coal produced in the Appalachian territory is sold are located in the states north and west of the Ohio River, that is, Ohio, Michigan, Indiana and Illinois and the northwest. By far the largest part of all coal produced in Appalachian territory is shipped into that marketing area. According to 1929 figures it represented approximately 75% of the toal coal produced in the Appalachian Territory. In this marketing area the coal from Appalachian territory meets in competition coal produced in Ohio, the Fairmont District of northern Virginia, the low volatile fields of southern West Virginia, Virginia and Maryland, the high and low volatile fields of Western and Central Pennsylvania, the high volatile fields of Indiana, Illinois, Western Kentucky, and Central Tennessee, and, of course, competition from shipments of non-defendant producers located in the Appalachian Territory.

In general, coal from the Appalachian territory reaches this competitive market at an adverse freight rate differential, ranging from 35 cents to $1.84 per ton. Coals from this region also meet keen competition throughout this territory from substitute fuels, such as natural gas and fuel oil. These markets are recognized as the most highly competitive coal consuming markets in the United States.

The Court below referred particularly to the southern markets. In 1929 only about 8% of the total production of the Appalachian Territory was shipped into the markets located in the states of Georgia, South Carolina, North Carolina, Alabama, Florida, Mississippi, Arkansas and Louisiana. In this territory substitute fuels, such as natural gas and hydro-electric power, have displaced large quantities of coal; and in most of these markets the use of these substitute fuels is growing rapidly. (R. 698, 534, 712.) In these states the shipments by defendant producers varied from a fraction of 1% of the total shipment of all coal into Mississippi in 1929 to approximately 53% of all the coal shipped into the state of South Carolina in that year.

There is no part of this Southern marketing area where Appalachian Coals, Incorporated will not meet competition from at least one other producing region. In addition, it will meet competition from the producers in Appalachian Territory who have not contracted with Appalachian Coals, Incorporated. These latter producers have a present installed productive capacity which is eleven times greater than the total shipments of coal into these Southern states from Appalachian territory as a whole.

With respect to freight rates to these markets, coal from the Appalachian territory enjoys a substantial freight rate advantage only in a restricted area in western North

Carolina and, of course, non-contracting producers in the Appalachian Territory have that advantage along with defendant producers. They reach no other market on as low a rate, and, for this reason, competition between defendant producers and other producers in the Appalachian territory is keen. In the rest of this territory the freight rate is either adverse or the advantage is inconsequential.

The facts which are summarized above demonstrate that Appalachian Coals, Incorporated will not have the power to dominate any market or fix the market price in any of the markets in which it will sell coal of the defendant producers.

The finding of the lower court that the price of coal would continue to be set in a competitive market is also supported by the uncontradicted testimony of every witness who dealt with the subject. These witnesses included railroads, consumers, retail and wholesale dealers in coal, non-defendant producers located in the Appalachian Territory and elsewhere and officers of Appalachian Coals, Incorporated.

The following is a brief résumé of this testimony:

Opinion of Consumers

The District Court found that "Consumers of coal representing the Louisville & Nashville Railroad, the Norfolk & Western Railroad and the Chesapeake & Ohio Railroad have declared that the organization and operation of Appalachian Coals, Incorporated, will he of benefit to the coal industry and will not restrain competition in the purchase of coal by these railroads.

"These railroads are the largest railroad users of coal operating in the Appalachian Region. The Norfolk & Western Railroad uses from two to three million tons annually (R. 305); the Louisville & Nashville Railroad uses from three and one-half to four million tons a year (R. 479); and the Chesapeake & Ohio Railroad uses from two and one-half to three million one hundred twenty thousand tons annually." (Findings of Fact No. 49 R. 213, 214.)

J. M. Dewberry, general coal and coke agent of the Louisville & Nashville Railroad, testified that:

> "Assuming that producers located in the southern Appalachian region and representing 75 per cent of the present productive capacity of that region have subscribed for stock in Appalachian Coals, Incorporated, and have agreed to dispose of their coal exclusively through that agency, and at a price determined by it, in my opinion, I will be able to buy coal for the use of our railroad in an open, competitive market. I have a number of reasons for that opinion.
>
> "Coal is in profusion in all of the districts that we serve. And the mines which are not members of this organization are fully equipped to furnish us with an abundance of perfectly satisfactory coal for our purposes. In addition to that the Louisville & Nashville Railroad, even without regard to its allied companies who consume considerable coal, have had a tremendous purchasing capacity. In other words, even the small amount we are taking now, 2,100,000 tons, would give employment, very desirable employment, to a number of mines, so that with that opportunity to furnish employment to a number of mines in these various districts, I do not anticipate the

slightest difficulty in getting all the coal that the Louisville & Nashville needs in these very distritcs without subpecting it to the necessity or inconvenience of going into some other district to get equally satisfactory coal, which it can do."

* * * * *

"One fact that has been left out of this program or plan, or whatever you might call it, is the tremendous, highly organized and concentrated buying power that can be exerted today. Now I have reference to that thing not merely with regard to the Louisville & Nashville Railroad, but consumers in general. It is a well known fact today that the buying power of these large consumers of coal is more intelligent, more forceful, more far-reaching than ever before in the history of the industry. And it just sounds to me like a joke for somebody to talk about the Appalachian Coals or somebody else dictating the price that they are going to pay. They dictate their own price." (R. 482, 483.)

Similar testimony was given by representatives of the other two railroads above-mentioned. (R. 307, 722.)

Ben E. Tate, vice-president of the Utilities Power & Light Corporation, 327 South LaSalle Street, Chicago, Illinois, a large public utility company operating in Indianapolis and St. Louis, and having power lines extending from Harvey, North Dakota, south into Oklahoma and to the cities of Dubuque and Clinton, Iowa, and Rochester, Minnesota, and along the Atlantic Seaboard in the States of Connecticut and Rhode Island, and consuming annually approximately 2,485,000 tons of coal (R. 460) has stated that the organization and operation of Appalachian Coals, Incorporated, will not affect competition in the markets in which his company buys coal, and that it will have a beneficial effect on the coal industry. (Findings of Fact No. 49, R. 214.)

This witness testified that "assuming that the producers located in the southern Appalachian region representing 75 per cent of the present production of that region, have subscribed for stock in Appalachian Coals, Incorporated, and have agreed to dispose of their coal through that selling agency, at a price determined by the agency, our company would be able to buy coal in the open competitive market. If their price was not in line with Pennsylvania or Fairmont or Ohio or Indiana or southern Illinois, we would buy from them." (R. 462.)

The witness, F. A. Jordan, Supervisor of Purchasing and Stores, of the Georgia Power Company, Atlanta, Georgia, operating throughout the State of Georgia, and using coal in the operation of a steam plant and of a stand-by steam plant, and using from thirty thousand to one hundred twenty-five thousand tons of coal annually has stated that the organization and operation of Appalachian Coals, Incorporated, will not restrain competition in the markets in which his company buys coal; (Findings of Fact No. 49, R. 214) and that:

> "Q. In event that the producers of coal in the Southern Appalachian region, representing, let us say, 75% of the tonnage produced in that region, entered into a contract with Appalachian Coals, Incorporated, to employ it as their exclusive selling agency for the coal produced by these defendant companies, will you state whether or not, in your opinion, you will be able to purchase coal for your power company in open competition in that market?
>
> A. I believe so.

Q. Why do you say that?

A. I think there would still be plenty of competition, that Appalachian Coals, Incorporated, would have plenty of competition from Alabama, and other operators possibly that are not in this Appalachian Coals organization.

Q. Would the coal that you can obtain from Alabama, or from these independent companies, be suitable for your purposes?

A. It would." (R. 557.)

The witness, G. V. Allen, purchasing agent and "a representative of the Carbide and Carbon Corporation, which uses annually about 250,000 tons of bituminous coal 100,000 tons of coke made from bituminous coal, and 40,000 to 50,000 tons of petroleum coke, and operating plants that consume coal at South Charleston, West Virginia, Niagara Falls, New York; Cleveland, Ohio; Sault Ste. Marie, Michigan; Indianapolis, Indiana, and Fremont and Fostoria, Ohio, has stated that the organization of Appalachian Coals, Incorporated, will have a beneficial effect in the coal industry and will not restrain competition in the markets in which his company buys coal." (Findings of Fact No. 49, R. 214.)

He testified:

"Q. Assuming that the producers located in this Appalachian region, representing let us assume, 73% of the present production of that region, have subscribed for stock in Appalachian Coals, Incorporated, and have contracted with that agency as the exclusive agency for the selling of their coal, at a price determined by that agency, in your opinion will you be able to buy coal in open competitive markets?

A. It is my opinion that I will be able to do so. I think that we can buy coal at substantially the same prices that we now enjoy, because of the competition that they will experience from non-members within the district, and hecause of the competition of other districts.

Q. Well, on the same hypothesis that I have given you what do you think the probable effect of that organization would be upon direct commercial consumers of coal?

A. Well, I think that an organization of that kind would have a beneficial effect. I believe that a great deal of development and research work should be carried on, and that new uses for coal would be found, and that some of the markets which have been lost to coal to competitive fields, might be regained if there were sufficient interest, if there were any one big enough and sufficiently interested to carry on that missionary work.

And I believe that some wastes might be eliminated, and that I would expect as the result of the larger production of coal within that territory, and the correspondingly lower prices or costs, because whenever you reduce the production of coal, you automatically increase the cost per ton of what is left. And an organization of this kind, it seems to me, would have to look forward to larger production. And possibly lower cost. And it would seem to me an impossible thing to raise the price of coal.

I do not think they could raise the price of coal because of the competition, nor do I think it would be a practical or sensible thing to do, because when you raise the price of coal you invite new interests into the coal business. Every time you have had high prices you have had new people come into the business and that creates a larger potential production,

> and I think that the experience these men have had from short high priced periods in the past would cause them to guard against a recurrence of that situation. Even if they wanted to increase the price I do not think they could." (R. 564, 565.)

The witness, Robert L. Boykin, who is empoyed by about 117 manufacturing plants, mostly in thc textile and allied interests, and who is the largest purchaser of coal in the States of North Carolina, South Carolina, Georgia and Eastern Tennessee, and who purchases approximately 600,000 tons of coal annually under normal conditions for use by textile mills, located in those statcs, has stated that Appalachian Coals, Incorporated, will not control or dominate the price in the markets in which he purchases coal, and that he will be able to purchase coal in an open and competitive market. (Findings of Fact No. 49, R. 214, 215.)

This witness testified:

> "Assuming that Appalachian Coals, Inc. did come into actual operation and controlled 73 per cent of the production in the Appalachian Territory, and that all the producers who joined it subscribed to the stock of the Appalachian Company and employed under contract that company as an exclusive agency and gave that agency the power to determine the price, I do not see how it would be possible for that company to fix the price for coal and hold it in the territory where I work."
>
> * * * * *
>
> "Demand, in the first place, is one of the largest factors in maintaining any price on any coal. If you have not got the demand, you cannot fix the price. In South Carolina, we have a good many coals which

are not incorporated in this proposed company, whose freight rates are similar. I know of certain properties in Virginia which, in 90 days, could be expanded from 10 cars a day to 50. There are other properties that could be expanded just as rapidly, which would give us all of the coal which would be necessary to combat any arbitrary price-fixing which might come up. Not only that, but there is a great deal of undeveloped coal at favorable tipple height, without any great expenditure of money that could be put in operation." (R. 515.)

* * * * *

"I don't believe that any group of operators can fix a price on their coal. I will even go so far as to say that I do not believe that if every operator in the Appalachian system would go into this organization that they can arbitrarily fix the price of coal." (R. 519).

DEALERS

The defendants in this case presented the testimony of wholesalers and retailers. As to this the District Court found as follows:

"The President of the American Wholesale Coal Association, an association of wholesale dealers in the United States and Canada, has stated that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to the wholesalers in the coal industry, and that it will not be able to set the price of coal in any market in which coal from Appalachian territory is sold or to restrain competition in the sale of coal in any such market. (Findings of Fact No. 50, R. 215.)

"The First Vice-President, and President for four years, from 1928 to May, 1932, of the National Re-

> tail Coal Merchants' Association, a federation of about one hundred local associations of retail coal merchants, with a membership in excess of 5,000 in forty-two States and in the District of Columbia, has testified that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to the coal industry and will not restrain competition in the sale of coal. A retail coal merchant operating in Columbus, Ohio, and selling at retail from 32,000 to 40,000 tons of coal annually to domestic consumers, has stated that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to the coal industry and will not restrain competition in the sale of coal. A retail merchant operating in the City of Cleveland, Ohio, and selling annually from 25,000 to 45,000 tons of bituminous coal to domestic consumers, has testified that the organization and operation of Appalachian Coals, Incorporated, will be of benefit to his business and that of retailers generally and will not restrain competition in the sale of coal." (Findings of Fact No. 50, R. 215.)

Charles T. B. Ward, President of the American Wholesale Coal Association testified:

> "Assuming that producers located in this Appalachian Territory, and representing 75 per cent of the present production of that region, have subscribed for stock in Appalachian Coals, Incorporated, the selling agency, and have agreed to dispose of their coal through this agency, and at prices determined by it, in my opinion I would be able to buy coal in an open competitive market. There would be a very large amount. As I understand it, if Appalachian controls 75 per cent of the coal produced in that district, it would be less than 10 per cent of the coal

that would be available in the markets where we sell. There would still be some Appalachian coal, or coals of the same district, that would be available. I think that I would be able to buy enough coal for my needs. I believe that the probable effect of the organization of Appalachian Coals, Incorporated, upon wholesalers of bituminous coal would be a big help to wholesalers in that there would not be so much pyramiding of tonnages. Pyramiding of tonnages comes about in many ways. The small operator offering coal to many wholesalers will pyramid that small operator's tonnage.

I might cite a case of my own, when I was a little younger in the business. During the time when there was quite a market at Tidewater for export coal, I got together about 20,000 tons of coal, then classified as Pool 34, coal, which was steam, just ordinary steam high volatile coal, starting at New York tide, to be sold upon arrival. About two days after it was started from the mines, I called one or two exporters in New York, and told them of this coal, offered them this tonnage of coal subject to a prior sale. They did not take it at once, but they were seeking a market for it.

The next day, I had not heard from them, but I had heard indirectly that there was quite a large tonnage of Pool 34 coal heing offered in New York City. So I checked with the railroads to see if there was a great deal moving there, and they said not. So I immediately thought there must be a pyramiding of my tonnage. I withdrew my offers to the three people to whom I had made them informally, and the next day I had quite an active demand for this coal and sold it very readily. Now, these 20,000 tons of coal that I had started down there, had been pyramided by being offered from one to another in New York City, until every one down there thought there was possibly 100,000 tons of coal in the market, when as a matter of fact there was very little.

In other words, that 20,000 tons being urged on the market, the same coal being urged on the market for a number of selling agencies or agents, had the effect of creating the impression that there was more coal than there actually was in that market and that the market was overloaded.

By Judge Soper:

"Pyramiding usually beats down the price. When there is a large quantity of coal offered, they do not seem to want to buy."

By Mr. Donovan:

"In other words, when they are led to believe that there is more coal than there actually is on the market, and believing there is more coal than there actually is, offers are made lower than the market price. And it may at the end be very disastrous to the buyer, if he believes there are 100,000 tons on the market, when there are only 20,000 tons, and somebody buys the 20,000 tons, he may have to pay a very high price for what coal he wants. There certainly would be a more accurate determination of market conditions by the existence of such an agency as Appalachian Coals, Incorporated." (R. 507, 508, 509.)

Charles A. Albright, President of the Albright Coal Company, a retail distributor of coal in Cleveland testified:

> "Assuming Appalachian Coals, Inc., could be organized in the way I have heard you describe, I have no fear of buying in an open competitive market.
>
> I think that an organization of this kind would probably give the average retailer a more stable supply of coal. That is, he would get more

regular shipments and have his business taken care of in a more satisfactory way. In our city the price I do not believe could be raised a cent because the value of coal is relative. The consumer is buying not coal, but he is buying heat and comfort in one instance in his home and he is buying power in the other instance where he is making steam. And which ever coal or fuel will give him that in the most satisfactory manner at the lowest price will be sold to him. And that is the job of myself and other distributors to find out what that is and see that he gets it. That is the way I stay in business." (R. 489, 490.)

The testimony of Harry B. Miles, the retail merchant in Columbus, Ohio, referred to above, is likewise typical. This witness testified as follows:

> "In my opinion the organization of Appalachian Coals, Incorporated, would not hurt the retailers one bit. The competition would be such not only from their own district, but from competing fields that the companies that are involved in the defense would be forced to meet the competition of the other fields." (R. 570.)

NON-DEFENDANT PRODUCERS

The Court summarized the testimony of the non-defendant producers who appeared as witnesses as follows:

> "A competing producer operating in the Harlan district, with an annual production of approximately 250,000 tons since 1920 (and with a productive capacity of approximately 600,000 tons annually, which can be produced with very little expenditure for additional equipment and with other

> properties in Knox County, Kentucky and with an annual production of about 70,000 tons and a productive capacity of about 150,000 tons a year, that could be increased to from 200,000 to 250,000 tons a year with very little expenditure of money, has stated that Appalachian Coals, Incorporated, would not have the power to drive his companies out of business or to injure them. An operator of non-defendant companies in the Clinchfield district, Virginia, with an aggregate annual production of approximately 220,000 to 250,000 tons and an annual productive capacity of from 320,000 to 350,000 tons, which could be produced with practically no further capital expenditure, has stated that the organization and operation of Appalachian Coals, Incorporated, would be a real benefit to the coal industry and would not restrain competition. A non-defendant producer operating in Campbell County, Tennessee, with an approximate annual production since 1925 to 250,000 tons, which could be increased with very little expenditure to 500,000 tons annually, has stated that the organization and operation of Appalachian Coals, Incorporated, would not have the power to put his company out of business or hurt his business. Non-defendant producers located in western Pennsylvania, Alabama, Ohio and Illinois have testified to like effect. The small coal producer can, to some extent, and for the purpose of producing and marketing coal, produce coal more cheaply than many of the larger companies and is not prevented by higher cost of operation from being a competitor in the market." (Findings of Fact, No. 51, R. 216.)

The following statements are typical of the testimony of these witnesses.

The non-defendant operator in the Clinchfield District of Virginia, referred to above, testified as follows:

> "I feel that Appalachian Coals, Incorporated would be of real benefit to the coal industry. I believe that, being operated by men of experience and intelligence, and certainly with an honest purpose in mind, it would be able to do things for the coal business that the small operator has not done heretofore, such as carrying on an extensive advertising campaign and doing research work to try to induce people who are using electricity to go back to coal—in other words, an educational program among the people to show that coal is the most efficient and most economical fuel to use. The small operator cannot do that. He does not have the capital to do it; and if this company is properly handled I think that they will be able to do that, which in itself will be not only a benefit to the members who join, but to the ones who do not become members." (R. 494.)

The testimony of the Alabama operator, referred to above, was as follows:

> "From my experience in the sale of coal in the markets where it competes with substitute fuel such as gas, hydro-electric power and fuel oil, I would say that these substitutes, where present, are a practical and an absolute check on the ability of the producer of coal to materially increase his price. In our experience in our territory, which is probably the most competitive territory in the United States, and has so been for 25 years, we have not only been [un]able to raise the price, but in many cases we have forced to reduce the price in order to retain the business against the competition of either hydro-electric power, natural gas, or fuel oil.

"Appalachian Coals, Inc., would not have the power to put my company out of business. They have not power enough to go into Georgia or any other market territory we enjoy, and make a price that we would not meet and go along with them. For the same reasons I do not think that Appalachian Coals, Inc., has the power to put its competitors generally, or any of its principal competitors, in any market where it meets those competitors, out of business.

"I doubt that the organization of Appalachian Coals, Inc., would have any effect upon the price of coal in North and South Carolina and Georgia, until such time as there might be a rise in the whole market and the price would go up then. The increase in price would be determined by conditions and not by Appalachian Coals, Inc., and by the demand for coal." (R. 532.)

B. W. Whitfield, a competing producer operating in the Harlan district testified:

"From my knowledge of the organization of Appalachian Coals, Incorporated, and its proposed operation I do not think it would hurt my business. I think that I can mine coal as cheap as the mines that they will sell for, and then the other is a matter of the quality of the coal, and I suppose the ability of the salesmen to make the sales, and I am satisfied with that selling agent. I do not think that Appalachian Coals, Inc., could wage any destructive war against the companies which I own or against the companies in my territory. I think that Appalachian Coals, Incorporated, would in a way help the bituminous industry. By having a number of mines, I think the coal could be better distributed. A commercial mine running on making several grades of coal can rarely ever ship out every day the entire production. They nearly always are long on some grades and short on others, and by being able—I think it might be possible, if one mine had slack standing today and another one over here was short on slack, to swap around that way and keep the demurrage coal off the market—that is, I mean coal that is going in distress—off the market.

"Our coal is sold in the States north of the river, that is, Ohio, Indiana, Illinois, and Michigan, and some in Iowa; and we also sell some into North and South Carolina and Georgia.

"We are able to go into North and South Carolina with the freight rates against us. We sell some there at the present time. In the event that the price of coal should be raised by Appalachian Coals, Inc., in that territory, we would go in there." (R. 486-487.)

William G. Polk, Vice President of Tennessee Jellico Coal Corporation, a non-defendant producer with mines in Campbell County, Tennessee, testified:

> "In the event that Appalachian Coals, Inc., should raise the price of coal in the Carolinas or in Georgia, it would certainly be to our advantage to divert the coal that now goes into the north and northwest markets to the Carolinas and Georgia."
>
> * * * * *
>
> "In the event that Appalachian Coals, Inc., should attempt to raise the price in that territory, it would be to our advantage to sell an increasing percentage of the Harlan County coal. We would like to get in with more Harlan coal in this territory. I do not think that Appalachian Coals, Inc., would have power to put my company out of business. It certainly could not wage a competitive war against any

of its competitors in that territory without involving all other companies that sell in competition, because they have members over in our territory, and they would have to suffer any competitive conditions that we have to meet. (R. 541-542.)

George M. Jones, Jr., engaged in the production and sale of bituminous coal in Ohio, testified:

"Q. Assuming that producers located in the southern Appalachian field representing 75 per cent of the present production of that region have subscribed for stock in Appalachian Coals and have agreed to dispose of their product through that agency and at prices determined by it, would that Appalachian Coals, Inc., in your opinion, have the power to put your company out of business?

A. No, sir, I do not see how they could.

Q. Well, tell us why?

A. Well, we have been competing with them in very severe competition for a great many years, and I do not see how they could do anything that would make the competition any more severe. And we are increasing our sales now. It looks like we can hold our own pretty well." (R. 578, 579.)

