

# COAL AND THE ECONOMY—A DEMURRER

By WALTON H. HAMILTON †

APROPOS of soft coal Eugene Rostow recites his faith. It is a grand faith and he sets down its articles most persuasively. There can be no quarrel with his belief in a release of resources, an efficient system of production, an economy flexible enough to meet the course of events and remain in service to the common good. Nor is his facility as a craftsman subject to attack. His essay, deftly articulated, is a pioneer contribution. It is a challenge to problems which impend; and if the statements were translated from the categorical to the inquisitorial, I should be tempted to concur. But, insistent as his summons is, in respect to the state of the art of control, it seems to me somewhat earlier than he thinks. I find myself fumbling for questions where he is facile with answers. And although I am quite in accord about objectives, I am compelled to demur to the plan of salvation.

As a good lawyer the author knows that general propositions do not decide concrete cases. Accordingly he has tried to make his creed vital by constant reference to a particular situation. To such a technique of norm and instance there can be no serious objection. The bother is with relevance in use; here the principle and the example seem to lie upon quite different planes. A policy for the operation of an economy is one thing; the ordering of the affairs of an industry quite another. Industries are, of course, severally members one of another. Measures for the well-being of the organism should insure conditions favorable to health in the parts. Yet a going economy may have its "sick" industries; a privileged corporate estate may flourish in one that is depressed. As the economy which fails to perform needs its general remedy, so the industry out of order requires its specific. The resort to a general panacea is not an insurance against a trouble that is local.

The point is that a general recipe, right or wrong, moves on a level quite different from that upon which the coal question lies. Industries are not of a kind; each has its own structure, trade practices, network of usages accommodated to its product and place in the economy. As it has had to do with them, public policy has grudgingly admitted the distinction. An ordering of the larger affairs of the economy gives no escape from a legislative concern with the railroads, electric power, radio broadcasting, banking. Certain measures addressed to such matters as investment, corporate structure, taxation, labor standards may have general application; but such statutes do not prevent the enigmas of steel, gasoline, optical goods, textiles, milk and alcoholic beverages from being

---

† Southmayd Professor of Law, Yale Law School.

of public concern. Where the state abjures action on this lower plane, it is not because its general regulation is assumed to straighten out the affairs in question. It is rather that, within this over-all of arrangement, the market can be trusted to work out the detail of order.

Eugene Rostow proposes a program for an economy—a plan for industrial recovery. He wants a system nimble enough to absorb shock; a system which keeps reaching out after resources, and converts their abundance into an ever-advancing standard of life. If momentum is lacking, he would meet the want through public works, government spending, and other devices of a “deficit finance.” And in order that impulses thus set in motion may make their way to the very ends of the economy, he would clear away all restraints, all trade barriers, all elements of structure too rigid to bend. An expanding economy, a program of spending, an “imaginative enforcement” of antitrust are good enough for the economy—and therefore for bituminous coal. I have no intent in this place to resolve, or even to explore, the general issue. There are persons with reputable credentials whose prescriptions run very differently. It is enough to leave the general question open—and with pertinence inquire into the sufficiency of the program for the ills of a single “sick” trade.

There may be industries which require no solicitous care. If so, it is because circumstance allows the market—whose positive agency of control is competition—to perform its reputed office. But from industry to industry competition differs in kind as well as in degree. There can be enough, too much, or too little competition; and competition, itself vital, can be caught up in the very pattern of activities which stands in need of correction.<sup>1</sup> If the market is to function properly, a number of conditions must be met. A standard commodity, a free and open market, an increase in unit expense with mounting volume, an obliging absence of the complexities brought by multiple products, a series of costs for skills and materials which are not themselves reflections of price—these are primary requisites. But others are almost as essential—an industry open to newcomers; want of patents and other legal sanctions with which to fence about closed domains; a freedom from private government through price leadership or an intricate array of trade practices; an institution of bankruptcy which promptly liquidates the obsolescent venture. It is hard to name an industry whose actuality accords with such specifications. Yet there are many which would better have served the author's purpose than the one chosen as illustration.

---

1. Note the consent decree in the recent case of *United States v. Paramount Pictures, Inc.*, filed November 20, 1940 (Eq. No. 87-273, S. D. N. Y.). The Government had complained of trade practices which conditioned the process of competition. Yet in the settlement it accepted in a mildly modified form a number of the trade practices—date of releases, clearance, block booking. More important, it set up a system of arbitration—an agency of control for the industry—to determine the detail of order which the market could no longer effect.

Bituminous coal accords with no such checklist of conditions. A unit of coal—even if B.t.u.'s replace the long or short ton as the measure—is a meaningless term. Its constituents of fuel and waste, of hardness and volatility, vary from mine to mine, from seam to seam, and even within the same vein from day to day. Unlike other forms of energy—oil, gas, electricity—it is not processed into a fairly homogeneous commodity before being put to work. The significant treatment is screening into sizes; nothing can be done to bring uniformity to its burning characteristics, its coking qualities, its sulphur and ash content.

