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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1932

APPALACHIAN COALS, INCORPORATED, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the specially constituted United States District Court for the Western District of Virginia (R. 219) and Judge Soper's concurring opinion (R. 241) are reported in 1 F. Supp. 339.

JURISDICTION

The decree of the District Court was entered October 17, 1932. (R. 243.) Petition for appeal was filed October 17, 1932, and was allowed the same day. (R. 1090, 1091.)

Jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. C., Title 15, Sec. 29), and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

(1) Whether the primary object of appellants' combination is to obtain a higher price for their product through the elimination of competition, in illegal restraint of trade.

(2) Whether a combination of 137 independent producers of bituminous coal to eliminate all competition among themselves and to sell their product in the amounts and at the prices fixed by a common exclusive selling agent is illegal under the Sherman Act when the combination controls 73% of the commercial production in the largest producing district in the United States and more than 50% of the trade in bituminous coal in numerous interstate markets.

STATUTE INVOLVED

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

> SEC. 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.

SEC. 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.

* * * * *

SEC. 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. * * *

STATEMENT

Preliminary outline of the case

This is a suit in equity under Section 4 of the Sherman Antitrust Act to enjoin a combination alleged to be in restraint of interstate commerce in bituminous coal and in attempted monopolization of a part of that commerce, in violation of Sections 1 and 2 of the Sherman Act. (R. 1, 7, 21.) Upon the filing of an expediting certificate under the Act of February 11, 1903 (32 Stat. 823, U. S. C., Title 15, Sec. 28), the case was tried before a court composed of the three judges of the Circuit Court of Appeals for the Fourth Circuit. (R. 151, 219, 243.) The court filed findings of fact, general findings of fact, and conclusions of law, and entered a decree enjoining the combination. (R. 152, 217, 218, 243.)

The appellants are Appalachian Coals, Incorporated, hereinafter sometimes referred to as Appalachian Coals, three individual officers of said corporation, and 137 producers of bituminous coal, hereinafter sometimes referred to as the defendant producers. (Fng.[1] 1, R. 152–153.) Each defendant producer has contracted to sell its coal exclusively through Appalachian Coals in the amounts and at the prices determined by it. (Fngs. 4, 53, R. 154–155, 217.) The defendant producers own all the issued capital stock of Appalachian Coals, to which they have subscribed in proportion to their 1931 production. (Fng. 8, R. 157.)

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[1] The abbreviation "Fng." is used herein to refer to the District Court's findings of fact.

The controversy here presented originated in a plan, approved and actively supported by the leaders of the bituminous coal industry and by the National Coal Association, to organize in each region producing bituminous coal a selling agency which, by means of exclusive agency contracts between it and producers in the region served by it, would control the price at which most of the coal produced in its region would be offered for sale and sold. Appalachian Coals was the first of the agencies formed pursuant to this plan. The Government does not charge the appellants with conspiring to procure adoption of the regional selling agency plan throughout the industry. But it contends that the purpose and effect of their combination must be judged in the light of the fact that it is an initial step in a plan to substitute the "more enlightened" competition of a few great selling agencies for the greater part of the existing competition, termed "destructive," among independent producers.

Appalachian Coals was organized to act as the exclusive selling agent for producers in 8 different producing districts, 3 of which lie in Kentucky, 2 in West Virginia, 1 in Virginia, one partly in Kentucky and partly in West Virginia, and one partly in Kentucky and partly in Tennessee. (Def. Ex. A, R. 54; Gov. Ex. 3, Table I, R. 951–956.) These 8 districts will be collectively referred to as Appalachian territory and coal produced therein will be referred to as Appalachian coal. The districts are known locally as Big-Sandy-Elkhorn, Harlan, Hazard, Kanawha, Logan, Southern Appalachian, Southwest Virginia, and Williamson. (Fng. 2, R. 153.) Together they form what is sometimes called the Southern High Volatile Field and are part of the coal-bearing area stretching from central and western Pennsylvania, through eastern Ohio, western Maryland, West Virginia, southwestern Virginia, eastern Kentucky and eastern Tennessee to northeastern Alabama. (*Ibid.*)

Each of the 137 defendant producers operates one or more bituminous coal mines in Appalachian territory and together they control about 73% of the total coal produced therein, other than by captive mines.[2] (Fng. 2, R. 153; R. 19, 40.) Heretofore each has been independently engaged in marketing its coal in interstate and foreign commerce in competition with each other and with other producers of bituminous coal. (Fng. 3, R. 153–154.)

The general regional sales agency plan

The regional sales agency plan had its inception in meetings of leaders of the industry held in New York City during the latter part of 1931. (Fngs. 18–20, R. 167–170.) The New York meetings followed a meeting of West Virginia producers called by the Governor of that State at which the Gover-

[2] Captive mines are mines owned by consumers of coal, the output of which is substantially noncompetitive with defendants' coal because ordinarily it is not sold commercially in any large amount. (Fng. 29, R. 180.) Mines that are not captive will be sometimes referred to herein as noncaptive or commercial mines.

nor was informed that one State alone could not cope with the problems of the industry. (R. 318, 443.) Accordingly, at the request of this meeting, the president of the National Coal Association[3] called a general meeting in New York, inviting the directors of the Association who resided east of the Mississippi (not as directors, but as individual producers), and requesting them to invite others. (Fng. 18, R. 167; R. 319.) This meeting convened October 21, 1931, and discussed a number of plans which were suggested to bring about "a more regulated production" and "methods of realizing a better price" for coal. (R. 319, 443.) A committee to consider these proposals was appointed. (Fng. 8, R. 167.)

The committee thus appointed decided that the problems of the industry could best be solved by physical consolidations and mergers and, where this was not practicable, by the formation of regional sales agencies, and special counsel was employed to pass upon the legality of the proposals. (Fng. 18, R. 167–168; R. 320–321.) The committee subsequently filed a report which was unanimously adopted at a second general meeting of bituminous operators held in New York on December 3, 1931. (Def. Ex. B, R. 104, 105, 147–150.) The report stated that in the opinion of the committee the re-

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[3] The National Coal Association is composed of the members of district coal associations and individual producers who are nonmembers of local associations. (R. 444.)

gional sales agency plan "offers the greatest promise for immediate betterment of conditions in the bituminous coal industry." (Def. Ex. B, R. 108.) It recommended that the chairman of the meeting appoint a committee in each producing district to "present this plan to the operators in their respective districts and procure, if possible, its adoption by them." (*Ibid.*) Counsel's opinion on legality and proposed forms of contract (1) between regional sales agencies and producers and (2) between these agencies and their subagents were attached to the report. (Def. Ex. B, R. 107, 114, 128, 137.)

The committee's report and attached documents were later printed in pamphlet form and generally distributed throughout the bituminous industry. (R. 443.) The National Coal Association bore this expense, as well as the expense of employing special counsel. (Fng. 24, R. 175; R. 443.)

The forms of agency and subagency contracts approved by the New York meeting are in every essential detail the same as the agency and subagency contracts later entered into between Appalachian Coals and the 137 defendant producers and between it and its subagents. (R. 33; Def. Ex. A, R. 87–100; Def. Ex. B, R. 128–140.) The chief difference is that the form of agency contract approved at the New York meeting was to run for 10 years, whereas the contracts with Appalachian Coals run to April 1, 1935, or about 3 years from the time when they became effective. (Def. Ex. A, R.

95–96; Def. Ex. B, R. 136.) The form of agency contract approved at the New York meeting also provides that it "shall become effective when substantially similar exclusive agency agreements are signed by producers representing — per cent of the tonnage" in the district represented by the agency. (Def. Ex. B, R. 136.) This provision was omitted in the contracts with Appalachian Coals, but the same result was achieved by depositing the contracts in escrow until 70 per cent of the commercial production in Appalachian territory had agreed to sell exclusively through this agency. (R. 9, 32.)

Counsel's opinion on the legality of the regional sales agency plan states at the outset (Def. Ex. B, R. 121):

> It is assumed that the plan for a common selling agency will be adopted, if at all, by the entire industry.

The opinion which is dated November 5, 1931, also states that the various districts to be represented by selling agencies had not been definitely determined, but that it was expected that, in general, these districts would be "coextensive with the districts now covered by producers' trade associations." (Def. Ex. B, R. 114, 116.) The opinion then lists 29 districts east of the Mississippi River, some of which had no district association. (R. 117–118.) But when the chairman of the New York meeting appointed committees to procure adoption of the plan, he grouped these 29 districts into 19 regions or districts. (Def. Ex. B, R. 140–146.)

Eight of these were, for the purposes of the plan, consolidated when Appalachian Coals was formed. (R. 443.) The maximum number of regional selling agencies east of the Mississippi River has thus been reduced from 29 to 11, with a consequent increase in the size and power of each, and there may be still further consolidations. (R. 443.)

The 10 districts, other than those consolidated to form Appalachian Coals, for which committees were appointed are Western Pennsylvania, Illinois, West Virginia Smokeless Field, Central Pennsylvania, Ohio, Northern West Virginia, Indiana, Alabama, Western Kentucky, and Freeport Thick Vein. (Def. Ex. B, R. 141–146.)

Steps to carry out the regional sales agency plan were actively undertaken. The situation which brought consummation of the plan to a temporary halt in districts outside Appalachian territory is stated in the finding of the District Court (Fng. 24, R. 174):

> In January, 1932, the Department of Justice announced that it regarded the selling agency plan as illegal, and shortly thereafter producers outside the Appalachian territory decided to hold their plans in abeyance pending the determination of the question by the courts.

The District Court also said (Fng. 24, R. 175):

> The evidence tends to show that other selling agencies 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. The plan appears to have the active support of the leaders in the industry, and it was originally announced as one intended for adoption by the entire industry.

The following summarizes the steps taken to put the plan into effect in the 10 districts other than the 8 in Appalachian territory where it has already been adopted:[4]

(1) In the West Virginia Smokeless Field a sales agency was incorporated and forms of agency and subagency contracts were approved at a general meeting of operators. (Gov. Ex. 1, Rider A, R. 788.) A pamphlet setting forth the plan in detail and covering 52 pages of this record was printed and distributed. (Gov. Ex. 1, Rider A, R. 785–837.) The West Virginia Smokeless committee in a letter dated February 10, 1932, in stating that organization of the agency would not be completed until the legality of the regional sales agency plan had been determined by the courts, advised the operators in that district (Gov. Ex. 1, Rider B, R. 837–838):

> We are encouraged over the prospect of perfecting an organization in the Smokeless field with sufficient tonnage to make it a complete success.

[4] The District Court, through some inadvertence, failed to state fully the steps taken in other districts to organize selling agencies, as stipulated by the parties. (Cf., Fng. 24, R. 174–175; Gov. Ex. 1, R. 782–784.) The second paragraph on page 174 of the record shows some obvious error.

The chairman of the West Virginia Smokeless committee and the president of Appalachian Coals are, respectively, president and vice president of the Island Creek Coal Company, the largest of the defendant producers. (R. 316, 444; Gov. Ex. 1, Table I, R. 951–956.)

(2) In Ohio a committee of operators incorporated a sales agency and printed and distributed a pamphlet equal in length and in detailed presentation of the plan to that of the West Virginia Smokeless operators. (Gov. Ex. 1, R. 783, Rider C, R. 838–888. Under the heading "General Statement" the committee advised operators (R. 839):

> As you undoubtedly know, an attempt is being made by the Bituminous coal industry to set its house in order and the plan quite universally favored is that built around a Central Sales Agency. The hope of this group is to bring together all producers having mines in Ohio and in the West Virginia Panhandle District.

(3) In Northern West Virginia at a general meeting attended by producers representing a majority of the tonnage in that district the regional sales agency plan was approved in principle and a committee was appointed to draw up a definite plan of organization. (Gov. Ex. 1, R. 784.) The plan drawn up by the committee covers 46 pages of this record. (Gov. Ex. 1, Rider E, R. 902–948.)

(4) In Western Kentucky at a meeting of a majority of the producers in that district the re-

gional sales agency plan was approved in principle by all except one of the producers present. (Gov. Ex. 1, R. 783.) The forms of agency and subagency contracts presented to the meeting were discussed and a committee was instructed to prepare a plan of organization. (*Ibid.*)

(5) In Western Pennsylvania a committee devoted a large amount of time to working out a regional sales agency plan and sent a questionnaire to about 75 producers in that district. (Gov. Ex. 1, R. 783; Gov. Ex. 17, R. 995–997.)

(6) In Alabama a group of operators conferred concerning the organization of a regional sales agency and designated counsel to prepare an outline along the lines of the plan of organization of Appalachian Coals. (Gov. Ex. 1, R. 784.)

The committee in Central Pennsylvania submitted the plan to their counsel, who advised it was illegal; for this reason, and also because the operators there were not favorable at the inception of the plan, no steps were taken to organize a selling agency in that district. (Fng. 24, R. 175; R. 552.) The producers in Illinois decided against the formation of a sales agency there. (*Ibid.*)

Organization and operation of Appalachian Coals, Incorporated

Immediately after the adjournment of the New York meeting of December 3, 1931, a Property Owners Committee (consisting of representatives of 4 West Virginia Smokeless districts and the 8 districts in Appalachian territory) met and decided to call a general meeting of the producers in the 8

Appalachian districts. (Fng. 21, R. 171; R. 341.) This meeting was held in Cincinnati, Ohio, on December 10, 1931, and organization of a single sales agency covering these 8 districts was tentatively approved. (*Ibid.*) A further general meeting was held in Cincinnati on December 30, 1931, at which a definite sales agency plan, jointly prepared by district committees, was presented and approved. (Fng. 21, R. 172.) Following this meeting, a pamphlet containing copies of the charter and by-laws of Appalachian Coals, the forms of agency and subagency contracts approved at the meeting of December 30th, the form of a stock subscription agreement, and a statement outlining the purpose of the sales agency plan, was printed and distributed. (Fng. 21, R. 172; Def. Ex. A, R. 50–51.)