Officers of Appalachian Coals, Incorporated, and other witnesses on behalf of the defendants

The Court found:

"Certain witnesses produced on behalf of the defendants and others nevertheless indicated that the organization and operation of the Sales Agency would have some effect in raising prices. The President and Vice-President of Appalachian Coals, Incorporated, said in substance that the organization would not be able to fix prices in an arbitrary way but, by the elimination of certain abuses, and by better advertising and sale organization, the producers would get more in the aggregate for their coal. Other witnesses for the defendants indicated that there would be some tendency to raise the price but that the degree of increase would be affected by other competitors in the coal industry and by producers of coal substitutes." (Findings of Fact No. 52, R. 217.)

This finding can only be understood in the light of the testimony referred to by the Court.

James D. Francis, President of Appalachian Coals, Incorporated, stated:

> "The producers employing this agency hoped that they could, in normal conditions, by eliminating some of the abuses and evils that I have described, by better advertising and better demonstration of the use of the coals, get more in the aggregate for their coal, but they did not expect to be able, in any arbitrary way, by naming a price, to go out and sell and get that price." (R. 349.)

SPECIFICATION OF THE ASSIGNED ERRORS

The Assignment of Errors upon which the Appellants will rely are as follows:

The Court erred:

1. In refusing to dismiss the petition as against each and all of the defendants.
2. In considering and adjudging that Appalachian Coals, Incorporated, constitutes an unlawful

combination in restraint of trade in violation of the Sherman Act. (26 Stat. 209.)

3. In considering and adjudging that the contracts entered into between Appalachian Coals, Incorporated, and the other defendants and between Appalachian Coals, Incorporated, and the sub-agents for the selling of coal were and are contrary to law and void.
4. In ordering, adjudging and decreeeing that the defendants, their officers, agents and servants be restrained and enjoined from proceeding further under the charter of Appalachian Coals, Incorporated, or under the contracts entered into by said corporation with the defendants and that the defendants be directed to dissolve said corporation and to surrender its charter.
5. In holding as a matter of law that the contracts entered into between Appalachian Coals, Incorporated and the other defendants and between Appalachian Coals, Incorporated and the sub-agents for the selling of coal are *per se* unlawful and contrary to the Sherman Act.
10. In concluding, as a matter of law, that the mere fact that the selling of coal by defendant, Appalachian Coals, Incorporated, will "affect market prices" is *per se* unlawful.
14. In failing to conclude, as a matter of law, that the main purposes to attain which, Appalachian Coals, Incorporated, was organized, are lawful and that the effect on the price of coal, if any, resulting therefrom, is incidental and, therefore, not unlawful.
15. In finding, as an ultimate fact in the case, that "the effect of the plan of defendants is to eliminate competition among themselves and fix uniform prices at which their product shall be of-

fered for sale upon the market." (General Findings of Fact No. 53, Par. 2, R. 217.)

17. In finding, as ultimate facts in the case "That the effect of the plan of defendants will be to eliminate free competition among a large group of producers of coal and substitute for same concerted action on their part in the offering of their product at uniform prices; and that, because they control so substantial a part of the coal sold in the United States, this elimination of competition and concerted action will affect market conditions, and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition." (General Findings of Fact No. 53, Par. 4, R. 217, 218.)
19. In finding that "at present the Appalachian coal has almost a complete monopoly in western North Carolina." (Findings of Fact No. 35, R. 186.)
20. In finding that "Reference is made in the testimony to competition inside the organization between various grades of coal. Bituminous coal is produced in various sizes and grades. Coals from different regions, and from different mines in the same region, vary in quality and characteristics. Appalachian Coals, Incorporated, would establish differentials in price between different grades and sizes of coal. But it would fix a price for each grade of coal which would yield the maximum possible realization from the total amount of each grade of coal sold. These sales of various grades of coal at different prices, all fixed by the same Selling Agent, would not constitute competition among defendant producers." Findings of Fact No. 48a, R. 209.)

21. In finding that Appalachian Coals, Incorporated, has "the power . . . . to control the price of 73% of the commercial production in Appalachian territory." (Findings of Fact, No. 48a, R. 209.)
22. In finding that "it was the expectation of the producers who formed Appalachian Coals, Inc., that shortly thereafter similar selling agencies would be organized in other producing districts controlling at least 70% of the bituminous coal respectively produced therein, and that these agencies would be organized in the districts producing coal which is competitive with Appalachian coal, and that it was the particular purpose of the defendants in the Appalachian territory to secure such degree of control therein as would eliminate competition among the 73% of the commercial production." (Findings of Fact No. 24, R. 173.)
23. In finding that "the evidence tends to show that other selling agents with a control of at least 70 per cent of the production in their respective districts will be organized if the petition in this case is dismissed." (Findings of Fact No. 24, R. 175.)
24. In finding that "in many consuming markets having a lower freight rate from other producing districts than from Appalachian territory, Appalachian coal has a marked competitive advantage over other coal because of its quality, lower cost of production or established marketing machinery, or a combination of these and other advantages." (Findings of Fact No. 27, R. 176.)
25. In finding that "captive mines are mines owned by consumers of coal in connection with their

individual business. The output of these mines is substantially non-competitive with the coal of the defendants. The owners of captive mines do not ordinarily sell a large amount of their coal in competitive markets . . . . these mines have not been purchased for the purpose of selling their output, and future needs of their owners constitute the primary consideration in their operations; and with a return to normal business conditions their output will not be a material factor in the commercial market." (Findings of Fact No. 29, R. 180.)

26. In finding that "Ohio during the same year shipped 750,581 tons to Michigan, of which about one-third was from northern and two-thirds from southern Ohio. Part of Ohio has the same freight rate to the Michigan peninsula as Appalachian territory, part of Ohio has a freight rate 25 cents less, and part of a freight rate 50 cents less, but Ohio coal, generally speaking, is of poorer quality." (Findings of Fact No. 39, R. 195.)

27. In failing to find that the organization of Appalachian Coals, Incorporated, is the conclusion of the considered efforts of a group of leaders in the coal industry to better the general deplorable conditions existing therein, that any improvement in said conditions will be in the public interest and that the promotion of private interests, if any, will be only incidental to such general improvement in said conditions.

28. In failing to find that the organization of Appalachian Coals, Incorporated, is the the natural and normal development of the long established custom of selling coal through agencies, and that it does not differ materially from other sales

agencies, many of which have been in operation in the coal industry for many years.

29. In failing to find that defendants do not and could not control the business, or any part of the business, in any market where their coal is sold.
30. In failing to find that Appalachian Coals, Incorporated, has no power to fix prices in any market.
31. In failing to find that the different grades (sizes) and qualities of coal produced by the defendant producers keenly compete with each other in all markets where they are sold, for the same uses, but at different market prices.
32. In failing to find that in all markets where defendants' coals are sold, including those markets where they have sold the largest percentages of the total coal sold in those markets, they meet keen competition from other producers of coal, from both the Appalachian and other coal producing regions, willing, anxious and able to supply all the coal needed in such markets.
33. In failing to find that in the markets in which coal will be sold by Appalachian Coals, Incorporated, the percentage of coal that has been sold in these markets by producers located in the Appalachian territory or in any other producing territory is not a true measure of competition in these markets in that it does not take into account actual and potential solicitation of business by producers of coal who do not sell large quantities of coal in these markets; and that in the markets in the States of Illinois, Indiana, Michigan and Ohio there is active and keen solicitation of business by producers located in western Pennsylvania, Ohio, Indiana and Illinois and that this active and continuous

solicitation of business furnishes keen competition to producers located in Appalachian territory even though this competition is not reflected in the dollar value of coal sold by producers located in those producing districts; and that in the States of Virginia, North Carolina, South Carolina and Georgia there is a similar situation with respect to coal from middle Tennessee, Alabama and the smokeless fields of West Virginia.

SUMMARY OF CONTENTIONS OF APPELLANTS

An agreement among producers in the same branch of industry for the purpose of promoting efficiency and economy, even though it restricts the competition formerly existing between the parties to the agreement, is not prohibited by the Sherman Act, unless either (a) an intent unreasonably to restrain or monopolize interstate commerce is implied from the character of the acts or from the circumstances surrounding the transaction, or (b) by reason of its inherent nature the agreement will have the direct and necessary effect of unreasonably restraining or monopolizing interstate commerce.

Intent

1. Appalachian Coals, Incorporated, was formed pursuant to a controlling and lawful purpose and the restraint upon the interstate shipment of bituminous coal, if any, is incidental to the accomplishment of that lawful end, and therefore not unreasonable within the meaning of the Sherman Act.

2. No intent to restrain or monopolize interstate commerce is to be inferred from the form of organization

adopted by these producers, for the reason that Appalachian Coals, Incorporated, was formed as a normal method of business organization in the coal industry and is the form of organization best adapted to the accomplishment of the lawful purposes of these defendants.

THE DIRECT AND NECESSARY EFFECT OF THE ORGANIZATION OF APPALACHIAN COALS, INCORPORATED

1. Appalachian Coals, Incorporated will not achieve monopoly because it will not have the power to dominate or set the price of coal in any consuming market. On the contrary, the price of coal will continue to be set in an open competitive market.

2. The formation of Appalachian Coals, Incorporated, will increase the competitive sale of bituminous coal from Appalachian territory and will thus promote rather than restrain interstate commerce.

ARGUMENT

I.

AN AGREEMENT AMONG COMPETITORS IN THE SAME BRANCH OF INDUSTRY FOR THE PURPOSE OF PROMOTING EFFICIENCY AND ECONOMY, EVEN THOUGH IT RESTRICTS THE COMPETITION FORMERLY EXISTING BETWEEN THE PARTIES, IS NOT PROHIBITED BY THE SHERMAN ACT, UNLESS EITHER (a) AN INTENT UNREASONABLY TO RESTRAIN OR MONOPOLIZE INTERSTATE COMMERCE IS IMPLIED FROM THE CHARACTER OF THE ACTS OR FROM THE CIR-

CUMSTANCES SURROUNDING THE TRANSACTION, OR (b) BY REASON OF ITS INHERENT NATURE THE COMBINATION WILL HAVE THE DIRECT AND NECESSARY EFFECT OF RESTRAINING OR MONOPOLIZING INTERSTATE COMMERCE

We shall make no attempt to discuss the assignments of *error seriatim,* for the reason that to do so would unduly prolong this brief. The substance of all of the assignments of error will be discussed under the various headings of this Brief.

Not all restraints are forbidden by the Sherman Act. Every contract or combination necessarily restrains the freedom of the parties. The Sherman Act, however, is concerned only with such contracts and combinations "as by reason of intent or the inherent nature of the contemplated acts, prejudice the public interest by *unduly* restricting competition or *unduly* obstructing the course of trade." *Nash* v. *United States,* 229 U. S. 373, 376 (1913); *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.,* 221 U. S. 106 (1911). (Italics ours.)

This rule of law was specifically applied by this Court to a combination in the form of a holding company controlling formerly competitive units to achieve economies and promote efficiency in the steel industry and develop domestic and foreign commerce in steel. In *United States* vs. *U. S. Steel Corporation,* 251, U. S. 417 (1920), the Government contended that the size and power of the United States Steel Company was so great as to be unlawful regardless of purpose, because by their necessary effect, they prevented that degree of competition to which the public had long looked for protection.

It appeared that the *United States Steel Corporation* produced between 45% and 50% of the total steel produced in the United States. It also appeared that with respect to certain items, its percentage of production was considerably higher. For example, it produced 64.7% of all wire rods; 56.1% of all steel rails, and 64.6% of all hoops, bands and cotton ties.

The comparative size of this company is best illustrated, however, by the fact that its largest competitor produced only 4.4% of the total steel products of the United States. (Government Brief in the *Steel* case, Vol. 2, Page 846.)

In spite of this evidence showing the great size of the combination, the District Court had found that:

> "in location, facilities, capital, and basic supplies, they (competitors) show such strong past, present, and prospective competition as affords just ground for concluding that the steel and iron business of this country is not being, and indeed cannot be, monopolized by the Steel Corporation. *For the real test of monopoly is not the size of that which is acquired, but the trade power of that which is* not acquired." (Italics ours.) (223 Fed. 68.)

In sustaining the holding that the United States Steel Corporation neither restrained nor monopolized commerce, the Supreme Court found that

> "It is greater in size and productive power than any of its competitors, equal or nearly equal to them

all, but its power over prices was not and is not commensurate with its power to produce." (251 U. S. 445.)

The contention of the Government that the possession of such size made the combination illegal regardless of purpose was answered by the Court in the opinion, as follows:

> "The corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence, but we must adhere to the law and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible." (251 U. S. 451.)

The *Steel* case clearly indicates that a combination of formerly competitive units is not necessarily illegal even though the direct and necessary effect of the combination is to eliminate competition formerly existing between its members. It appeared in that case that the Steel Corporation was a holding company owning the stock of the following former competitors: American Steel & Wire Company, American Tin Plate Company, American Sheet Steel Company, American Steel Hoop Company, National Tube Company and the American Bridge Company. Each of these companies was itself a combination of formerly competitive units. In spite of the elimination of competition between these companies this Court found no evidence of any *continuing* intent to restrain or monopolize interstate commerce in steel products. On the contrary, it recognized the economic advantages flowing from the combination, particularly the desirability of integration in such an industry.

The appellants contend that, like the combination upheld in the *Steel* case, Appalachian Coals, Incorporated, represents a combination for the purpose of achieving economies and promoting efficiency in the sale of bituminous coal. It may be pointed out that in the *Steel* case the Court found that any intent and purpose to restrain or monopolize commerce had been abandoned, and that the sole question to be determined by the Court was whether the size attained and the power acquired were sufficient to make the combination illegal. In this case there is no illegal purpose to be abandoned, but, on the contrary, the testimony affirmatively establishes a lawful purpose. (*Supra* pp. 24 to 34.) It may be pointed out that Appalachian Coals, Incorporated, is not an attempt at the same kind of integration as the Court considered in the *Steel* case. It is obvious that integration is not in itself a test of legality, but is merely evidence of a lawful purpose. Integration as it existed in the steel industry had no place in the production and sale of coal. Each of the purposes for which Appalachian Coals, Incorporated was organized was directly related to the peculiar conditions existing in the bituminous coal industry and was calculated to promote efficiency and achieve economies in the coal industry just as integration was intended to achieve economies in the production of steel.

Accordingly, the District Court found that Appalachian Coals, Incorporated, was intended to supplement orders for one grade of coal with orders for the other grades which were necessarily produced as an incident to the first grade. (R. 163, 210.) This distribution of orders is necessary to prevent the further breakdown of the industry resulting from the forced sale of coal of all grades for which there are no orders but which are necessarily produced in complying with contracts of sale for a particular grade. This is the type of integration best adapted to the coal industry. Such integration not only is desirable but it is essential if the price of coal is to be determined in a normal competitive market.

The District Court distinguished the *Steel* case on the ground that the combination was corporate in form and apparently from this fact alone it concluded that the Steel Corporation had resulted "from normal growth and development." (R. 229.) The United States Steel Corporation was a holding company. While such a holding company may have been a normal and usual method of conducting business at that time, it may be doubted whether it is still a normal method in view of the provisions of Section seven of the Clayton Act (38 Stat. 730). But there can be no doubt that exclusive common selling agencies are usual and normal methods of combining selling facilities in the coal industry. The District Court found that common exclusive selling agencies similar in form to Appalachian Coals, Incorporated had long existed in the coal industry, and that at the New York meeting:

> "Attention was directed to the fact that sales agencies had played an important part in the distribution of coal during the past sixty years and that during a period of from twenty to twenty-five years a particular agency had sold substantially the entire output of the Pocahontas coal field on the N. & W. railroad. At that time there existed other exclusive agencies operated under contracts with producers to sell their entire output, or so much of it as could be sold, in the competitive market." (Findings of Fact No. 19, R. 168.)

The court also found that in general these contracts were identical in substance with the contracts between the defendant producers and Appalachian Coals, Incorporated. (R. 168.) Whatever may be said of other industries, there can be no doubt that selling agents are both necessary and normal in an industry composed of thousands of small and independent producers of coal who can operate only if their product is distributed over a widely scattered market.

The District Court recognized the practical necessity of selling agents when it stated in its opinion that common exclusive selling agents "would not he condemned in the absence of an actual intent to eliminate competition and affect prices." (R. 230.) In the case at bar there is affirmative evidence of a lawful purpose and this evidence is supported by the findings of the court below (*supra* pp. 24 to 34). The inference to be drawn from the statement quoted above that an actual intent to eliminate competition is present in this case is directly contrary to all the evidence and to the findings of fact. Obviously, the *Steel* case could not have held that a combination large enough to "affect" prices was illegal, for every transaction in the market, whether large or small, "affects" prices and the Steel Corporation controlled the production of approximately fifty per cent of the entire steel industry.

The rule of law applied by this Court in the *Steel* case was not new. It was specifically stated by the late Chief Justice Taft in 1914 in his book, "The Anti-Trust Law and the Supreme Court," as follows:

> "The effect of the cases is that a mere union of capital in the same branch of industry for the purpose of promoting economy and efficiency, though it uses interstate commerce, and though to the extent of the business of the two firms or companies it suppresses the competition of each against the other, is *not within the statute unless what is done necessarily has the effect to control all the business or can be shown by the character of the acts to be intended to effect that purpose or to be a step in the plot to bring it about. Mere bigness is not an evidence of violating the act. It is the purpose and necessary effect of controlling prices and putting the industry under the domination of one management that is within the statute.* This evil is to be punished or restrained under the statute, no matter how ingenious or varied the device for bringing it about may be. The court will look through the form of the device adopted to evade the effect of the law to its essence, to the intent, and to the result." (p. 112.) (Italics ours.)

Here again, there is no distinction drawn between corporations and other normal and usual methods of combining formerly competitive units.

This principle finds its roots in the English common law. In the *Standard Oil* case, *supra,* this Court referred to the case of *Mogul Steamship Co.* v. *McGregor* (1892), A. C. 25, and stated that the opinions in that case accurately summarized the law in England at the time the anti-trust statute was enacted. That was an action for damages. The defendants were firms of shipowners who had formed an association for the purpose of securing to themselves the homeward tea trade from China by offering exceptional and very favorable terms to customers who would deal exclusively with them. The Court found that the combination was not formed with any malicc or ill-will toward the plaintiff. Nor was it formed to exclude the plaintiff from the tea trade. The Court held that the combination had been formed primarily for the purpose of furthering the trade of the defendants and securing profits and that this was a lawful purpose. Judgment was given for the defendants.

In speaking of the combination, which was not corporate in form, and which was formed for the lawful purpose of furthering the trade of the defendants, the opinion of Lord Morris states, at page 50:

> "Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade

of competitors, provided they do no more than is incident to such motive object, and use no unlawful means. And the defendants' case clearly comes within the principle I have stated."

It is inconceivable that the Sherman Act, at this late date, is to be construed as condemning a combination merely because a combination in the form of a common selling agency rather than a consolidation of physical assets in one corporate entity, or the formation of a corporate holding company, is the means used to achieve a lawful purpose. The true test of legality is to be determined by the purpose and effect of a combination. This is exactly what is meant by the following extract of the lower court opinion of Lord Justice Bowen in the *Mogul Steamship Company* case:

> "The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one

> individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression—of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides." (L. R. 23 Q. B. D. 598, 617.)

That opinion recognized, and it is not disputed, that certain kinds of conduct not criminal in any one individual may become criminal if done by several. But that doctrine has no application to an agreement or a combination of capital for a lawful purpose, namely to achieve economies in trade, where, as here, the activities of the combination are reasonably confined to the accomplishment of that purpose.

If the distinction drawn by the District Court between open cooperation between small competitive units to accomplish economies in industry and corporate consolidations or corporate holding companies is to be sustained, the effect will be to retard the normal growth of the small, poorly financed business unit and to subsidize corporations of sufficient size and financial strength to effect corporate consolidations or mergers. The effect of the application of this principle was pointed out by Mr. Justice Brandeis in his dissenting opinion in the case of *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 418 (1921) as follows:

> "If, as is alleged, the Plan tends to substitute stability in prices for violent fluctuations, its influence, in this respect, is not against the public interest. The evidence in this case, far from establishing an illegal restraint of trade, presents, in my opinion, an instance of commendable effort by concerns engaged in a chaotic industry to make possible its intelligent conduct under competitive conditions.
>
> "The refusal to permit a multitude of small rivals to cooperate, as they have done here, in order to protect themselves and the public from the chaos and havoc wrought in their trade by ignorance, may result in suppressing competition in the hardwood industry. These keen business rivals, who sought through cooperative exchange of trade information to create conditions under which alone rational competition is possible, produce in the aggregate about one-third of the hardwood lumber of the country. This court held in *United States* v. *United States Steel Corporation*, 251 U. S. 417, that it was not un-

lawful to vest in a single corporation control of 50 per cent. of the steel industry of the country; and in *United States* v. *United Shoe Machinery Co.* 247 U. S. 32, the court held that it was not unlawful to vest in a single corporation control of practically the whole shoe machinery industry. May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting field of consolidation? And if they do, may not another huge trust with highly centralized control over vast resources, natural, manufacturing and financial, become so powerful as to dominate competitors, wholesalers, retailers, consumers, employees and, in large measure, the community?"

The following decisions indicate that combinations for the purpose of promoting trade by achieving economies and by the introduction of more effective sales methods are not forbidden by the Sherman Act, even though they incidentally eliminate competition formerly existing between the parties.

In *Whitewell* v. *Continental Tobacco Company*, 125 Fed. 454, 458 (1903), Judge Sanborn stated:

> "If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy in restrain of trade, within the true interpretation of this act, and it is not subject to its denunciation."

We submit that the case at bar comes squarely within both the language and general purport of that decision, and that the true test of legality is there laid down. It is immaterial whether a combination is blessed with sufficient money to assume the form of a corporate merger or consolidation or even a corporate holding company. The real test is whether it will have the effect condemned by the Sherman Act. To condemn this organization merely for the reason that it is not a corporate organization is, we repeat, to disregard the substance of the Act and to worship its form.

The case of *Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918) clearly outlines the test of legality for which we are contending.

That case involved an agreement by members of the Chicago Board of Trade to maintain between the close of the Exchange on one day and the opening on the next, the price which had been that day determined by open competition on the floor of the Exchange. The Court held that the agreement had no material effect on market prices and that in any event its effect was merely to continue in effect a price established in an open competitive market. In that case, as here, the Government urged that there was involved a price agreement which eliminated all price competition between the parties and which was, therefore, illegal *per se*. In rejecting this contention, the Supreme Court, in an opinion written by Mr. Justice Brandeis, stated:

> "The case was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality

of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." (p. 238.)

The rule of law for which we are contending is set forth in the following cases: *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383, 404 (1912); *American Press Association* v. *United States*, 245 Fed. 91 (1917); *National Association of Window Glass Manufacturers* v. *United States*, 263 U. S. 403 (1923); *United States* v. *International Harvester Company*, 274 U. S. 693 (1927); *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291 (1930); *Robinson* v. *Suburban Brick Company*, 127 Fed. 804 (1904); *Arkansas Brokerage Company* v. *Dunn et al.*, 173 Fed. 899 (1909); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1894) App. Cas. 535.

