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LABOR PROVISIONS OF THE NATIONAL BITUMINOUS COAL ACT

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INTRODUCTION

The Bituminous Coal Act of 1937[1] was enacted by Congress in an effort to preserve the vast coal resources of the nation and to stabilize the bituminous coal industry. To achieve these purposes it set up a system of regulation which revolves around the establishment of prices for bituminous coal, the enforcement thereof and the promulgation of a code of fair trade practices in order that the bituminous coal operators might realize, as nearly as practicable, their weighted average costs of production.

The conditions in the bituminous coal industry which gave rise to the enactment by Congress of the Bituminous Coal Act are set forth by Justice Cardozo in his dissenting opinion in *Carter v. Carter Coal Co.*, 298 U. S. 238:

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

The Bituminous Coal Act provides that the National Bituminous Coal Com-

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[1]The predecessor of the Bituminous Coal Act of 1937 was the Coal Conservation Act of 1935. The 1935 Act was declared unconstitutional by the Supreme Court of the United States in Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936). The Congress then enacted the Bituminous Coal Act of 1937 which was upheld by the United States Supreme Court in Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940).

mission[2] established thereunder shall establish effective minimum prices for coal. Pursuant to this authority, district boards of producers have been organized.[3] These boards determine from cost data submitted to them by the field officers of the Division the weighted average of the total costs of the ascertainable tonnage produced in the district for a specified calendar year.[4] The Division then determines from the weighted average costs submitted by the district boards the average costs of larger geographic units known as minimum price areas.[5] The Division transmits the average so determined back to the district boards, and each board is required to propose minimum prices for each district so as to yield a return equal to the weighted average costs of its minimum price area.[6] The prices so proposed are submitted to the Division, for approval, disapproval or modification.[7] Prices then are coordinated among the various districts and the coordinated prices submitted to the Division for approval.[8]

The minimum prices fixed by joint action of the district boards and the Division are applicable only to the coals produced by code members.[9] Thereafter no code coal may be sold at prices less than the fixed minimum except at the risk of penalties. In order to constrain the eligible coal within the code, an excise tax of 19½% of the sale price is placed upon all bituminous coal "sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code" with an exemption from this tax on sales by code members.[10] In addition, provision is made for the establishment of maximum prices[11] and certain unfair trade practices are prohibited.[12]

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[2]The Bituminous Coal Act was approved April 26, 1937, c. 127, 50 Stat. 72-90, 15 U.S.C.A., Secs. 828-851, and extended April 11, 1941, Pub. No. 34, 77th Cong.; 1st Sess. The Act, as initially passed, was to be administered by the National Bituminous Coal Commission. However, by the terms of the Executive Order (Reorganization Plan No. II, submitted by the President to the Congress on May 9, 1939, Sections 4 (a) and (b) effective July 1, 1939, Pub. Res. No. 20, 76th Congress; 1st Session, c. 193, approved June 7, 1939) made pursuant to authority granted in the Reorganization Act of 1939 (Pub. No. 19, 76th Cong.; 1st Sess.; approved April 3, 1939, 53 Stat. 561, 5 U.S.C.A. Sec. 133ff) the functions of the Commission were transferred to the Department of the Interior and the Act is now being administered by the Bituminous Coal Division, hereinafter referred to as the "Division."

[3]Section 4-I (a) of the Act.

[4]Section 4-II (a), 7th Paragraph of the Act.

[5]*Id.*

[6]Section 4-II (a), 3rd Paragraph of the Act.

[7]Section 4-II (a), 5th Paragraph of the Act.

[8]For a general discussion of the procedure involved in such coordination, see Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission, 105 F. (2d) 559. See also "Regulation of the Bituminous Coal Industry," *James E. Curry*, 13 *University of Colorado L. Rev.*, No. 4.

[9]Section 5 (a) of the Act provides that producers of bituminous coal may accept membership in the "Bituminous Coal Code." Producers accepting such membership are required to abide by prices established for the coals produced at their mines and to conduct their business in accordance with the trade practices permitted by the Act.

[10]H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, et al. v. Seaboard Air Line Railway Company, 62 S. Ct. 326-334, 86 L. Ed. 285, 292 (1941).

[11]Section 4-II (c) of the Act.

[12]Section 4-II (i) of the Act.

Section Nine

Section 9 enjoins employers to respect the right of collective bargaining under penalty of ineligibility to obtain government contracts for the supplying of coal or termination of such contracts in the event that the operator is found to be in violation of the provisions of this section. Section 9 provides as follows:

"Sec. 9(a). It is hereby declared to be the public policy of the United States that—

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

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

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

"(b) No coal (except coal with respect to which no bid is required by law prior to purchase thereof) shall be purchased by the United States, or by any department or agency thereof, produced at any mine where the producer failed at the time of the production of such coal to accord to his or its employees the rights set forth in subsection (a) of this Section.