A third general meeting was held January 27, 1932. (Fng. 21, R. 172.) The Secretary of the National Coal Association at the opening of the meeting informed those present of the steps that had been taken to organize selling agencies in other districts. (Fng. 21, R. 173.) It was agreed that contracts appointing Appalachian Coals as exclusive agent and stock subscription agreements should not become binding until operators representing at least 70% of the commercial production in Appalachian territory had executed similar contracts and subscription agreements. (Fng. 21, R. 172.) At a later meeting on March 1, 1932, it was reported that approximately 73% of the 1931 commercial production in the territory had signed contracts and it was decided that a sufficient tonnage was represented to justify proceeding with the plan. (*Ibid.*)

At the meeting of January 27, 1932, when it was agreed that a minimum of 70% of the commercial tonnage should be secured before the plan became effective, it was also agreed that 80% of such tonnage was the maximum which the agency should represent.[5] (Fng. 21, R. 173.) A resolution to make the maximum 90% was defeated. (*Ibid.*) Concerning this action, the District Court found (Fng. 48d, R. 213):

> The purpose of the defendants to establish an organization that would exercise substantial influence upon market conditions is shown by the understanding between them that the contracts between the producers and the Sales Agency would not become effective until a minimum of 70% of the tonnage had come into the arrangement. A maximum of 80% was fixed, because it was feared that a greater percentage would bring about an unlawful restraint of trade.

Appellants in their brief (p. 18) state that the 73% of tonnage controlled by Appalachian Coals does not properly reflect its competitive strength in the territory in which it is located because certain competitive producing areas were "arbitrarily"

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[5] The 80% maximum can be changed by action of the stockholders or board of directors of Appalachian Coals. (R. 478.)

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excluded from that used in determining the percentage of tonnage necessary to make the plan effective. The court's finding to which reference is made shows, not an arbitrary exclusion, but that operators in certain localities surrounding Appalachian territory, who decided not to join the agency, were in a somewhat different competitive position than Appalachian operators, by reason of an advantage in local markets, facilities for shipment on the Ohio River, or slightly lower volatile coal. (Fng. 29, R. 181.) And the court referred to the testimony of the president of Appalachian Coals that the purpose was to combine in each district, under a common selling agency, coal produced under like competitive conditions. (Fng. 29, R. 182.) This same witness testified that it was, and still is, expected that additional operators will contract to sell exclusively through Appalachian Coals. (R. 445.)

The District Court found that the organization of Appalachian Coals was not made dependent upon the formation of other regional sales agencies and it found no evidence of an understanding that, in the event other sales agencies were formed, there would be any agreement among them, direct or indirect, to divide market territory, fix prices, or limit production. (Fng. 24, R. 173–174.) But the District Court also recognized the close relationship between appellants' decision not to proceed with the organization of Appalachian Coals unless they secured a 70% control in their own territory and their expectation that other agencies with a like degree of control would be formed in other districts. It found (Fng. 24, R. 173):

> 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 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.

Each defendant producer, by his contract with Appalachian Coals, appoints the latter his exclusive selling agent for the coal produced by him in Appalachian territory; agrees that he will not "dispose of, sell, or ship any coal except upon the order and at the direction of the Selling Agent"; agrees to pay the selling agent the damages caused by his failure or refusal to ship coal "as directed by the Selling Agent"; and agrees to pay the selling agent a commission of 10 per cent of the gross selling price f. o. b. at the mines. (R. 33; Def. Ex. A, R. 88, 92, 95.) The producer authorizes the Selling Agent to sell his coal at the best price obtainable under existing competitive conditions, subject to the proviso that upon contracts calling for deliveries of coal after 60 days from the date of the contract, the selling agent must obtain the prior written authorization of the producer. (R. 90–91.) Both parties agree that when demand is not sufficient to absorb the output of all the producers represented by the selling agent, the latter shall allocate available orders among the producers represented by it, upon the basis of railroad mine ratings, so as to give "each producer's mine or mines producing the same or interchangeable grades of coal as nearly its pro rata part of the available orders as is reasonably possible." (R. 89–90.)

The contract, as modified after execution, provides that the producer shall turn over his coal to the selling agent for sale not later than July 1, 1932, or within 30 days after the favorable termination of any litigation previously instituted to enjoin operation under the contract. (R. 11, 222.) The contract runs to April 1, 1935, and thereafter from year to year until terminated by either party upon 6 months' prior notice. (R. 95–96.)

Appalachian Coals, on its part, agrees to establish a standard classification for the coal which it sells and to use "its best efforts to sell all the coal produced by the Producer at the best possible prices obtainable." (R. 88, 89.)

The contract authorizes the producer to designate at any time subagents of Appalachian Coals, upon the terms and conditions contained in the annexed form of subagency contract. (R. 34; Def. Ex. A, R. 93-94.)

In this subagency contract the subagent agrees to use its best efforts to sell coal of the producers for whom it is designated to act "upon such terms and conditions and at the price or prices established by the Selling Agent from time to time" and agrees not to depart from these terms and conditions and prices. (R. 98.) For these services the subagent is to be paid a commission of 8% of the selling price f. o. b. at the mines. (R. 99.)

The purpose of having subagents is to preserve all the existing sales outlets of the defendant producers, by converting their existing sales representatives into subagents. (Fng. 6, R. 156.) Practically all of the 137 defendant producers have indicated that they will appoint subagents for the sale of their coal. (Fng. 7, R. 157.) It should also be noted that in the report submitted to the New York meeting of December 3, 1931, the committee stated that probably 90% of the coal going into regional sales agencies in the beginning would be sold by designated subagents. (Def. Ex. B, R. 112.) As we shall later contend (*infra*, pp. 54, 89), the only material change in the marketing of coal effected by appellants' combination is to vest price control in a single common agent of the individual defendant producers. The District Court pertinently observed in its opinion (R. 222):

> Subagents are to sell the coal of the producer at whose instance they are appointed; and, notwithstanding the agreement as to prorating orders, it is understood that coal

sold to be delivered by a certain producer is to be delivered by him. It does not appear with certainty how this is to be reconciled with the agreement for prorating; but it is certain that no producer is to sell except through the agency and that the agency is to fix the prices at which all sales are to be made.

The defendant producers have paid or agreed to pay over $500,000 for the stock of Appalachian Coals to which they have subscribed. (Fng. 8, R. 157.) Four of the 137 own together more than one-fourth of the company's common stock, which has sole voting rights, and 17 of them own a majority of said common stock. (*Ibid.*)

Existing and prior sales agencies

We submit that appellants' discussion (brief, pp. 13, 70–71, 87–89, 111–112) of sales agencies gives the erroneous impression that agencies comparable in nature and scope to Appalachian Coals are now operating and have always operated.

The approval by the industry, in extraordinary session and upon advice of counsel, of the regional sales agency plan as a means of improving conditions, would seem to refute the suggestion that this was merely a plan to create (app. brief, p. 13) "the usual and normal method of marketing coal." That this is not so is also conclusively established by the evidence bearing directly upon sales agencies. The only existing agencies in Applachian territory as to which any definite information was given are those representing mines which are largely or wholly under common ownership and therefore bring about the elimination of little, if any, competition.

Reasonably definite information was furnished as to three existing sales agencies. The largest of these represents 16 mines, of which 15 "are practically a common ownership" and were referred to by the president of the agency as "just a family affair." (R. 695, 702.) The production of these mines is normally from 2,500,000 to 3,000,000 tons a year. (R. 695.) The next largest agency represents 7 mines having "an interlocking stock ownership." (R. 687.) Their annual output is between 2,000,000 and 2,250,000 tons a year. (R. 687.) The third agency sells the output of 7 mines,[6] the president of the agency being also president of and financially interested in 3 of these. (R. 742, 743.) This selling agent is not authorized to make sales on contract without consulting the producer. (R. 746.)

With reference to prior agencies, it appears that practically the entire output of mines in the Pocahontas district (one of the 4 districts in the West Virginia Smokeless Field) on the Norfolk & Western Railroad was represented by an exclusive agency from about 1882 to about 1905. (R. 335.) It is not shown whether or not the agency opera-

[6] At least 6 of the 7 mines represented have a very small production. (R. 742, Gov. Ex. 3, Table I, R. 953, 954, Table II, R. 959.)

tions were abandoned because of the decision in 1902 of *Chesapeake & Ohio Fuel Co.* v. *United States,* 115 Fed. 610 (C. C. A. 6th), holding that a combination of certain producers in the Kanawha district to market part of their coal exclusively through a common selling agency at prices fixed by a committee of producers was illegal under the Sherman Act. Another agency handled for a number of years the output of from 70% to 90% of the mines in the Kanawha district, but it ceased to do business in 1907 or 1908. (R. 335, 744.) The agency to which defendants refer (brief, p. 88) as " fully equal in importance to " Appalachian Coals began operating in 1900 or 1901 and continued as a selling agency for one year or less. (R. 727, 735–736.) On the important question of price control, the testimony as to these early agencies is merely that " as a rule " the agreements permitted the agency to use its own judgment on spot sales, but required the producer's consent where the sale was to run for a period of more than 60 days. (R. 335.)

At least one and probably both of the 2 sales agency contracts introduced by the appellants, presumably typical of the kind of sales agency upon which appellants rely, is fundamentally different from the contracts with Appalachian Coals in that the producer retains control over price. (Fng. 19, R. 168–169, R. 335–336, 781.) One contract provides that the producer "reserves the right to, and will, from time to time, determine the prices and terms of sale at which and on which coal is to be sold by" the selling agent. (Def. Ex. 41, R. 1081.) The other contract provides that the selling agent shall endeavor to secure the highest possible price for the producer's coal, with the understanding that the selling agent is to be "permitted" to meet all reasonable competition and "is not to be unduly restricted as to the price at which it is permitted to sell coal." (Def. Ex. 42, R. 1085.)

Production and distribution of bituminous coal

The effect of appellants' combination and their purpose in forming it must be judged, at least in part, in the light of their degree of control over commerce in bituminous coal in particular markets. In this connection it is pertinent to review briefly the distributive situation to determine to what extent the different producing districts compete or do not compete in common markets.[7]

The entire production east of the Mississippi River is not a common "pot" from which all markets and all consumers may draw with equal advantage, and, conversely, all producing districts can not compete on equal terms in all markets. Since freight rates frequently represent a large percentage of the total delivered cost (R. 497), a district

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[7] Only the area east of the Mississippi River need be considered, since imports are negligible (Def. Ex. 1, Table IV, R. 1005) and production west of the Mississippi River is not substantially competitive with appellants' coal (R. 247; Gov. Ex. 2, R. 948D, 948H, 948L).

can not enter a market, other things being equal, to which it has an adverse freight differential. But in many markets there are other factors of equal or greater importance, such as differences between districts in the quality of the coal mined and in its suitability for particular uses; varying costs of production, involving such items as taxes, wage levels, and original investment costs; and less tangible considerations, such as likelihood of strikes interrupting supply, established marketing outlets, and the habits, preferences, and prejudices of consumers. While it is impossible accurately to appraise the influence of each of these items separately, the net result—that the operators in certain producing districts obtain substantially all of the trade in bituminous coal in certain consuming regions—is clearly shown.

The 1929 production of bituminous coal in the producing districts east of the Mississippi River, defined or grouped to correspond as closely as possible to the districts proposed to be set up or set up under the general regional sales agency plan, was substantially as follows (R. 5–6, 26):

Producing District[8]	Production (Net Tons)
Appalachian Territory	95,100,000
Western Pennsylvania	91,700,000
Illinois	60,200,000
West Virginia Smokeless Field	57,500,000
Central Pennsylvania	45,200,000
Ohio and West Virginia Panhandle	30,500,000
Northern West Virginia	28,200,000
Indiana	18,500,000
Alabama	17,700,000
Western Kentucky	14,600,000
Somerset-Meyersdale, Cumberland-Piedmont	13,300,000
Miscellaneous	12,300,000
Total	484,800,000

Table VI of Defendants' Exhibit 1 (R. 1006A) shows the number of tons of bituminous coal moving by rail from each producing district (those west of the Mississippi River being combined) to each consuming State. Coal consumed locally and not shipped, coal sold for railroad fuel, shipments to the Great Lakes and to tidewater, and exports via rail are shown separately. The districts listed in this table are the same as those shown above, subject to the following explanation:

The New River-Winding Gulf and Pocahontas-Tug River districts together constitute the West Virginia Smokeless Field. (Gov. Ex. 1, Rider A, R. 785, 816.) The Northern Ohio and Southern

[8] The Western Pennsylvania district includes the Freeport Thick Vein district, the 1929 production of which was less than 10,000,000 tons. (Def. Ex. 1, Table III, R. 1004B; Def. Ex. 3, p. 1.) The production listed as "Miscellaneous" represents chiefly production in areas near or adjacent to Appalachian territory. (*Infra*, p. 26.)

Ohio districts together constitute the Ohio district and West Virginia Panhandle is grouped with Western Pennsylvania instead of with Ohio. The districts designated "Total Appalachian Coals, Inc., Districts" include Appalachian territory, with a production of about 95,100,000 tons, and a certain amount of near-by territory, with a production of about 12,675,000 tons. (Gov. Ex. 22, R. 1000.) In connection with Table VI we shall refer to this entire area as the Appalachian district.