From the cases cited it is apparent that Appalachian Coals, Incorporated, is a lawful organization unless

(A) An intent unreasonably to restrain or monopolize interstate commerce is implied from the character of the acts or from the circumstances surrounding the transaction, or

(B) By reason of its inherent nature the combination will have the direct and necessary effect of restraining or monopolizing commerce.

We come now to apply this test to the facts of the case at bar.

A. INTENT

1. *Appalachian Coals, Incorporated, was formed pursuant to a controlling and lawful purpose and the restraint upon the interstate shipment of bituminous coal, if any, is incidental to the accomplishment of that lawful end, and therefore not unreasonable within the meaning of the Sherman Act.*

In determining what is, and what is not, an undue restraint of trade within the meaning of the Sherman Act, it is clearly established by the decisions at common law and under the Sherman Act that when the main purpose of the contract or combination is lawful then those restraints which are purely incidental to and which subserve the main lawful purpose are not unreasonable. See especially *United States* v. *Addyston Pipe & Steel Company,* 85 Fed. 271, 282 (1898).

The controlling purpose in the formation of Appalachian Coals, Incorporated, was to increase the sale and thus the production of Appalachian coal by better methods of distribution, intensive advertising and research. (R. 210-211.) Such efforts by these defendants must necessarily result in promoting trade by increasing the competitive sales of Appalachian coal.

Appalachian Coals, Incorporated, was also intended to achieve economies in the production and sale of coal. Inasmuch as the cost of production is decreased in direct proportion to the increased running time of the mines, economies in production were expected to result from increased sales of Appalachian coal. (R. 1079-1080, 750-752.) Increased running time is also of first importance to mine labor. Other economies in selling would result largely from elimination of duplication of sales effort and in a lower advertising cost per unit. (R. 208, 210-211.) Insofar as this is a combination to achieve economies in the marketing of coal, it was formed pursuant to a lawful purpose within the meaning of the *Steel* and *other cases* cited *supra*, at pages 66 to 79.

It was also expected that, so far as the defendant producers were concerned, Appalachian Coals, Incorporated, would eliminate the deceptive and abnormal practice of "pyramiding" coal whereby different selling agents in the same market are authorized, subject to prior sale, to offer the same coal in the same market to the same customers at the same time. (R. 210.) As a result of this prcatice, the buyer is led to believe that more coal is being offered on the market than is actually the fact. The elimination of this practice would, therefore, merely remove an element of deception from the market and permit the price of coal to be established in open and actual competition. A combination to establish normal competitive conditions is not unlawful.

The formation of Appalachian Coals, Incorporated, was also intended to lessen the losses of the defendants resulting from the shipment and sale of distress coal. (R. 210, 162-163.) It is impossible to produce one size of coal without also producing one or more additional sizes. Consequently, if a mine is unable to obtain orders for all sizes of coal it must of necessity produce coal for which it has no available orders. Inasmuch as there are no available storage facilities at the mines, the coal for which there are no orders must be loaded into railroad cars and started toward some market or billing point. "If the coal is not sold by the time it reaches its destination, it is set on a sidetrack by the railroad, and, if not unloaded promptly, goes on demurrage. For the first two days the demurrage is at the rate of $2.00 a day per car. Beginning with the third day, the rate is $5.00, equal to ten cents per ton each day. With coal selling from fifty cents to one dollar and fifty cents per ton for different grades, if the shipper does not dispose of it very quickly, he will not get enough for the coal to pay the demurrage charges." (Findings of Fact, No. 11, R. 163.) Under such conditions the coal is dumped on the market regardless of price or demand.

The defendants, however, have not expected to eliminate entirely the shipment of distress coal, but have formed an organization which will have sufficient capital and selling facilities to asure that the coal of these producers will be distributed over a widespread consuming market. By reason of this fact, it is hoped that Appalachian Coals, Incorporated will be able to balance orders for the various sizes and grades of coal and thus reduce, if not eliminate, so far as these defendants are concerned, the necessity for mining and shipping distress coal. (R. 210.) We submit that such a joint effort to prevent the forced sale of coal below the cost of production is not illegal.

The applicable principle of law was enunciated by this Court in *United States* v. *American Tobacco Co.,* 221 U. S. 106, 177 (1911) where it was stated that an agreement to prevent "cut throat" competition, and reasonably confined to that purpose, is legal. The Court said:

> "Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the Old American Tobacco Company, asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that as the act forbids every contract, and combination, it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war."

This contention of the Government was rejected by this Court.

This statement of this Court indicates that insofar as the formation of Appalachian Coals, Incorporated, was intended to prevent, or at least lessen, the ruinous trade practices of shipping distress coal without orders and regardless of demand and selling it at prices below the cost of production, it was formed pursuant to a lawful purpose and any restraint which was merely incidental to that lawful purpose would not be unreasonable.

The question is further presented whether the formation of Appalachian Coals, Incorporated, exceeded what was reasonably necessary to accomplish these lawful purposes.

The primary purpose of these defendants being to sell more coal and to develop an efficient, economical and effective marketing organization and to eliminate so far as possible the destructive trade practices growing out of the sale of "distress" coal and the "pyramiding" of orders, it is obvious that these purposes could only be achieved by joint action of these defendants. (R. 210.)

The use of a common, exclusive selling agent was the marketing method with which these defendants were best acquainted through long experience in the coal industry. This method alone offered a means of consolidating selling effort at small expense. The evidence shows that a selling organization of the size and financial strength of Appalachian Coals, Incorporated was essential if the widespread consuming markets were to be effectively reached by all the producers and if the destructive trade practices were to be materially lessened. (R. 329.) Moreover, if the destructive practice of "pyramiding" coal was to be eliminated as far as the defendants were concerned, it was necessary that Appalachian Coals, Incorporated be made an exclusive selling agent. It is obvious that this practice would continue so long as the same distress coal could be offered in the same market by more than one selling agent. But it is equally clear that this practice cannot exist, or will be curbed, where the producer is represented by a single selling agent.

The further question is presented whether an illegal intent is to be implied from the fact that Appalachian

Coals, Incorporated, will be a large competitive unit. In the case of *Standard Oil Company* v. *United States, supra,* the Supreme Court stated that "unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation * * * of the stocks of so many other corporations, * * * gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of *intent and purpose*" to monopolize. (221 U. S. 75.)

However, the size of Appalachian Coals, Incorporated, and its power over the market are in no sense comparable to that which the Supreme Court was considering in the *Standard Oil* case. In that case it appeared that the combination had the power to control and in fact did control the price of crude petroleum. The evidence in this case shows that Appalachian Coals, Incorporated, will not have the power to set the market price for coal in any market in which it will sell, and the District Court so found. (R. 225, 175.) Consequently, no inference of illegality can arise on this record. But assuming, *arguendo,* that the size of Appalachian Coals, Incorporated, is sufficiently large to give rise to a *prima facie* presumption of intent and purpose to monopolize, it is submitted that on the face of the record in this case any such presumption is conclusively overcome. No complainant has been produced by the Government. On the contrary, competing producers, consumers, wholesalers and retailers have unanimously declared that Appalachian Coals, Incorporated, would not have the power to dominate or control any consuming market or to injure its competitors, *supra,* pages 38 to 57. This is the testimony of men who know conditions. The testimony also shows the lawful purpose for which it was organized. Unless every witness introduced by the defense is unworthy of belief, any *prima facie* presumption of an illegal intent must therefore fall.

The quotation, from the opinion of this court in the *Chicago Board of Trade* case, *supra,* with respect to what agreements and regulations are and are not illegal, might well have been written in deciding the instant case. Here we have under consideration an effort by small producers of coal to maintain their existence in the competitive market by effecting economies, by better distribution practices, by increasing the use of coal and by broadening their markets. By reason of the present lack of such advantages, small producers are unable to obtain a living share of business, particularly of the business of large consumers who must have ample and dependable sources of production to supply their needs. In no other way can small producers participate in the most desirable coal trade. Under present conditions, competition is being limited by the destruction of small producers, with an inevitable tendency toward a monopoly in the production of coal in the hands of a few. This is an effort of small producers to maintain their industrial independence and life by correcting the evils and weaknesses which now handicap them.

For the reasons stated, it is submitted that Appalachian Coals, Incorporated, was formed pursuant to lawful purposes and that its formation did not exceed what was reasonably necessary to accomplish these ends.

2. NO INTENT TO RESTRAIN OR MONOPOLIZE INTERSTATE COMMERCE IS TO BE INFERRED FROM THE FORM OF ORGANIZATION ADOPTED BY THESE PRODUCERS, FOR THE REASON THAT APPALACHIAN COALS, INCORPORATED, WAS FORMED AS A NORMAL METHOD OF BUSINESS ORGANIZATION IN THE COAL INDUSTRY AND IS THE FORM OF ORGANIZATION BEST ADAPTED TO THE ACCOMPLISHMENT OF THE LAWFUL PURPOSES OF THESE DEFENDANTS.

The District Court made a basic distinction between what it described as "a bona fide corporate organization resulting from normal growth and development," (R. 229) and "artificial agreements designed to limit the operation of natural economic laws." (R. 230.) In this latter classification it would put all exclusive selling agencies having the power to "affect" market prices and apparently it would not apply the same test to corporate organizations. The description of a common selling agent as an "artificial" combination ignores the findings of fact that "sales agencies had played an important part in the distribution of coal during the past sixty years and that during a period of from twenty to twenty-five years a particular agency had sold substantially the entire output of the Pocahontas coal field on the N. & W. Railroad," and that "there existed other exclusive agencies operating under contracts with producers to sell their entire output, or so much of it as could be sold, in the competitive market. As a rule, these contracts provided that the agency would use its own judgment on spot sales as to prices and quantities sold, but where the sale called for delivery for a period of more than sixty days, it was required that the producer be notified and his consent obtained as to quantity and price." (Findings of Fact, No. 19, R. 168.)

The provisions of the existing agency contracts, as found by the Court below, are almost identical with the contracts between Appalachian Coals, Incorporated, and the respective producers. (R. 168-169, 87.) Both contracts obligate the selling agent to sell the entire output of the producer or so much of it as can be sold in the competitive market. In each case the contracts provide that the agency shall determine the price and quantity of spot sales but where the contract called for delivery for a period of more than sixty days, it was required that the producer be notified and his consent obtained as to quantity and price. These are the essential provisions of the contracts between Appalachian Coals, Incorporated, and the defendant producers.

The operation of an exclusive common selling agency is, therefore, a usual and normal method of selling coal in the Appalachian Territory and Appalachian Coals, Incorporated, differs from existing agencies chiefly in the fact that it is larger in size, although one witness testified that one exclusive selling agent operating in about the year nineteen hundred "was fully equal in importance to this company that was formed with fifty-eight million tons." (R. 727.) Appalachian Coals, Incorporated, assumed the form of an exclusive common selling agency not for any sinister purpose but because that was the method of selling coal long in use and with which these defendants were acquainted, and they believed that it was the only practicable method of selling coal efficiently and of effecting the purposes for which Appalachian Coals, Incorporated, was formed.

The Sherman Act permits the making of normal and usual contracts to further trade by normal methods, and this may be done by agreement. In the *American Tobacco Case, supra,* Mr. Chief Justice White in referring to the Standard Oil opinion, said:

> "* * * that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose" (221 U. S. 179).

Similarly, in *Moore* v. *New York Cotton Exchange,* 296 Fed. 61, the Circuit Court of Appeals for the Second Circuit stated:

> "As construed by the Supreme Court in the cases cited and in those about to be cited, the Sherman Act is not construed as forbidding or restraining the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. And see *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; *United States* v. *Reading Co.,* 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

> "The cases disclose that where the facts clearly show that the purpose of a contract is not to regulate, obstruct or restrain interstate commerce, but that the object is properly and fairly to regulate the transaction of the business in which the parties to it are engaged, the agreement will be upheld as not within the statute. The contract is good if 'it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.' *Anderson* v. *United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300" (p. 68).

The lower court was itself compelled to recognize that an exclusive common selling agency was not illegal *per se*, but excluded from its condemnation cases where it represented only a few producers who did not have the power to "affect prices." (R. 230-231.) It is therefore apparent that no illegal purpose is to be presumed merely because Appalachian Coals, Incorporated, assumed the form of an exclusive common selling agency; but if this organization is to be distinguished from existing agencies, that distinction must lie in the fact that it is larger in size.

B. THE DIRECT AND NECESSARY EFFECT OF THE ORGANIZATION OF APPALACHIAN COALS, INCORPORATED.

The testimony in this case shows conclusively that Appalachian Coals, Incorporated, will not have the power to dominate or set the price of coal in any consuming market. (*supra* pp. 38 to 57.) The District Court in its opinion stated that "the agency will not be able to fix market prices or establish monopoly control in the markets in which it sells . . ." (R. 225.) There is no evidence of any intent to restrain or monopolize the interstate shipment of bituminous coal. On the contrary there is undisputed affirmative proof that Appalachian Coals, Incorporated, was formed pursuant to a lawful purpose. In view of this purpose and in the absence of any power in Appalachian Coals, Incorporated, to fix market prices or establish monopoly control, the question is squarely presented whether by reason of its size and alleged competitive strength the direct and necessary effect of the formation of Appalachian Coals, Incorporated, would be to restrain or monopolize interstate commerce in bituminous coals.

We have pointed out that a similar question was considered by the Supreme Court in the case of *United States* v. *United States Steel Corporation, supra.* The direct and necessary effect of that combination was to eliminate competition formerly existing between the parties.

The combination in that case produced and sold approximately 50% of all of the steel products sold in the United States. It also appeared, however, that with respect to certain items, its percentage of the total sales was considerably higher. The Government urged in view of the elimination of price competition and of the great size and competitive strength of the Steel Corporation, that the direct and necessary effect of the combination was to restrain trade. The Court rejected that contention and held that the combination was lawful.

Comparing the size of Appalachian Coals, Incorporated, with that of the United States Steel Corporation it appears that the former will sell 11.96% of all coal produced and marketed in the United States east of the Mississippi River (R. 179, while the latter sold approximately fifty per cent of all steel products sold in the United States as a whole, or four to five times as much as the percentage which Appalachian Coals, Incorporated, will sell in the more restricted territory east of the Mississippi River. Undoubtedly the percentage of total sales of the Steel Company was greater in some states than in others. Similarly the percentage of total sales by defendant producers varied from a fraction of one per cent in Mississippi to approximately 53.3% in South Carolina (*infra* Appendix I, page 131). But even in South Carolina the percentage of sales by Appalachian Coals, Incorporated, will be about the same as the percentage of all sales of steel products in the entire United States controlled by the United States Steel Corporation.

In the case at bar the District Court, in speaking of the decision in the *Steel* case, pointed out that "where a corporation has grown large by natural processes, even though absorption of competition be involved, it is almost a matter of impossibility to dissolve it without injury to the public interest." (R. 230.) This is purely a practical consideration which does not minimize the holding of this Court in the *Steel* case. A practical consideration which we believe is of more importance is the fact that Appalachian Coals, Incorporated, could be dissolved with the greatest ease. A mere cancellation of the agency contracts would restore the defendants to their present competitive positions. There is, therefore, not the same degree of danger to the public as in the case of a consolidation or merger, for in this case any abuse of power can be effectively dealt with by dissolution.

The lower court would further distinguish the formation of Appalachian Coals, Incorporated, from the Steel Corporation because "the unified control arising from such combination will necessarily affect prices, not only as a result of the elimination of competition between the members themselves, but also because of the position of leadership and influence in the trade which the combination will acquire." (R. 231.) The extent to which Appalachian Coals, Incorporated, will affect prices is not stated. We had supposed that all sales of coal affected prices. Is some vague and uncertain test as to the degree to which prices are affected to be the determining factor? The District Court did not say so, but attempted to escape this dilemma by saying that Appalachian Coals, Incorporated, will necessarily affect prices "because of the position of leadership and influences in the trade" (R. 231) and that its organization is therefore illegal. The same argument was advanced by the Government in the *Steel* case, *supra*, and rejected by this Court (251 U. S. 417, 449).

In *United States* v. *International Harvester Company,* 274 U. S. 693 (1927) it was urged upon the Court that the combination was illegal and in violation of the provisions of a decree not only because of its great size and power but also because this necessarily induced competitors to attempt to follow the prices established by the International Harvester Company and therefore to affect and restrain price competition. In holding that this did not constitute a violation of the Sherman Act, the Supreme Court stated:

> "It has not, either during those two years or since, attempted to dominate or in fact controlled or dominated the harvesting machinery industry by the compulsory regulation of prices. The most that can be said as to this, is that many of its competitors have been accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines; but one of its competitors has habitually sold its machines at somewhat higher prices. The law, however, does not make the mere size of a corporation, however, impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. *United States* v. *Steel Corporation,* 251 U. S. 417, 451. *And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. United States* v. *Steel Corporation, supra,* 448. And see *Cement Mfg. Protective Assoc'n.* v. *United States,* 268 U. S. 588, 606 (274 U. S. 708.) (Italics ours.)

The size of the combination considered in the *Harvester* case is in marked contrast with that of Appalachian Coals, Incorporated. Its dominance is reflected in the following table:

Harvesting Machines Sold by the International Harvester Company in the United States in 1923

Products	*Number Sold*	*Percentage of Total in U. S.*
Grain binders	30,161	71.2
Corn binders	13,419	70.6
Mowers	70,341	63.4
Reapers	401	37.7
Headers and push binders	1,040	73.7
Sulky rakes	27,627	35.4
Side delivery rakes, including sweep rakes	5,031	45.3
Tedders	10,380	93.1
Harvester threshers	430	33.8

(Government Brief, p. 154 in the *Harvester* case, *supra.*)

Of the total harvesting machines sold in the United States, the International Harvester Company sold 64.1%. Its total sales of certain types of harvesting machines constituted as much as 90% of the total sales of all such types. Its largest competitor sold 12.9%, and its next largest competitor 5.1% of all harvesting machines sold in the United States. A mere recital of these percentages indicates that the Court in sustaining the combination could not have applied the test laid down by the District Court, namely, whether a combination would affect prices. In fact, it was assumed by this court in the Harvester case that by reason of its dominance in the industry the combination "affected" prices. (p. 708.)

We submit, therefore, that the true test of monopoly of a market or restraint of trade is not whether in some mysterious way the sales of the combination may effect prices or even whether it will be an important and influential factor in the industry. *The true test is not the size of the combined companies but the competitive strength of the companies that are not acquired. United States v. United States Steel Corporation,* 223 Fed. 55, 68. Appalachian Coals, Incorporated meets this test squarely.

No testimony by complaining or protesting witnesses was produced by the Government. There is no testimony even suggesting that keen competition will not remain after the formation of Appalachian Coals, Incorporated. On the contrary it appeared that producers located in the same competitive territory who have not contracted to sell coal through Appalachian Coals, Incorporated, produced in 1929 approximately 46% of all coal produced in this region (R. 179) and had a present installed productive capacity greatly *in excess* of the combined actual production of the defendants for that year. (R. 207.) But the mere recital of statistics does not fully reflect the competitive strength of the non-defendant producers. Several of these non-defendant producers from the Appalachian region appeared as witnesses and testified that

1. Appalachian Coals, Incorporated would not have the power to set the price of coal in any market in which its coal is sold.
2. Appalachian Coals, Incorporated would not have the power to put its competitors generally, or any of its principal competitors, out of business.

(Findings of Fact No. 51; R. 216; R. 486, 532, 541, 512.)

They also testified that in the event that Appalachian Coals, Incorporated, attempted to set an arbitrary price for coal, they would expect to come into the market, cut the price for coal and secure the business. (R. 487, 541.) Similar testimony was given by representative producers located in the production fields of western Pennsylvania, Alabama, Ohio and Illinois. (Findings of fact No. 51, R. 216; R. 529, 532, 498, 499, 545, 578, 579.)

Large commercial consumers of coal and retail and wholesale dealers in coal testified that the formation of Appalachian Coals, Incorporated, would be of benefit to the coal industry and that after its formation they would still be able to buy coal in a competitive market at a competitive price. (Findings of fact No. 49, 50; R. 213-215.)

The opinion of the lower court in the *Steel* case, *supra,* p. 67, 223 Fed. 55, 78, correctly states the significance of such testimony as follows:

> "*For of the conduct of the Steel Corporation, the views of its competitors is the best gauge. Monopoly and unreasonable restraint of trade are, after all, not questions of law, but questions of hard-headed business rivalry, and whether there is monopoly of an industry, whether trade is subjected to unreasonable restraint, whether there is unfair competition, are facts about which business competitors best know and are best qualified to speak.* And it may be accepted as a fact that where no competitor complains, and much more so where they unite in testifying (Campbell, volume 5, p. 1857; Smith, volume 19, p. 7942;

> King, volume 6, p. 2121; Bowron, volume 25, p. 10247; Pigott, volume 26, p. 11075; Manning, volume 19, p. 7701) that the business conduct of the Steel Corporation has been fair, we can rest assured there has been neither monopoly nor restraint. Indeed, the significant fact should be noted that no such testimony of acts of oppression is found in this record as was given by the competitors of the Tobacco or Standard Companies in the suits against those companies. We have carefully examined all the evidence given by competitors of the Steel Corporation. We have read the testimony of customers who purchased both from it and from its competitors. Its length precludes its recital here, but we may say its volume, the wide range of location from which such witnesses came, and their evidently substantial character in their several communities make an inevitable conclusion that the field of business enterprise in the steel business is as open to, and is being as fully filled by, the competitors of the Steel Corporation as it is by that company." (Italics ours.)

Officers of Appalachian Coals, Incorporated and of certain defendant producers testified that Appalachian Coals, Incorporated will meet vigorous competition in every market in which its coal will be sold and that it will not have the power to set the market price for coal in any market. This testimony has not been contradicted. It is supported by the testimony of competitors, consumers, and dealers. (*supra* pp. 38 to 57.) The existence of competition is a fact about which these witnesses are competent to testify and their testimony should not be ignored.

The weight which should properly be given such uncontradicted testimony, when as here it is supported by other facts, was indicated by the Court in *International Shoe Company* v. *Federal Trade Commission,* 280 U. S. 291, 299 (1930), as follows:

> "In addition to the circumstances already cited, the officers of the International testified categorically that there was in fact no substantial competition between the companies in respect of these shoes, but that at most competition was incidental and so imperceptible that it could not be located. The existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the business which they have carried on, assert that there was no real competition in respect of the particular product, their testimony is to be weighed like that in respect of other matters of fact. And since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted."

In the light of the testimony in this case we submit that in every market in which it will sell, Appalachian Coals, Incorporated will meet vigorous competition from other producers able and willing to supply that entire market and whose competitive strength insures that Appalachian Coals, Incorporated will not be able to dominate or control any market. (*supra,* pp. 38 to 57, see Appendix I, page 131.) In addition, competition will continue to exist between the coals sold by Appalachian Coals, Incorporated by reason of their differences in quality and intrinsic value, such coals being interchangeable as to use and the consumer having a choice based upon difference in quality and price. (*supra.* p. 36.)