Nor is its character fixed by physical properties alone. Coal is sold in terms of the available equipment in which it is to be used.<sup>2</sup> Large industrial consumers run boiler tests on fuel before they enter into annual contracts; the chemical analysis may show one thing and the practical test quite another. Thus a coal may be rated as superior in one plant; where another type of equipment is used, it may be mediocre or poor. Ordinarily, in a particular consuming area, equipment is developed to suit the coals which have entered in the past. If new coals can penetrate the market, they may be at a price disadvantage irrespective of their quality. Not only are they unfamiliar and lack "consumer acceptance"; the character of the burning equipment may not permit a full utilization of their qualities. Thus the engine, boiler, furnace through which coal is converted is an aspect of its identity.

Market confusion is likewise an outgrowth of the vast miscellany of sizes. If the mine has orders for lump coal, several smaller sizes must necessarily be produced. But what is considered as a major product in one mine is a resultant in another. Seasonal changes intermittently convert a main product into a byproduct. Installation of new equipment by important customers affects not only the sizes they require but the sizes of ancillary products. Similarly, one size of coal may be accounted a major product in one market and a minor in a second. A generation ago all coal, with the exception of lump for domestic use, was sold as run-of-mine; and the basic problem of the market was with differences in quality. The technological improvements in burning equipment gave the original impetus to sizing, but it quickly became a pawn in the competi-

---

2. The author very effectively makes the point that the demand for coal is of a secondary character; sales depend, not upon price, but upon the general vitality of business activity. It does not follow, however, that if a decrease in coal prices does not stimulate demand, an increase in prices results in a shift to competitive fuels. One must differentiate between short and longtime results. An essential in determining the character of the fuel used—irrespective of price—is burning equipment. Only a relatively few plants in the country, largely the utilities, have pulverizer equipment and can shift instantaneously from coal to oil or gas. Competition among fuels is sharp when replacements are to be made in equipment, but this is of course only occasional. Then decisions are made on the basis of guesswork about longtime trends in price. A temporary drop in price would be irrelevant.

tive game. As a result, a vast array of sizes has been created — differing from market to market.<sup>3</sup> Some of them are functional and serve a useful purpose; many are unnecessary and have their excuse only in the intensity of the competitive struggle.<sup>4</sup> In short, there is no such thing as coal, but only coal and coal.

Nor is the market the instrument of competitive order. In respect to soft coal there can hardly be even the roughest approximation of its norms. In gold, nickel, silver, copper — where a standard of purity can be fixed with precision — the market can set its stamp upon every transaction. In corn, wheat, soy beans, tobacco — where nature resents any such regimentation of grain or leaf — standards have been set up and the crop is resolved into a hierarchy of classes with differentials falling more or less neatly into a structure. As the taint of motley becomes more and more manifest, as in coal, the “free and open market” becomes harder and harder to maintain. Its function of mediation is dissipated into a sprawling and confused process of bargaining. A lot of rumors about separate sales replace the market quotation; inadequate information, rarely verified, is circulated by written and oral report. Prices are for a commodity whose definition cannot be reduced to terms. There are no adequate criteria by which the terms of a contract may be made to reflect market conditions.

As for soft coal, the market lacks the very mechanisms through which it orders the affairs of an industry. Even upon their face, quoted prices are for a variable commodity and are not comparable. In the sale of an ordinary good, the exchange price is quoted for a time and a place; a series of articulated differentials makes for an orderly price structure. But with soft coal, time creates fault-lines. Charges are too expensive for the article to be stored; most coal degrades rapidly with removal from the ground. It must be sold when produced, rather than produced and

---

3. This condition has been slightly mitigated by the process of crushing. Some mines produce nothing but slack since the larger sizes are crushed. But, whatever the trend may be, this applies at present to a very small fraction of the total tonnage.

4. Size creates a problem of price which an authority for the industry alone is competent to handle. “But the existence of differences does not mean that there should be a difference in price. Necessarily, varying sizes and qualities must be grouped, and only substantial or significant difference can or should be recognized. Otherwise, orderly pricing would be impossible, and the very purpose of the Act—to eliminate chaotic marketing and pricing practices—would be defeated. The issue is essentially one of reasonable classification, in accordance with the standards of the Act. That this obtains here is, in my opinion, clear on the basis of the present record. Further, in my opinion, the objective of administration of the Act should be to reduce and simplify the number of size groups and price classifications, rather than to increase the hundreds of groupings now established. The history of this and other industries shows that this is the way towards order.” *Findings of Fact, Conclusions of Law, and Opinion of the Director*, In the Matter of the Petition of the Ohio and Pennsylvania Coal Company (Docket No. A-40, Bitum. Coal Div. 1940).