Table VI shows the following, based upon 1929 rail shipments:

(1) North Carolina: All receipts were from the Appalachian district or the West Virginia Smokeless Field.

(2) South Carolina: 2,398,282 tons, or over 99.9% of all receipts, were from the Appalachian district and the West Virginia Smokeless Field, and 96% of all receipts were from the Appalachian district.

(3) Georgia: 3,000,996 tons, or over 99% of all receipts, were from the Appalachian district and Alabama.

(4) Virginia: 4,780,784 tons, or about 98% of all receipts, were from the Appalachian district and the West Virginia Smokeless Field.

(5) Alabama: 9,118,794 tons, or about 97% of all receipts, were from Alabama.

(6) Tennessee: 5,358,602 tons, or about 97% of all receipts, were from the Appalachian district and Western Kentucky.

(7) Florida: 486,694 tons, or over 95% of all receipts, were from the Appalachian district and Alabama.

(8) Kentucky: 3,929,053 tons, or about 94% of all receipts, were from the Appalachian district and Western Kentucky.

(9) Michigan: 18,365,421 tons, or over 92% of all receipts, were from the Appalachian district and the West Virginia Smokeless Field.

These percentages indicate that one producing district obtains substantially all of the trade in bituminous coal in 3 of these States and that 2 districts obtain substantially all of this trade in the other 6 States.

Table VI shows that in the markets (other than tidewater) east of the Mississippi River to which the Appalachian district shipped more than 1,000,000 tons in 1929, the producers there met substantial competition from operators in other producing districts only as follows: In South Carolina, none; in Michigan, North Carolina, and Virginia, only West Virginia Smokeless; in Kentucky and Tennessee, only Western Kentucky; in Georgia, only Alabama; in Indiana (outside the Chicago district), only Indiana; in Ohio and Lake Ports, only Ohio, Western Pennsylvania, and West Virginia Smokeless; in the Chicago district, only Illinois, Indiana, and West Virginia Smokeless; in Illinois (outside the Chicago district), only Illinois, Indiana, and Western Kentucky. The large producing district of Central Pennsylvania is not substantially competitive with the Appalachian district in any of these markets.

In the markets largely supplied by Appalachian coal, the per cent of total 1929 rail receipts from the Appalachian district, as shown by Table VI, is as follows:

Consuming State	% from Appalachian District
South Carolina	96.0
Georgia	84.0
Michigan	72.8
North Carolina	68.3
Kentucky	66.4
Tennessee	57.8
Indiana (outside Chicago district)	44.3
Great Lake ports	43.8
Ohio	34.8
Virginia	33.4

On the other hand, Pennsylvania may be cited as a State where the Appalachian district can not effectively compete because of the proximity of other supplies of suitable coal. Although it is one of the two outstanding consuming States, Table VI shows that less than 1% of its rail receipts were from the Appalachian district.

Defendants' Exhibit 2[a] enables us to carry the examination one step farther. This exhibit gives

[a] By stipulation this exhibit and Defendants' Exhibit 3 were not printed, but copies were furnished the Clerk of this Court for distribution to each Justice and to the parties. (R. 1104.)

the all-rail movement of bituminous coal in 1929, 1930, and 1931 from the various producing districts to, *inter alia,* Ohio, Michigan (divided between Lower Peninsula and Upper Peninsula), Indiana (outside the Chicago district), and certain cities in these States. It also gives the like rail movement for the year 1929 to Georgia, Florida, North Carolina, and South Carolina and to certain cities in these States. The district designated in this exhibit as "Territory from which Appalachian Coals, Inc., will ship coal" substantially corresponds with what is here described as Appalachian territory. (Gov. Ex. 22, R. 1000.)

This exhibit shows that the competitive situation is not fully reflected by percentages based upon the business of an entire State. The figures on distribution to cities show that a producing district may be a dominating factor in certain parts of a State and of negligible importance in other parts. Thus in Ohio, which is probably the largest consuming State in the country (Def. Ex. 1, Table VI, R. 1006A), Defendants' Exhibit 2 shows (p. 1) that of the total receipts in 1931, 30.25% were from Appalachian territory, 26.62% from Western Pennsylvania, and 25.36% from Ohio. But in the Ohio cities which obtained more than 60% of their coal from any one district, the percentage of the total 1931 business obtained by these three producing districts varied as follows:

City	% from Appalachian territory	% from Western Penna.	% from Ohio
Miami Valley (p. 61)	90.28	0.01	0.28
Springfield (p. 65)	87.51	.02	5.15
Dayton (p. 43)	76.48	.02	6.64
Cincinnati (p. 37)	66.57	1.08	.11
Marion (p. 57)	66.17	.13	22.91
Youngstown & Mahoning Valley (p. 69)	1.50	84.66	8.48
Lorain & South Lorain (p. 53)	3.90	78.97	2.50
Alliance (p. 33)	5.87	12.67	81.28
Akron (p. 29)	12.38	11.20	66.0
Massillon (p. 59)	.11	33.51	62.15

In general, in the south central and western parts of the State Appalachian territory has from 66% to 90% of the market and Western Pennsylvania is not a competitor; the steel-producing cities in the extreme northeast are supplied principally by Western Pennsylvania and Appalachian territory is not a substantial competitor; and in the central northeastern region, where the northern Ohio mines are located (Def. Ex. 9, R. 1028A), Ohio coal is the dominant market factor and Appalachian territory is not a substantial competitor. The District Court found that the percentage of Appalachian coal consumed in the entire State of Ohio does not reflect the relative importance of that coal in the south central and western parts of the State. (Fng. 40, R. 198.)

The same territorial cleavage is graphically shown by Government Exhibit 7 (R. 983–985) giving, by consuming regions, the percentage of coal from Appalachian territory (R. 249) and the percentage of all other coal consumed in 1928 by electric public utilities in the generation of electric power. Coal from Appalachian territory represented 99.7% of the total of this consumption in Ohio west of Columbus and only 11.7% in Ohio, Columbus and east. (R. 983.) The following percentages taken from this exhibit show a similar situation in Kentucky and Tennessee (R. 984):

Consuming Region	% from Appalachian Territory
Kentucky—East of Louisville	100
Kentucky—Louisville and west	0
Tennessee—East of Nashville	86.6
Tennessee—Nashville and west	10.8

The data in Defendants' Exhibit 2 on 1929 shipments to Georgia and North Carolina cities likewise illustrate how widely the competitive situation within a State may vary. Only 4 Georgia and 6 North Carolina cities are covered by the exhibit. Nevertheless, one Georgia city received 87.36% of its coal from Appalachian territory, another only 21.68%; one North Carolina city received all of its coal from this territory, another only 27.57%. (Pp. 119, 125, 129.)

The freight-rate structure

In the printed pamphlet entitled "Plan of Organization of Appalachian Coals, Incorporated," it is estimated that less than 6% of Appalachian coal is sold in markets which it reaches on equal or favorable freight rates, compared with coal from other districts. (Def. Ex. A, R. 50, 61.) It is also stated that Appalachian coal has a freight disadvantage to points north and west of the Ohio River, where 75% of this coal is sold, averaging from 25¢ to $1.50 or more per ton. (R. 61–62.) These statements raise the question whether the freight rate structure operates as a check upon actual or potential monopolization of markets by operators in Appalachian territory.

Defendants' Exhibit 3 gives the freight rate per ton from the various producing districts to each city or group of cities included in their Exhibit 2. Defendants' Exhibit 9 (R. 1028A) is a map which attempts to present the freight rate structure in graphic form.

In the southeastern States, where Appalachian coal largely dominates the market, there are no uniform freight differentials. The map shows certain complicated differentials, but they have little evidentiary value in view of the wide range in rates, sometimes amounting to over $1 a ton, from the different districts within Appalachian territory to points in the Southeast. (Def. Ex. 3, pp. 50–57.)

The map deals principally with comparative freight rates from districts south and east of the Ohio River to the region north and west of the Ohio River. It shows that to the latter region (excluding a large part of Ohio[10]), freight rates from

[10] The map indicates that to southwestern Ohio the rate from Appalachian territory is 25¢ higher than from Ohio and the same as the rate from Western Pennsylvania. In fact, the rate to Cincinnati from Appalachian territory is, with minor exceptions, 35¢ *lower* than from Ohio and 54¢

Inner Crescent mines are 25¢, 35¢, or 50¢ a ton higher than from Ohio mines and that freight rates to corresponding destinations from Outer Crescent mines are 25¢ a ton higher than from Inner Crescent mines. Appalachian territory (except the Southwest Virginia district), Western Pennsylvania, and Northern West Virginia are in the Inner Crescent. (R. 301–302, Def. Ex. 3, pp. 20, 24, 37–d.) The West Virginia Smokeless Field, Central Pennsylvania, and the Southwest Virginia district are in the Outer Crescent. (*Ibid.*) The map does not show comparative rates from Illinois, Indiana, and Western Kentucky. Another map gives the rates from these and other districts to certain cities in northwestern Ohio. (Def. Ex. 23, R. 1052A.)

The fact that rates from Appalachian territory and Western Pennsylvania to the north central region are equal does not mean that the latter district can or does compete there with the former to any substantial extent. It also definitely appears that, notwithstanding the freight differential in favor of Ohio coal, that coal can not compete on equal terms with Appalachian coal in the more important consuming centers in this north central region. Generally speaking, Appalachian territory and Western Pennsylvania have the same rate to

lower than from Western Pennsylvania. (Def. Ex. 3, p. 5–a.) To Miami Valley the rate from Appalachian territory is slightly lower than from the larger Ohio districts and 31¢ lower than from Western Pennsylvania. (Def. Ex. 3, p. 17.)

the Lower Peninsula of Michigan, the Chicago district, and Indiana (except the Chicago district). (Def. Ex. 9.) Ohio has a differential over Appalachian territory of 50¢ to Michigan and northeastern Indiana, 35¢ to the Chicago district and northwestern Indiana, and 25¢ to the southern half of Indiana. (*Ibid.*) But the actual shipments in 1931 to these destinations from Appalachian territory, Western Pennsylvania, and Ohio were as follows (Def. Ex. 2, pp. 5, 7, 107):

	Shipments from Appalachian Territory	Shipments from Western Pennsylvania	Shipments from Ohio
Michigan, Lower Peninsula	8,836,199	229,313	1,051,767
Chicago district	3,758,761	8,387	15,453
Indiana (outside Chicago district)	4,547,839	2,324	142,321
Total	17,142,799	240,024	1,209,531
% of Appalachian shipments		1.4	7.1

The District Court found (Fng. 27, R. 176):

> 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.

Appellants' relatively low cost of production

Costs of production in Western Pennsylvania are higher than in Appalachian territory. This probably explains why the former can not compete with the latter when freight rates are equal. (R. 502.) An officer of the Pittsburgh Coal Company [11] whose mines are located in Western Pennsylvania, testified that, compared with Appalachian territory, this was a densely populated and highly industrialized region, making its taxes and coal-land values (and therefore depletion costs) relatively very high. (R. 495, 502–503.) In 1931 the Pittsburgh Coal Company's depletion, depreciation, and amortization costs were 33.46¢ per ton, while in the same year the like costs of the largest appellant company, Island Creek Coal Company, were 14.48¢ a ton. (Def. Ex. 5, Table V, R. 1010 I.)

Wages seem to constitute much the largest factor in total cost of production. (Def. Ex. 17, R. 1042.) Wages south of the Ohio River are lower than those north of that river and the southern operators believe that this difference in wage levels tends to offset their rate disadvantage to the north central region. (R. 338–339.) The Interstate Commerce Commission in a decision rendered in 1927 said that the record indicated that the southern West Virginia and eastern Kentucky districts produce bituminous coal at a lower cost than the principal Ohio and Western Pennsylvania districts. *Lake Cargo Coal Rates, 1925,* 126 I. C. C. 309, 351. It said that in the latter districts taxes and coal-land

[11] The record indicates that in 1931 this company's production was probably the largest of any company in the United States. (Def. Ex. 5, Table V, R. 1010, 1010 I.)

values are generally higher and that they encounter greater competition for certain classes of labor. (*Ibid.*)

Although Alabama has a freight advantage of 17¢ a ton over Appalachian territory to Atlanta, Georgia (R. 533), it ships there less than 8% as much coal. (Def. Ex. 2, p. 125.) This was explained as being due to the higher costs of Alabama mines. (R. 533.)

Other factors affecting competition: Quality of coal, suitability for particular uses and equipment, consumer good will

The District Court found that "Ohio coal generally speaking is of poorer quality" than Appalachian Coal. (Fng. 39, R. 195.) Ohio coal, compared with Appalachian coal, bas a much larger average moisture content, which makes it less combustible and to that extent less desirable at the same price (R. 574); it is, generally speaking, much poorer in actual combustion (R. 576) and averages less heat units per pound (R. 415); it averages higher in ash and sulphur content (R. 414, 415, 672); coal of low sulphur content is desirable in certain industries and is necessary in others, e. g., for metallurgical purposes (R. 620, 622); firing engineers have a standing objection to high sulphur coal because it tends to clinker and cover over the grates, which may possibly destroy them after a while (R. 672); steam plants requiring coal with high ash fusion can use very few Ohio coals (R. 416). Some

Illinois coal is worse than the Ohio coal and some is about the same (R. 574); generally speaking, it is not interchangeable, ton for ton, with Appalachian coal for steam purposes (R. 576); Illinois and Indiana coal, particularly Illinois coal, is considerably higher in moisture content than Appalachian coal and therefore inferior at the same price on a heat unit basis (R. 672).