II.

THE OPINION OF THE DISTRICT COURT

We make no attack upon the Sherman Act. It embodies a principle as old as the common law. It is old because it is sound. Reduced to the ultimate, it is that private gain is subordinate to the public interest.

Before going further, the defendants here and now disclaim any such contention as the Court attributes to them in its opinion, when it says:

> "It is argued with much force that organization is essential to the preservation of the coal industry, one of the basic industries of the country, and that the organization can be effected only by means of some such arrangement as that embodied in the coal-selling agency before us; but this is an argument which addresses itself to the law-making branch of the government." (R. 240-241.)

The same idea is expressed in the concurring opinion of Judge Soper, as follows:

> "So, the defendants say that since they are unable to conduct their business successfully under prevailing competitive conditions, they should be allowed to introduce a form of group control." (R. 242.)

We make no such contention. On the contrary, we contend that the plan and contracts in issue are lawful, unless, and in that event only, they are shown to be in restraint of trade. That fact must affirmatively appear if the plan and contracts are to be condemned.

The strength of the principle of law embodied in the Sherman Act is found in its flexibility in meeting changing conditions. What is restraint of trade and what is the public interest, are currently determined by the changing conditions of a growing and progressive civilization. No rule of thumb defining these terms has ever been formulated, nor is it possible to do so.

This Court has recognized the truth of this statement by saying that each case involving this question must be determined upon its own facts and circumstances. *Maple Flooring Association* v. *United States*, 268 U. S. 563, 579 (1925). It is a far cry from the ancient case where a tailor in a small town sold his business and covenanted with the buyer that he would not again engage in that business, to the instant case where a group of coal producers adopt a plan for the betterment of conditions in a vital, but prostrate, industry, but the legal test is the same in both instances. In the latter case restraint of trade can no more be tolerated and the public interest can no more be disregarded, than in the former; but what will constitute restraint of trade, what will be promotive of trade, what will be inimical to the public interest and what will be to the public interest, are far more complex questions than those involved in the sale by the tailor. They must be correctly answered before the underlying principle involved in both cases properly can be applied.

In aid of the solution of such problems, this Court has further said that not all restraint of trade is unlawful, but only such as is unreasonable, again recognizing the controlling effect of the facts and circumstances in each particular case.

These fundamental principles and rules are here reiterated because, it is respectfully submitted, the District

Court's opinion and decree show that it failed to give them proper consideration. It failed to give to the facts, disclosed by unquestioned evidence, which make up the economic background and setting of this case, the significance to which they are entitled. The plan and contracts under investigation here, condemned hy the District Court, have their origin in that economic situation and should be approved or condemned in the light of the facts of that situation.

Many pages of the record are given to a statement (a) of the deplorable condition of the coal industry; (b) of the interest of those employed in the mines and their dependent families; (c) of the interest of the public, individuals, other businesses, state, county and municipal organizations, in the welfare of that industry; and (d) of the beneficial effect upon all concerned, if the defendant Appalachian Coals, Incorporated, is put into operation. The conclusion is, as the evidence shows, that labor will be helped and the public interest will be promoted, and not, as the District Court seems to think, that the defendants contend that favors should be granted to them. The defendants have entered into contracts which can be held to be unlawful only in the event that they adversely affect the public interest by "unreasonably restraining trade;" but the private interests of the defendants may be disregarded entirely, and the evidence shows that, from the standpoint of the public interest alone, these contracts will inure to the benefit of all the inhabitants of the coal producing states, as well as of the consumers. The defendants need not, and do not, claim that their efforts are purely altruistic and solely in the public interest, but they do claim, and believe, that they have shown by undisputed evidence that the results which they seek to attain are as clearly in the public interest as in their own. This fact the court has failed properly to appraise.

The Court admits the need for doing something for the coal industry when it says:

> "The evidence before use discloses that the condition of the coal industry for many years has been indeed deplorable." (R. 223.)

It further negatives any idea of improper motive or intent on the part of defendants in the formation of Appalachian Coals, Incorporated, and accords to them recognition of proper motives and honest efforts to carry them into effect, for it says:

> "Before the defendants began operating through the Agency, however, they called the attention of the Department of Justice to what they were proposing to do. Although, for the reasons hereafter stated, we think the plan violative of the Sherman Act, it is but due to the defendants to say that the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from over-expansion, destructive competition, wasteful trade practices and the inroads of competing industries." (R. 222-223.)

Thus we have, in the Court's own words, a statement of a deplorable condition, brought about by known and stated causes, with an open and fair effort to improve conditions by normal and usual contracts in the coal industry. But while the District Court correctly stated the facts, it gave them no weight and concluded as a matter of law that the combination was *per se* illegal.

We submit, therefore, that the first error made by the District Court was in failing to construe and apply the statute itself, in the light of the facts in this case, and in actually deciding it upon isolated statements of this Court in other cases in which the facts and issues were either wholly different or where the similarity was at most, only partial. Later on we shall attempt to differentiate the cases cited by the Court from the instant case, for it is believed that such radical differences exist as to make them inapplicable or not controlling here.

Going to the heart of the decision of the trial court, it appears from the opinion, to be based upon the idea that the contracts between Appalachian Coals, Incorporated, and the producer defendants constitute a price-fixing agreement, and that any price-fixing agreement is, *per se*, unlawful.

We shall now discuss that question, from the standpoint of the Court, as we understand it, and hope to demonstrate that the Court is in error, and that no price fixing agreement was ever intended or made or could have been effective if it had been made.

In the first place, the language of the contracts expressly negatives that theory. Appalachian Coals, Incorporated, covenants that it "will use its best efforts to sell all the coal produced by the producer at the best possible prices obtainable." (R. 89.) It then provides how Appalachian Coals, Incorporated, shall pro rate orders, "when the demand is not sufficient to absorb the output of all producers represented by the Selling Agent." (R.89-90.) It thus appears that the Selling Agent is to "use its best efforts to sell all the coal produced by the Producer," but it is recognized that this cannot always be done because, at times, "the demand is not sufficient to absorb tbe output of all producers represented by the Selling Agent." This positive obligation by the Selling Agent "to use its best efforts to sell *all* the coal produced by the Producer," is the complement of another provision of the contract authorizing it to sell the coal "at the best price or prices obtainable under existing competitive conditions." (R. 91.) So it is clear that the Selling Agent must sell all the coal it can and sell it at the market price. There is only one thing tbat can prevent it from selling *all* such coal, namely, that the demand is not sufficient to "absorb" it.

The Court, in its opinion, says:

> "The Selling Agent will not be able, we think, to fix the market price of coal." (R. 238.)

It will thus be seen that the Selling Agent is affirmatively bound by the contract to sell at prices which it cannot "fix."

The Court is in error, therefore, when it says tbat the Selling Agent "is empowered to fix the price at which these producers will sell and to refuse to sell at offers less than that price." (R. 238.) It is bound by the contract to sell "at the best price obtainable under existing competitive conditions," (R. 91) which means the market price, and the Court admits that it cannot "fix the market price of coal." (R. 238.) It has no power or authority to "refuse to sell" under any conditions.

The fact is that the Selling Agent has the power to *name an asking price, but it is its duty to accept some offer* that is made it, namely, the one that it believes to be the best "obtainable under existing competitive conditions." (R. 91.) There is no necessary relation between the two.

Failure to make this distinction led the Court into another error in applying the decision in the case of *Chesapeake & Ohio Fuel Company* v. *United States,* 115 Fed. 610 (1902), to the facts in this case as a decision "almost on all fours with the case at bar." (R. 238.) In that case, a committee of producers actually fixed prices and the Agent was *not allowed* to sell at lower prices. Its power was thus specifically limited. The District Court, commenting on the decision in the *Chesapeake* case, said:

> (It) "is very pertinent here, when it is remembered that the contract here under consideration restricts the right of the producer to sell the coal except through the agency. If the agency fails to sell it at the prices which have been fixed, his mines must remain idle; for he cannot sell except through the Agency." (R. 239.)

As has been shown above, Appalachian Coals, Incorporated, has no power to fix prices, but is under a specific obligation to sell at the best price it can get. It would violate the express terms of its contract if it *refused* to sell because it could not obtain the prices which it asked. It has no choice in the matter. It must sell "at the best price or prices obtainable," (R. 91) which means best market prices, which the Court says it has no power to "fix." (R. 238.)

But the *Chesapeake & Ohio Fuel Case* is distinguishable on other grounds. In that case, on the facts before it the Court declared:

> "The parties may well be concluded to have intended * * * to put an end to competition in the district * * * *by getting all the operators into an agreement* to sell for a single price, to be fixed by a committee of their number, and to limit competition among themselves in markets near and remote, within the scope of the agreement" (p. 623). (Italics ours.)

In the case at bar, however, the defendant producers consciously avoided any attempt to get all the operators in the district to sell through Appalachian Coals, Incorporated. (R. 172.) Unlike the facts presented in the *Chesapeake & Ohio* case there is, therefore, no evidence in this case of an attempt to monopolize a local market or any other market and the court below found no such intent.

It may also be doubted whether the principles of law discussed in the *Chesapeake & Ohio* case are sound. The case was decided prior to the announcement of the "rule of reason" by the Supreme Court in the *Standard Oil* case, *supra,* and it is obvious from the opinion that the decision rests on a rule of law later rejected. The Court said:

> "* * * Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for considera-

> tion by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the states" (p. 619).

The rule of law applied in that case was specifically repudiated by the Supreme Court in the subsequent *Standard Oil* decision, 221 U. S. 1 (1911).

For these reasons, it is respectfully submitted, the *Chesapeake & Ohio* case has no application here.

At several places in the opinion the statement is made that the amount of coal offered for sale by Appalachian Coals, Incorporated will "affect" prices. For example, the Court said:

> "Where the parties to such a combination control a substantial portion of the trade, however, the unified control arising from such combination *will necessarily affect prices,* not only as a result of the elimination of competition between the members themselves, but also because of the position of leadership and influence in the trade which the combination will acquire." (Italics ours) (R. 231.)

Any amount of coal offered for sale on any market will "affect" the prices on that market. For example, the record indicates that under the abuse called "pyramiding," whereby ten cars of distress coal, placed in the hands of ten dealers for sale, in any given market, become, on that market, one hundred cars, the market price is not only "affected" but may be determined. (R. 164.) The effect on the market price of offering coal for sale in any market depends upon many things, among them the demand and the total amount of coal offered. These factors make the market price. Other things being equal the more coal offered, the less the market price. If all agreements are to be condemned which "affect" prices, there must be an end of all trade.

It is also submitted that the court is in error in saying that the defendants *control* "a substantial part of the coal sold in the markets in which they compete," (R. 221) and "control a substantial portion of the trade." (R. 231.) It is true that they *have heretofore sold* a substantial part of the coal sold in some of the markets where they sell, but they have no control over any of these markets, or over any trade therein, but must meet the keenest kind of competition everywhere. Every sale made is made after meeting that competition and the contest is constant. The evidence is that in every market where this coal is sold, other producers are present willing, anxious and able to supply all the coal needed in that market. (R. 484, 493, 504, 511, 541.)

The testimony also indicates that the effect of these contracts will not be to destroy competition between these defendant producers in any market, except to a certain extent where the coals are identical in quality. See *supra* p. 36. Even then, there will remain competition between identical coals for the reason that the coals of certain producers being sold under trade names will move more freely than the coal of other producers. In this regard the testimony shows that the consumer will be furnished coal from particular mines if he so specifies. (R. 222.) The effect of this situation will be that the producer whose coal does not move freely will insist that the selling agent meet the competition of the better known coal and accept such price as will move his coal at approximately the same rate as that of the other producer. (R. 347-348, 702.) It has already been shown that the contracts accord with that evidence, for the Agent agrees, in each case, to *sell* all the coal that the market will absorb. Absorption, not price, is the factor which determines whether or not the coal will be sold. This is in recognition of the fact that the realization to the producers will vary as the cost of production varies, and in view of the fact that its cost of production is dependent upon running time, (R. 1079, 710, 715-716) each producer will insist that his coal be sold.

The court also draws a distinction between a corporation "resulting from normal growth and development," (R. 229) and what it terms "loose combinations," (R. 227) meaning groups held together by agreements, and seems to reach the conclusion that the acts of the former are to be treated with more leniency than can be extended to the latter.

The distinction made by the Court in favor of the great corporation as against "loose combinations," (R. 227) is that the former (in the *Steel* case a holding company) "is ordinarily the product of natural economic forces," (R. 229) leaving the *non sequitur* inference that agreements, such as we have here, are not. The Court, referring to such corporations, further says: "Such organizations have grown large ordinarily because of the economic law of increasing returns is operative—because internal economies and the elimination of duplication and waste make operation on a large scale more profitable than in small units." (R. 230.)

The Court seemingly overlooked the fact that these defendants, by the organization of the Sales Agency, seek to accomplish the identical economies and improvements in conditions named by the Court, as appears from Exhibit A filed with the answer, (R. 50, 54-66) and testified to by many witnesses. The Court cannot mean that these defendants cannot organize for the purpose of accomplishing those ends simply because they have a "loose combination" while a corporation may pursue that course simply because it is a "tight" organization. It escapes the possibility of having such a meaning applied to what it says about corporations, by describing the "loose combinations" it has in mind, and says: "Combinations of independent producers, on the other hand, organized to fix uniform prices (which it elsewhere says these defendants cannot do) for the sale of their products or to eliminate competition among themselves (which we have shown these defendants have not done), are artificial agreements designed to limit the operation of natural economic laws —." (R. 230.)

The present Sales Agency, Appalachian Coals, Incorporated, is as truly and fully "the product of natural economic forces" (R. 229) as any corporation, in the nature of a holding company or otherwise, to which the Court applies that justifying and pardoning phrase. For more than sixty years coal has been ordinarily and regularly sold by exclusive sales agencies. The evidence discloses numerous specific instances. This agency differs from its predecessors only in size, and that difference is not very striking when it is compared with Castner, Curran & Bullitt which, for years, sold the entire output of coal from the Pocahontas Field (R. 335). The whole situation of the coal industry has changed. The over-productive capacity of the mines has given rise to many bad trade practices, such as shipping coal on consignment, distress coal, and pyramiding, all described in the evidence, injurious to mine owner, labor and consumers, to say nothing of the state and municipal organizations and general business in the coal states. Coal is in a life-and-death struggle with substitute fuels, oil and natural gas, and with hydro-electric power. There is insistent need that such trade practices be eliminated and that the competition with oil, natural gas and hydro-electric power be adequately met. None of these things can be done by individual producers or by a few, but must be done by an organization of a sufficient number of producers to finance it properly. The lower court suggests that a corporation's natural growth may be properly approved because "the economic law of increasing returns is operative," (R. 230) but surely these defendants are not to be condemned because they would lessen the effect of the law of decreasing returns which is operative in their case.

Assuming that the distinction drawn by the lower court between corporations and other forms of co-operative enterprise is sound, let us apply that test to the facts of this case. Corporations may be merged to bring about integration, to secure additional outlets or facilities, to bring about economies in management or overhead, or merely to acquire a business or additional assets at a favorable price. Apparently by reference to the *Steel* case, *supra,* and other cases dealing with mergers and consolidations, the lower court would limit such combinations to the purchase of control through acquisitions of stock or acquisitions of physical property. But property may consist of intangible rights as well as of physical property. Does the District Court mean that one rule of law is to be applied if the assets transferred are tangible, and another is to be applied merely because the assets consist of rights that are not tangible? Clearly this cannot be the contention of the Government for the *Steel* case involved the control through stock ownership of all of the rights and properties of formerly competitive units having to do with the production and sale of steel. Through this control, the United States Steel Corporation had the absolute power to set a price for the steel products produced by the companies it controlled and to refuse to sell except at that price. It also had the power to determine tbe quantity of steel which should be produced by its constituent companies. While it may be urged that the effect of the contracts in this case is to consolidate in Appalachian Coals, Incorporated, certain of the rights of these defendants having to do with the sale of coal, such rights do not include the power to set a price and to refuse to sell at that price or the right to limit the production of coal.

On the contrary, there is imposed upon the defendant, Appalachian Coals, Incorporated, by the contracts, an affirmative duty and obligation to use its best efforts to sell all the coal of all the producers "at the best prices obtainable."

Inasmuch as Appalachian Coals, Incorporated, will be a corporation engaged exclusively in selling coal in the open market, the price at which it sells coal will, as a practical matter, be determined entirely by market price and will have no necessary relation to costs of production. Under the facts as disclosed in the record here, there being no power to control price, as the court below found, the coal must necessarily be sold irrespective of cost of production. Any arbitrary refusal to sell coal would be a direct violation of this provision of the contract. Appalachian Coals, Incorporated, can refuse an offer to buy coal upon one ground only, namely, that, in its opinion, it is not the best offer obtainable on the market. This is not some meaningless self-serving contractual declaration. Instead, it is the very gist of the contracts. It epitomizes the main and controlling purpose of these defendants, namely, to sell more coal and thus reduce the cost of production.

The main purpose of the contracts was not to "fix" or control prices, but to provide a means whereby more coal could be sold,—to create a means for effecting economies in the sale and production of coal and to attempt to prevent the further decline in the use and consumption of coal as against competitive fuels which, as we have shown, have made and are continuing to make serious inroads in the markets of the bituminous coal industry. *The change in the form of competition between the defendant producers in the sale of coal was entirely incidental to this main lawful purpose.*

For these reason, we respectfully submit that the court was not justified in saying, with reference to these matters:

> "It is said that this elimination of competition and any consequent effect on prices is but incidental to the proper purposes of the organization, as in the case of U. S. Steel Corporation or the International Harvester Company. But it is clear, we think, that these are not incidental, but are the very crux of the plan. It is upon the elimination of competition among the individual producers and the unified control given in offering their product upon the market, that the whole plan is predicated." (R. 225.)

Here again the Court suggests that if the combination assume the form of a corporate merger, consolidation or holding company, the elimination of competition between formerly competitive units may be incidental to a lawful purpose and therefore not unreasonable. But if the combination assume the form of a common selling agent the evidence of a lawful purpose will be disregarded and the "elimination of competition" will become, as a matter of law, "the very crux of the plan." No mere price-fixing scheme, if adopted and approved, could reach the fundamental evils which it is here sought to remedy. The parties to the plan adopted knew that a mere price-fixing scheme would be unlawful and likewise ineffective.

Even if there were no prohibitive law, coal producers would not be able to fix the price of coal by contract, by reason of the wide distribution of coal, developed and undeveloped, the diversified ownership thereof and the competition of other sources of energy. Nobody knows this more definitely than the coal people themselves. Their situation is similar to that of the farmers. Freed from the prohibitions of the Sherman Act, with full liberty of cooperation and with but a tenuous and unexercised theoretical governmental supervision over price-fixing, the farmers have been unable to exercise the least control over the price of their products. So it would be with coal producers, as to price-fixing, and these defendants would, therefore, never have attempted the impossible, as they are here charged to have done.

To consider and determine this case upon the narrow theory that prices will be "affected" is to fail to understand the nature and importance of the economic questions involved or to recognize the constructive work which has been here undertaken. And yet this has been done under a statute which forbids only unreasonable restraint of trade. The statute has been so construed by the lower court in this case as to forbid both the restoration and preservation of trade.

CASES RELIED ON BY THE DISTRICT COURT

The District Court rests its conclusion that the formation of Appalachian Coals, Incorporated, is illegal *per se*, largely upon the following decisions of the Supreme Court of the United States:

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897);
United States v. *Joint Traffic Association*, 171 U. S. 505 (1898);
Addyston Pipe and Steel Company v. *United States*, 175 U. S. 211 (1899);
United States v. *Union Pacific R. R.*, 226 U. S. 61 (1912);
United States v. *Trenton Potteries Company*, 273 U. S. 392 (1927);

American Column and Lumber Company v. *United States,* 257 U. S. 377 (1921);

United States v. *American Linseed Oil Company,* 262 U. S. 371 (1923);

Dr. Miles Medical Company v. *Park and Sons Company,* 220 U. S. 373 (1911).

The appellants take the position that the cases cited by the Court were decided on facts clearly showing that the main and controlling purpose of the agreements condemned was to remove competition and thereby *control* market prices with power to make these agreements effective; that *the agreements actually resulted in establishing arbitrary prices* and that in certain of the cases practices which in and of themselves were illegal were resorted to, in order to accomplish the main purpose of the agreements. On the other hand, the evidence in this case shows that Appalachian Coals, Incorporated, was formed pursuant to a lawful purpose, namely; to effect economies in producing, selling and distributing coal, to diminish the forced sale of distressed coal below the actual cost of production and without regard to market conditions, to eliminate pyramiding, to promote the use of coal as against competitive fuels, to broaden markets, etc., and that the elimination of competition, if any, was entirely incidental to this lawful purpose. In no case cited by the Court were the facts analogous to the case at bar, and the decisions are not, therefore, applicable.

The *Trans-Missouri Freight Association* case, *supra,* involved an agreement among eighteen railroad companies who formed an association for the purpose, among other things, of fixing the rates for transportation in an area comprising a large part of the United States. The purpose was made effective by fining members who failed to maintain the rates so fixed. The rates were arbitrarily made, because not determined or affected by competition and the parties had the power to enforce them. In holding this combination illegal, the Court emphasized the fact that each of the lines was itself a monopoly, so that the public was necessarily compelled to pay whatever rates were determined by the association of competing railroads. The agreement broadened the field of monopoly and consolidated it. The Court quoted with approval the following statement from the lower Court:

> "*As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements.* By reason of this fact the action of this Corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer and the merchant, from the sale of the products of the farm, the workshop and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country * * * A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the

public interest. *By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.* * * * (Italics ours) (166 U. S. 290, 336.)

Similarly, in the *Joint Traffic Association* case, *supra,* the Court considered the legality of an agreement among thirty-one railroad companies engaged in interstate transportation between Chicago and the Atlantic Seaboard with respect to the rates of transportation on their lines. The defendants attempted to distinguish this combination from that condemned in the *Trans-Missouri* case. This contention was rejected by the Court on the theory that the "natural and direct effect of the two agreements is the same, viz., to *maintain* rates at a higher level than would otherwise prevail." (171 U. S. 565.) (Italics ours.) These two decisions therefore condemn agreements between competing railroads, each of which enjoyed a monopoly along its lines, as a result of which agreements transportation rates were arbitrarily increased above the rates that would have been established in a competitive market.

The combination of railroad systems considered in *United States* v. *Union Pacific R.R., supra,* was similar in purpose and effect.