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

"(d) Nothing contained in this Act or section shall be construed to repeal or modify the provisions of the Act of March 23, 1932 (ch. 90, 47 Stat. 40), or of the Act of July 5, 1935 (ch. 372, 49 Stat. 449), known as the National Labor Relations Act, or of any other Act of Congress regarding labor relations or rights of employees to organize or bargain collectively, or of the Act of June 30, 1936 (ch. 881, 49 Stat. 2036)."

Legislative History of Section 9.

In the Congressional bills preliminary to the enactment of the Coal Conservation Act of 1935 which was the legislative predecessor of the Bituminous Coal Act

of 1937, there was introduced in the House H.R. 8479 which contained the following provisions:

"Sec. 14(a). No bituminous coal shall be purchased by the United States or any department or agency thereof produced at any mine where the producer has not complied with the provisions of the Code set out in Section 4 of this title."

(Section 4 consisted of the Code and labor provisions contained in Title III and were a part thereof.)

"(b) Each contract made by the United States or any department or agency thereof with a contractor for any public work or service, shall contain a provision that the contractor will buy no bituminous coal to use on or in the carrying out of such contract from any producer except such producer be a member of the Code set out in Section 4 of this title as certified to by the National Bituminous Coal Commission."

The Coal Conservation Act of 1935 carried over this identical language in Section 14.

Following the invalidation of the Bituminous Coal Conservation Act of 1935 in *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), Congress again attempted to regulate the bituminous coal industry. In the measure preliminary to the enactment of the Bituminous Coal Act of 1937 there appeared in Section 1 the following provisions:

"Sec. 9(a). It is hereby declared to be the public policy of the United States that—

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

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

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

"(b) No bituminous coal shall be purchased by the United States or by any department or agency thereof produced at any mine where producer refuses to accord to his or its employees the rights set forth in subsection (a) of this section.

"(c) Each contract made by the United States or by any department or agency thereof with any contractor for public work or service or supplies shall contain a provision that the contractor shall use no bituminous coal on or in the carry-

ing out of said contract unless the producer has accorded to his or its employees the rights set forth in subsection (a) of this section.

"(d) On the complaint of any employee of a producer of bituminous coal or any interested parties, the National Labor Relations Board may hold a hearing to determine whether any producer supplying coal for the use of the United States or any agency thereof or for the use of any contractor on or in carrying out of any contract subject to the provisions of subsection (c) of this section is complying with the provisions of subsection (a) of this section. If the Board shall find that such producer is not complying with such provisions it shall certify its findings to the department or agency concerned. Such department or agency shall thereupon declare the contract for the supply of the coal of such producer or for such work, service, or supply of the contractor using such coal to be cancelled and terminated."

The companion House Bill H. R. 2015 contained an identical provision.

The House Ways and Means Committee struck subsection (c) of Section 9 and amended subsections (b) and (d) to read as they now appear as subsections (b) and (c) of the Bituminous Coal Act of 1937.

Section 9 as thus amended in this and other particulars by the House Ways and Means Committee was introduced in the House as H. R. 4985 and was eventually enacted as part of the Bituminous Coal Act of 1937.

Interpretation of Section 9

The context of Section 9(c) has reference to a presently occurring infraction as distinguished from one that has already occurred.[13] This entails ascertaining whether a violation of subsection (a) is a continuing violation which persists in unbroken sequence until such period of time as the violator absolves himself by revival of the preexisting lawful condition, or whether once Section 9(a) is infringed it is a thing of the past.

It may be reasoned that violating Section 9(a) is tantamount to a continuing violation which endures until the wrong is corrected. Accordingly, if the violation occurred prior to the time that the hearing on the charge is litigated under Section 9(c) it may be determined that the employer is not complying with the provisions of Section 9(a). This rationalization proceeds upon the hypothesis that subsections (b) and (c) of Section 9 should be synthesized, the first (b) giving recognition to the correlative rights and duties of the employee-employer relationship, the latter (c) providing concrete application of remedies for violation of the employees' rights. *A fortiori,* the public policy of the United States[14] as promulgated at the beginning of this section should be given efficacy by construing subsection (b) to prohibit purchase by the Federal Government from a producer of coal who failed at the time of the production of such coal to accord to his or its employees the

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[13] ". . . whether any producer supplying coal for the use of the United States . . . *is complying* with the provisions of subsection (a)." (Italics supplied.)