A number of witnesses testified that the concerns which they represent use exclusively Appalachian coal and that they had used or tested Ohio coal and found it unsatisfactory from an efficiency standpoint. (R. 265, 267, 280–281, 285–286, 287.) Some of the reasons given for not using Ohio coal were lack of uniformity (R. 263), high moisture or high ash (R. 265), high sulphur and ash (R. 285), less heat value and lack of uniformity in heat and formation of clinkers (R. 287). The purchasing agent of a company maintaining daily efficiency records on coal had read the chemical analysis of 100 different Ohio mines without finding any that would be suitable. (R. 264–265, 270; Gov. Ex. 14, R. 991.) These witnesses represented the largest paper company in Kalamazoo, Michigan, a pulp and paper company at Detroit, Michigan, a brick manufacturing company at Portsmouth, Ohio, and a company manufacturing grey iron and malleable iron castings at Warsaw, Indiana. (R. 264, 279, 285, 286–287.)

One witness testified that Indiana coal filled the fire box with clinkers and, compared with Appalachian coal, gave less heat and was high in ash. (R. 287.) He stated that the company's experiment with Illinois coal showed it to be about the same as Indiana coal. (R. 287.) A company which maintained a laboratory and a trained staff for testing coals had at one time tried Illinois coal and found it "not good at all." (R. 280.)

The suitability of certain coals for certain uses affects distribution and tends to delimit competition. Bituminous coal is classed as high volatile or low volatile, depending upon the per cent of smoky gases given off when a fixed quantity of coal is heated without air. (R. 258–259.) Low volatile coal, which is often called smokeless, represents a little less than one-fifth the total United States production of bituminous coal. (R. 247.) Low volatile coal, because of its greater cleanliness and ability to hold fire longer, is more desirable than high volatile coal for domestic purposes.[12] (Fng. 28, R. 178; R. 313, 370, 389.)

Most of the large cities have smoke ordinances limiting the volatile matter that can be used and Smokeless producers are attempting to have other cities adopt such ordinances. (R. 389.) In the District of Columbia the choice between high volatile and low volatile coal is entirely governed by the smoke ordinance. (R. 262.) The use of West Virginia Smokeless coal has been growing very rapidly in Chicago, Cleveland, Detroit, and all

[12] These include the heating of large buildings, such as apartments and hotels. (R. 253.)

other cities where they are insisting on smokeless fuel. (R. 657.) It is a striking fact that over 50% of all 1929 rail shipments from the West Virginia Smokeless Field went to the Chicago district or tidewater,[13] whereas these markets absorbed in that year only about 11% of the shipments from the Appalachian district. (Def. Ex. 1, Table VI, R. 1006A.)

West Virginia Smokless coal, having this preferred outlet, ordinarily sells for a higher price than Appalachian coal. (R. 313, 370, 575.) This, in turn, gives Appalachian coal an advantage in other markets. The tremendous preponderance of Appalachian coal in the South Carolina market, where West Virginia Smokeless coal is the only competitor, is largely a matter of delivered price. (R. 389.) The president of Appalachian Coals, in explaining that the Appalachian operators had never considered including West Virginia Smokeless operators in this agency, said (R. 388):

> The competition and the difference in the quality of coals, the difference in the structure of the coals, to some extent the difference in the use of coals, was so generally realized that there was no discussion that there might be a possibility of the two competing fields working together in any way from a sales standpoint.

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[13] Tidewater coal is shipped by boat to New England, New York, Philadelphia, and other northern Atlantic ports. (R. 300.)

High volatile coal is, on the other hand, the accepted coal for the manufacture of illuminating gas and gas for industrial purposes, although sometimes a mixture of high volatile and low volatile coal is used. (R. 387.)

Since no two coals are exactly alike, it is necessary to find by chemical analysis and actual tests the coal best adapted to a particular type of equipment. (R. 260, 262.) The District Court found that certain coals are more desirable than others for particular firing equipments, which are often built to consume coal of a particular kind of combustion. (Fng. 28, R. 177–178.) This necessarily results in limiting the consumer in his choice of coal, thereby narrowing the field of competition.

A company manufacturing coal and water gas at Nashville, Tennessee, uses exclusively Appalachian coal, but has experimented with other Tennessee coals on which the freight rate was about one-half that on Appalachian coal. (R. 281–282, 285.) Unsuitable coal causes maladjustments in operation and damage to equipment and the company's engineer stated that he would rather give away such coal than use it. (R. 283.)

High volatile coal requires a larger fire box than low volatile coal in order that the gas may burn, instead of escaping as smoke, before it reaches the boiler tubes, thereby utilizing this heat. (R. 276.) Use of low volatile coal in a large fire box decreases the efficiency because the fire bed is unnecessarily far away from the boiler tubes. (R. 276.) In

North Carolina and South Carolina about 75% of the older cotton mills have been constructed for high volatile coal; low volatile coal can not be burned under these boilers because the combustion is complete before it reaches the bottom of the boiler and the boiler is heated with smoke only. (R. 517.)

The District Court found (Fng. 28, R. 178):

> Apart from this [type of equipment], the personal element is a vital factor affecting the interchangeability of different coals. Plant managers, engineers, firemen, and others accustomed to a particular quality of coal, being familiar with its action and effects, are reluctant to use substitutes. To change from one grade of coal to another in a particular plant causes considerable inconvenience.

One of appellants' witnesses explained the large use of Appalachian coal in Michigan as being largely due to the fact that during the War Ohio and Western Pennsylvania were not permitted to ship coal into that State, and "if you once get into a market of that kind, the fuel habit is a very hard thing to change." (R. 621–622.) He also stated that an important factor in preventing change from one kind of coal to another was the "personal equation," which he explained as a compound of inertia, prejudice, and the efficiency in operation which results from actual experiment with a particular kind of coal. (R. 625–626.)

Expectation of uninterrupted supply has been another factor in building up consumer good will for Appalachian coal. Every two years when a new union scale was to be made in Ohio or Pennsylvania there was let-down in mining lasting from 2 to 4 months, interruptions which are very serious for a plant with no storage facilities. (R. 621.) Consumers requiring a steady supply of coal prefer to purchase Appalachian coal rather than Indiana, Ohio, or Pennsylvania coal because they know that mines in the former region, being non-union, are not subject to periodic shut-downs. (R. 626, 776.)

SUMMARY OF ARGUMENT

I. The evidence fully supports the finding of the District Court that the effect of appellants' combination is to eliminate all competition among themselves and to fix uniform prices at which their product will be offered for sale. It also supports the court's conclusion that the elimination of competition and the consequent effect on prices are "the very crux of the plan." From the inception of the regional sales agency plan it was contemplated that its adoption in any district should be contingent upon securing control of a certain percentage of the production. The agreement among the defendant producers that their agency contracts with Appalachian Coals should not become effective until the latter controlled 70% of the commercial production in Appalachian territory shows the same purpose even more directly.

Appellants have enumerated economies, increased sales, joint research, advertising and credit information, and the partial elimination of "pyramiding" and distress coal as among the primary purposes of their combination It is pertinent to inquire whether it was necessary to set up an exclusive sales agency, with power to fix uniform prices, to achieve these ends, and whether this agency plan will materially change marketing methods, apart from restraint of trade. The plan will not bring economies in the marketing of coal or increase sales. Joint research, advertising, and credit information can be undertaken without adopting this exclusive sales agency plan. "Pyramiding" appears to be only a minor incident in the sale of bituminous coal. Appellants' combination will bring little relief in the matter of distress coal.

In appraising these alleged purposes, the Court must consider whether appellants' unwillingness to effect an organization to achieve them alone does not indicate that they are not the primary purpose of this combination. The Court must determine whether appellants surrendered a large measure of individual freedom and assumed substantial financial obligations chiefly to secure such intangible benefits as may result from joint advertising and research or a decrease in "pyramiding" and distress coal. We maintain that the real purpose of the combination is parallel with its outstanding effect, namely, the suppression of competition.

II. The District Court found that elimination of competition and concerted action, through the combination, will affect market conditions and tend to raise prices to a higher level than would prevail under conditions of free competition. It found that appellants will not have monopoly control of any market or power to fix monopoly prices.

These findings of the District Court must be read in the light of its other findings and of the evidence. The power of Appalachian Coals to control price will not be seriously affected by the competition of independent producers in Appalachian territory. Generally speaking, it is the large producers which have joined the combination and the small producers which thus far have stayed out. Both self-interest and business prudence will dictate a policy of accepting the price leadership of Appalachian Coals and endeavoring, upon this basis, to obtain a fair share of the market. The organization of regional sales agencies in other districts, which is already far advanced and only awaits the favorable outcome of this litigation to be completed, will increase the power of Appalachian Coals to affect and control price. Changes in conditions, such as a widespread strike or a production tax, would greatly increase this power, any sudden change in supply or demand being sharply reflected in price. Another important factor in the competitive situation is that certain producing districts have an advantage in certain markets which these producers can translate into higher prices if they are permitted to eliminate competition among themselves.

A review of the competitive situation in the States of North Carolina, South Carolina, Georgia, Ohio, Michigan, Tennessee, and Kentucky shows that Appalachian Coals will control more than 50% of the business in bituminous coal in important interstate markets in each of these States.

III. The Sherman Act must be interpreted so as to effectuate its policy and purpose. Congress, in prohibiting restraints of trade and monopolies, adopted the view that the public interest was best served by the maintenance of free competition, and the courts, in construing the Act, may not adopt other criteria of the public interest. If there are conflicting considerations which render it doubtful whether the policy of the Sherman Act is working to the best social advantage in a particular industry, it is for Congress, not the courts, to grant relief. Furthermore, it does not appear that appellants' sales agency plan will remedy the basic problems of the bituminous coal industry and it is probably economically unsound.

IV. Appellants' principal defense seems to be that there is no difference in legal or economic effect between their combination and a union of competitors under single ownership. They assert that a merger is not illegal unless it attains or exercises monopolistic power and that their combination will not give them such power.

Appellants recognize that a combination formed for the purpose of suppressing competition, whether in the form of a merger or otherwise, is illegal. Therefore, if we have correctly analyzed the primary purposes of appellants' combination, it is illegal upon appellants' view of the law. Moreover, the *Steel* and *Harvester cases,* upon which appellants rely, do not establish any legal principle of general application, except that the size of a corporation or its unexerted power is not in itself an offense under the Sherman Act. In addition, appellants' premise is not correct. Although mergers necessarily result in the elimination of the competition previously existing between the merged units, this consequential elimination of competition is usually merely incidental to a normal, legitimate business undertaking.

On the other hand, the abnormality of appellants' arrangement is shown by the fact that Appalachian Coals was created, not to displace sales agencies now operating, but to provide a medium for exercising price control. The abnormality of the plan is further shown by the fact that 137 different producers have given to a common agent the power to fix the price at which their product shall be sold. The provisions for allocating business create a definitely static condition among members of the group and likewise stamp the combination with abnormality. It also does not represent a normal trade development, but is essentially a "plan" imposed from above to bring about a change in competitive conditions.

While the analogy between this combination and a merger of competing units is remote, cases dealing with agreements not to compete or to sell at uniform prices are directly in point. A review of the decisions of this Court shows that it has always held or assumed that agreements of this character among a group large enough to affect the market are illegal under the Sherman Act.

ARGUMENT

I

APPELLANTS' COMBINATION ELIMINATES ALL COMPETITION AMONG THEMSELVES AND THIS IS THE CRUX AND PRIMARY PURPOSE OF THE COMBINATION

The District Court found that the effect of appellants' combination is to eliminate all competition among themselves and to fix uniform prices at which their product will be offered for sale. (Fng. 53, R. 217.) The court in its opinion, after repeating these findings, said (R. 225):

> 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 the 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 pro-

> ducers and the unified control given in offering their product upon the market, that the whole plan is predicated.

We submit that the evidence fully supports both the finding that, by the plan, all competition among the defendant producers is eliminated and the finding that this is the primary purpose of the combination.

Counsel in his opinion on the legality of the general regional sales agency plan frankly stated (R. 122):

> The adoption of this plan by certain producers in a particular producing district will, of course, eliminate competition formerly existing between the parties.

Under the plan the price at which coal is sold and offered for sale is determined by the common selling agent. Defendants nevertheless contend (brief, pp. 36–37) that since the selling agent will fix different prices for different grades of coal, there will be competition between different grades produced by different operators. The District Court dealt with and effectively disposed of this contention, finding (Fng. 48a, R. 209):

> Appalachian Coals, Inc., 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 dif-

ferent prices, all fixed by the same Selling Agent, would not constitute competition among defendant-producers.

The District Court also correctly found that the effect of appellants' combination is to fix uniform prices for the sale of their product. Appellants attempt to offset this finding by contending (brief, p. 37) that the sales agency contracts require Appalachian Coals "to sell all coal at the best price obtainable, no matter what that price may be." This is alleged to be the correct interpretation of the contract provision that Appalachian Coals will use its best efforts to sell "all the coal" of all the producers represented by it "at the best possible prices obtainable, or so much thereof as the market will justify." (Def. Ex. A, R. 89.)

Any amount of coal can be sold at a price. If the contracts mean that Appalachian Coals is under a duty to sell, regardless of price considerations, all the coal which the defendants can produce, then the competition between Appalachian Coals and all outside producers would be truly destructive. If this is the meaning of the contracts, it is idle for appellants to concern themselves with the depressive effect on prices of "pyramiding" and distress coal.

Another interpretation of the contract suggested by appellants (brief, pp. 110, 113–114) is that Appalachian Coals is required to ascertain what the market price is and then, having made this ascertainment, to sell all the coal which can be absorbed at that market price. But the actual and potential offerings of Appalachian Coals, and its sales, are necessarily important factors in making the market price. To suggest that any market price could be made without relation to the sales and price policy of what would be the outstanding unit in the industry is, we submit, to deal in fictions and not reality. The command to Appalachian Coals to sell all the producers' coal "at the best possible prices obtainable" is a meaningless limitation upon its power to fix prices since what is the best obtainable price depends upon the action of Appalachian Coals itself.