In the *Freight Association* and *Joint Traffic Association* cases, *supra,* the Court declared that the "rule of reason" was inapplicable to cases arising under the Sherman Act. In *Standard Oil Company* v. *United States,* 221 U. S. 1, the Supreme Court specifically overruled these dicta, hut indicated that the *Joint Traffic Association* and *Trans-Missouri Association* cases had nevertheless been correctly decided on the facts presented. With reference to the scope of these two decisions the Court declared:

> "But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States* v. *Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505. Both the cases involved the legality of the combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and

character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot by an possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made . . ." 221 U. S. 1, 64, 65).

In that case the defendants were engaged in a private business enjoying monopolistic privileges. But even if the test applied in the *Trans-Missouri* and *Joint Traffic Association* cases is applicable to the case at bar, it appears that Appalachian Coals, Incorporated, was not formed for the purpose of eliminating competition and in fact cannot achieve monopoly.

The *Addyston Pipe and Steel Company case, supra,* involved an agreement among six corporations manufacturing and selling iron pipe. The agreement was entered into for the purpose and with the effect of enhancing the price of pipe. The defendants in that case controlled and dominated the cast iron pipe market in a large number of states so that they were in fact *able to control the prices in those states.* In order to make the agreement effective, the defendants, by elaborate articles of association, followed by a series of secret meetings, formed a "bonus territory" and arranged, by a *system of false bidding,* for the elimination of all competitive bids in favor of the company to whom the association had assigned a particular monopoly in a particular territory. This combination was held to be in violation of the Sherman Act.

It is, however, utterly unlike the case at bar. It was an agreement among those *dominating* the market. It was entered *for the purpose of increasing prices, and actually resulted in such increase.* It was entered into in secrecy and made effective by deception of the consuming public.

In the case at bar the agreement was openly arrived at. There is no deception of the public. There is no intent to increase prices and the record conclusively shows that these defendants will not have the power to dominate any market in which their coal is sold, or fix the market price therein, but that on the contrary the price of coal will be determined in an open competitive market. In the Addystone Pipe and Steel Company case, the defendants both *had and exercised* the power to fix prices.

The case of *United States* v. *Trenton Potteries, supra,* involved the legality of a combination to fix prices by those controlling 82% of the business of manufacturing and distributing vitreous pottery throughout the entire United States. The respondents, twenty individuals and twenty-three corporations, had been convicted in the District Court of the United States for the Southern District of New York of violating the Sherman Anti-Trust Act.

> "The trial court charged, in submitting the case to the jury, that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the unreasonableness of the prices fixed, or the good intentions of the combining units, whether prices were actually lowered or raised or whether sales were restricted to the special jobbers, since both agreements of themselves were unreasonable restraints." (p. 395.)

The Circuit Court of Appeals for the Second Circuit reversed the judgment of convictions on the ground that there were errors in the conduct of the trial. On appeal to this Court it was urged on behalf of the Government that the Circuit Court of Appeals erred in holding in effect "(1) that the trial court should have submitted to the jury the question whether the price agreement complained of constituted an unreasonable restraint of trade." (p. 394.) Other errors were also urged.

In reversing the judgment of the Circuit Court of Appeals this Court declared:

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of

competition. *The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price tomorrow.* Once established, it may be maintained unchanged because of the *absence of competition* secured by the agreement for a price reasonable when fixed. Agreements which create *such* potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. *Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable*—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States* v. *Cohen Grocery Co.* 255 U. S. 81; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Nash* v. *United States, supra.* Thus viewed, the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It 'is a limitation of rights, * * * which may be pushed to evil consequences and therefore restrained.' *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49" (273 U. S. 397-398.) (Italics ours.)

This Court was speaking of an agreement fixing prices among those dominating and controlling the sale of vitreous pottery throughout the United States, and having the "power to *control the market* and to fix *arbitrary and unreasonable prices.*" It was a price agreement made among ostensible competitors. The power of these competitors was so great that the price could "be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." It is also obvious that the main and controlling purpose of such an agreement between ostensible competitors in an open market was to eliminate price competition.

The case at bar is utterly different The evidence without exception shows that Appalachian Coals, Incorporated, will not be able to set the market price for coal in any market where its coals will be sold. The trial court so found. Consequently it will not have the power to fix arbitrary and unreasonable prices. The price of coal will continue to be set in an open competitive market. Unlike the agreement involved in the *Trenton Potteries* case, the contracts with Appalachian Coals, Incorporated, were publicly and openly arrived at. All sales will be made through Appalachian Coals, Incorporated, so that there will be no deception of the public with respect to ostensible competition between defendant producers. No price has been fixed or proposed by agreement, so that, in fact, the question of the reasonableness of a fixed price is not presented. And finally, the evidence in this case conclusively establishes that the purpose of the formation of Appalachian Coals, Incorporated, was not to eliminate competition but, among other things hereinbefore set out, to achieve economies in production and selling; to minimize certain practices necessitating the sale of coal below the cost of production with resultant loss to the public, to labor and to the industry and to provide more efficient machinery for the marketing of coal than had existed prior to its organization. The doctrine that each case must turn on its own facts and circumstances (*American Foundries* v. *Tri-City Council,* 257 U. S. 184, 206, [1921]; *Maple Flooring Association* v. *United States,* 268 U. S. 563, 579 [1924]) is peculiarly applicable to cases arising under the Sherman Act and this case demands its application here. In any event there is no rule of interpretation which would extend the holding of the Supreme Court in the Trenton Potteries case beyond a price fixing agreement between ostensible competitors in an open market having the purpose and effect of controlling market prices.

This Court in the *Trenton Potteries* case stated that whether or not a particular price was reasonable was so difficult of determination that it would make "the difference between legal and illegal conduct depend upon so uncertain a test" that the Supreme Court was loathe to adopt it. We likewise submit that the test applied by the District Court, namely, that the combination has power to "affect" prices, is so uncertain in its meaning that it would bring into serious doubt the constitutionality of this, a criminal statute. See *Cline* v. *Frink Dairy Co.* 274 U. S. 445 (1927).

The cases of *American Column and Lumber Company* v. *United States* and *United States* v. *American Linseed Oil Company,* are also distinguishable. In the recent case of *Maple Flooring Manufacturers' Association et al.* v. *United States,* 268 U. S. 563 (1925), the Supreme Court had occasion to review its holding in the *American Column and Lumber and American Linseed Oil Company* cases. With reference to these cases the Court declared:

> "It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined under the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied. (268 U. S. 579.)
>
> * * * * *
>
> "The court held that the defendants in those cases were engaged in conspiracies against interstate trade and commerce because it was found that the character of the information which had been gathered and the use which was made of it led irresistibly to the conclusion that they had resulted, or would necessarily result, in a concerted effort of the defendants to curtail production or raise prices of commodities shipped in interstate commerce. The unlawfulness of the combination arose not from the fact that the defendants had effected a combination to gather and disseminate information, but from the fact that the court inferred from the peculiar circumstances of each case that concerted action *had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices*" (268 U. S. 584, 585). (Italics ours.)

This is the most recent declaration by this Court with reference to the precise holding in the cases relied upon by the Government. As thus defined by this Court, those decisions are obviously distinguishable from the facts at bar. In this case there is no evidence in the record that the operation of Appalachian Coals, Incorporated, will tend "arbitrarily to lessen the production or increase prices." This distinction is fundamental.

The case of *Dr. Miles Medical Company* v. *Park and Sons Company, supra,* involved a series of agreements between a manufacturer, retailers and wholesalers to maintain a resale price established by the manufacturer. No similar combination is presented in the case at bar.

We confidently invoke the principle that every case of this kind must be determined upon its own particular and peculiar facts.

The Government's contention in the court below was that the contracts between the defendants, Appalachian Coals, Incorporated and the defendant producers were intended to be, and are a price-fixing scheme, and, therefore, unlawful. As a necessary basis for that contention, the Government denied that the true purpose of those agreements was to effect the various economies, correction of abuses and broadening of the markets for coal herein discussed, with some voluntary suggestions as to other ways by which those ends might have been attained. This contention, and the assertions found necessary to sustain it, are contrary to the undisputed evidence. We submit that we have herein affirmatively shown that there is no basis, in fact, for the Government's contention.

CONCLUSIONS

This case is unique because the Sherman Act is invoked under conditions diametrically opposite to the conditions it was intended to meet. It is not here invoked by the Government to curb monopoly and restraint of trade accompanied by the imposition of arbitrary prices, but to prevent the application of a normal and tried method of selling coal in an effort to aid a prostrate and vital industry.

It is unique because the defendants invoke the Sherman Act and the principles it embodies, upon the ground that the circumstances leading up to the contracts under investigation, the terms of the contracts themselves, the intent of the parties and the necessary results from carrying these contracts into effect, demonstrate that these contracts are in the public interest, which the Sherman Act was intended to protect and promote. The true intent and effect of these contracts can be determined only in the light of all of these antecedent conditions. Upon this basis, we ask no judicial relaxation of the Sherman Act, but rely upon its true purpose and meaning when applied under the facts and circumstances shown in this case. To interpret and apply the Sherman Act to the facts in this case as herein contended, will, we submit, have the effect of giving to that Act the practical meaning and force that it was intended to have.

Finally, this case is unique because all the representatives of the public who appeared or testified in the case, including producers of coal in competition with the defendant producers, wholesale and retail dealers, consumers and representatives of the railroads that transport the coal, unanimously agreed that the sales plan under attack herein would inure to the benefit of all concerned.

For the reasons and upon the authority of the cases above cited, it is respectfully submitted that the decision of the District Court should be reversed.

Respectfully submitted,

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APPENDIX I

(Analysis of Competitive Markets)

THE EFFECT OF THE ORGANIZATION AND OPERATION OF APPALACHIAN COALS, INCORPORATED ON COMPETITIVE CONDITIONS IN THE BITUMINOUS COAL INDUSTRY

A. *THE POSITION OF APPALACHIAN COALS, INCORPORATED AS A COMPETITIVE FACTOR*

1. *The Percentage of Production of Appalachian Coals, Incorporated East of the Mississippi River and in the Appalachian Territory.*

The District Court found that:

"The total production of bituminous coal in States east of the Mississippi River, together with the total production of the defendant producers and the total production in the Appalachian Region, together with the percentage of production of the defendant producers and the percentage of production of the Appalachian Region for the year 1929, is as follows:

Defendant Tonnage (Gov. Ex. 3, Table I)	58,011,367	(1)
Outside (non-member) (non-captive)	20,541,841	(2)

(Gov. Ex. 3, Table II)

	78,553,208	(3)
Surrounding Territory	12,000,000	(4)
	90,553,208	(5)
Captive Mines (Gov. Ex. 3, Table III)	16,455,001	(6)
	107,008,209	(7)
Production east of Mississippi River	484,786,000	(8)
Percentage of total production east of Mississippi River Represented by defendants' production (Lines (1) and (8)	11.96	
Percentage of total Appalachian territory production (including captive) represented by defendants' production (Lines (1) and (7)	54.21	
Percentage of total Appalachian territory production (not including captive but including surrounding territory) represented by defendants' production (Lines (1) and (5)	64.00	
Percentage of total Appalachian territory production (not including captive mines or surrounding territory) represented by defendants' production (Lines (1) and (2)	74.4	

(Findings of Fact No. 29, R. 179.)

The figures given above require some explanation. The figure of 12,000,000 tons production in 1929 of the "Surrounding Territory" means production from territory immediately surrounding what is referred to in this case as the Appalachian territory. With respect to the coal produced in this surrounding territory the District Court has found that:

> "The coal produced in the surrounding territory is the same kind of coal as that produced in the Appalachian territory and is suitable for the same purposes and available to the same markets, generally on the same freight rates, and for all practical purposes might have been included in the territory described as Appalachian territory." (Findings of Fact No. 29, R. 181.)

The court then describes the location of this territory and finds that:

> "The operators were invited to the meetings, but there were scattered people around Chattanooga and Knoxville, Tennessee, who thought they had some advantage in the local markets and would be a little better off by not coming in. On the Virginia side, between the Virginia District and the Smokeless District, there are coal producers whose volatile matter is slightly lower than in the high volatile districts, and they thought they would have a little advantage in the markets by staying out of the organization.
>
> "On the K. & M. Railroad and the Kanawha River, some producers have river facilities for the shipment of coal on the Ohio which gave them a competitive advantage, and led them to stay out." (Findings of Fact No. 29, R. 181.)

It is therefore apparent that the tonnage of the coal operators in the "Surrounding Territory" must be included in the calculation, on a percentage basis, of the competitive position of the defendant producers who make up Appalachian Coals, Incorporated.

The other figure that requires comment is that of the tonnage produced by captive mines. The District Court found that:

> "Captive mines are mines owned by consumers of coal in connection with their individual business. The output of these mines is substantially non-competitive with the coal of the defendants. The owners of captive mines do not ordinarily sell a large amount of their coal in competitive markets. Some of the companies owning captive mines cannot, under present depressed conditions of industry, absorb the output of their mines and, therefore, offer a part of their production for sale in competitive markets. But these mines have not been purchased for the purpose of selling their output, and future needs of their owners constitute the primary consideration in their operation; and with a return to normal business conditions their output will not be a material factor in the commercial market. (Findings of Fact No. 29, R. 180.)

This finding of fact is assigned as error by appellants and the record contains testimony that at all times a substantial percentage, but, of course, not all, of the production of captive mines is sold in the open market. (R. 420, 724-726.)

The correct percentages are therefore as follows:

(a) 11.96%, representing the percentage of the total production of bituminous coal east of the

Mississippi River that is produced by the defendant producers who make up Appalachian Coals, Incorporated;

(b) the figure for the percentage of the production of the Appalachian territory that is produced by the defendant producers lies somewhere between 54.21% (which figure includes in the total production of the Appalachian territory the total production of captive mines) and 64.00% (which figure entirely excludes the production of captive mines in calculating the total production of the Appalachian territory).

Both of these figures properly include the production of the "Surrounding Territory."

The figure of 74.4%, as found by the District Court, only has validity in so far as it represents the action of the Cincinnati meeting of coal operators in fixing a certain area and a certain percentage of the production of that area for the purpose of determining whether or not the contracts between the coal producers and Appalachian Coals, Incorporated should become effective. The area fixed for this purpose arbitrarily excluded the "Surrounding Territory" and the tonnage of that area for the reason, as found by the District Court, that producers located in that territory did not wish to join Appalachian Coals, Incorporated, and also excluded entirely, for the same reason, the production of captive mines. But in determining the competitive strength of Appalachian Coals, Incorporated, the production of the "Surrounding Territory" should be included in its entirety and at least a part of the production of captive mines should be included. The whole of the production of captive mines is potentially competitive. It is impossible to determine at exactly what point between the figures of 54.21% and 64.00% the correct figure lies because there are no figures in existence showing the sales by captive mines in the open market. However, the evidence referred to above is sufficient to warrant a conservative assumption that the correct figure is about 60%.

2. *The Interchangeability of Coals Produced in the Appalachian Territory with Coals Produced in Other Territories for All Purposes.*

Throughout this Appendix I reference will be made to the production of the Tug River, Pocahontas, New River and Winding Gulf fields located in Southern West Virginia. These are the great low volatile or smokeless coal fields of this country, (R. 656), as distinguished from the high volatile Appalachian and other bituminuous coal fields. Coal from these fields is an extremely high grade low volatile coal and is sold as smokeless coal in both the eastern and western markets. This coal has a broader market than any other. (R. 657.) It is used for practically every purpose for which any coal coal can be used and its use has been growing very rapidly in Chicago, Cleveland, Detroit and all cities where they are insisting on smokeless fuel and where smoke ordinances exist (R. 656-657). The District Court found that this coal is generally competitive with coal from the Appalachian region. (Findings of Fact No. 30, R. 183.)

In the petition, paragraph X, it is alleged that "Appalachian coal is superior in quality to the coal produced in Indiana, Illinois and Ohio. The pig iron and glass industries can and do use Appalachian coal, but these industries can not use Indiana, Illinois or Ohio coal because of its sulphur content" (R. 16). This was denied in the Answer, paragraph X. (R. 38.)

The findings of fact of the District Court fully sustain appellants' position. As to the glass industry, the court found that:

> "Referring to the allegation in the petition, Paragraph X, page 23, as to the glass industry, it is found that for glass making, with the exception of a very small amount (about one-half of one per cent. of the total used for this purpose)—any kind of coal can be used, including coal from Indiana, Illinois, or Ohio, and natural gas and producer gas are very extensively used for this purpose." (Findings of Fact No. 28, R. 177.)

As to the pig iron industry, the District Court found that:

> "Coals from Pennsylvania and the Appalachian region can be and are interchanged for use in coking and gas making. The use of coal for metallurgical purposes is for the smelting and refining of pig iron and the refinement of other ores. In these industries coal is used to make coke and the coke in turn is used in the smelting and refining processes. For this purpose, by-product coke ovens are used almost entirely. Of the total number of by-product coke ovens in the markets in which Appalachian coals are sold, 77.6 per cent used coal from their own captive mines in 1929. Referring to the allegation in the petition, Paragraph X, page 23, as to the pig iron industry, it is found that Illinois coal and some Indiana coals have been successfully used in coke making, and therefore in the pig iron industry, and substantial tonnages of Illinois coal are now being used for

that purpose. Coals from Pennsylvania can be used for any purpose for which Appalachian coals can be used, including metallurgical purposes." (Findings of Fact No. 28, R. 176-177.)

In addition to the issues raised by the pleadings and disposed of in the findings of the court quoted above, the District Court made several general findings as to the interchangeability of these coals for other purposes. It found that:

> "For steam and all uses, excepting Ohio coals for metallurgical uses, Indiana, Illinois or other coals can be used instead of Appalachian if the cost warrants. A difference in the delivered price of coal of from a few cents to ten cents per ton will cause a change from one coal to another." (Findings of Fact No. 28, R. 177.)

Also, it found that:

> "For domestic purposes coals from any field can and are now interchanged with coals from the Appalachian region. High sulphur coal can be, and is, used in gas making, its use depending upon the final cost of making gas, after considering cost of coal plus cost of removing sulphur." (Findings of Fact No. 28, R. 177.)

The District Court in its findings also referred to the fact that often firing equipment is designed to burn a certain kind of coal and that frequently plant managers, engineers and firemen are reluctant to change from one kind of coal to another but the findings of fact quoted above and the abundant testimony in the record on which these findings are made fully support the statement that coal from the Appalachian territory must meet competition from all other coals for practically all uses to which coal can be put and that it has no peculiar qualities, other than a general reputation for being "one of the best high volatile coals" (Findings of Fact No. 28, R. 178-179) that in any way tend to minimize the force of competition of coal produced in the other producing regions of this country.

3. *The Productive Capacity of the Mines of Defendant Producers and of Non-defendant Producers and Potential Undeveloped Capacity In the Appalachian Territory.*

Coal, unlike a manufactured article, can only be produced if it exists and the existence of a developed capacity to produce coal has an important bearing on the competitive strength of any group of coal producers. The productive capacity of the mines of defendant and of non-defendant producers in the Appalachian territory is therefore of major importance.

The District Court found that:

> "The capacity of the non-defendant mines in the Appalachian region is 82,660,760 tons, as against a capacity in the defendant mines of 86,628,880 tons. The present yearly capacity of all mines in Southern West Virginia, Virginia, eastern Kentucky and Tennessee is 245,233,560 tons, based on an eight hour working day. This excess capacity over actual production could be brought into production at moderate expense and with reasonable promptness." (Findings of Fact No. 47a, R. 207.)

The annual capacity of all mines referred to above is derived from the mine rating statistics compiled by the railroads pursuant to Section 12 of the Transportation Act of March 1, 1920. In general this section requires all railroads to maintain mine ratings reflecting present installed productive capacity and to distribute railroad cars equitably between the mines on the basis of these ratings. All figures given above represent an annual productive capacity.

In addition to this installed capacity, the District Court found that in the Appalachian territory alone coal exists in such abundance that there are approximately 3,240,000 acres of coal land, containing more than 17,900,000,000 tons of recoverable coal, that are not now being developed or mined. The finding of the court is as follows:

> "In the eight districts in the Appalachian region alone, not held by any operating company or by any captive company, there are approximately 760,000 acres, containing more than 4,300,000,000 tons of recoverable coal. In addition to that amount, in the same territory, owned by captive companies and not being operated, or owned by operating companies who are using only a very small proportion of their holdings, there is an additional 860,000 acres, containing more than 4,600,000,000 tons of coal. Within the twenty-four counties in which the defendant producers are located, and immediately adjacent to them, on railroads already operating and in existence, with the exception of short, feeder extensions, there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recoverable coal, comparable both in quality and mining conditions with the coal now being mined in that region. The opening up of this acreage would in-

volve only the extension of short branch lines from the railroads and the building of mining plants. The price of these lands at the present time would be less than half of the value of two or three years ago, and considerably less on a royalty basis. Coal produced from these districts is available for any market in which Appalachian coal is sold. Conditions in the coal industry are such that new companies are free to enter the business of producing and marketing coal in competition with existing companies." (Findings of Fact No. 48, R. 207-208.)

The situation then is that there are two backlogs of coal (1) present installed productive capacity and (2) potential and undeveloped productive capacity. All of this enormous excess capacity, the District Court found, could be brought into actual production at moderate expense and with reasonable promptness and, further, that conditions in the coal industry are such that new companies are free to enter into competition with existing companies. The existing annual capacity of the mines of defendant and non-defendant producers in Appalachian territory is 169,289,640 tons (R. 1027), or almost twice the production of 90,553,208 tons in 1929. (R. 179.) The capacity of non-defendant producers in Appalachian territory is alone almost equal to the production of the entire region in 1929. The untapped reservoir of nearly 18 billion tons of recoverable coal is sufficient to furnish coal for almost 200 years if coal continues to be produced at the rate of production of the year 1929.*

*The production of defendant and non-defendant producers and of the surrounding territory in 1929 was 90,553,208 tons (R. 179). This indicates a coal supply at this rate of production for 198 years.

In the bituminous coal industry, producers must continue to meet potential competition from these abundant sources of supply. This is in marked contrast to the anthracite coal industry in which all available coal will be entirely consumed within a comparatively short period. Economists have long recognized that under the competitive system the ability of producers to come into the business is an effective check on high prices, and experience in the bituminous coal industry shows that in times of high prices there is a substantial increase in the number of mines operated and in the production of coal. (R. 1027-1028.) These factors are therefore vital to a proper understanding of the competition which Appalachian Coals, Incorporated, has to meet.

4. *Competition from Substitute Fuels Such as Oil and Natural Gas.*

The Findings of Fact of the District Court as to this important competitive factor are as follows:

> "(e) Consumption of coal in all of the industries which are its largest users has shown a substantial relative decline for some years and this is likely to continue for some time. The actual decrease is partly due to the industrial condition but the relative decrease is progressing, due to entirely other causes. Coal has been losing ground rapidly for a number of years to substitute fuels as a source of light, heat, and power. It has been losing markets to oil, natural gas, and water power, and has also been losing ground due to greater efficiency in the use of coal. The coal industry in 1916 furnished 72% of the total supply of energy from mineral fuels and water power in the United States. In 1919, this had

dropped to 64.6%. In 1929, it had dropped to approximately 54%. During the same period, from 1919 to 1929, natural gas and oil had increased from 17.9% to 32.1%, and water power from 4.7 to 7.3%. The increase in the use of coal over the decade from 1920 to 1930 was almost negligible, although the increase in heat, light, energy and power used was rapid. (Slight absolute increase of coal from 1916-1929.) These percentages are not strictly accurate because gasoline was excluded from the competition in 1916 and the entire coal industry was included in that year, but later only the soft coal industry.