[14] (a) "It is hereby declared to be the public policy of the United States****."

rights set forth in subsection (a). Likewise subsections (b)[15] and (c)[16] are integral and coordinate segments of a cohesive whole which being read and construed together, syllogize into the finite principle that a continuing violation will be imputed.

Section 9(a) declares the public policy of the United States to be that employees of producers of coal shall have certain rights,[17] and it contains a correlative prohibition against interference with or violation of those rights by the producer. Among such prohibitions is the provision that "no producer shall . . . discharge . . . any employee for the exercise" of the right to organize and to bargain collectively without restraint, coercion, or interference on the part of the producers.[18]

Any construction of Section 9 other than the one advanced above would virtually nullify the section. Unless a violation of the employee's rights is held to continue until such violation is adjusted or removed, the only coal affected by Section 9(b) would be that which happened to be mined at the precise instant that a producer engaged in any unfair labor practice against his employees. Similarly, under Section 9(c) the producer under the alternative view would have to be held to be "complying" with the provisions of Section 9(a) immediately after the unfair practices occurred, notwithstanding that the employees in question would continue to be harmed. Since an interpretation so destructive of the Section's efficacy should not be adopted unless clearly called for by the terms of the statute, it should follow that any violation of the rights granted to employees by Section 9(a) places the producer in a category of a producer who has "failed . . . to accord to his employees the rights" granted to them by subsection (a) (thus making subsection (b) applicable) and of "not complying with" the provisions of Section 9(a) (thus making subsection (c) applicable). The producer necessarily remains in this status until the violations are adjusted or terminated in some other manner.

There is no express power in the Division to take any measures to *prevent* the award of a coal contract by a federal agency to a producer who is violating Section

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15"****failed *at the time of the production of such coal* to accord to his or its employees the rights set forth in subsection (a) of this section."

16"****is complying with the provisions of subsection (a) of this section."

17Collective bargaining, freedom from coercion or discrimination, no required membership in company unions, etc.

18Section 9 (a) (2). Pursuant to the provisions of this section, the United Mine Workers of America filed a complaint against the West Kentucky Coal Company (Docket 602-FD). In its order dated June 28, 1939, the Division found after hearing that the company had violated Section 9 (a) and notified all government agencies to that effect. The United Mine Workers of America filed a complaint on August 8, 1941, against the Albuquerque and Cerrillos Coal Co. (Docket 1808-FD). No decision has been rendered as yet.

9;[19] the grant of power relates rather to action to be taken after the contract has come into effect.[20] Nevertheless, the Division would appear to have the power to prescribe regulations with respect to the observance of Section 9(b) as well as 9(c) for the following reasons:

> 1. Section 2(a) of the Act empowers the Division "to make and promulgate all reasonable rules and regulations for carrying out the provisions of the Act." This would seem to vest in the Division the administrative power to enforce even a general provision such as subsection 9(b) which does not express or place in the Division or any other federal agency the enforcement of its regulations.
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> 2. If the Division may, by its certification, require the federal agency to set aside a coal-purchase contract after it has been awarded to a producer who has violated Section 9, sound administrative policy would require that the award be prevented if possible.
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> 3. Section 10(a) empowers the Division to "require reports from producers." This might justify a regulation that the producers found guilty of violating Section 9(a) should prior to the submission of a bid to the Federal Government for the sale of coal, submit a certificate to the proposed purchasing agency and to the Division stating whether the violation has been rectified. If the producer has never been cited for a violation of this Section, it could be required that a statement be included that there has been compliance with Section 9(a) of the Act.

It would therefore seem that a violation by a producer of Section 9(a) will continue until it has been rectified or in some way terminated; that the Division after a contract has been awarded to a delinquent producer may upon proper complaint make a certification to the federal agency dealing with such producer, which

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[19]The Comptroller General of the United States, in an opinion rendered to the Secretary of the Interior, dated October 26, 1939 (B-4668) in answer to a request by the Secretary as to whether government purchasing agents may reject bids by code members for furnishing the government coal below code prices, stated, ". . . it is concluded that the question admits of too much doubt to warrant either the accounting or administrative officers foreclosing the right of the government to obtain the coal needed in the performance of its functions on the best terms available in the absence of a statute clearly so providing or of a final judicial determination that code-member contracts with the government at less than code minimum prices are prohibited by the Bituminous Coal Act . . . The Act makes code-member contracts at less than code minimum prices unenforceable, but even if this applies to contracts with the government, which it apparently does not, the contract so made while voidable would be good to the extent actually performed . . . and if the contractor is willing to make and abide by the contract either because he considers it not in violation of the Code or because willing to assume the risk of possible penalties or for any other reason thought to justify such action, there would appear no authority for government contracting agents to act as his guardian in such respects, contrary to the possible interests of the government and by a summary rejection of his bid to foreclose his opportunity to have all questions involved finally adjudicated."