We turn to the question whether the elimination of substantial competition is "the very crux" of appellants' combination and whether "the whole plan is predicated" upon the elimination of competition and "the unified control given" in marketing their product. There is ample evidence to support these conclusions of the court below although under the decision in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, actual evidence of intent would seem unnecessary. The Court there said (p. 243):

> It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement.

The form of sales agency contract approved at the New York meeting of December 3, 1931, provided that it would not become effective until producers representing an agreed per cent of the total tonnage in the area served by the sales agency had agreed to sell exclusively through it. (*Supra*, p. 9.) From the outset, therefore, the plan contemplated that its adoption was to be contingent, not upon the amount of production represented by the agency, but upon the percentage of production controlled by it.

The purpose to restrict competition is reflected in the reduction in the maximum number of proposed regional sales agencies east of the Mississippi River from 29 to 11 (*supra*, pp. 9–10), a development which enormously increased the size of the territory represented by each such agency and its power to affect or control prices. This striking consolidation of districts is difficult to explain unless elimination of competition and price control were primary considerations. If these were not the primary considerations, it would seem easier to bring about adoption of the plan if each selling agent represented a small and cohesive producing district. Agencies so organized would also be better able to serve the particular needs of the local operators.

The agreement that the sales agency contracts between the defendant producers and Appalachian Coals should not become effective until the latter had secured control of 70% of the commercial production in Appalachian territory shows the same purpose even more directly. Control of an aggregate tonnage equal to 70% of the commercial production was not necessary for the successful operation of the plan, apart from a purpose to affect prices by suppressing competition. Of the 10 other districts east of the Mississippi River for which selling agencies are proposed under the plan as developed, the 1929 production in all but 3 of them was less than half that in Appalachian territory. (*Supra,* pp. 24–25.) In other words, Appalachian Coals, had it secured only a 50% control, would have represented a greater aggregate tonnage than 7 of the other proposed agencies would have if they secure a 100% representation. The production in Western Kentucky, where a sales agency plan has been approved in principle by the operators (*supra,* pp. 12–13), is less than that of one of the 8 districts represented by Appalachian Coals and about equal to that of another such district. (R. 446.)

Appellants' unwillingness to put their combination into effect until they secured a 70% control is, we submit, of the utmost significance. After meetings had been held; after the form of agency contract and the corporation's charter and by-laws had been approved; after contracts had been signed and stock had been subscribed for, even then the interested parties were not willing to proceed with the plan unless 70% of the commercial production was represented. (*Supra*, pp. 14–15.) This 70% was, moreover, within 10% of the 80% maximum which was adopted "in view of the danger of an illegal restraint of trade." (R. 448.) The court below was warranted in its finding that appellants' purpose "to establish an organization that would exercise substantial influence upon market conditions" is shown by their agreement that the agency contracts with Appalachian Coals should not become effective until a minimum of 70% of the tonnage had been secured. (Fng. 48d, R. 213.)

A combination which unreasonably restrains trade is not "excused because it was induced by good motives or produced good results." *Thomsen* v. *Cayser*, 243 U. S. 66, 86. Like quotations might be multiplied. But passing the objection that valid collateral purposes are no defense to a combination which directly and substantially restrains trade, it is pertinent to inquire whether appellants' combination will, apart from results incident to the suppression of competition, afford them any substantial relief or relief that could not be obtained without restraint of trade. Such an inquiry has a bearing on the question of the extent to which purposes not related to restraint of trade actually motivated appellants in forming their combination.

Appellants have enumerated (brief, pp. 24–29) economies, increased sales, cooperative research, advertising and credit information, and the partial elimination of "pyramiding" and distress coal as the purposes of their combination. We shall briefly discuss to what extent these "purposes" appear to have actually motivated appellants in setting up their exclusive sales agency plan.

(1) Economies and increased sales

Practically all of the defendant producers have indicated that they will appoint subagents for the sale of their coal. (Fng. 7, R. 157.) There is no limit upon the number of subagents a producer may appoint. (R. 34.) Under the plan existing selling agents will market coal as subagents, subject to the control by Appalachian Coals over prices and the allocation of orders, "in substantially the same manner that they have always marketed it heretofore." (R. 530, 700–701.) Under the plan the cost of maintaining the elaborate sales organization which Appalachian Coals will set up for determining prices (R. 423–425) will be superimposed upon all the usual, present expense of marketing coal. The president of Appalachian Coals testified the plan would effect no economies in the immediate future; that economies could be achieved, if at all, only after a year or so of operation; that the economies would be in advertising, rather than in distribution. (R. 333, 471.) It may be fairly inferred, therefore, that the plan will increase, rather than decrease, the cost of marketing the producers' coal.

We submit that neither the findings of the District Court nor the evidence warrant appellants' statement (brief, p. 30) that the designation of subagents is a "temporary expedient" and that it is expected that, as Appalachian Coals develops its own selling organization, the great bulk of the coal will be sold by its sales staff. If the present agencies for the sale of coal have "long established good will and personal contacts with consumers" which it is desirable to retain, it will continue to be desirable to maintain this good will and these contacts.

Appellants assert (brief, p. 24) that the "primary purpose" of the defendant producers in organizing Appalachian Coals "was to sell more coal." To increase sales may be the *desideratum,* but appellants have completely failed to show any necessary relation between this end and their exclusive sales agency plan. The plan will not furnish the sales stimulus of lower prices since it will not reduce the producers' costs. It does not effect economies in production or distribution and the avowed purpose of the plan in preventing "pyramiding" and distress coal is to mitigate the alleged depressive effect of these practices on prices.

The court below found that appellants believe that the cooperative advertising, research, and credit information which Appalachian Coals may undertake would result in the more economical sale of coal. (Fng. 48b, R. 210.) We shall therefore consider what is the relation, if any, of these activities to appellants' adoption of the sales agency plan.

(2) Joint advertising, research, and credit information

The exchange of credit information and the promotion of advertising and research are the ordinary activities of trade associations. These do not conflict with the free operation of economic laws, but rather make their operation more effective. Appellants urge that Appalachian Coals is to be the medium through which they will carry on these activities, but they have not satisfactorily explained why, in order to accomplish this purpose, it was necessary to set up a common exclusive sales agency with the power to fix prices. In many other industries trade associations carry on these purposes without having power to fix uniform prices or allocate business. If, as the president of Appalachian Coals testified, the bituminous producers have not heretofore been willing to cooperate in such matters because of the jealousy with which individual producers guard their independence (R. 349–350), it is curious that this unwillingness could be overcome only by a much greater surrender of independence.

Since joint advertising, research, and credit information can be undertaken without the price-fixing features of appellants' combination, there is a strong inference that Appalachian Coals was not organized to attain these ends.

It is also significant that no estimate has as yet been made of how much of the net income of Appalachian Coals, which will be in excess of $1,000,000 per year,"[14] will be devoted to these activities and that there is no provision in its detailed by-laws for setting aside any percentage of its net income for advertising or research. (Def. Ex. A, R. 74–87; R. 779–780.)

(3) Pyramiding

Appellants in their brief in this Court have given great emphasis to what is referred to as "pyramiding." (Brief, pp. 28, 50–51, 81, 84.) This occurs when a producer offers a given quantity of coal for sale through more than one agent, subject to prior sale. (R. 508.) The court below made no finding as to the extent of this practice (Fng. 12, R. 164); the evidence shows that it is "not the rule" for producers to sell coal in this way (R. 325). It was only referred to incidentally by 2 or 3 witnesses, the principal testimony on this point being quoted in appellants' brief (pp. 50–51). The practice would seem to be similar in effect to the placing of purchasing orders with more than one agent in a seller's market. "Pyramiding" appears to be for the most part a minor incident in the sale of distress coal, the shipper sometimes finding it necessary to offer it through several sales agents in order more quickly to find a purchaser. (R. 500.)

[14] The average f. o. b. sales price of the coal of defendant producers, even in 1931, would be at least $1.40 a ton. (Def. Ex. 1, Tables IV, VIII; R. 1005, 1007.) The production of defendant producers in 1931 was over 42,000,000 tons (Gov. Ex. 2, Table III, R. 948L), making their total sales realization over $58,800,000, on which the 2% commission of Appalachian Coals would be over $1,176,000, assuming that all coal is sold through subagents.

(4) Distress coal

The mining of coal results in the production of various sizes. All the sizes may be sold together as mine run coal or the coal may be run over screens, separating it into 2 or 3 or as many as 5 or 6 sizes. (Fng. 11, R. 162.) If a producer accepts an order for coal of a certain size without an order for the resulting excess size or sizes, the latter must be promptly shipped in order to keep the producer's tracks clear. (*Ibid.*) In that event the excess sizes are shipped on consignment to the producer or his agent at some consuming center or to a railroad billing point and if this coal arrives there unsold, it must sometimes be sold with little regard to price to avoid demurrage charges. (Fng. 11, R. 162–163.) This is termed distress coal. The finding (R. 163) as to the amount of no-bill coal [15] on July 16, 1932, might be regarded as indicating that all no-bill coal is distress coal, but the court found (R. 164) that distress coal is "only a fraction of the no-bill coal shipped" The practice of shipping coal to railroad billing points is well established and has been approved by the Interstate Commerce Commission. (R. 526–527, 592.) The production and shipment of unordered coal may be a purely voluntary method of marketing.

There is no data as to the amount of distress coal. Some producers limit their production to

[15] Coal standing on mine tracks or railroad holding yard.

coal for which they have orders. (Fng. 11, R. 163.) About 80% of the coal sold is purchased by industrial consumers, most of whom buy their requirements on a yearly contract. (Fng. 11, R. 164.) Many large domestic consumers purchase coal in the same way. (*Ibid.*) Ordinarily distress coal does not have the effect of depressing the price of coal purchased on contract. (*Ibid.*) It thus appears that the great bulk of all coal is neither sold as distress coal nor affected by its sale.

Appellants urge (brief, pp. 82–83) that Appalachian Coals will balance orders so as to give each of the 137 defendant producers, so far as possible, orders for complementary sizes and thus "reduce, if not eliminate" the necessity for shipping distress coal. The vice president of Appalachian Coals (R. 696) and the president of a sales agency representing 16 producers, all but one of whom are under common ownership (*supra,* p. 21), testified (R. 720):

> I think so far as the pro-rating of these orders is concerned, that is going to be an extremely difficult matter. We can not do it in our own organization.

To some extent the existence of distress coal is due to changing seasonal demand, the greater demand for domestic sizes in the fall creating a surplus of steam sizes and the reverse condition occurring in the spring. (Fng. 11, R. 164; R. 592.) The allocation of orders by Appalachian Coals would not materially alleviate the problem of distress coal in so far as it is seasonal. (Fng. 11, R. 164.)

Finally, there is reason to doubt that Appalachian Coals will attempt to prorate orders to any substantial extent. The allocation of orders is a difficult matter, even in a medium sized sales agency. (R. 706, 720, 759.) Apart from the inherent difficulties, the testimony discloses, and appellants appear to concede (brief, p. 37), that no effort will be made to prorate orders when a consumer orders coal of a particular producer or mine. (R. 773, 780.) That is the way commercial consumers ordinarily purchase their coal. (R. 272, 276, 284, 775.) It is expected that the subagents will push the sale of the coal of the producers whom they represent under the latters' trade names and brands (R. 530, 700-701, 781), and Appalachian Coals is required by the terms of its contracts with the defendant producers to maintain their trade names and good will (Def. Ex. A, R. 90). The court below found it difficult to reconcile the plan to prorate orders with the fact that subagents would sell the coal of producers whom they represent. (*Supra*, pp. 19–20.)

If appellants' purposes are the test of the legality of their combination, which we deny, the issue before this Court is whether their purposes, other than the elimination of competition, so far transcend in importance the intent to eliminate competition that their arrangement can be held to be a normal, usual, reasonable restraint of trade. And appellants must be held to have intended that which is "the necessary and direct result of their agreement," the elimination of substantial competition. (*Supra,* p. 50.) In appraising these collateral purposes, the Court must consider whether appellants' unwillingness to effect an organization to achieve these other purposes alone, does not indicate that these are not their main purposes. The Court must also take into consideration the fact that appellants by their agreements have surrendered in large measure their individual liberty of action and have agreed, in a time of financial stress, to contribute a capital fund of over $500,000. (*Supra,* p. 20.) The Court must determine whether freedom was thus surrendered and financial obligations undertaken, chiefly to secure such intangible and problematical benefits as may result from cooperative advertising and research and a decrease in "pyramiding" and distress coal.

We maintain that the inference is irresistible, that the real purpose of the selling agency plan is parallel with its outstanding effect, namely, the suppression of competition among a large number of individual producers.

II

APPELLANTS' COMBINATION GIVES APPALACHIAN COALS, INCORPORATED, THE POWER SUBSTANTIALLY TO AFFECT AND CONTROL THE PRICE OF BITUMINOUS COAL IN MANY INTERSTATE MARKETS

The court below found as an ultimate fact (Fng. 5, R. 217–218):

> 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. The defendant will not have monoply control of any market nor the power to fix monoply prices.

In its opinion the court said (R. 225)—

> although the agency will not be able to fix market prices or establish monopoly control in the markets in which it sells, the volume of coal which it will handle is so great that the elimination of competition among those who produce it, and the power to fix uniform prices at which it will be offered for sale, must necessarily affect market prices.