"(f) The relative proportion of energy used in the United States furnished by coal has been decreasing steadily since 1909, while that furnished by oil, gas and water power has been increasing. This change has become more rapid during the last few years, due to the development of both oil and gas fields. Based upon the assumption that bituminous coal would have maintained the upward trend prevailing between 1900 and 1915 in percentage of total energy supply in the United States, the total substitution between 1915 and 1930 has been equal to more than two hundred million tons per year. The number of domestic oil burners in use has increased more than sixty-fold (12,500 to 774,500) from 1921 to 1931. In addition there are 42,500 commercial oil burners in use. About fifty per cent of all oil burners, both domestic and commercial, are in the markets in which Appalachian coals are sold." (Findings of Fact No. 9(e), (f), R. 160-161.)

These are, of course, general findings and the situation as it exists in particular markets will be set forth hereinafter. Attention is directed to Defendants' Exhibit 24 (R. 1052B) for a graphic presentation of the increasing inroads being made by water power, natural gas and petroleum on bituminous coal as sources of energy in the United States. This exhibit shows the increasing importance of petroleum and natural gas, particularly since 1926 and during the years 1930 and 1931.

The displacement of more than 200,000,000 tons of coal annually by substitute fuels has necessarily narrowed the market for coal and intensified the competition of coal producers in their efforts to retain their markets.

5. *The Declining Consumption of Coal by Railroad and Industrial Users as a Competitive Factor.*

In addition to the displacement of more than 200,000,000 tons of coal annually by substitute fuels, it has been estimated that the more efficient burning of coal by railroads, industrial users and public utilities has resulted in an annual decrease of approximately 101,000,000 tons of coal used by those large users. This is shown by the finding of the District Court that

> "The railroads have improved combustion methods and reduced their fuel consumption from 1916 to 1929 by 32,000,000 tons. In freight service, their consumption of coal per thousand freight ton miles dropped from 164 pounds in 1919 to 125 pounds in 1929.* The electrical industries decreased consumption of coal per kilowatt hour from approximately 3.2 pounds to 1.6 pounds,† and thereby reduced their

* In "The Competitive Position of Coal in the United States" (1931) published by the National Industrial Conference Board the following statement appears: "Comparison of average performances with the best individual locomotive records indicates that the progress made during the past decade has by no means reached its ultimate goal." (At p. 117.)

† In the same book mentioned in note (*) the following statement appears: "A fuel consumption of 1 pound per kilowatt hour may be expected." (At p. 62.)

requirements for coal in excess of 47,000,000 tons. Efficiency in the smelting of pig iron decreased the consumption of coal in relation to the pig iron made by 10,000,000 tons. The saving in by-product coke manufacture over the beehive system amounted to 12,000,000 tons." (Findings of Fact No. 9(f), R. 161.)

This represents a further substantial narrowing of the market for coal and, as in the case of substitute fuels, is a factor that intensifies competition in the sale of coal.

B. *THE POSITION OF APPALACHIAN COALS, INCORPORATED, AS A COMPETITIVE FACTOR IN THE COAL CONSUMING MARKETS IN THE STATES NORTH AND WEST OF THE OHIO RIVER.*

The principal markets in which coals produced in the Appalachian territory are sold are in the states north and west of the Ohio River. Thus, in 1929, (the last year for which complete consumption and distribution figures are available,) 65,947,037 tons or about 75% of the total tonnage shipped from this territory was shipped into the markets north and west of the Ohio River.* These markets are recognized as the most competitive coal consuming markets in the United States and this is particularly true of the states of Ohio, Michigan, Indiana and

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*Out of 87,667,139 tons shipped from this territory, 65,947,037 tons went into these markets. This calculation excludes 17,566,736 tons of railroad fuel which cannot be allocated by states of destination and 575,750 tons of exports by rail. (Defendants' Exhibit 1, Table VI, R. 1061A; Defendants' Exhibit 9, R. 1028A; R. 396.)

Illinois, into which go the great bulk of the shipments from the Appalachian territory (R. 396, 312, 315).

The tabulation which appears at page 147 of this brief shows with respect to each of the states north and west of the Ohio River and Lake Cargo shipments, (a) the total consumption of coal in 1929, (b) the tonnage shipped all-rail from the Appalachian territory (c) total sbipments by defendant producers, (d) the percentage of the total coal consumed that was shipped in by defendant producers and (e) the percentage that was shipped in from the Appalacbian territory, as a whole.

The figures given in that tabulation for consumption and distribution of coal by states do not include Lake Cargo coal as no figures are available to allocate by states the Lake Cargo shipments. It is evident that the percentages of shipments by defendant producers and from the Appalachian territory as a whole into Michigan, Ohio, the Chicago District and to a lesser extent to Wisconsin and Minnesota would be substantially reduced if this allocation were possible.

The table also shows the position of the Appalachian territory as a whole and of the defendant producers in each of the states named.

The District Court made the following general finding which explains why it is that coal from the Appalachian territory has been able to reach these distant markets:

> "When coals from the Appalachian region were first sold in the markets North and West of the Ohio River, they were considered more desirable because they were better cleaned and prepared but at the present time Western Pennsylvania and Ohio producers have installed modern equipment for the

ALL FIGURES AND PERCENTAGES ARE FOR THE YEAR 1929 AND SHOW ONLY ALL-RAIL SHIPMENTS EXCEPTING LAKE CARGO COAL

	Total Consumption of coal (including captive tonnage) — in tons*	Total shipments from Appalachian territory as a whole (including captive tonnage)*	Total shipments from defendant producers†	Percentage of total coal consumed (excluding captive tonnage shipped and consumed) that was shipped by defendant producers	Percentage of total coal consumed (including consumption and shipment of captive tonnage) that was shipped from the Appalachian territory as a whole‡
Ohio	45,847,286	15,941,414	10,955,157	33.7‡	34.8
Michigan	19,947,446	14,522,291	6,287,701	43.2‡	72.8
Indiana (except the Chicago District)	14,632,580	6,484,157	3,611,829	33.8‡	44.3
Illinois (except the Chicago District)	19,230,660	1,850,215	2,781,154		9.6
Chicago District	32,254,255	7,429,543	separate figures not available	10.00¶	23.0
Lake Cargo	39,204,835	17,172,446	5,974,487	20.7§	43.8
Iowa	7,921,207	1,621,689	997,200	17.2§	20.5
Missouri	10,186,388	296,948	26,380		2.9
Wisconsin	2,613,169	299,813	614,605		11.5
Minnesota	1,655,714	237,118	164,234		14.3
South Dakota	721,689	68,069	52,018		9.4
Nebraska	3,588,929	17,053	29,644		0.5
Kansas	2,367,985	6,281			0.3

* The figures in these columns for Ohio are taken from Findings of Fact No. 40, R. 196-197. for Michigan from Findings of Fact No. 39, R. 194; for Indiana from Findings of Fact No. 41, R. 199; for Illinois and the Chicago District from Findings of Fact No. 42, R. 201; for Lake Cargo from Findings of Fact No. 43, R. 202; and for the remaining states from Findings of Fact No. 44, R. 204.

† The figures in this column are taken from Government's Exhibit 2, Table I (R. 948A-948D).

‡ taken from Government's Exhibit 21. (R. 999.)

¶ This percentage is found in Findings of Fact No. 42 (R. 201).

§ These percentages were calculated in the same manner as the percentages in Government's Exhibit 21 (R. 999). From the figure of 39,204,835 total Lake Cargo tonnage there was deducted 9,056,317 tons (being 23.1% of the total Lake Cargo tonnage on account of estimated captive tonnage) and to the figure of 5,974,847 tons shipped by defendant producers there was added 272,320 tons, being 9.2% of the total of 2,960,518 unclassified shipments of defendant producers shown in Government's Exhibit 2, Table I (R. 948D), attributable to Lake Cargo shipments. (9.2 is the percentage that defendant Lake Cargo shipments, 5,974,487 tons, is of the total defendant tonnage of 58,011,384 less 2,960,518 tons of unclassified shipments). Similarly, for Iowa there was deducted from the total consumption 1,829,799 tons on account of captive tonnage and to the shipments of defendants there was added 53,289 tons, being 1.8% of the total unclassified shipments.

cleaning and preparation of coal, and this fact tends to put these coals on an equal competitive footing with the coal from the Appalachian region." (Findings of Fact No. 39, R. 195.)

In order to understand the competitive conditions in these states both from coals originating in other producing regions and from substitute fuels it is necessary to consider each state separtely.

1. THE STATE OF OHIO

The table appearing on page 149 of this brief shows the amount of coal moving all-rail into the State of Ohio in the years 1929 and 1931 from the producing regions named and the percentage of the total shipments from the various producing regions.

The table brings out clearly the extent of the competition of other producing regions, as shown by actual sales, that Appalachian Coals, Incorporated, must meet in Ohio. It also shows that between 1929 and 1931 coals from all of the producing regions, except the Ohio Districts, decreased in their percentage of the total while Ohio coals increased from 16.89% to 25.36% of the total. In the case of particular cities—such as Columbus, Fostoria, Lima and Marion—the decrease in the percentage of coal from the Appalachian region and the increase in Ohio coals, is even more marked. Findings of Fact, No. 40. (R. 198.) The District Court found that "in 1929 the Ohio districts produced approximately 24 million tons and these districts have a capacity of approximately 42 million tons" (R. 197-198). This productive capacity

	Movement of coal all-rail into Ohio (including captive tonnage) in tons of 2000 pounds*		Percentage of total shipments by each producing region named (including captive tonnage)†		Percentage of total shipments by defendant producers (excluding consumption and shipments of captive tonnage)
	1929	1931	1929	1931	1929
Appalachian territory as a whole	14,012,876	8,608,456	32.42	30.25	33.7‡
Northern West Virginia-Fairmont	2,948,673	1,734,438	6.82	6.09	
Southern West Virginia, Virginia and Maryland (low volatile)	5,340,729	3,324,233	12.35	11.68	
Western Pennsylvania	13,623,552	7,574,679	31.52	26.62	
Ohio (All Districts)	7,299,091	7,218,383	16.89	25.36	
Grand Total	43,224,921	28,460,189	100.00	100.00	

* The figures in these columns are taken from Findings of Fact No. 40 (R. 196-197).

† The percentages in these columns are taken from Findings of Fact No. 40 (R. 197) and Defendants' Exhibit 2, page 1.

‡ Government's Exhibit 21. (R. 999.) The probable explanation of the fact that this percentage is higher than the figure of 32.42% for shipments from the entire Appalachian region is that in the latter figure captive tonnage is included in the figure for consumption and shipments from the Appalachian territory as a whole, while in the former percentage captive tonnage is entirely excluded.

is approximately equal to the total consumption of the entire state in 1929 and far exceeds the consumption in 1931. The force of this competition will be more evident when the freight rate situation is considered.

As to this, the District Court found that:

> "Ohio coal has a freight rate advantage of 25 cents a ton over coal from the Appalachian territory on shipments into Southern and Southwestern Ohio, as shown in the area marked '1' on Defendants' Exhibit 9. Ohio coal has a freight rate advantage of 50 cents a ton over Appalachian coal on shipment into Northwestern Ohio, as shown in the portion of Defendants' Exhibit 9 marked '2.' (R. 1028A.)" (Findings of Fact No. 40, R. 198.)

In addition to competition from Ohio coal the District Court found, and the table clearly shows, that Appalachian Coals, Incorporated must meet competition from substantial quantities of coal from the Fairmont District of Northern West Virginia, the low volatile fields of Southern West Virginia, Virginia and Maryland and the high and low volatile fields of Western Pennsylvania and, of course, from shipments by non-defendant producers in the Appalachian territory. The court also found that there was a slight competition from coals from the neighboring state of Indiana from 1929 to 1931, even though no shipments were made, and that the "Illinois mines have freight rates that enable them to ship coal into Ohio if the market demand justifies it." (Findings of Fact No. 40, R. 197.)

The foregoing table shows only the all-rail movement of coal. An important movement of coal takes place into Ohio by barge down the Ohio River. As to this the District Court found that:

"About one-half of the bigh volatile coal, amounting to something over 1½ million tons, goes into Cincinnati by barge down the Ohio River. Western Pennsylvania coal for fifty years moved down the Ohio River into Cincinnati, and can now do so. This is also true of the Pomeroy, Ohio, districts, and of the West Virginia Panhandle district." (Findings of Fact No. 40, R. 199.)

It also found that:

"Along the Southern area of Ohio on the Ohio River, coal can now be moved from West Virginia, Northern West Virginia and Western Pennsylvania by barge." (Findings of Fact No. 40, R. 198.)

The evidence indicates that coal can be moved down the Ohio River from Pittsburgh to Cincinnati and neighboring points at a freight cost less than the all-rail rates from the Appalachian territory (R. 401).

With respect to competition from natural gas and fuel oil the map of oil and natural gas pipe lines, Defendants' Exhibits 6, 6A, and 6B (R. 1011, 1012A, 1012B), shows that Ohio is fairly honey-combed with pipe lines that carry these substitute fuels into practically every important city in Ohio. This indicates the increasing importance of this competition.

The District Court found that:

"Competition from natural gas and fuel oil in Cincinnati is keen and has displaced substantial tonnages of coal.

"The total consumption of energy in Ohio in 1929 derived from fuels and water power is shown in percentages as follows: from coal, 88.7%; from other fuels, 11.2%; from water power, .1%. The total energy consumed by manufacturing establishments in Ohio in 1931 was derived as follows: 90.7% from coal; 9.2% from other fuels; .1% from water power." (Findings of Fact No. 40, R. 199.)

2. THE STATE OF MICHIGAN

The table appearing at page 153 of this brief shows the amount of coal moving all-rail into the State of Michigan in the years 1929 and 1931 from the producing regions named and the percentage of the total shipments from the various producing regions:

The figures show only all-rail shipments into the lower peninsula of Michigan. A substantial tonnage comes into this market by the lakes but since it is impossible to allocate Lake Cargo shipments by states of destination it is only possible to state that the percentage of shipments by defendant producers would be substantially reduced if such an allocation were possible. This is particularly true in view of the small percentage of lake shipments shipped by defendant producers.

The most striking conclusion to be drawn from the above table is that, as in the case of the State of Ohio, from 1929 to 1931, the percentage of total shipments coming from the Appalachian territory as a whole decreased from 73.70% to 68.11% while in the same years Ohio coal increased from 3.86% to 8.11%, or more than doubled. Increases were also made by coals from Northern West Virginia, Western Pennsylvania and the smokeless fields. These increases occurred, as the District Court found, "while the production of coal generally was rapidly decreasing" (Findings of Fact No. 39, R. 196).

	Movement of coal all-rail into the lower peninsula of Michigan in tons of 2000 pounds (including captive tonnage)*		Percentage of Total Shipments by each producing region named (including captive tonnage)†		Percentage of total shipments by defendant producers (excluding consumption and shipments of captive tonnage)
	1929	1931	1929	1931	1929
Appalachian territory as a whole	14,311,087	8,836,199	73.70	68.11	43.2†
Northern West Virginia—Fairmont	167,145	212,408	.81	1.64	
Southern West Virginia, Virginia and Maryland (low volatile)	3,796,568	2,617,245	19.55	20.17	
Western Pennsylvania	235,227	229,313	1.21	1.77	
Ohio (All Districts)	750,052	1,051,757	3.86	8.11	
Indiana (All Districts)	48,718	9,586	.25	.07	
Illinois (All Districts)	34,568	8,422	.18	.06	
Western Kentucky	84,196	9,353	.44	.07	
	19,417,561	12,974,283	100.	100.	

* The figures and percentage in these columns are taken from Findings of Fact No. 39 (R. 194) and the Defendants' Exhibit 2, page 5.

† Government's Exhibit 21. (R. 999.)

This competitive situation is well shown in Detroit, the largest coal consuming city in the state, and also in Flint, another large coal consuming city. (Findings of Fact No. 39, R. 196.)

In the matter of freight rates, coal from the Ohio Districts goes into the lower peninsula of Michigan on a rate that is 50 cents a ton less than coal from the Appalachian territory, except the southwest Virginia field, and 75 cents a ton less than coal from southwest Virginia (Defendants' Exhibit 9, R. 1028). The District Court found that part of Ohio has the same freight rate to the Michigan peninsula as the Appalachian territory, part has a rate of 25 cents less and part a rate of 50 cents less. (Findings of Fact No. 39, R. 195.) This finding was assigned as error. (Assignment of Errors No. 27, R. 1097.) Defendants' Exhibit 9 clearly shows the correctness of appellants' position. None of the citations to the record in support of the Court's findings as to freight rates contain any testimony to justify the Court's finding.

As to freight rates the District Court also found that:

> "Coal going into Michigan from Western Pennsylvania, Northern West Virginia (including the Fairmont Field) and the Northern Panhandle of West Virginia has the same freight rate as coal from the Appalachian territory." (Findings of Fact No. 39, R. 195.)

As to the smokeless fields of southern West Virginia, Virginia and Maryland, the freight rate is the same as from the Appalachian territory, except as to that portion of the smokeless fields which is in Virginia and Maryland. From this territory the rate is equal to the rate from the Virginia District, referred to above, and 25 cents more than the rate from the bulk of the Appalachian territory (R. 1028A).

As to competition in this market the District Court found that "the chief competitor of Appalachian coal in Michigan is from the Smokeless region." (R. 195.) Also, "Coal from Western Pennsylvania also competes with Appalachian coal in Michigan." (R. 196.) In the same finding the Court found that:

> "Coal from the Ohio district is available for all practical purposes in Michigan, and there is actual as well as potential competition in that market. Appalachian coal holds the market by reason of price." (Findings of Fact No. 39, R. 195.)

Competition from substitute fuels is severe in this state. As to this the District Court found that:

> "There is also competition in the State with oil and gas, and in the last two years persons who had been consumers of coal for more than twenty years adopted the use of natural gas." (Findings of Fact No. 39, R. 196.)

Also:

> "Competition from fuel oil is severe in the State and has displaced approximately 370,000 tons of coal in twenty-three industrial plants. Natural gas and electricity are substantial competitors of coal.
>
> "In 1929 the total energy consumed by all manufacturing establishments in Michigan was derived as follows: 88.5% from bituminous coal; 8.3% from other fuels, and 3.2% from water power. Of the total energy consumed by manufacturing establish-

ments in twenty leading counties of Southern Michigan, more than 80% was derived from bituminous coal in 19 of these counties, and over 99% in three of these counties." (Findings of Fact No. 39, R. 196.)

Defendants' Exhibit 39 (R. 1079) is a list of some of the manufacturing plants in southern Michigan and northern Ohio that used to burn coal and are now using fuel oil. This list is a graphic presentation of the reality of this competition. The list is up to date and is more recent than the 1929 figures shown in Government's Exhibit 9 (R. 988) which form the basis of the finding of the District Court last quoted above. The list also shows the variety of plants that use fuel oil and such differing industries as chemicals, lead, steel, can manufacturing, glass, sugar, chair manufacturing, public utilities, roller bearing manufacturing and oil refining.

3. INDIANA, ILLINOIS AND THE CHICAGO DISTRICT

The tables appearing at pages 157 and 158 of this brief show the amount of coal moving all-rail into each of these markets in the years 1929 and 1931 from the producing regions named and the percentage of the total shipments from the various producing regions.

An examination of these tables shows that in Indiana the principal sources of coal were the Appalachian territory and mines in the state of Indiana with substantial tonnages coming in from the smokeless fields of West Virginia, Virginia and Maryland. In Illinois, mines in the state of Illinois furnished approximately half of the

	Movement of coal all-rail into Indiana except the Chicago District in tons of 2000 pounds*		Movement of coal all-rail into Illinois, except Chicago District in tons of 2000 pounds*		Movement of coal all-rail into the Chicago District in tons of 2000 pounds*	
	1929	1931	1929	1931	1929	1931
Appalachian territory as a whole	6,429,272	4,547,829	8,123,388	4,633,915	6,926,011	3,758,761
Northern West Virginia-Fairmont	44,548	23,402	72,961	16,736	67,409	14,406
Southern West Virginia, Virginia and Maryland (low volatile	1,208,350	944,484	11,167,630	7,007,674	10,899,542	6,780,409
Western Pennsylvania	4,851	2,324	328,616	15,096	320,943	8,387
Ohio (All Districts)	142,321	110,494	31,427	15,706	29,865	15,453
Indiana (All Districts)	5,502,336	3,692,237	3,989,491	3,213,331	2,797,784	2,175,249
Illinois (All Districts)	521,260	230,769	26,049,251	17,892,071	10,092,689	6,589,731
Western Kentucky	352,499	134,717	2,909,585	1,136,192	1,168,773	594,185
	14,215,437	9,686,266	52,672,349	33,930,721	32,303,016	19,936,581

	Percentage of total shipments into Indiana, except the Chicago District, by each producing region named (including captive tonnage)*		Percentage of total shipments into Illinois, except the Chicago District, by each producing region named (including captive tonnage)*		Percentage of total shipments into the Chicago District by each producing region named*		Percentage of total shipments by defendant producers into Indiana (excluding consumption and shipments of captive tonnage)	Percentage of total shipments by defendant producers into the Chicago District (excluding consumption and shipments of captive tonnage)
	1929	1931	1929	1931	1929	1931	1929	1929
Appalachian territory as a whole	45.23	46.95	15.42	13.66	21.44	18.86	33.8†	10.00‡
Northern West Virginia-Fairmont	.31	.24	.14	.05	.21	.07		
Southern West Virginia, Virginia and Maryland (low volatile)	8.50	9.75	21.20	20.65	33.74	34.01		
Western Pennsylvania	.03	.03	.62	.04	1.00	.04		
Ohio (All Districts)	1.00	1.14	.06	.05	.09	.08		
Indiana (All Districts)	38.71	38.12	7.56	9.47	8.66	10.91		
Illinois (All Districts)	3.67	2.38	49.46	52.73	31.24	33.05		
Western Kentucky	2.55	1.39	5.52	3.35	3.62	2.98		
	100.00	100.00	100.00	100.00	100.00	100.00		

* The figures and percentages in these columns are taken from Defendants' Exhibit 2, pages 7, 9 and 107.