sold. But the conditions of mining may change, and most contracts for future delivery take account of a miscellany of exigencies. Thus even the quoted price tends to become a variable. Place interposes even more of a breach. Cost of carriage is extremely high in relation to the value of the product; in the usual instance the freight rate is as much as, or is in excess of, the pit-mouth price. The buyer is interested in price at the place of use. Coals from the same mine, creatures of an identical productive process, are sold in different localities, at different removes from the point of origin, and put to different uses.<sup>5</sup> The market reach of the operator obeys no simple formula of coal, demand for fuel, available transport. In cost and facilities carriage may be equally available, yet the direction in which traffic goes and the ease or difficulty of its movement is determined by rates. A mine may be able to send its product north or northwest, yet encounter a pecuniary barrier south and east. The schedules may endow one venture with an infusion of monopoly and leave another exposed to competition from a distance. The irregular area, within which the operator has even a chance to sell, is pent in by rates; yet these are items in a structure which has no rationale in cost. And the ratio of freight rate to price renders extremely loose any reflection of mine efficiency in price at destination. Yet the calculus of the vendor must focus upon the places of sale; unless the "delivered price" is right, he loses his customer. He receives quite different sums from lots almost identical—and, as a consequence, lacks a norm for the price of his own coal at his own mine. The price varies with where the cargo is going and how it is to be used. His interest is in realization upon his total production. His profits and his solvency depend upon it—yet it all depends.

To the operator, the price is an act of finite judgment—he must make a bid which will get the order. The joint character of the product eliminates the significance of particular costs. A number of lots of different sizes have incurred a common cost of production; yet they must be sold at different prices.<sup>6</sup> Since they take different freight rates as they move to different destinations, the net yield per ton shows a wide variation. The price an operator can afford to quote on a shipment depends upon his "realizations" from other shipments. It likewise turns upon the rela-

---

5. LAMB, *THE BITUMINOUS COAL RATE STRUCTURE* (1932) (unpublished manuscript submitted as a thesis in the Yale Graduate School).

6. If the market does not decree his prices, neither does it shape the major costs which are terms in the operator's loose equation for judgment. There is a "market price" for machinery, props, mine-cars; but such items are an inconsiderable amount of his outgo. Labor is not purchased, in units as demanded, in a general labor market. Instead the terms of employment are established by collective agreement between operators and miners. Between mine and point of delivery lie the charges for carriage—an expression of human judgment made without benefit of a market process. The major items of expense in arriving at the delivered price are man-, not market-made.

tive activity of his mine. Coal, like modern industry generally, is subject to diminishing costs with increased volume. Consequently, every effort is made to maintain — and expand — sales in order to spread fixed costs thinly over as wide an area as possible.<sup>7</sup> The concern of the seller is not with an item and its price, nor with a series of items each with its price. Instead, in an endless series of decisions concerned with a complex of interdependent prices, the operator must keep his business a going concern.

Thus coal presents its distinctive case — an intense competitive struggle, lacking adequate norms for judgment, in an industry largely removed from market guidance. The collective control over wages — the largest operating expense — Eugene Rostow does not propose to drop. No plan is suggested to replace or modify the control of freight rates — which by their bite determine the operator's residuum. In wage-making, wisdom distilled from a long period of fumbling suggested the over-all for a medley of specific judgments. In rate-fixing, the Interstate Commerce Commission has imposed such symmetry as it could upon a chaotic array of charges.

The pricing process is of a character with those of wage-making and rate-fixing between which it is pent in. In fact, all three are pricing processes. If a general oversight is necessary in respect to two of three aspects which are interlocked, its necessity seems apparent for the third. The issue is not one of the substitution of human authority for the im-

---

7. The occasional employment by Rostow of the concept of the "marginal mine" indicates that his picture of the industry has been shaped by such a speculative norm far more than he will readily admit. It is, of course, easy enough—starting with the right assumptions and using the most rigorous logic—to make soft coal an example of increasing cost. To that end a competition is conjured up which is equipped with all the mechanisms essential to the maintenance of industrial order. Unfortunately, the description of how matters ought to work does not fit the turbulent realm of bituminous coal.

If Rostow is loath to abandon his marginal analysis, he is far too much of a realist to ignore overhead. His program supplies the necessary reconciliation. The interest of the public is in the going concern; the business will run if out-of-pocket is met; a return to capital is not necessary to keep the established venture going. It is of note that public policy, as expressed in current legislation generally, does not subsume his disregard for the return to capital. Nor does his presumption accord with the amenities of business enterprise. The operator is under constant pressure from his capital account; he attempts to keep his volume of tonnage as near capacity as possible and thus to spread overhead thin.