Appellants, we understand, do not take serious issue with these findings and conclusions of the District Court, but they contend that it erred in concluding as a matter of law that a combination of the nature of theirs and without power to exact monopoly prices is within the prohibitions of the Sherman Act. We contend (*infra* pp. 83–100) that under the decisions of this Court it is unnecessary to go beyond these findings of the District Court, but we shall endeavor to show the extent to which, in the light of the evidence, Appalachian Coals will have power to affect and control price.

Prior to an examination of the statistical data, it seems desirable to consider certain broader aspects of the situation.

An important question is the extent to which competition of independent (i. e., nonmember, noncaptive) producers in Appalachian territory will limit the power of Appalachian Coals to affect or control price. Generally speaking, it is the large producers which have joined the combination and the small producers which thus far have stayed out. In 1929 the output of the 137 defendant producers was 58,011,367 tons, or an average for each of 423,441 tons. (Gov. Ex. 3, Table I, R. 956.) There are 130 independent producers in Appalachian territory now operating and their 1929 production was 19,969,575 tons, or an average production for each of 153,612 tons. (R. 459; Gov. Ex. 3, Table I, R. 961.) A great many buyers do not purchase from mines whose annual production is 100,000 tons or less. (R. 411.) Based on 1929 production, as against the control by Appalachian Coals of over 58,000,000 tons, only 7 independent producers in Appalachian territory had production of over 500,000 tons. (Gov. Ex. 3, Table II, R. 956–961.)

The independent producer in Appalachian territory with an annual production of a few hundred thousand tons could not ignore the fact that Appalachian Coals, controlling approximately 50,000,000 tons of production, would be marketing coal in every market reached by him. To risk antagonizing this powerful agency by underselling it would certainly not be prudent. The self-interest of the producer would dictate a policy of accepting the price leadership of Appalachian Coals and endeavoring, upon this basis, to obtain a fair share of the market. The vice president of Appalachian Coals expressed the hope that the outside producer would "see the light" and would "play the game according to what is considered good business, at least, and not destructive competition." (R. 718.) He then said (*ibid*):

> If we can eliminate the destructive competition, we will have done all we expected to do with Appalachian Coals, Inc.

The District Court found (Fng. 48a, R. 209):

> In all consuming markets where a substantial portion of the present consumption is furnished by Appalachian coal, * * * many other producers would follow its price

> leadership for the purpose of maintaining their present share in these markets upon the basis of the price level established by Appalachian Coals, Inc.

Another question is the effect which the organization of other regional sales agencies will have upon the power of Appalachian Coals to affect and control price. The organization of regional sales agencies in the West Virginia Smokeless Field, Ohio, Western Kentucky, and Northern West Virginia is already far advanced and only awaits the favorable outcome of this litigation to be completed. (*Supra*, pp. 10–13.) There is evidence that other such agencies will be established. (*Supra*, p. 13.) It is expected that the competition of regional sales agencies will be "more enlightened" or "more intelligent" than that of individual producers. (R. 683, 707, 759.) These agencies which may be said to be organized to eliminate price competition and practices which depress prices are not likely to engage themselves in "destructive" price competition. These agencies organized pursuant to a common plan are not likely to operate in such a way as to defeat the common purpose of stabilizing conditions in the industry. (Def. Ex. B, R. 107.)

Another question is the weight to be accorded to the opinion testimony of appellants' witnesses as to the power of Appalachian Coals to affect or control price. The situation presented here is not like that before the court in *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, where the competition between two shoe companies could be "disclosed by observation." In the instant case the opinion of witnesses was given with reference to a competitive situation which was not within the experience of any of them. There has not been heretofore any unit in the bituminous coal industry comparable in size to Appalachian Coals. The 1931 production of the defendant producers was 42,361-771 tons (Gov. Ex. 3, Table I, R. 956), while the 1931 output of the four companies having the largest production of all those whose securities are listed on exchanges was (Def. Ex. 5, Table V, R. 1010 I):

Company	Production (In tons)
Pittsburgh Coal Co	10, 931, 636
Consolidation Coal Co	9, 866, 584
Island Creek Coal Co	4, 329, 022
West Virginia Coal & Coke Corp	2, 881, 000

Almost all of appellants' witnesses are engaged in the coal business and are thus to some extent interested in the movement to establish regional sales agencies. Among those not engaged in the coal business, the majority represented coal-carrying railroads. (R. 305, 478, 571–572, 721.) One of these witnesses stated, "If our operators are not prosperous, it will follow in due time that the railroad probably will not be prosperous." (R. 311.) Only three of appellants' witnesses represented consumers other than railroads. One of these represents a large power company which relies chiefly on water power and uses coal only incidentally. (R. 556.) One is described by appellants (brief, p. 47) as "the largest purchaser of coal" in certain

States. The third represents one of the largest chemical companies in the country. (R. 562.)

The Government witnesses, on the other hand, represented, in general, the industrial consumer of medium size, who does not have the bargaining power and resources of very large concerns. They were not asked to express speculative opinions as to the effect upon price of the organization of Appalachian Coals, but they testified to facts which showed their dependence upon coal from Appalachian territory. They are using, and for some time have used, solely Appalachian coal. (R. 264, 271, 272, 274, 275, 280.) Some had tested coals from other districts and found them unsatisfactory. (R. 269–270, 280, 281, 282, 285, 287.) Several had firing equipment designed especially for the use of Appalachian coal. (R. 267, 271–272, 274.) In the past their business has been solicited by several different defendant producers. (R. 271–272, 277, 282, 285.) The cost of coal represents from 10 to 50% of their cost of operation. (R. 273, 280, 283, 286, 288.) Most of these may properly be regarded as "complaining witnesses," but in any event no inference may be drawn from failure to call such witnesses when the producers' coal has not yet been turned over to Appalachian Coals for sale and the shoe has not yet begun to pinch.

The District Court found (Fng. 52, R. 217):

> 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.[16]

The effect of changes in competitive conditions must also be considered in connection with the power of Appalachian Coals to affect price. In the bituminous coal industry any sudden change in supply or demand is sharply reflected in price since there are no substantial stored supplies of bituminous coal. The effect upon price of the British and anthracite strikes in the latter part of 1926 is shown by the fact that the average monthly price of bituminous coal, which from May to July, inclusive, was practically stationary, jumped in the next 4 months from $1.91 a ton to $3.19 a ton, and in the following month dropped to $2.53 a ton. (R. 297.)

The charts attached to Government Exhibit 5 give the average yearly wholesale price of bituminous coal, pig iron, copper, lead, zinc, wheat (winter and spring), cotton, farm products, and "all commodities" (represented in the commodity price index of the Bureau of Labor Statistics, Department of Labor). (R. 982–982 I.) These yearly price averages tend to level off price fluctuations, but they nevertheless show that, using 1913 prices as the index, since 1913 the peak price of bituminous coal has been higher than the peak price of any other commodity or group of commodities cov-

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[16] This finding does not rest solely on the testimony quoted in appellants' brief (p. 58). The court also referred to the testimony of four other witnesses for appellants. (R. 313–315, 537, 559 (see 560), 561, 709.)

ered by the exhibit. (*Ibid.*) For a time after the War some bituminous coal was selling at $21 a ton at the mines. (R. 521.) In 1930 the average price at the mines was $1.70 a ton. (Def. Ex. 1, Table V, R. 1005.)

Conditions are never static. A widespread strike in any one of several districts, or in several districts at the same time, would greatly increase the power of Appalachian Coals to affect and control price in particular markets. A heavy production tax in certain States would have substantially the same effect.

Finally, the most important factor in the competitive situation is that certain producing districts supply substantially all the requirements of certain markets. (*Supra*, pp. 26–28.) This is not accidental, but is due to some definite advantages enjoyed by the producers in the preferred district or districts. The latter can translate this advantage into higher prices if they are permitted to combine to eliminate competition among themselves.

Consumers use the coal which is the cheapest to them in terms of efficiency. The actual price per ton depends upon the selling price at the mine plus the freight rate. A lower cost of production will offset higher freight rates. Better quality of coal or its suitability for particular uses or equipment may also make it cheaper in terms of efficiency than coal which can be purchased at a lower per ton cost. We have previously outlined the effect of these and other factors upon the distribution of bituminous coal and have noted that their net effect is to make Appalachian territory the largest producing district in the United States and Appalachian coal the preponderant coal in numerous markets.

It seems unnecessary to examine the competitive situation in every market reached by Appalachian coal. North Carolina, South Carolina, Georgia, Ohio, Michigan, Tennessee, and Kentucky may be taken as illustrative of the situation in markets where Appalachian Coals would have the greatest power to affect and control price.

(1) North Carolina and South Carolina

These States have certain common characteristics. In each the defendant producers supplied more than half of all the bituminous coal (other than railroad fuel) consumed in 1929. (Gov. Ex. 21, R. 999.) In that year Appalachian territory furnished 94.25% of the coal consumed in South Carolina and 73.66% of the coal consumed in North Carolina. (Def. Ex. 2, pp. 121, 123.) In North Carolina all, and in South Carolina substantially all, of the remaining coal used was West Virginia Smokeless coal. (*Ibid.*) The evidence discloses that if the present petition is dismissed a powerful sales agency similar to Appalachian Coals will be formed by the West Virginia Smokeless operators and that these 2 agencies together will then control at least 70% of the coal now consumed in these 2 States. (*Supra*, pp. 11, 26.)

To typical cities in these States the freight rate from the Virginia district[17] in Appalachian territory is lower than from other parts of Appalachian territory, except a small subdivision of the Southern Appalachian district. (Def. Ex. 3, pp. 50–53, 57.) Because of this difference in rates, in South Carolina 81% and in North Carolina about 45% of the coal received from Appalachian territory is from the Virginia district. (Fng. 36, R. 188; Def. Ex. 2, p. 122.) Appellants control 84% of the commercial production in the Virginia District, as compared with a 73% control in the entire Appalachian territory. (Fng. 36, R. 188.) Of the nondefendant commercial producers in the Virginia district only 2 had a production in 1929 of over 200,000 tons and the largest of these had a production of only 233,463 tons. (Gov. Ex. 3, Table II, R. 960–961.) Independent producers in the Virginia district therefore can not furnish the "steady and large supply of coal of the same variety" which is a factor in the purchase of coal by large consumers. (R. 274.)

The District Court found that at present Appalachian coal "has almost a complete monopoly" in western North Carolina; that to Asheville and Canton freight rates from the West Virginia Smokeless Field are more than $1 per ton higher than from parts of Appalachian territory; that Canton con-

[17] This is sometimes called the Southwest Virginia district. (*Supra*, pp. 5–6.)

sumed 220,263 tons of coal in 1929, all of which came from Appalachian territory; that Asheville consumed in that year 150,826 tons, of which 95.48% came from Appalachian territory. (Fng. 35, R. 186.)

As to South Carolina, the District Court found that the following table shows the competition between Appalachian territory and the West Virginia Smokeless Field for business in that State (Fng. 36, R. 189):

City	Freight differential [1]	Appalachian coal
Greenville	72¢	98.77%
Spartanburg	62¢	99.06%
Anderson	55¢	99.76%
Columbia	27¢	86.71%
Charleston	20¢	91.67%
Florence	0	99.81%

[1] In favor of Appalachian territory.

There is no natural gas in North Carolina or South Carolina. (R. 518.) Fuel oil is substantially competitive only along the coast. (Fng. 35, R. 187; Gov. Ex. 9, Table II, R. 989.) In South Carolina bituminous coal supplied in 1929 56.9% of the total energy consumed in manufacturing establishments, and an analysis of the energy consumption by manufacturing establishments in the 15 leading counties of the State shows that in 3 of the 15 over 90% of the consumption was derived from bituminous coal. (Gov. Ex. 8, Table II, R. 987; Gov. Ex. 9, Table II, R. 989.) We submit that the "percentages of total value of fuels consumed in manufacturing establishments derived from: (a) bituminous coal (b) water power" (app. brief, p. 185) cannot be relied upon.[18]

(2) Georgia

Of the coal (other than railroad fuel) consumed in Georgia in 1929, 45.7% was shipped by the defendant producers and 75.53% of the coal consumed in that State in 1929 was Appalachian coal. (Fng. 37, R. 190.) All except 6.38% of the remaining coal was from Alabama, where the organization of a regional sales agency has been undertaken. (*Ibid; supra*, p. 13.) In 1929, 816,182 tons of bituminous coal were shipped to Atlanta and 146,896 tons to Augusta, of which 85.67% and 87.36%, respectively, was from Appalachian territory. (Fng. 37, R. 190–191.) In the same year bituminous coal supplied in Georgia 72.3% of the total energy consumption derived from fuels and water power.[19] (Gov. Ex. 8, Table I, R. 986.)

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[18] In computing these percentages, the value of bituminous coal used in the production of electric power is included in the value of "purchased electric energy" (which appellants' brief erroneously designates "water power") and is excluded from the value of bituminous coal consumed by manufacturing plants. (R. 407–408.) The effect of this is to make the bituminous coal percentage too low and the purchased electric power percentage too high.

[19] If 1930 figures were substituted, the increased consumption of natural gas would reduce the percentage of total energy consumption derived from bituminous coal about 1.4. (Gov. Ex. 8, Table I, R. 986.)

(3) Ohio

In considering the competitive situation in this State, there are two outstanding facts. One is that the shipments to Ohio by the defendant producers constitute a greater percentage of their total shipments than do the shipments to Ohio of the producers in Appalachian territory as a whole. The second is that in the south central and western part of the State a very large part of the coal comes from Appalachian territory, which has to this area freight rates equal to or lower than those from Ohio mines, which are the only other large shippers to consumers there. (*Supra*, pp. 30, 32–33.)