† This percentage taken from Government's Exhibit 21 (R. 999). It should be noted that in arriving at this percentage the figure of tons consumed excluded consumption in the Chicago District (no other figure was available) and the figure of shipments by defendant producers includes shipments to the entire state of Indiana, including so much of the Chicago District as is in Indiana (no other figure was available). It is therefore evident that to be accurate the percentage of shipments by defendant producers should be substantially reduced and would probably be in the neighborhood of 25%.

‡ The District Court found that: "A substantial percentage of coal from the Appalachian region going into the Chicago district is shipped by captive mines. For instance, the United States Steel Corporation, the Inland Steel Company, Wheeling Steel Corporation, and the Interlake Iron Company. In 1929 these four companies shipped 3,747,725 tons into the Chicago district. This captive tonnage, together with the unknown quantity of coal produced by non-defendants, should be taken into consideration in calculating the percentage sent by defendant-producers into the district. Defendants estimate that total shipments by the defendants do not exceed 10% of the total." (Findings of Fact No. 42, R. 201.)

coal consumed, with the smokeless fields of West Virginia, Virginia and Maryland furnishing the next largest amount and the Appalachian territory a poor third and decreasing in importance at the expense of Illinois and Indiana mines. In the Chicago District, the Illinois fields and the smokeless fields of West Virginia, Virginia and Maryland together furnish about two-thirds of the coal consumed in that district with the Appalachian territory again a poor third and again decreasing in importance at the expense of these two formidable competitive fields.

It is only natural to find that mines located in Indiana and Illinois in 1929 shipped in the aggregate more than twice, and in 1931 more than three times, the amount of coal shipped into these markets by the Appalachian territory as a whole. It is only in Indiana, outside the Chicago District, that Appalachian coal is holding its own and this is the smallest consuming market of the markets here considered. In the other markets it is losing ground to Indiana and Illinois coals.

The production of Indiana and Illinois mines is substantial. In 1929 Illinois produced 60,657,641 tons and Indiana produced 18,344,358 tons of coal. While the combined production of these mines fell about 20 million tons short of the total consumption of these markets in 1929, the capacity of these mines to produce is indicated by the fact that in 1923 production exceeded the figure of consumption for 1929, and in 1924 and 1926 it was almost equal to it. In every year from 1914 to 1930 inclusive the figures of production were substantially in excess of the figure of consumption for 1931. (Defendants' Exhibit 1, Table II, R. 1004a, R. 200.) These facts are recited to show the importance of the competition of these mines located, as they are, close to these consuming markets.

In the matter of freight rates, we again find that coal from the Appalachian territory must overcome an adverse freight rate differential as against its strongest competitors. As to the Indiana markets the District Court found that

> "Coal from all the districts of Indiana, Illinois and Western Kentucky goes into Indiana at substantially lower freight rates than Appalachian coal, the differences ranging from $1.64 to .44." (Findings of Fact No. 41, R. 200.)

While the court made no specific finding as to rates from the Indiana and Illinois mines to points in Illinois, Defendants' Exhibit 3, page 37-d shows that Indiana and Illinois mines enjoy a freight rate advantage of from $1.14 to $1.84 a ton over coal from the Appalachian territory on shipments into the Chicago District. On shipments to Peoria and East St. Louis, Illinois, points that may be taken to be typical of the state outside the Chicago District, the differential in favor of Illinois and Indiana mines is even greater. (Defendants' Exhibit 3, pages 38, 39.)

As to Ohio coal, the District Court found that:

> "Ohio coal goes into Northern Indiana on a freight rate 50c per ton less than Appalachian coal, and into the southern half of Indiana on a freight rate 25c less, and into Northwestern Indiana, including the Chicago District, on a freight rate 35c a ton less." (Findings of Fact No. 41, R. 200.)

In Illinois the differential in favor of Ohio coal is from 25c to 35c a ton. (Defendants' Exhibit 9, R. 1028 A.)

As an instance of the fact that competition is not reflected merely by volume of sales in a given market the District Court found that:

> "Coal from Western Pennsylvania competes actively in the States of Indiana, Illinois, and in the Chicago district, and producers in Western Pennsylvania are endeavoring to regain markets lost as a result of labor problems, transportation deficiencies, and the zoning of coal by the United States Fuel Administration, which forced the Western Pennsylvania producers out of that market." (Findings of Fact No. 42, R. 201.)

This finding was made in spite of the small sales by Western Pennsylvania producers in these markets.

The ability of natural gas and fuel oil to compete in these markets is shown by an examination of Defendants' Exhibit 6, 6A, and 6B, (R. 1011, 1012A, 1012 B) the map of fuel oil and natural gas pipe lines. Natural gas and fuel oil are both available in Chicago and in the principal cities of Illinois and Indiana. In 1929 bituminous coal furnished 92.7% of the total energy consumed in Indiana, Illinois and the Chicago District and fuel oil furnished 5.2% with natural gas a small factor in that year but increasing in importance. In the manufacturing industries the percentages were 88.2% for bituminous coal and 10.0% for fuel oil (Government's Exhibit 8, Tables I and II). (R. 986-987.)

4. LAKE CARGO SHIPMENTS

There are no figures available to allocate Lake Cargo coal to the competitive consuming markets in the states bordering the lakes and in Canada. However, Lake Cargo shipments will be considered to complete the story of the distribution of coal from the Appalachian territory and to indicate the extent of the qualifications that must be made to the percentages of shipments by the defendant producers into Michigan, Ohio, the Chicago District, Wisconsin and Minnesota.

Lake Cargo shipments are described in the findings of the District Court as follows:

> "These shipments include shipments by rail from various coal districts to loading points on Lake Erie and thence by boat to points on Lakes Erie, Huron, Michigan, and Superior, and the St. Lawrence River. The Lake docks, especially on the west shore of Lake Michigan, and of Lake Superior, take in large quantities of domestic coal during the summertime for distribution in Canada, Wisconsin, Minnesota, North and South Dakota. None of these docks are owned or controlled by the defendants. They are owned by producers in Ohio, Pennsylvania, and Northern West Virginia." (Findings of Fact No. 43, R. 202.)

The following table shows the amount of coal moving on the lakes in the years 1929 and 1931 from the producing regions named and the percentage of the total shipments from the various producing regions and from the defendant producers:

	Movement of Lake Cargo coal in tons of 2000 pounds (including captive tonnage)*		Percentage of total shipments from the producing regions named (including captive tonnage)*		Percentage of total shipments by defendant producers (excluding consumption and shipments of captive tonnage)
	1929	1931	1929	1931	1929
Appalachian territory as a whole	17,087,335	12,923,817	43.88	42.82	21.0†
Northern West Virginia-Fairmont	2,236,815	927,702	5.75	3.03	
Southern West Virginia, Virginia and Maryland (low volatile)	7,674,337	5,623,319	19.71	18.63	
Western Pennsylvania	8,213,821	7,400,956	21.09	24.52	
Ohio	3,728,179	3,305,747	9.57	10.95	
	38,940,487	30,181,541	100.00	100.00	

* Figures and percentages are taken from Defendants' Exhibit 2, page 117.

† This percentage was calculated in the same manner as the percentages in Government's Exhibit 21. (R. 999.) From the figure of total Lake Cargo coal there was deducted 8,955,252 tons on account of captive tonnage and to the shipments of defendants there was added 319,736 tons, being 10.8% of the total unclassified shipments. The trifling discrepancy between the percentage of 21.0 shown here and the percentage of 20.7 shown in the table on page 147, above, is the slight difference in the figures used to show total shipments.

Here again we find that the producing region having the next largest tonnage to that of the Appalachian territory, namely Western Pennsylvania, showed a marked increase in its percentage of the total shipments between 1929 and 1931. Ohio coals showed a slight increase while all other regions showed slight decreases.

Again we find that coals from the Appalachian territory must overcome a freight rate disadvantage as against other regions. The District Court found that:

> "In the matter of freight rates, coals shipped on the lakes from the Appalachian region have a freight rate disadvantage of 38 cents a ton as against the Ohio districts, with the exception of Virginia, which has a freight rate disadvantage of 53 cents a ton as against Ohio. As to Western Pennsylvania coal, the Appalachian districts, with the exception of Virginia, have a freight rate disadvantage of 35 cents a ton, and Virginia has a freight rate disadvantage of 50 cents a ton. The freight rate disadvantage of the Appalachian region on lake shipments, as compared with the freight rates from Ohio, Northern West Virginia and Western Pennsylvania, ranges from 35 to 53 cents a ton." (Findings of Fact No. 43, R. 202-203.)

The large tonnage shipped from the Appalachian territory on the lakes, in spite of the adverse freight rates, is explained by the District Court in its findings as follows:

> "The reason Southern Appalachian coal is able to take lake cargo business in spite of adverse freight rates is that, during the War, Southern Appalachian coal was zoned into this market and each producer was required, during certain periods, to ship a cer-

tain percentage of his total production into that market. Since that time the retention of these markets by the Southern Appalachian producers has been due in large measure to competitive prices in these markets. The markets are an outlet for domestic coals for which the Southern Appalachian producers have no demand during the summer time, when the demand exists chiefly for nut and slack coal for industrial purposes. In order to keep the mines in operation the Southern Appalachian producers have met competitive prices in the lake cargo markets in order to retain this business." (Findings of Fact No. 43, R. 203.)

Another factor in this large movement of coal from the Appalachian region is found by the Court to be the movement of captive tonnage. The District Court found that:

"A large factor in this movement of coal from the Southern Appalachian region into the lakes has been that large industrial concerns having steel and by-product coke plants on Lake Erie, Lake Huron, Lake Michigan and Lake Superior ship large quantities of coal to these plants during the season of open navigation because they can deliver coal to these plants during that season by lake cheaper than they can all-rail, and all of them try to take in the greater part of their year's supply during this season of open navigation. Instances of this movement are United States Steel Corporation, International Harvester Company, Inland Steel Company and the Ford Motor Company. These companies all own captive mines in the Southern Appalachian region. Another instance is the Cannelton Coal and Coke Company, with an annual production of 727,000 tons. These are captive mines of the Algoma Steel Company of

Algoma, Canada, and during the period of lake navigation a substantial part of their production is sent to their own plants." (Findings of Fact No. 43, R. 203.)

5. *States in the Northwest and the Duluth and Superior Dock Markets.*

The District Court found that:

"In the States in the Northwest, the following tabulation shows the total coal consumed in 1929, the total shipments of coal all-rail from the Southern Appalachian region and the percentage that the coal from the Southern Appalachian region bears to the total.

Destination	Total Consumed	Total Coal from Sou. Appal. Region	Percentage
Minnesota	1,655,714	237,118	14.3
Wisconsin	2,613,169	299,813	11.5
Iowa	7,921,207	1,621,689	20.5
North Dakota	1,447,304	None	None
South Dakota	721,689	68,069	9.4
Nebraska	3,588,929	17,053	0.5
Kansas	2,367,985	6,281	0.3
Missouri	10,186,388	296,946	2.9

"The figures given above for the coal consumed in the States named coming from the Southern Appalachian region includes shipments by defendant and non-defendant producers and by captive mines. In the markets in these States coal from the Southern Appalachian region comes into substantial and active competition with coal from the Westrn Pennsylvania and Fairmont regions and goes into these markets all-rail on the same freight rate. In addition, there is competition from coal produced in the State of Iowa and the State of Missouri, and a substantial amount of lignite coal produced in North and South Dakota is shipped as far East as Minneapolis and St. Paul." (Findings of Fact No. 44, R. 204.)

Competitive conditions in these markets are fully described by the District Court, as follows:

> "In the market supplied by coal from the Duluth and Superior Docks, and covering a range of 200 miles, including Minneapolis and St. Paul, Southern Appalachian coal is in competition with coals from Illinois, Indiana, Western Kentucky, lignite coal, coal produced in Arkansas, and with oil, natural gas and hydro-electric power." (Findings of Fact No. 45, R. 205.)

The Court also found that:

> "A considerable tonnage of coal from Western Pennsylvania is shipped into the lake dock territory. Two by-product plants in that region are now using both Southern Appalachian and Western Pennsylvania coal; a large public utility operating a chain of plants throughout the Northwest has bought coal from both Western Pennsylvania and the Southern Appalachian fields, and is now using coal from both regions at its plants. On the banks of Lake Michigan there are two by-product plants, both of which were solicited by a Western Pennsylvania operator, and one of these plants uses Western Pennnsylvania coal and the other uses Southern Appalachian coal. A big steam plant on the west bank of Lake Michigan is using both Western Pennsylvania and Southern Appalachian coal indiscriminately; and one of the largest steam plants in Northern Michigan is buying coal from both the Western Pennsylvania and Southern Appalachian fields. Coal from the Central Pennsylvania fields is a potential competitor and, to a slight extent, an actual competitor in the lake markets. The receipts of bituminous coal at the

docks at Duluth, Superior, Ashland and Washburn show that between the years 1927 and 1931 coal received from the Pittsburgh district increased 5½% and coal received from Ohio districts increased 4%." (Findings of Fact No. 44, R. 204-205.)

The competition from substitute fuels is keen in these markets. As to this the District Court found that:

> "There has been a development of hydro-electric power in the Duluth market, and the coal docks now use hydro-electric power in the operation of those docks, instead of coal. In this same market natural gas is a strong competitor, and there is heavy competition in fuel oil. This has had an effect on the volume of the coal business in this market. At Rochester, Minnesota, the Franklin Heating Company has cancelled its contracts for coal and is now using natural gas to heat the Mayo clinic and the hospitals in that city. Oil burner installation in the cities of Minneapolis and St. Paul have increased at a rapid rate from 1928 to 1931. On January 1, 1928, in these two cities there has been installed 2,747 oil burners for heating homes with the use of fuel oil as a fuel. In the year 1928 there were 1,139 additional oil burners installed; in the year 1929 there were 1,924; in the year 1930, 2,831; and in the year 1931 2,975 additional oil burners were installed. The installation of these oil burners has necessarily displaced a large tonnage of coal for use by domestic consumers. At the present time seventeen cities in the State of North Dakota, eight cities in the State of Minnesota, and thirteen cities in the State of South Dakota are now using or have contracted to use natural gas. (Findings of Fact No. 45, R. 205-206.)

C. *THE POSITION OF APPALACHIAN COALS, INCORPORATED AS A COMPETITIVE FACTOR IN THE STATES IN WHICH THE MINES OF THE DEFENDANT PRODUCERS ARE LOCATED*

The next largest consuming markets for coal produced in the Appalachian territory are in the states in which the mines of the defendant producers are located. These are Tennessee, Virginia (in which the District of Columbia is included for convenience), West Virginia and Kentucky. In 1929, 8,711,194 tons of coal produced in the Appalachian territory were consumed in these states. (R. 1006A.) This is about 10% of the total shipments from this region, excluding railroad fuel and exports to Canada by rail.

The table on page 170 of this brief shows the distribution of coal in 1929 into these states and the District of Columbia from the producing regions named and the percentage of the total shipments from the various producing regions:

An examination of this table shows that in Tennessee, the largest consumer of coal in this group, a little over half the coal consumed in that state comes from the Appalachian territory and a little less than half comes from Western Kentucky. In Virginia more than two-thirds, and in the District of Columbia almost nine-tenths, of the coal consumed comes from the low volatile or smokeless fields with the Appalachian territory supplying most of the balance in Virginia and only a small part of the balance in the District of Columbia. In West Virginia, which is in the heart of the Appalachian territory,

ALL FIGURES AND PERCENTAGES ARE FOR THE YEAR 1929 AND SHOW ALL RAIL SHIPMENTS

	Consumption of coal in Tennessee in tons of 2000 pounds*	Percentage of total shipments from each producing region named†	Consumption of coal in Virginia in tons of 2000 pounds*	Percentage of total shipments from each producing region named†	Consumption of coal in District of Columbia in tons of 2000 pounds*	Percentage of total shipments from each producing region named†	Consumption of coal in West Virginia in tons of 2000 pounds*	Percentage of total shipments from each producing region named†	Consumption of coal in Kentucky in tons of 2000 pounds*	Percentage of total shipments from each producing region named†
ppalachian territory as a whole	3,228,952	57.8	1,628,500	33.4	92,947	8.0	978,769	22.1	2,782,026	66.4
labama	145,060	2.7							495	
uthern West Virginia, Virginia and Maryland (low volatile)	16,805	.3	3,152,284	64.6	828,516	70.9	682,316	15.4	167,539	4.0
'estern Kentucky	2,129,650	38.1							1,147,027	27.4
orthern West Virginia—Fairmont			58,846	1.2	54,192	4.6	885,042	20.		
'estern Pennsylvania			265		2,735	.2	1,782,582	40.3		
hers	61,952	1.1	40,203	.8	190,518	16.3	99,754	2.2	94,588	2.2
rand Total	5,582,419	100.	4,880,098	100.	1,168,908	100.	4,428,463	100.	4,191,675	100.

* The figures in these columns were taken from Defendants' Exhibit 1, Table VI. (R. 1006 A.)

† The percentages in these columns for shipments from the Appalachian region as a whole were taken from Defendant's Exhibit 1, Table VI. (R 06 A.) The remaining percentages were calculated from the figures shown.

almost half the coal consumed comes from outside the state from Western Pennsylvania with the balance divided between the Appalachian teritory, Northern West Virginia and the low volatile or smokeless fields, in the order named. In Kentucky, the smallest consumer of coal of this group of states, almost all of the coal consumed comes from the Appalachian territory and Western Kentucky, the former furnishing about two-thirds and the latter about one-third.

The percentages given in the foregoing table show only the percentage of the total coal consumed that came from the Appalachian territory as a whole. The following figures show the percentage of the total coal consumed that was supplied by the defendant producers, excluding consumption and shipment of captive tonnage:

Tennessee	29.1*
Virginia	30.0
District of Columbia	1.1
West Virginia	28.8
Kentucky	44.0

In addition to the large quantities of coal coming into these markets from other producing regions, the production of non-defendant producers and of the surrounding territory, excluding captive tonnage, was 32,541,841 tons

*These percentages were calculated in the same manner as the percentages in Government's Exhibit 21 (R. 999). The following tonnages were deducted from the figures of total tonnages consumed in these states on account of captive tonnage: for Tennessee, 1,289,539 tons; for Virginia, 1,127,303 tons; for the District of Columbia, 270,018 tons; for West Virginia, 1,022,975 tons; for Kentucky, 968,267 tons. To the figure of shipments by defendant producers into each of these markets the following tonnages were added, being the percentages stated of the total unclassified shipments: for Tennessee, 65,131 tons (2.2%); for Virginia, 56,250 tons (1.9%); for the District of Columbia, 592 tons (.02%); for West Virginia, 50,327 tons (1.7%); for Kentucky 71,052 tons (2.4%).

in 1929 (R. 179) which was substantially in excess of the 20,251,563 tons consumed in that year in all of these markets. Further, we have noted that the developed productive capacity of non-defendant producers is 82,660,760 (R. 207) tons a year or about four times the consumption in these markets in 1929. In addition, the undeveloped productive capacity of this region is so great as to leave no doubt that consumers of coal need have no fear of any domination by the defendants. (R. 207-208.)

The production of other regions located in these states is also substantially in excess of the consumption of the states in which they are located. In West Virginia the District Court found that the production of the low volatile or smokeless fields (Pocahontas, Tug River, New River, Winding Gulf) was 57,500,000 tons in 1929 and that "smokeless coal is generally competitive to Appalachian coal." (Findings of Fact No. 30, R. 183.) The Northern West Virginia regions produced 28,200,000 tons in 1929. Findings of Fact No. 30, R. 183.) Virginia produced 12,000,000 tons of coal in 1929. (Findings of Fact No. 33, R. 185.) Western Kentucky produced 14,437,000 tons in 1929. (Defendants' Exhibit 1, Table III, R. 1004B.)

In short, coal exists in abundance in these states and Appalachian Coals, Incorporated will enjoy no special advantages in these markets by reason of the location of the mines of the defandant producers.

Substitute fuels are also important competitive factors in these states. An examination of the map of oil and natural gas pipe lines (Defendants' Exhibit 6, 6A, 6B, R. 1011, 1012A, 1012B) will show that West Virginia is fairly honeycombed with both oil and natural gas pipe lines and that all of the principal cities of Kentucky are reached by these substitute fuels. As to Virginia the District Court found that:

> "Large natural gas lines coming from the gas fields in West Virginia and Kentucky have been built to the principal consuming markets in Virginia within the past two years. Fuel and oil has also become an important competitive factor along the Seaboard." (Findings of Fact No. 33, R. 185.)

D. *THE POSITION OF APPALACHIAN COALS, INCORPORATED AS A COMPETITIVE FACTOR IN THE MARKETS IN THE SOUTHERN STATES.*

The next most important markets in which coals produced in the Appalachian territory are sold are in the states south of this producing region. These states, in the order of their importance as consumers of coal from the Appalachian region, are Georgia, South Carolina, North Carolina, Alabama, Florida, Mississippi, Arkansas and Louisiana. In 1929, 7,369,199 tons of coal were shipped into these states from the Appalachian territory. (R. 1006A, 1028A.) This is about 8% of the total shipments from this region, excluding railroad fuel and exports to Canada by rail.

The table appearing on page 174 of this brief shows the total consumption of coal in 1929 in these states together with the tonnage shipped all-rail from the Appalachian territory and the percentage of the total coal consumed that was shipped in by the defendant producers and the percentage that was shipped in from the Appalachian territory as a whole:

ALL FIGURES AND PERCENTAGES ARE FOR THE YEAR 1929

	Total consumption of coal—in tons of 2000 pounds*	Total shipments from Appalachian territory as a whole*	Total shipments by defendant producers‡	Percentage of total coal consumed that was shipped by defendant producers†	Percentage of total coal consumed that was shipped from the Appalachian territory as a whole*
Georgia	3,024,614	2,541,533	1,380,992	45.7	84.0
South Carolina	2,400,025	2,295,476	1,279,214	53.3	96.0
North Carolina	3,215,337	2,197,545	1,680,961	52.3	68.3
Alabama	9,419,956	185,158			2.0
Florida	508,763	145,360			28.6
Mississippi	1,376,831	3,227			2.0
Arkansas	730,791	500			.07
Louisiana	553,088	400			.07

*The figures and percentages in these columns are taken from Defendants' Exhibit 1, Table 6, (R. 1006 A) and Defendants' Exhibit 9. (R. 1028 A.)

†The percentages in this column are taken from Government's Exhibit 21. (R. 999.)

‡These figures are taken from Government's Exhibit 2, Table I (R. 948A-948D) and to the totals there shown there have been added on account of unclassified shipments 85,855 tons for North Carolina, 65,427 tons for South Carolina and 70,460 tons for Georgia.