All of this, of course, is not to say that there are not circumstances under which unit expense rises with volume. In a single mine, the unit-cost depends largely upon the method of mining; as the operation continues, it is likely to rise where pillar-and-stall is employed and to fall where long-wall is used. As a district passes its crest, the operations are pushed further and further underground and the technical expenses increase; the mines of Central Pennsylvania cost more to operate than when they were in their heyday. But such technical differences and long-time factors have nothing to do with the ability of the industry at any given time to furnish an additional increment of coal at a diminished unit-cost.

personal operation of the market. It is no more than that of the manner in which human discretion shall be exercised. Shall it be by a host of semi-isolated individuals seriatim? Or shall it be by an authority whose vision and powers are as broad as the affairs which must be reduced to system? A return to the market is out of the question; long ago the controls by which it performs its regulatory office were sterilized. As between the practical alternatives, the choice seems clear. A myriad of separate and half-informed guesses presents a poor road towards a rational structure. A public control must replace the market as the agency of industrial order.

## II

The plight of bituminous — at least in the past — Eugene Rostow has been gracious to concede. But his diagnosis is rested largely upon conditions which he regards as transitory.<sup>8</sup> To me his items seems only manifestations of an industrial disorder which runs much deeper; and some of them have proved far more persistent than his narrative indicates.

He attributes great importance to the last war and the feverish activity which resulted in the opening of new mines. In consequence, the industry overshot its mark.<sup>9</sup> The point is that conditions exist which make for

8. In his creation of the pattern of the industry—implicit in general argument rather than explicit in statement—Rostow has used his economic theory rather trustfully. An inquiry can get nowhere without its assumptions; but an intellectual approach may subordinate fact to pattern. The value of a theory lies in its capacity to transcend the particulars which underlie it. Its relevancy cannot, however, extend to cases unlike those which called it into being. I am surprised to see a reference to Alfred Marshall's *Principles of Economics* in respect to a situation the like of which had never been in Marshall's mind. I cannot imagine Rostow citing a legal proposition so far away from its native habitat.

9. Rostow's analysis of production for the years 1923 and 1929 does not give a picture of the trend in events. The course of production is indicated by the following tables, in which the figures for the last three decades are, for the sake of graphic illustration, set down in parallel columns:

1911—405, 907, 059	1921—415, 921, 950	1931—382, 089, 396
1912—450, 104, 982	1922—422, 268, 099	1932—309, 709, 872
1913—478, 435, 297	1923—564, 564, 662	1933—333, 630, 533
1914—422, 703, 970	1924—483, 686, 538	1934—359, 368, 022
1915—442, 624, 426	1925—520, 052, 741	1935—372, 373, 122
1916—502, 519, 682	1926—573, 366, 985	1936—439, 087, 903
1917—551, 790, 563	1927—517, 763, 352	1937—445, 531, 449
1918—579, 385, 820	1928—500, 744, 970	1938—348, 544, 764
1919—465, 860, 058	1929—534, 988, 593	1939—393, 065, 000
1920—568, 666, 683	1930—467, 526, 299	

The figure for 1939 is preliminary, and for 1940 nothing is available save a rough estimate of 452,445,000. The figures for 1911 to 1931, inclusive, are from MINERAL RESOURCES, an annual publication of the United States Geological Survey; those from 1932 to 1939, inclusive, from MINERALS YEARBOOK, an annual publication of the United States Bureau of Mines.

Thus it appears that the course of production was continually upward until the end of the World War. The peaks were in 1918 and 1920; between that time and 1929 the

a recurrent excess of zeal. Coal reserves are widely distributed over the country; compared to oil, the supplies are extraordinarily large; ownership is disseminated among many hands.<sup>10</sup> In 1917 a scarcity, created by a temporary car shortage, opened up a host of new mines; and the impetus endured long after the shortage had ceased. Already, under the current defense boom, the impact has been felt; and new mines are being opened. The suggestion that new mines are opened only if anticipated revenues cover operating costs — and a bit more — reveals a faith that the “economic man” has survived the deadly climate of bituminous coal. In small mines, particularly, the anticipation is no more than the thought of picking up a little loose change; most of what comes in goes into wages.<sup>11</sup> The very concept of “operating costs” — the folkterm of the business world — is irrelevant. Even in respect to the opening of larger mines — where cost accounting is accorded at least ceremonial respect — the hedonistic calculus is little understood. The fact is that in the past — and in the absence of a general control so it promises to be in the future — new mines, large and small, readily and hastily plunge into production.

The problem is not merely one of “over-capacity.” This term has come to be a cover-all for the varied ills of the industry. A Darwinian concept of the “survival of the fittest” has made its way into economic literature and created a theory in its likeness. In its terms pecuniary cost is an expression of technical efficiency. A concern well run — low expenses are there to prove it — prospers like the green bay tree; an inefficient one is marked by an excess of unit cost over price and falls prey to the deficit. But soft coal, like agriculture, lies somewhat upon the fringes of so pur-

---

trend of production flattened. During these years general industrial activity was increasingly heavy, but the effects of competitive fuels and fuel economies had their toll on coal sales. Production during and since the Depression has not equalled the better years of the twenties, so that the trend since then has been downward.