Excluding receipts from captive mines, in 1929 the defendant producers furnished 33.7% of the rail receipts of bituminous coal in Ohio, whereas in that year Appalachian territory as a whole furnished only 32.42% of the total rail shipments to Ohio.[20] (Gov. Ex. 21, R. 999; Def. Ex. 2, p. 1.)

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[20] We can not accept appellants' explanation (brief, p. 149) of these percentages as probably due to the fact that one includes and the other excludes shipments and consumption of captive coal. Of the total 1929 captive production in Appalachian territory, all but about 12,000,000 tons was shipped to tidewater, used as railroad fuel or mined by the State of Tennessee. (R. 420.) Of this 12,000,000 tons, approximately 8,175,000 tons is identified as going to the Chicago district, Michigan or Canada, and a considerable part of the remaining 3,825,000 tons appears to be shipped to Lake Ports. (R. 420–421.) We do not find any captive production in Appalachian territory definitely identified as going to Ohio.

Since Appalachian Coals would therefore control substantially more than 73% of the Ohio shipments of commercial Appalachian coal, 80% may be taken as conservatively representing this control. Applying 80% to the percentage of total receipts represented by Appalachian coal will give the approximate share of the business done by the defendant producers. The Government does not contend that this method gives precisely accurate results for any particular city; it does contend that it indicates with accuracy the broad outlines of the situation.

The following shows the total 1931 rail receipts of bituminous coal in Miami Valley and 3 Ohio cities, the percentage shipped from Appalachian territory and the approximate percentage shipped by the defendant producers: [21]

City	Total receipts (in tons)	Per cent from Appalachian territory	Per cent from defendant producers
Miami Valley	1,386,695	90.28	72.2
Springfield	233,270	87.51	70.0
Dayton	746,286	76.48	61.2
Cincinnati	1,585,578	66.57	53.3

Appellants have referred (brief, p. 151) to shipments to Cincinnati by barge down the Ohio River. The only districts mentioned as making such shipments at the present time are those in Appa-

[21] Columns 2 and 3 are taken from Defendant's Exhibit 2, pages 37, 43, 61, 65. Column 4 is 80% of column 3. If the same calculation was made for 1929, the percentages in column 4 would be somewhat higher.

lachian territory. (R. 398.) Since 1918 a negligible quantity of coal has been shipped to Cincinnati by river from western Pennsylvania and northern West Virginia and no such shipments are now being made. (R. 403.)

In Ohio in 1929 of the total consumption of energy derived from fuels and water power, 88.7% was derived from bituminous coal, 11.2% from other fuels and 0.1% from water power. (Gov. Ex. 8, Table I, R. 986.) Of the total energy consumed by manufacturing establishments in that State in 1929, 90.7% was derived from bituminous coal, 9.2% from other fuels and 0.1% from water power. (Gov. Ex. 8, Table II, R. 987.)

(4) Michigan

The defendants shipped 43.2% of all the rail shipments to this State in 1929, excluding captive production. (Fng. 39, R. 194.) In 1931 of the total rail shipments to the Lower Peninsula of Michigan amounting to 12,974,283 tons, 68.11% were from Appalachian territory and of the like shipments to the Upper Peninsula of Michigan amounting to 75,709 tons, 51.28% were from Appalachian territory. (Def. Ex. 2, pp. 5, 13.) In 1929 these percentages were higher. (*Ibid.*)

Using the method previously described to show the defendant produeers' share of the trade in certain Ohio cities, but taking 73% instead of 80% as their share of shipments from Appalachian territory, gives for the year 1931 the following result for 5 inland cities in Michigan. (Def. Ex. 2, pp. 73, 79, 83, 85, 87):

City	Total receipts (in tons)	Per cent from Appalachian territory	Per cent from defendant producers
Kalamazoo	590, 135	90. 11	65. 78
Battle Creek	274, 627	84. 38	61. 59
Lansing	401, 503	82. 69	60. 36
Jackson	218, 074	75. 09	54. 81
Flint	528, 713	72. 26	52. 75

In Michigan in 1929 of the total consumption of energy derived from fuels and water power, 89.7% was derived from bituminous coal, 6.7% from other fuels, and 3.6% from water power. (Gov. Ex. 8, Table I, R. 986.) In Michigan in 1929 of the total energy consumed by all manufacturing establishments, 88.5% was derived from bituminous coal, 8.3% from other fuels, and 3.2% from water power. (Gov. Ex. 8, Table II, R. 987.)

(5) Kentucky and Tennessee

There is no data in the record showing the movement of bituminous coal to points within these States, but in 1929 Appalachian coal constituted 66.4% of the total consumption in Kentucky and 57.8% of the total consumption in Tennessee. (Fng. 31, R. 184.) In that year the Appalachian and Western Kentucky districts together shipped about 94% of the total rail shipments of bituminous coal (other than railroad fuel) to Kentucky and about 97% of such shipments to Tennessee. (*Supra*, p. 27.)

Since the Western Kentucky district lies, as its name indicates, in western Kentucky, and since the southwestern part of Appalachian territory lies in eastern Kentucky and Tennessee (Def. Ex. 23, R. 1052A), it is apparent that the producers in each of these districts have a natural market in these States not subject to substantial competition from producers in the other. This inference is confirmed by the fact that electric public utility plants in Kentucky, east of Louisville, use exclusively Appalachian coal and, Louisville and west, do not use any Appalachian coal, and that in Tennessee, east of Nashville, 86.6% of the coal used by such plants is Appalachian coal and, Nashville and west, only 10.8% of their consumption is Appalachian coal. (*Supra,* p. 31.)

III

THE SHERMAN ACT MUST BE INTERPRETED SO AS TO EFFECTUATE ITS POLICY AND PURPOSES

Appellants urge (brief, p. 129) that their combination is "an effort to aid a prostrate and vital industry" and that their contracts are "in the public interest, which the Sherman Act was intended to protect and promote."

Congress, in prohibiting restraints of trade and monopolies, adopted the view that the public interest was best served by the maintenance of free and untrammeled competition. In interpreting the Act, therefore, it is not permissible to seek or apply other criteria of the public interest.

The purpose and policy of the statute has frequently been stated by this Court. In *United States* v. *American Linseed Oil Co.,* 262 U. S. 371, 388, it said:

> The Sherman Act was intended * * * to protect the public against * * * those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.

In *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 43, the Court said:

> The Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition and no length of discussion or experimentation amongst parties to a combination which produces the inhibited result can give validity to their action.

In *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 397, the Court said:

> Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it can not be doubted that

> the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.

If there are conflicting considerations which render it doubtful whether, in a particular industry, the policy of the Sherman Act is working to the best social advantage, it is for Congress, not the courts, to grant relief. It may be that the time has come to revamp prior conceptions of social policy and to accord to certain industries the power to make agreements limiting production or directly suppressing substantial competition. But this change must be made by Congress, which may at the same time impose restrictions designed to safeguard the interests of the consuming public and labor. In *Standard Sanitary Manufacturing Co. v. United States,* 226 U. S. 20, 49, this Court said:

> The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.

The economic doctrine implicit in the Sherman Act is that competition results, over a period of time, in the price of a product being established at the cost of production, including a reasonable profit, of that body of producers which can supply the total market demand at the lowest price. Certain critics of the Act too hastily assume that this doctrine is not applicable to present conditions. We may test the validity of this criticism by comparing the effect on the bituminous industry of (1) the free play of competitive forces and (2) appellants' sales agency plan.

The bituminous industry is suffering from overexpansion and, at the moment, a stationary or declining demand for its product. (Def. Brief, pp. 6–7, 11–13, 102–103.) Competition is supplying its own corrective. From 1921 to 1930 the number of commercial bituminous coal mines in the United States declined from 8,038 to 5,891 (Def. Ex. 1, Tables VII, VIII, R. 1006 B, C), thus eliminating a part of the excess supply which adversely affects all producers. It must be assumed that it is the high-cost, inefficient mines which are being closed. Secondly, capital charges which are excessive in the light of present commodity price levels and consumer demand are being liquidated through receiverships and reorganization. (R. 546.) Both of these results will enable the industry as a whole and the Appalachian operators as a group to compete more effectively with substitute fuels and thus obtain a larger share of the total market.

The sales agency plan provides no remedy for the problem of expansion, but instead proposes to stabilize the industry in such a way as to enable present producers to survive. It will, if successful, impose upon the consuming public the cost of supporting the overexpansion of the industry. It proposes to do this, like all plans which provide for the elimination of competition among independent producers, by allocating available business among members of the group. The contract provides for allocating the business upon the basis of installed productive capacity, giving low-cost mines no real opportunity to increase their share of the business at the expense of other members of the combination. The result is to create a definitely static condition which may in the long run prove detrimental to the producers.

A combination which empowers a single agency to fix the price at which the product of 137 otherwise independent producers shall be offered for sale and sold is certainly abnormal and probably economically unsound. The selling agent, in fixing the price at which it offers coal for sale, can not be guided by any known cost of production; the record shows the wide range in this item even among a few producers in the same district in Appalachian territory. (Gov. Ex. 19, R. 998.) Appellants state (brief, p. 114) that the price at which Appalachian Coals will sell coal "will have no necessary relation to costs of production." The situation is wholly different from that of the sales staff of a large corporation intimately acquainted with the company's cost of production, financial problems, and business policies.

IV

APPELLANTS' COMBINATION, BY WHICH THE DEFENDANT PRODUCERS AGREE TO ELIMINATE ALL COMPETITION AMONG THEMSELVES AND TO SELL THEIR PRODUCT AT UNIFORM PRICES, IS IN RESTRAINT OF TRADE, IN VIOLATION OF THE SHERMAN ACT

In this case 137 producers of bituminous coal, otherwise independent, have agreed not to compete with each other in the sale of their product. The combination thus effected controls 73% of the commercial production in the largest producing district in the United States and more than 50% of the trade in bituminous coal in numerous interstate markets.[22]

Appellants' primary defense seems to be that there is no difference in legal or economic effect between their combination and a union of competitors under single ownership. Relying upon *United States* v. *United States Steel Corp.*, 251 U. S. 417, and *United States* v. *International Harvester Co.*, 274 U. S. 693, they assert that a merger or consolidation is not illegal unless it attains or exercises monopolistic power. Appellants maintain that their combination will not give them monopolistic power, and that it is therefore not within the prohibitions of the Sherman Act.

[22] The District Court found that it would not have the power to fix monopoly prices. (Fng. 53, R. 218.) This finding must be read in the light of other findings of the Court with reference to the power of Appalachian Coals over prices and our prior discussion of this question.

The Government's answer to this contention is threefold. First, that appellants' combination was formed for the primary purpose of obtaining higher prices through the elimination of competition and is clearly illegal even if appellants correctly interpret the *Steel* and *Harvester cases.* Second, that the only principle of general application which may be deduced from the *Steel* and *Harvester* decisions is that mere size of a single corporation is not an offense under the Sherman Act. (*Infra,* pp. 85–87.) Third, that the difference between the kind of merger or consolidation which may be permissible under the Sherman Act and the present case is not a difference in form alone, but the difference between a legitimate business undertaking not directed at restraint of trade and one which, both in form and substance, is aimed directly at restraint of trade through suppression of competition.

We have already dealt with the question of purpose. (*Supra,* pp. 47–61.) If we have been correct in our analysis of the primary purposes of appellants' combination, there can be no question as to its illegal character, even accepting the legal principles urged by appellants. In *United States* v. *Reading Co.,* 253 U. S. 26, this Court held that the acquisition by a company which owned all the stock of a railroad and of a large anthracite coal company of the controlling interest in a competing railroad which owned the stock of another anthracite coal company was in illegal restraint of trade. The two coal companies together had one-third (see p. 53) of the total United States production. This Court, referring to the acquisition both of the railroad and the coal company, said (p. 57):

> Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.
>
> That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this court.

In considering the *Steel* and *Harvester* decisions, the Court must bear in mind the precise issues there dealt with. *United States* v. *United States Steel Corp.*, 251 U. S. 417, *supra,* was decided in 1920. The corporation was organized in 1901 and suit to dissolve it was instituted in 1911. At that time its share of the domestic business was 40.9%. (P. 439.) The Court recognized that a monopolistic purpose was one of the motives leading to organization of the corporation, but it found that this purpose had been given up. The Court said (p. 451) that no act of aggression upon its competitors was charged against it, that while it had at times entered into price agreements, such acts had been abandoned before suit was brought, and that "since 1911 no act in violation of law can be established against it except its existence be such an act." The Court was not dealing with the attainment of power by combination. That had occurred 19 years earlier. The Court was dealing with the mere existence of power. The sole question decided was that the mere size of the Steel Corporation and its possession of "unexerted power" did not violate the Sherman Act.

United States v. *International Harvester Co.*, 274 U. S. 693, involved principally the construction of a consent decree. The original decree entered by the District Court in 1914 required separation of the corporation into three independent competing companies. While an appeal was pending the parties agreed to the entry of a modified decree. This decree, entered in 1918, provided that the International Harvester Company should sell three of its lines to competitors, and that it should not have more than a single agent in any one city or town. The decree further provided (p. 697):

> The object to be attained under the terms of this decree is to restore competitive conditions * * * and, in the event that such competitive conditions shall not have been established * * * the United States shall have the right to such further relief herein as shall be necessary to restore said competitive conditions and to bring about a situation in harmony with law.