Of the markets here considered Georgia and the Carolinas are the largest consumers of coal from the Appalachian territory. We have already noted that in order to reach the great consuming markets north and west of the Ohio River coal from the Appalachian territory must, and does, overcome substantial freight rate disadvantages to hold those markets as against its most formidable competitors. We have also noted that in the very states in which the mines of the defendant producers are located, and where freight rates are not an important factor for the Appalachian producers, coals from other regions come in and furnish vigorous competition in spite of longer hauls to get to these markets. Freight rates are always important in the movement of a bulky and heavy commodity such as coal but our survey of markets has demonstrated that the Appalachian coal producers can and do overcome freight rate advantages of from 44 cents to $1.84 (in the case of Indiana, Illinois and the Chicago District) enjoyed by competitors whose mines are more favorably located with respect to these markets. Large quantities of coal are shipped into these markets in spite of these adverse freight rates. Freight rates, then, do not tell the whole story.

There are two preliminary points in connection with the markets in Georgia and the Carolinas. First, the Carolinas are the only markets, outside of the states in which the mines of the defendant producers are located, in which coal from the Appalachian territory enjoys freight rate advantages over other producing regions in these markets and these advantages are in no instance so great as to bar coal from competitive fields. In Georgia, the largest consumer of Appalachian coal of these southern states, this coal comes in at an actual freight rate disadvantage in relation to Alabama coal, its most formidable competitor in that state. It seems to be the fate of the Appalachian producers (the distance of their mines from the great consuming markets is, of course, the reason) to have to battle against adverse freight rates to sell a ton of coal. And the value of the advantages in the Carolinas is not as great as might be supposed because none of these states is a large consumer of coal. The state of Alabama alone used more coal in 1929 than Georgia and the Carolinas combined. The second preliminary point is that the use of substitute fuels is so great in these states that it is not at all unlikely that in the not too distant future these states, like Florida, will be lost as markets for coal in any great quantities.

First let us consider the freight rate situation in its relation to the competitive situation. It is difficult to generalize about freight rates on coal into these states because uniform patterns do not exist to the extent that they do in the markets north and west of the Ohio River.

In Georgia the record gives freight rates to the cities of Atlanta, Augusta, Columbus and Valdosta. These cities are so distributed as to give a valid picture of the freight rate situation in the state. The following table shows the range of actual rates in cents per ton of 2000 pounds from the different districts in the producing regions named to these cities:

RANGE OF RATES* TO:

	Atlanta	Augusta	Columbus	Valdosta
Appalachian territory†	209 to 248	304 to 327	276 to 315	330 to 369
Alabama‡	192 to 209	287 to 304	192 to 209	305 to 322
Middle Tennessee¶	197 to 209	293 to 304	265 to 277	299 to 330

* All rates taken from Defendants' Exhibit 3, pages 54, 55.

† Rates from the Big Sandy, Kanawha, Kenova-Thacker Districts are not included in the range because Defendants' Exhibit 2, page 126 shows that these districts shipped only a trifling tonnage of coal to Georgia in 1929.

‡ Rates from the Brilliant District are not included because Defendants' Exhibit 2, page 126 shows that this district shipped no coal to Georgia in 1929.

¶ Only rates from the Wilder, Whitwell and Bon Air districts are included because Defendants' Exhibit 2, page 126 shows that these were the only districts from which substantial tonnages were shipped into Georgia in 1929.

RANGE OF RATES* TO:

	Anderson	Charleston	Columbia	Florence	Greenville	Spartanburg
Appalachian Territory†	270 to 335	310 to 340	292 to 330	320 to 348	253 to 335	253 to 325
Low volatile fields of Southern West Virginia and Virginia‡	325	330	320	320	325	315
Middle Tennessee¶	299	310	320	348	282	282
Alabama§	304	325	310	349	287	287

*All rates taken from Defendants' Exhibit 3, pages 52, 53, 57.

†Includes rates from all districts.

‡Includes rates from all districts.

¶Includes only rates from Wilder district because Defendants' Exhibit 2, page 124 shows that this was the only district that shipped coal in any quantity into South Carolina in 1929.

§Includes only rates from the Birmingham district because Defendants' Exhibit 2, page 124 shows that this was the only district that shipped coal in any quantity into South Carolina in 1929.

The obvious conclusion to be drawn from this table is that the chief competitive producing regions enjoy either an equality of freight rates with the lowest rates from the Appalachian region or enjoy advantages over even these lowest rates.

In South Carolina, the record gives freight rates to the cities of Anderson, Charleston, Columbia, Florence, Greenville and Spartanburg. As in the case of Georgia these cities are so distributed in different parts of the state as to give a valid picture of the freight rate situation in this state. The table appearing at page 177 of this brief shows the range of actual freight rates in cents per ton of 2000 pounds from the different districts in the producing regions named to these cities:

This table shows that in South Carolina coal from the Appalachian territory enjoys a freight rate advantage over from the low volatile fields of Southern West Virginia and Virginia and the fields of Middle Tennessee and Alabama. In order to show just what this advantage amounts to the following tabulation shows the greatest differentials to these cities, that is, the difference between the lowest rate from the Appalachian territory and the rate from the competitive fields:

	Differential on coal from low volatile fields	Differential on coal from Middle Tenn.	Differential on coal from Alabama
Anderson	55c.	29c.	34c.
Charleston	20c.	0	15c.
Columbia	27c.	28c.	18c.
Florence	0	28c.	29c.
Greenville	72c.	29c.	34c.
Spartanburg	62c.	29c.	34c.

RANGE OF RATES* TO:

	Asheville	Canton	Charlotte	Raleigh	Wilmington	Winston-Salem
Appalachian territory†	219 to 337	219 to 337	287 to 317	310 to 349	320 to 349	299 to 337
Low volatile fields of Southern West Virginia and Virginia‡	327	327	307	300	320	289
Middle Tennessee§	277	277	304	327	293	338

* All rates taken from Defendants' Exhibit 3, pages 50, 51, 57.

† Includes rates from all districts.

‡ Includes rates from all districts.

¶ Includes only rates from Tracy City District because Defendants' Exhibit 2, page 122 shows that this was the only district that shipped coal into this state in 1929. However rates from the Whiteside, Whitwell and Bon Air Districts to these cities are generally identical with or lower than rates from the Tracy City District and to Winston-Salem, Asheville and Canton rates from the remaining Middle Tennessee districts are lower than rates from the Tracy City District and to Charlotte they are only 1c. higher.

In view of these differentials it is apparent that the freight rate advantage enjoyed by the Appalachian territory is not so great as to exclude coal from these competitive fields. In fact the advantage is slight in comparison with the advantages enjoyed by competitive fields in the markets north and west of the Ohio River.

In North Carolina, the record gives freight rates to the cities of Asheville, Canton, Charlotte, Raleigh, Wilmington and Winston-Salem. Again these cities are sufficiently well distributed throughout the state to give a valid picture of the freight rate situation. The table appearing at page 179 of this brief shows the range of actual freight rates in cents per ton of 2000 pounds from the different districts in the producing regions named to these cities:

In order to show the exact advantage enjoyed by the Appalachian territory the following tabulation shows the greatest diffierentials to these cities, that is, the difference between the lowest rate from the Appalachian territory and the rate from the competitive fields:

	Differential on coals from low volatile fields	Differential on coals from Middle Tennessee
Asheville	108	58
Canton	108	58
Charlotte	20	17
Raleigh	0*	17
Wilmington	0	0†
Winston-Salem	0‡	39

* Appalachian coal has a freight rate disadvanrage of 10c. a ton to Raleigh

† Appalachian coal has a freight rate disadvantage of 27c. a ton to Wilmington.

‡ Appalachian coal has a freight rate disadvantage of 10c. a ton to Winston-Salem.

From these tables it is apparent that it is only in the small area that comprises western North Carolina that

ALL FIGURES AND PERCENTAGES ARE FOR THE YEAR 1929

	GEORGIA			SOUTH CAROLINA			NORTH CAROLINA		
	Total consumption of coal*	Percentage shipped by defendant producers	Percentage shipped from producing regions named*	Total consumption of coal*	Percentage shipped by defendant producers	Percentage shipped from producing regions named*	Total consumption of coal*	Percentage shipped by defendant producers	Percentage shipped from producing regions named*
alachian territory as a whole	2,739,081	45.7†	75.53	2,434,942	53.3†	94.25	2,893,046	52.3†	73.6
thern West Virginia (low volatile)	11,145		.31	102,969		399	1,034,716		26.34
ldle Tennessee	220,098		6.07	43,546		1.68	121		.00
bama	656,170		18.09	1,996		.08			
	3,626,494		100.00	2,583,453		100.00	3,927,883		100.00

* The figures and percentages in these columns are taken from Defendants' Exhibit 2, pages 121, 123, 125.

† These percentages are taken from Government's Exhibit 21. (R. 999.)

Appalachian coal enjoys any substantial freight rate advantage over one of the competitive producing regions and Asheville and Canton, the largest cities in this area, together consumed only 371,089 tons of coal in 1929. Defendants' Exhibit 2, page 121, 129. So it can be stated that in the entire United States the only market, outside the states in which the coal is produced, to which the Appalachian territory has any substantial freight rate advantage is this small coal consuming area. And, of course, the non-defendant producers in the Appalachian territory enjoy the same freight rates as the defendant producers.

With this freight rate situation in mind let us consider competitive conditions in these states. The table appearing at page 181 of this brief shows the total consumption of coal in 1929 in these states together with the amounts coming from the producing regions named and the percentage shipped by the defendant producers and from the various producing regions:

In addition to the coal shown in this table a small tonnage was mined in Georgia (Findings of Fact No. 37, R. 190) and in North Carolina. (Findings of Fact No. 34, R. 186.)

In all of these states Appalachian Coals, Incorporated must meet the competition of non-defendant producers located in the Appalachian territory, and as to this the District Court found that:

> "The total production of the non-defendants, excluding captive mines, but including the surrounding territory, in the year 1929, was 32,541,841 tons, or about four times the total consumption of the three states.

The total productive capacity of the mines of non-defendants in the Southern Appalachian region, including captive mines and the surrounding territory, is 82,660,760 tons.

From this figure there should be deducted approximately ten per cent to cover the coal produced in the Hazard District, which has no railroad connections to the three states under discussion.

This figure is based upon the capacity of all the defendant mines, including captive mines, both active and inactive. (Findings of Fact No. 38, R. 192.)

The Court also found that:

"There is testimony of non-defendant producers having an aggregate annual production of 1,150,000 tons, and annual capacity of 2,450,000 tons that they are accessible to the markets in these three states, and sell substantial quantities of coal therein, and have the power to increase the tonnage in the event of any increase in price, or in the event of an attempt by Appalachian Coals, Incorporated, to dominate the market in these states.

A non-defendant producer in the Appalachian territory gave evidence tending to show that the production of non-defendants in the Harlan District, not including captive mines, was 1,945,000 tons in 1931, a year of small production; that the productive capacity of these mines is approximately 4,000,000 tons, and that the non-defendants in Harlan and Bell Counties alone could supply the entire requirements of the three States." (Findings of Fact No. 38, R. 193.)

Referring particularly to Georgia the District Court found that:

"In Georgia, Appalachian coal will meet competition from the coal of non defendants. And also from coals from Central Tennessee, Western Kentucky and Alabama.

The State of Georgia is relatively a small consumer of coal.

The coal fields of Alabama are closer to Georgia than the coal fields of the Appalachian region." (Findings of Fact No. 37, R. 191.)

Referring to South Carolina the District Court found that:

"A. producer, operating in Alabama, with an annual production of approximately 2,500,000 tons, and a capacity of 3,000,000 tons, gave testimony tending to show that if prices were raised in South Carolina, an attempt would be made to secure an adjustment of the present freight rate so as to permit Alabama coal to enter the State on a more favorable basis.

A purchaser of 600,000 tons of coal for use by textile mills in South Carolina gave testimony to show that Appalachian Coals, Incorporated, could not dominate the market prices for coal in North Carolina, South Carolina, Georgia and Eastern Tennessee, because Alabama coal and coal of non-defendants would be available.

There is a possibility of competition between the defendant producers and the Smokeless Field and with Alabama coal in South Carolina. But considering the total rail shipments of coal to South Carolina in 1929, it appears that 3.99 was Smokeless coal, .08 Alabama coal, and 94.25 Appalachian coal." (Findings of Fact No. 36, R. 189.)

As to North Carolina the Court found that:

"All the coal, other than the Appalachian, used in North Carolina, according to Table VI of Defendants' Exhibit 1, constituting 1,017,792 tons, came from the Smokeless region. The percentage of coal coming from the Smokeless region has increased since the year 1929." (Findings of Fact. No. 34, R. 185-186.)

Also that:

"There is competition between defendants and non-defendants producing coal in the Appalachian territory. (Findings of Fact No. 35, R. 187.)

We come now to the matter of substitute fuels as competitive factors The use of substitute fuels in Georgia and the Carolinas in competition with coal is far greater than in any other markets in which coal from the Appalachian territory is sold. This is largely due to the development of hydro-electric power. The following table is merely a convenient statement of facts found by the District Court:

ALL PERCENTAGES ARE FOR THE YEAR 1929

	Georgia	South Carolina	North Carolina
Percentages* of total energy derived from:			
(a) bituminous coal	72.3	64.8	60.4
(b) water power	22.2	31.7	38.4
Percentages* of total energy consmued in manufacturing establishments derived from:			
(a) bituminous coal	58.8	56.9	54.4
(b) water power	29.0	36.5	43.1
Percentages† of total value of fuels consumed in manufacturing establishments derived from:			
(a) bituminous coal	30.25	29.05	29.26
(b) water power	54.76	66.36	66.35

*Percentages taken from Government's Exhibit 8, Tables I and II. (R. 986, 987.)

†Percentages taken from Defendants' Exhibits 10, 11 and 12. (R. 1029, 1030.)

The use of hydro-electric power has actually displaced coal. The District Court found that:

> "Very little coal is used in these three States to produce hydro-electric power because of super-power hook-ups, which enable the electricity produced in any one section of the country to be used in another when there is a local shortage of water power. It is estimated that in Georgia alone the consumption of coal on this acount has been reduced between 400,000 and 500,000 tons annually." (Findings of Fact No. 38, R. 193-194.)

Also that:

> "Seventy-five per cent. of the textile mills, in the three States, are equipped to use hydro-electric power, but many new plants are going back to steam." (Findings of Fact No. 38, R. 193.)

In Georgia in recent years natural gas has come in and displaced a substantial tonnage of coal. As to this the District Court found that:

> "In Georgia during the past three years natural gas has come to Atlanta, Augusta, Albany and many other cities, and is being used by 94 companies that formerly used 471,00 tons of coal." (Findings of Fact No. 38, R. 193.)

At another point the District Court finds that this natural gas displaced from 400,000 to 500,000 tons of coal in the last few years. (Findings of Fact No. 37, R. 191.) This competition was summarized by the testimony of an Alabama operator and the District Court found that his evidence tended to show that:

> "Appalachian coals would meet in Georgia competition from Tennessee coals, that are not included in the Appalachian Coals, Inc. from Alabama coal, from fuel oil on the Southern Atlantic coast, from hydro-electric power and natural gas in the interior." (Findings of Fact No. 37, R. 191.)

Fuel oil is also a competitor but at the present time it principally found along the coast. As to this the District Court found that:

> "There is also competition in the three States with hydro-electric power and fuel oil; the latter being particularly found along the coast, though it is also used in increasing amounts in Diesel engines in the interior." (Findings of Fact No. 38, R. 193.)

The District Court made separate findings as to the State of Florida. It is enough to point out that the Alabama coal fields are the nearest source of supply and that, except for the sparsely populated states of Nevada, Arizona and New Mexico, Florida was the smallest consumer of coal of any state. (Defendants' Exhibit 9, R. 1028A.) In 1929 it consumed 508,763 tons of which 145,360 or 28.6% came from the Appalachian territory and 341,334 tons came from Alabama. (Defendants' Exhibits 9, R. 1028A and 1, Table VI, R. 1006A). This small consumption of coal is easily explained. Government's Exhibit 8 ,Table I (R. 986) shows that fuel oil furnished 60.3% of all the energy consumed in that state whereas bituminous coal furnished only 38.2%.

This state is therefore wholly unimportant as a consumer of coal.

The remaining southern states, Alabama, Mississippi, Louisiana and Arkansas require no comment because of the trifling tonnage of coal from the Appalachian territory that goes into these states and because of the proximity of the Alabama coal fields. (R. 1028A, 1006A.)

E. *THE POSITION OF APPALACHIAN COALS, INCORPORATED AS A COMPETITIVE FACTOR IN THE NEW ENGLAND, NORTHEASTERN AND ATLANTIC STATES.*

Included in this consuming area are the New England States, New York, Pennsylvania, New Jersey, Delaware and Maryland. The bulk of the coal going into these markets from the Appalachian region goes by rail to Norfolk, Virginia and thence by boat to New York and other costal points from which it is distributed to the points of consumption. These are called Tidewater shipments and, as in the case of Lake Cargo shipments, the available figures show only the total tonnage shipped in this way and no detailed figures exist to show the distribution of Tidewater coal by states of consumption. It is perhaps needless to point out that this area is second only to the states north and west of the Ohio River as a coal consuming market. In 1929 these states consumed 113,134, 757 tons of coal while the states listed under the heading of markets north and west of the Ohio River consumed 201,-619,447 tons in 1929. (R. 1028A.) And into this great market we again find that coal from the Appalachian region must overcome a freight rate advantage enjoyed by competive producing regions.

As to these markets the District Court found that:

> "Of a total of 36, 054,877 tons of coal moving to tidewater in 1929, 4,575,970 tons, or 12.7%, were shipped from the Appalachian region. Tonnage other than Appalachian came from the low volatile fields of Southern West Virginia, Northern West Virginia, the Maryland and the Pennsylvania fields. The Smokeless fields of Virginia and West Virginia in 1929 shipped 17,451,109 tons of coal to tidewater. These fields enjoy a freight rate of ten cents a ton lower than the rate from the Appalachian region. Coal from the Appalachian region going to tidewater to New England comes in competition with all Smokeless coal. It comes in competition with coal going to tidewater from the port of Baltimore with rates of $2.25 to $2.50 a ton, and with coal going to the port of Philadelphia with rates varying from $2.32 to $2.57 a ton, as compared with a rate of $2.62 to $2.72 from Appalachian districts. In addition to the coals going to tidewater to all points north of Washington, coals from the Appalachian region are in competition with all-rail coals going from Maryland, Northern West Virginia and Pennsylvania to all-rail points from Washington north to Maine. Until a few years ago there were some millions of tons of coal used for bunkering purposes at the principal ports along the Atlantic Coast. That tonnage has been very materially reduced by competition from oil. In addition, fuel oil in large amounts is being delivered to industrial plants along the Atlantic Seaboard, and is going inland for a considerable distance. It has displaced a very considerable tonnage of coal. (R. 495-497, 442.) Coal going from the Appalachian region into the Northeastern States, in addition to tidewater, meets competition from coal coming from Central Pennsylvania." (Findings of Fact No. 46, R. 206.)

APPENDIX II

Excerpts from the publication of the National Industrial Conference Board's publication entitled "The Competitive Position of Coal in the United States." (1931)

In the introduction the troubles of the industry are summarized. The following are pertinent excerpts:

> "Overcapacity in production, growing competition from other sources of energy, and increasing fuel efficiency are the three great disturbing factors that the principal coal-producing countries of the world are facing. The first factor stimulates excessive output, and the last two factors intensify the oversupply by restricting demand." at page 1.)
>
> "The growth in competition from other sources of energy has been a major factor in restricting the demand for coal." (at page 1.)
>
> "Increasing fuel economy is a factor almost equal in importance to the quantitative use of other sources of energy in its effect on coal demand. The decline in the amount of coal necessary to produce a unit of electric power is probably the most notable factor. The rapid expansion in the use of public utility electric power has resulted in the substitution of purchased power for the smaller and less efficient power plants. The installation of by-product coke ovens and the resultant saving in gas and by-products over the old bee-hive oven is another notable step in fuel economy. Improved furnace and boiler equipment has generally resulted in better combustion and the saving of waste heat and gases. The spread of mine mechanization has necessitated the mechanical preparation of coal and has resulted in purer coal with a higher heat value per ton. All these factors mean a

larger recoverable output of energy per ton of fuel used and consequently a relatively smaller amount of fuel required for an equal volume of industrial output." (at p. 2.)

At the conclusion of this exhaustive study of the coal industry, the following statement appears and its pertinency is such that it is quoted at length:

"The elimination of 1,665 companies since 1920 bears testimony to the ruthlessness of the competitive struggle in recent years, but, in a sense, it represents progress. In the last decade the prices of coal have materially fallen, and the number of miners has decreased. More recently the length of the working year has increased, and the average output per man has risen. When this costly process of deflation is completed, the survivors will face the problem of building a more permanent structure for the future.

"The distribution of coal from mine to consumer has been accompanied by much uneconomic selling. Among the important reasons for this condition are overproduction and stress on volume sales rather than profitable sales. The high cost of distribution warrants an analysis of this aspect of the coal-producer's problem. The ultimate objective of any sales organization is to secure and hold customers. This cannot be done without thorough knowledge of the market, fair prices, and satisfactory service to the consumer.

"An essential preliminary is an intensive study of the market. This involves, as a first step, an analysis of the total coal consumption in the area that can be served by the company's mines and the routes by which this area is served. The second step is a detailed canvass covering the kinds of sizes of coal consumed, the classes of consumers, the number of consumers in each class, the tonnage taken by each of the individual consumers, and the division of each of those markets among rival coal companies. To serve this market area with the various kinds of coal needed, the sales organization of a company must familiarize itself with the details of rail, river, and lake transportation and possibly with tide-water and export shipping problems.

"The study of the market and the means of serving it must be accompanied by a superior service to the consumer. This involves not only engineering tests to determine the suitableness of types of coal, to the particular needs of the customer, industrialist as well as householder; it requires also a trained personnel competent to advise the customer on his needs.

"The success of the distribution branch of the industry in maintaing a permanent market outlet depends on the effectiveness of the producing branch in supplying a well-prepared coal. The function of the producer does not stop here, however. The keenly competitive situation requires that every available means of cost reduction should be utilized. The changing conditions of production and coal preparation, which mechanization is bringing about, offer opportunities of cost reduction, provided that a reasonable degree of continuity of operation can be assured. The success of cost reduction hinges on sustained and repeated sales, which are in turn contingent on being able to meet the competitive market.

"Finally, the effectiveness of an organization in capturing and holding the market can be promoted by strengthening its position through the acquisition of carefully selected properties. The guiding principle underlying the consolidation of one or more producing properties is the selection of mines that are strategically located in the company's market territory to supply the types of coal required at a minimum of production and transportation costs. If operations are sufficiently large, other advantages will follow the consolidation of mining properties, among which may be noted the following: (1) the ability to concentrate orders in such a manner as to operate the low-cost producing units at satisfactory capacity levels, and to curtail or shut down the high-cost producing units during a period of declining demand; (2) the ability to secure technical consultants in finance law, engineering, marketing, and distribution; (3) greater financial resources and strength; (4) elimination of duplication of expenses in freight, advertising, sales agencies, and management; (5) lower prices of materials and supplies through concentrated power." (At pages 267-269.)