10. A common practice in discussing coal is to confuse mines with companies. In his article the author points to the increase in size of mines to show an “increase in the relative importance of large concerns.” The point is that the corporate structure and the operating unit are two separate and distinct things. Nor is a mine producing 100,000 tons a year a “larger mine” either in the parlance of the trade, or in the amount of capital required, or in percentage of total volume produced by the industry.

His comparison of mines begins with 1923 when the percentage figure for units producing 100,000 or more was 70.4%. This figure is lower than for previous years; it reflects the entry of hundreds of small mines arising out of the impetus of the World War. In 1913, for example, the figure is 75.4%—as against 81.1% in 1938. The drift towards large mines is hardly in the nature of a stampede. For detailed analysis of the earlier period, see *COAL IN 1926* (Bureau of Mines 1928) 493.

11. An increase in the number of small mines has been stimulated by the growth of truck transportation. Today such ventures have reached the record number of some 15,000. It is significant that of the total only 2,500 have rail connections, yet they account for 95% of the tonnage in their class.



positive a scheme of activity. If finance points to failure, expenses are put through the wringer. Reserves for depletion and depreciation are forgotten; the purchase of equipment and repairs is deferred to a more opportune season; salaries and other immediate expenses are cut. A revision of railroad rates is sought to remove a competitive disadvantage. If the volume of freight seems to warrant it, the railroad handling the mine's business will readjust its purchases of fuel and price upward.<sup>12</sup> Thus, as conditions change, the business — by one or more of the many available means — makes its accommodation. Coal mining is a highly specialized venture; the pecuniary barriers are low; its equipment and machinery cannot be commuted into instruments of another trade; its personnel would be awkward in another role. A concern reorganizes, reorganizes again, goes through bankruptcy, but rarely quits. Tickets of admission are cheap, and the stage of activity lacks a proper exit.

A failure to resolve unutilized capacity into its elements leads the author to liken it to undeveloped resources. It hardly seems necessary to support with reasons a challenge to such a comparison. As for the one, there is available a fully equipped mine, managerial skill, a labor force willing to work — all waiting for orders. As for the other, there is nothing more than a series of dormant deposits underground, held against a future demand. The one is a fragment detached from a going industry; the other, an inert resource for which the economy may some day have need. Nor does the fact that the bulk of soft coal is produced to order draw together concepts which stand so far apart. A potential output, impatient for release, exerts its constant pressure towards industrial disorder. Reserves which cost little to carry are content to abide their time. It is suggested that so long as prices are "compensatory," the public interest is served. But as an enterprise takes its course, the business process affects a reconciliation of cost and price. Although figures vary somewhat, about 82 per cent of the rail-destination-cost of the commodity represents the expenses for labor and of carriage, set by a commission and by a collection agreement; another fraction, running to approximately ten per cent is fixed, directly or indirectly, by

---

12. The practice of railroads' paying a price for coal higher than other industrial consumers was common during the depression. It reflected their deep pecuniary concern in maintaining coal shipments on their lines; for bituminous coal represents 29% of all the freight tonnage originated by the railroads and accounts for 17% of their total freight revenue. The close reciprocal relation between coal mines and railroads is one of the most intriguing aspects of the coal industry. Rostow suggests that coal is holding its own, among competitive fuels, with the railroads. The answer is found not wholly in the operation of "economic laws"; the two industries, conscious of their interdependence, have zealously worked together. It is an interesting fact that, though sizing has gone so far among industrial consumers, the railroads can—and do—use almost any size. This permits the railroad to accommodate mines by taking sizes which they cannot readily dispose of in the market.

the operation of some state or federal law.<sup>13</sup> Accordingly only about eight per cent is nominally under the control of the operator; and the volcanic force of competition, pent up within so small an area, is bound to seek its release. All concur that the investment may be pared down; and Rostow has no tears to shed if it is wiped out altogether. He seems to insist that overhead can go and out-of-pocket be left undisturbed. But the capital charge is in general too small to absorb so terrific an impact; and the management, in its impecunious discretion, is not altruistic enough to accept a burden which it may lay upon the shoulders of others. If labor rates stand,<sup>14</sup> in their payment a part of their substance may be eaten away; and the maintenance of safety may have to bow before falling receipts. Within the industry a variation in wage rates up to as much as fifty cents a ton proclaims their real dependence seriatim upon corporate ability to pay. In an absence of regulation the expenses of production have proved unusually sensitive to what the market will bear. So long as such a process of adjustment marks the industry, price and cost can be no more than different sides of the same thing. A justification of the one by reference to the other is, therefore, an idle exercise.