[20]The Comptroller General in an opinion dated August 16, 1939, 19 Decisions Comptroller General 208, held that where the Division has determined that a bituminous coal producer is in violation of section 9 of the Act and the findings of the Division have been duly certified to the department concerned, the fact that the contract for purchase of coal was awarded prior to the date of determination of said violation would appear to have no bearing on the statutory requirement that the contract be cancelled and terminated, but payments may be made thereunder for any deliveries effected prior to date of termination.

would be a condition precedent to the cancellation of the contract; and finally that the Division by reason of Section 10(a) is impliedly vested with power to promulgate regulations for the enforcement of Section 9(b) which regulations may require that producers found guilty of violating Section 9(a) submit with their bids to federal agencies a statement that no violations of Section 9(b) by such producer continue in effect at the time of the bid.

The adoption of rules of procedure would be necessary to enforce Section 9 where a producer who has previously been found by the Division to have violated this provision submits a bid on a government coal contract. The following regulations are suggested as a basis for governing this type of situation:

> 1. Where a producer had previously been found by the Division to have violated Section 9 of the Act, he shall in submitting bids on governmental contracts for the furnishing of bituminous coal, make affidavit to the Bituminous Coal Division that he has discontinued the practices for which he was previously cited and that he is at the present time complying in all respects with Section 9 of the Bituminous Coal Act.
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> 2. This affidavit shall be served upon the complainant in the matter wherein the producer was found to have violated Section 9 of the Act and it shall also be published in the Federal Register.
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> 3. If no objections are filed with the Division by any interested party to the affidavit within twenty (20) days from its service or publication, the producer shall be deemed eligible to bid on said contract.
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> 4. In the event that objections are filed to said affidavit, the Division shall thereupon set a date for said objections to be heard as promptly as deemed reasonable.

Section 9 of the Act indicates in mandatory and unambiguous language the course of action which must be adopted where a producer violates this provision.

Enforcement of this section where violations are found to exist would undoubtedly have a salutary effect.[21] It is a generally accepted fact that an employer can by resorting to dilatory tactics prevent prosecutions for violations under the National Labor Relations Act.[22] As long as the employer professes in good faith

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[21] A labor provision such as Section 9 which is so closely patterned after a similar section in the National Labor Relations Act but being enforced by the Bituminous Coal Division might be considered rather anomalous. Congress might, however, have been of the opinion that a staff such as that of the Bituminous Coal Division, trained in the technical and economic phases of the Coal Industry, more appreciative of its problems and background, might enforce this section with a better understanding than an administrative agency such as the National Labor Relations Board which specializes in no particular industrial field. This consideration, however, might well be outweighed by the fact that the National Labor Relations Board has by specialization acquired the technique and mechanics whereby a personnel trained exclusively in labor problems might better enforce Section 9 than the Bituminous Coal Division.

[22] H. J. Heinz Co. v. N.L.R.B., 61 S. Ct. 320; H. M. Ritzwoller Co. v. N.L.R.B., 114 F. (2d) 432 (C.C.A. 7).

a willingness to negotiate, he cannot be cited for violations of the Labor Act. However, the cases indicate that what is good faith under any given set of circumstances is not exactly clear.[23]

Section 9, however, offers a speedy and effective method of disciplining recalcitrant employers who seek to deny certain rights to labor. This consideration might well be persuasive in adopting a policy to be followed by the courts in regard to this Section of the Act.

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[23]"It has been universally recognized that the requirements of Section 8 (5) (of the National Labor Relations Act) demand more than lip service, and that hence the employer's conduct must evidence an effort in good faith to arrive at understandings with the representatives of its employees. Lack of good faith is indicated where the employer engages in unfair labor practices while bargaining with the union; where it engages in dilatory tactics during negotiations; or where it ignores requests for conferences; or where it institutes a wage cut by unilateral action and without consulting the majority representative; or where he goes over the heads of the union representatives and attempts to bargain individually with the employees or to induce them to abandon the union." Fifth Annual Report of the National Labor Relations Board (1940), Pages 100 and 101.

*Opinions expressed in this article are those of the writer and not the Bituminous Coal Division. Statements made in this article are not intended to be binding upon the writer or any other government officer in his official capacity.