In 1923 the United States filed a supplemental petition to obtain relief under the foregoing provision of the decree. The basic contention of the Government was that the decree required the restoration of competitive conditions as they existed in 1902 when the corporation was organized. The Supreme Court rejected this contention (pp. 702–703), holding that the decree itself set forth the extent to which "competitive conditions" bringing about "a situation in harmony with law" should be established, and that the defendants had complied with these requirements of the decree.

An alternative contention of the Government was that the existing situation was not one "in harmony with law." But the Court found that the corporation was not enjoying a monopoly and that it encountered substantial and increasing competition. The Court was not concerned with the manner in which this size was acquired, but only with the existing condition. As in the *Steel case,* the decision was merely that size [23] alone of a single corporation does not render the corporation's existence unlawful under the Sherman Act. The decision has no bearing on a case charging a conspiracy among several independent corporations to fix uniform prices or otherwise to restrain trade.

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[23] The percentages quoted by appellants (Brief, p. 95) from the Government's brief in the *Harvester case* were called "incomplete and inaccurate" in the brief (p. 176) filed by the defendants in that case.

Turning to appellants' basic contention, is there, in fact, no difference, from the standpoint of an illegal restraint of trade, between the union under single ownership of two or more companies previously competitive and an agreement among two or more concerns, otherwise remaining independent, to suppress competition and to allocate business among themselves, assuming in each case that a substantial amount of commerce is affected?

Although mergers necessarily result in the elimination of the competition previously existing between the merged units, this consequential elimination of competition is usually merely incidental to a legitimate business transaction. A merger is recognized as a normal business undertaking when it is for the purpose of achieving economies in overhead or management, integration of functions, etc. As the court below said (R. 229–230):

> Corporate organization is ordinarily the product of natural economic forces; and so long as there is no intention to monopolize control of the market or unreasonably to restrain trade, there is no substantial danger of injury to the public or reason for interference by the state. Such organizations have grown large ordinarily because 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.

The abnormality of appellants' arrangement is shown by the fact that it does not in any real sense create a new or more efficient selling agency to displace those now operating. Under the plan the latter will continue, for the most part at least, to perform the actual function of finding purchasers for coal, being paid the usual commission for this service and functioning much as heretofore except for the control of Appalachian Coals over the price at which they may sell coal or offer it for sale. (*Supra*, pp. 19, 34.) It is not surprising, therefore, that the vice president of Appalachian Coals and the chairman of its executive committee are each the president of a large sales agency appointed subagent by a number of defendant producers.[24] Furthermore, although the plan designates the subagent as the agent of Appalachian Coals, his true principal is the producer appointing him. This is indicated by the fact that the defendant producer by his agency contract with Appalachian Coals guarantees (as to sales of his own coal) the financial responsibility of the subagents whom he appoints. (Def. Ex. A, R. 95.)

The abnormality of the plan is further shown by the fact that the common agent is empowered to fix the price at which the coal of 137 different producers shall be sold and offered for sale. These producers "will have nothing to do with the deter-

[24] (R. 695, 696, 742; Gov. Ex. 3, Table VI, R. 968–970.)

mination of the price at which the selling agent will offer coal" and the prices fixed by Appalachian Coals "will have no necessary relation to costs of production." (App. brief, pp. 35, 114.) Moreover, the producer who does not fill orders accepted for him by Appalachian Coals (except contracts calling for deliveries 60 or more days thereafter) is liable for damages. (*Supra,* p. 17.) An arrangement whereby sales will be made, and even compelled, without any necessary reference to cost of production, certainly departs from all accepted conceptions of sound business policy.

The provisions for allocating business also stamp the combination with abnormality. Under these provisions the more efficient producers, those with better coal or lower costs of production, have no real opportunity to increase their share of the total business of the gronp at the expense of the less efficient. It is true that a producer "may" increase his rating by increasing his productive capacity, but productive capacity is based upon physical conditions of the mine, past production, labor supply, and all other factors influencing production. (Fng. 48c, R. 212.) Under the agency contracts with Appalachian Coals the only one of these factors within a producer's control is his physical plant. There being, as appellants stress, a large present surplus of productive capacity, an agreement which permits a producer to better his relative position only by adding to a plant already adequate certainly makes for a definitely static condition.[25]

Appellants' combination also does not represent a normal trade development, a gradual expansion of existing sales agencies. It grew from the top downwards, not from the bottom upwards. It did not have its origin in local conditions, but in a "plan" worked out by leaders of the industry to bring about a change in competitive conditions.

Appellants' combination will achieve none of the economies which are characteristic of a legitimate merger of competitors. It is likely to make distribution more, rather than less, costly; it will not to any appreciable extent, if at all, effect economies in production; and whatever advantages may be derived from joint advertising and research are not attributable to the agreement to sell exclusively through a common agent having power to fix prices and allocate business since such joint activity can be carried on without entering into this price-fixing agreement. (*Supra*, pp. 54–57.)

There is, therefore, only a remote analogy between this combination and a merger of competing units. On the other hand, cases dealing with agreements not to compete or to sell at uniform prices are directly in point. A review of the decisions of this Court will show that it has always held or as-

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[25] We deny appellants' statement (brief, p. 33) that the District Court found that the provision for allocating business "did not make for a static condition as between producers." (See Fng. 48c, R. 212.)

sumed that an agreement of this character is illegal under the Sherman Act. The first of these cases to come before the Court was *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290. A group of competing railroads formed an association and agreed not to depart, without prior notice, from the rates approved by the association. The defendants contended (pp. 329–331) that their agreement was not prohibited by the Act because its purpose was to establish and maintain reasonable rates and to prevent destructive competition leading to "financial ruin and insolvency." The Court rejected both contentions, and said (p. 342) that the "direct, immediate and necessary effect" of the agreement was to restrain trade and commerce, and that such an agreement was prohibited by the Act "no matter what the intent was on the part of those who signed it."

The facts in *United States* v. *Joint Traffic Association*, 171 U. S. 505, were substantially similar to those in the *Trans-Missouri case* and the Court adhered to its previous interpretation of the Act.

Addyston Pipe & Steel Co. v. *United States,* 175 U. S. 211, held illegal an agreement by six manufacturers of cast iron not to compete with each other in bidding upon contracts. The Court said (pp. 244–245):

> Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade.

> It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded.

Dr. Miles Medical Co. v. *Park & Sons Co.,* 220 U. S. 373, involved a series of agreements to maintain resale prices established by a manufacturer. In holding the combination invalid, the Court said (p. 408):

> But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.

In *Standard Oil Co.* v. *United States,* 221 U. S. 1, *supra,* the Court, in laying down the rule that the Sherman Act prohibits only undue and unreasonable restraints of trade, said (p. 65) that the agreements which were held illegal in the two freight association cases were, considering their necessary effect and the character of the parties, "clearly restraints of trade within the purview of the statute," and that "they could not be taken out of that category by indulging in general reasoning as to * * * the wisdom or want of wisdom of the statute which prohibited their being made."

American Column & Lumber Co. v. *United States,* 257 U. S. 377, held that members of a trade association had illegally combined "to restrict competition and thereby restrain interstate commerce * * * by concerted action in curtailing production and in increasing prices." The members of the association controlled 5% of the hardwood mills of the country and about a third of the total production. (P. 391.) The association received information from its members on stocks on hand, production, shipments, prices, names of purchasers, and views on future market conditions. It summarized this information and made suggestions as to future production and prices. The Court said (p. 409):

> Such close cooperation, between many persons, firms, and corporations controlling a large volume of interstate commerce, as is provided for in this "Plan," is plainly in theory, as it proved to be in fact, inconsistent with that free and unrestricted trade which the statute contemplates shall be maintained: * * *.

In *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, *supra*, there was also no express agreement to charge uniform prices. Manufacturers of "a very large [24] part" of the linseed products consumed in the United States agreed to file their published price lists with a central agency, to report

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[24] In Jaffe and Tobriner, "The Legality of Price-Fixing Agreements," 45 Harvard Law Review 1164, 1191, the conclusion is reached from an analysis of the briefs in this case that at the time suit was brought the defendants' share of the business was only about 35%.

to it by telegraph all quotations varying from these list prices and to report to it other details of their business. In holding the combination illegal under the Sherman Act, the Court said (p. 390)—

> concerted action through combination * * * is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection.

In *Cement Manufacturers Association* v. *United States,* 268 U. S. 588, the Court, in sustaining the validity of a trade association which collected various trade data from its members and distributed this information to them, said (pp. 604–605):

> Agreements or understanding among competitors for the maintenance of uniform prices are of course unlawful and may be enjoined, but the Government does not rely on any agreement or understanding for price maintenance.

The defendants in *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, *supra,* controlling some 82% of the sanitary pottery business, were convicted under the Sherman Act of combining to fix and maintain uniform prices for the sale of their product. This Court sustained the trial court's charge that the jury might find the defendants guilty "without regard to the reasonableness of the prices fixed" and its charge that—

> * * * an agreement on the part of the members of a combination *controlling a substantial part of an industry,* upon the prices

> which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; * * *. (Italics ours.)

This case holds that under the Sherman Act reasonableness of price is no defense to a combination by a substantial part of an industry to charge uniform prices. The Court said that its view of what is a reasonable restraint of trade is "controlled by the recognized purpose of the Sherman Law itself"; that the statute is based upon the assumption that "the public interest is best protected * * * by the maintenance of competition"; that the aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition; that there is no definite concept of what is a reasonable price; that, accordingly, it would hesitate to adopt a construction of the law which would make the difference between legal and illegal conduct "depend upon so uncertain a test as whether prices are reasonable" and which would render difficult the enforcement of the law; and, finally, that since the *Freight Traffic Association cases*—

> it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon.

We submit that the conclusion to be drawn from the foregoing cases is, to use the language of the charge to the jury in the *Trenton Potteries case,* that "an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade" illegal under the Sherman Act. In these cases the Court has not found it necessary to determine the precise degree of the defendants' control. In certain cases where there was no express agreement upon prices, but where competitors had entered into an abnormal arrangement which the Court found to be, in purpose and effect, a combination to suppress competition with each other, the defendants controlled only about one-third of the industry. In no case has the Court stated that the lack of substantial outside competition was a determining factor in its decision.

Chicago Board of Trade v. *United States,* 246 U. S. 231, is in no way an exception to the general rule. The Court there held that it was not a violation of the Sherman Act for the Board to adopt a rule which prohibited its members from purchasing or offering to purchase during the period between the close of the Call at 2 P. M. on one day and the opening of the session on the next business day, any wheat, oats, corn, or rye "to arrive" at a price other than the closing bid at the Call. This rule could have no general effect upon the course or volume of trade; the Court said (p. 239) that it applied only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales. Any effect which it had upon prices would be purely adventitious. The purpose and effect of the rule, as found by the Court (pp. 240–241), was to improve market conditions by concentrating trading upon an open, public exchange.

We shall refer only to two of the decisions of the lower Federal courts dealing with price-fixing agreements. *Chesapeake & Ohio Fuel Co.* v. *United States,* 115 Fed. 610 (C. C. A. 6th), held that an agreement among certain producers to market part of their coal exclusively through a common selling agency was a combination in illegal restraint of trade under the Sherman Act. The selling agent agreed that it would not sell coal at less than the minimum prices fixed by a committee of the producers. (P. 612.) The agreement applied to only the western shipments of producers representing less than one-third of the productive capacity in the Kanawha district, one of the eight districts represented by Appalachian Coals. (Pp. 612, 618.) In 1897, the year previous to the agreement, the shipments of the parties thereto were considerably less than 675,000 tons (pp. 612, 618), or less than one-half of 1% of the total United States production in that year (147,617,519 tons, Def. Ex. 1, Table I, R. 1002). The court, composed of Judges

Lurton, Day, and Severens, rejected the contention that the agreement was lawful because its main purpose was to increase the trade of the parties, to enhance competition in a larger field, and to improve the character of the product, and because competition would largely determine the price of the coal sold by the selling agent.

A second case directly in point, and one cited with apparent approval in the *Trenton Potteries case* (p. 401), is *Live Poultry Dealers' Protective Association* v. *United States*, 4 F. (2d) 840 (C. C. A. 2d). There were over 300 wholesale buyers of live poultry in the city of New York, of which 178 were members of the association. The members of the association appointed a committee who were, after negotiation with commission men, with an eye on supply and demand, to establish a price for the day which should obtain as to all purchases made by any member of the association. The demoralized condition of the market, "fake" or "wash" sales, frauds upon buyers, and the hope that by "stabilizing" prices buyers and sellers might be given a reliable guide upon which to deal, and thus eliminate opportunities for bad trade practices, were the reasons given for forming the association. There was no suggestion that it had the power of "monopoly control" over the market or that it could fix market prices. In holding that the combination violated the Sherman Act, the court, speaking through Judge Learned Hand, said (pp. 842–843):

> As to the second point, it is somewhat surprising at this day to hear it suggested that a frank agreement to fix prices and prevent competition as regards them among one-half the buyers in a given market may be defended, on the notion that the results are economically desirable. We should have supposed that, if one thing were definitely settled, it was that the Sherman Act forbade all agreements preventing competition in price among a group of buyers, otherwise competitive, if they are numerous enough to affect the market. The suggestion is that, since *Standard Oil Co.* v. *U. S.,* 221 U. S. 55, such a combination may be justified, if some prejudice to the public be not shown. That might be the law, but we do not so understand it.
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> * * * Among those trade practices which fall within the statute, none we think is more typical than an agreement of a substantial number of either buyers or sellers to fix the price at which alone all members of the group will trade.

In the instant case the court below carefully reviewed all the authorities and concluded that it is uniformly held that where a number of dealers control a substantial part of the trade in a market "any agreement to eliminate competition among themselves or to fix uniform prices is per se unreasonable and contrary to the statute." (R. 231.)

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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