The Lake Cargo controversy looms large in Rostow's account. Here again there has been a tendency to read symptoms as causes. The struggle between Northern and Southern operators for the Great Lakes business is not an isolated event; it is characteristic of the coal industry. The war on the Lakes has significance because it presents in all its confusing intensity the struggle for markets. Nor is the issue dead. For the South a better quality and lower costs more than offset higher freight rates;<sup>15</sup> the handicap of the North in respect to most markets though somewhat lessened, still endures; and a sense of injustice still rankles in the North.

---

13. The matter of the operator's zone of discretion is explored in detail in Richards, *The Complementary Marketing Function of the Bituminous Coal Act to the Interstate Commerce Act and to the National Labor Relations Act* (paper delivered at the Annual Meeting in 1940 of Section of Mineral Law of the American Bar Association).

14. It is not without significance that for bituminous coal the ratio of labor expense to pit-mouth price is three times as great as the ratio of labor expense to total cost of production in the 48 largest manufacturing industries.

15. In nominal terms, the Pennsylvania mines in general enjoy lower rates to the Lake ports than do those of West Virginia. They are higher in terms of distance, but it would take an elaborate study to reveal what this signifies, for each of the two rates breaks down into a carriage charge and terminal expenses at each end. But the lower charges fail to compensate the Pennsylvania operators for a consumer's preference in favor of the more volatile coals from further South. Nor does it cancel a difference in labor expense favorable to the southern fields. The matter derives added importance from the state of mind in the trade which has come to look upon freight rates as according or withholding access to markets. Thus the Pennsylvania operators regard the decisions of the Interstate Commerce Commission in establishing the rate differential as denying to them an opportunity to compete. If such a usage has drifted far from the picture which the word competition ordinarily evokes, it indicates how treacherous it is to attack bituminous coal with a set of general concepts alien to its affairs.

In fact another case is once more getting under way. The Pennsylvania operators have recently filed a protest to the Interstate Commerce Commission seeking a downward revision of their rates. This time a new strategy is to be tried. Instead of attacking as an entity the schedules which are relevant, the approach is to be piecemeal; it is hoped that, by going after the detail, the whole structure will be undermined. Already the interested states, the carriers, and the operators are lining up in formidable array.<sup>16</sup>

Nor is it quite correct to make Appalachian Coals an instrument of the Lake Cargo controversy. The argument seems to run that, with the depression, the Southern fields lost their competitive advantage; Pennsylvania recovered its position as chief producer; and the operators of West Virginia and adjacent states created the marketing agency to win back lost tonnage. But the fact is, the Southern Appalachian operators—once they had wrested the lion's share of the Lake trade—have never been seriously threatened by the North. As late comers, the Southern producers entered the competitive race with decided advantages. They brought new blood to the industry; they had Eastern money with which to mechanize their mines; they employed the devices of aggressive salesmanship to market their product. An advantageous freight rate and a wage differential favored them. The bulk of the Lake business, in which their dominance was established in the mid twenties, is still theirs. In 1931, as Appalachian Coals, Inc. came into being, Lake shipments from the Southern fields amounted to 18,425,000 as against 11,241,000 from the North. In 1939 the figures were 27,281,000 as against 12,556,000.<sup>17</sup>

16. The State of Pennsylvania has appropriated \$50,000 for rate cases—and, as in the past, will take a most active part in the regional squabble over freight adjustments.

The following cases, with the dates at which they were filed with the Interstate Commerce Commission, indicate that the issue is far from moot: Western Pennsylvania Coal Traffic Bureau (Docket No. 28467, April 30, 1940); Property Owners' Comm. (Docket No. 28482, May 20, 1940); Northern West Virginia Coal Ass'n (Docket No. 28521, July 6, 1940); Eastern Bituminous Coal Ass'n (Docket No. 28533, Aug. 1, 1940); Ohio Coal Ass'n (Docket No. 28556, Aug. 30, 1940).

17. Figures from 1909 through 1931 are contained in *MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY* (1932). Figures for later years have been supplied by the Traffic Section of the Bituminous Coal Division. In these totals for later years, the shipments from the Fairmount fields—a very small amount—have been omitted and figures supplied by the Traffic Section have been broken down and rearranged to make them comparable with Mansfield's statistics.

The Rostow theory of Appalachian Coals comes as a surprise. When the anti-trust case was being prepared, an attorney from the Department of Justice traveled through the Appalachian fields and interviewed a large number of operators, both for and against the plan. He states that in their opinion its primary function was to halt inroads of gas and electric power upon their markets in the Carolinas and states to the south. That it was directed against Pennsylvania operators came to him as a novel idea. It seems a more plausible reason that they got together to erect some sort of a barrier against the prevailing disorder. But such an action savors—faintly says the United States

The author makes much of the rift in the labor structure which in recent years has been corrected. It is true that once the mine workers were a house that existed "half-slave and half-free," and that since 1933 the union which prevailed in the northern mines has organized most of the southern fields. But an instrument for its attainment is not of itself a new status for labor; and its presence alone does not insure an end to the north-south wage differential. In spite of the accord, the fault-line across the industrial topography, with all of its impulse towards confusion, is still visible. When the NRA was doing its pioneering work, the differential was too firmly established to be eradicated. Although narrowed by collective bargaining, it still remains. With the expiration of the current agreement and the renewal of negotiations in the next few weeks, the differential faces a fresh assault. The stronger "statistical position" of the industry gives hope of a partial victory—but the enlarged ability-to-pay derives in no small part from the price schedules recently promulgated by the Bituminous Coal Division.

The assumption that since 1933 the industry has been fitted out with a new labor order is somewhat optimistic. The exploitation of workers—through company housing, company stores, company-controlled medical services and utility rates, discounting of scrip—is not "recent." It is current. The total of such debits eats away the great bulk of the miner's earnings; one would have to reduce such charges to their market equivalents to discover how much fiction the quoted wage-rates hold. As late as 1939 the United Mine Workers vainly attempted to have their agreements provide that a minimum of ten per cent of every wage payment should be in the form of cash or a check which could be cashed at par. The contracts usually provide that smithing services, explosives, tools and supplies, cap lights, and other essentials of the miner's employment shall be sold at "cost"; they also specify maximum charges for coal, water and light, rent on houses. But cost is an evasive word; the miner's profligacy does not reach its height in accountancy; and devices are still rampant by which hypothesis corrodes the pecuniary into the real wage.<sup>18</sup>

---

Supreme Court—of "conspiracy," and would hardly be whispered to a representative of antitrust.

18. An official of Koppers United Company recently stated: "A substantial proportion of the coal mining companies own their own mining towns and own their own stores in those towns. Even though the prices and quality of their goods are fairly comparable, in most cases, with the independently owned stores with which they compete, these stores are nevertheless highly profitable operations, largely because their credit losses are practically zero. Likewise, the rents charged for the miners' houses, though reasonable and in a sense fixed by union contract, are such as to render some return on the investment in the town over and above the expense of production. Consequently, the industry has these two sources of net income which are not taken into consideration in the fixing of prices under The Coal Act. And if prices under The Coal Act should be successfully fixed so as to return exactly the over-all cost of production, the industry would still operate at a profit because of the income it will receive from these store and

A number of operators frankly admit that they were able to pull through the early thirties only by profits derived from these ancillary enterprises.

The author appears to be rather sanguine of the union's ability to insure adequate labor standards under unregulated competition.<sup>19</sup> His opinion is not shared by the officials of the Mine Workers. Labor fought consistently for all the coal acts; its attitude was that if the price structure went to pieces, wage after wage all along the line would fall. For employment, whatever its price and hazards, must be preserved. At first the adjustment may be hidden somewhere within the series of entries which make up the worker's account. But if the situation becomes desperate, even the pretense of keeping up the rates may be abandoned. A constant problem of the national officials has been a policing of the terms set by the national agreement. They have persistently been compelled to hold in line locals inclined to barter away wage-rates for the prospect of a little more work. When mines operate only two or three days a week, the union leaders on the spot are hard put to it to maintain the integrity of their trade agreement.<sup>20</sup> The United Mine Workers is not a clear-cut entity; like many another institution, a general is set against a local control. Its gravest danger is a breakdown in the instance against what has been secured in the aggregate.<sup>21</sup> If competition again takes the destructive form of the past, the pattern of history could easily be repeated. The resulting strain would impair the operation—and might even jeopardize the existence of—the union. An appreciation of this threat, sustained by painful experience, supports the faith of the mine workers' high command in coal control.

### III

It is not the least among its good qualities that wisdom grows with the course of the article. At its beginning we are called upon to "discard the experiments which have failed to work." At its end we are informed that current "techniques have not always been well used"; "the mistakes came from want of skill in the employment of new procedures and do

---

town operations." Address by Thomas J. Michie at the annual meeting in 1940 of Section of Mineral Law of the American Bar Association.

19. Mr. Rostow protects his position by an addendum suggesting the possible need for direct regulation of miners' wages by the Federal Government.

20. A favorite device has been to reorganize the company. That done, the mine workers make a fresh agreement with the new corporation.

21. I have been unable to discover an account of the process by which, through a series of transactions between the company and the miner, wages are actually paid—though the factual raw material is quite abundant. Although usages and items are very different, the sort of thing which goes on is suggested by a discussion of the fictions which reside in the payment by the distributor to the farmer for milk. See Till, *Milk: The Politics of an Industry* in HAMILTON & ASSOCIATES, PRICE AND PRICE POLICIES (1938) 483-490.

not weaken the case for relying upon the same weapons again." It is true that the first statement had to do with bituminous coal and the last had reference to deficit finance, but the references are interchangeable. Both ventures are in an experimental stage; neither as yet is a demonstrated success; each is condemned by a reputable body of opinion; a demonstration of the superiority of the one or the other involves a resort to speculation. The coal control is as novel as the spending program. Each is an instrument fitted to an economic function; neither has as yet hit upon just that detail of policy through which its objective is to be gained. It is impossible, save by an act of personal faith, to set the one — thoroughly renovated — back at its task and at the same time to condemn the other to the block.

As with a spending program, so let it be with bituminous coal. For the next move I know no better norm than that set down by Eugene Rostow. It makes the detail of past performance significant, not as an argument against regulation, but as error which points to a revised trial. As suggestions for revision rather than counts in an indictment, I find myself usually — with qualifications — inclined to go along. I am most tempted to dissent when he condemns some procedure by reference to an ideal standard rather than through comparison with the practical alternative. Thus he complains of how "expensive and cumbersome" the system of control is, and says not a word about how cumbersome and expensive no system at all has proved. Again he insists that the act-in-operation does not liquidate unwanted ventures and neglects to state that the failure of an unregulated rivalry to slough off the obsolete is notorious. And again he demands that the industry be made "as competitive as possible" but does not bother about the quality of that competition. Nor do I find very persuasive the argument that in a more orderly world than ours there would be no need for a Coal Act.

The author quite rightly demands arrangements flexible enough to assimilate the changes which the course of events brings. He fears the trend in administrative control towards freezing the structure of the industry. As to the nimble pattern which he would prescribe there can be little question; but his strictures are valuable as warnings rather than as announcements of impending doom. If there was to be a coal control, the act had to be written in terms which gave assurance that there would be no sacrifice of hard-won interest; the intense jealousy among the widely scattered units of the industry forbade any other the rhetoric. But *status quo* is a reference in whose idiom decisions can be made reasonable rather than a blue-print to be reduced to industrial design.

The prices recently put into effect were established upon cost schedules furnished by the operators. In giving a measure of uniformity to a structure marked by confusion and contradiction, typical costs had to be taken. And where costs, always in bondage to price, had never come to

rest, or where a multiple of products had shared common expenses, some had to be preferred over others. It is not so much that an informed discretion was possible; it is rather that the law made its exercise inevitable. So too with the series of orders which attend the administration of the price schedules. As far as possible the judgment, however much of status or novelty it holds, is set down in the language of precedent.<sup>22</sup> In its current form the agency of control has been in existence little more than a year and a half, and the experiment in price control is only in its beginnings. The difference between the four months which price regulation has had and the seven years accorded deficit finance must be remarked. But order for so chaotic an industry is an affair of many tasks. Basic to the art of administration is the matter of careful timing; an industry cannot be renovated in a day. Its very miscellany robs the *status quo* of its shackles, and novelty will prove insistent enough to make its own way. If there is to be continuity, the past must serve as some sort of guide; if an industry is to be led along, a respect must be shown for experience. In the law the craft of the judge draws admiration as deftly he bends ancient precedents to a progressive purpose.

Here and there an outcrop displays a vein running deep beneath the surface of the argument and reveals a deep-seated distrust of a public agency as an instrument for the distribution of wealth. Rostow's skepticism does not rest on speculation alone. He can — in milk, public utilities, trademarked goods — cite instance after instance in its support. But the trouble is that such discretion is inseparable from the operation of the economy. Our basic institutions, the usages of business, the process of bargaining together make up an arrangement which apportions among persons the national dividend. If there could be a market for coal in the likeness of the competitive ideal, the question of who gets and how much would constantly be reanswered. The far-off approximation — which is reality — leaves its mark upon every coal price and every wage rate. Coal, by unanimous opinion, is sold in a "buyer's market," which means that the purchaser pays — and the operator receives — less than would be the case were there between the parties that "equality of bargaining power in which freedom of contract begins." The case for control, accordingly, is much

---

22. At this point the author's argument is buttressed by the citation of two decisions: *In re Wheeling Township Coal Mining Co.* (see p. 580 *supra*) and *In re Sahara Coal Co.* (see p. 582 *supra*). In the one the Division held the business to its established orbit; in the other novel circumstance was accorded full play. The Wheeling order was for temporary relief in anticipation of a public hearing at which issues were fully to be threshed out. It was a way of meeting an urgent problem without yielding too much. In the Sahara judgment the language was decorative but the realities were formally recognized. Reference was made to the fact that river shipments were economical, practical and justified by the character of the development of the Mississippi. The judgment of a court of law, which accords place to novelty, would scarcely be condemned for the reason that a couple of precedents are cited in the opinion.

like the demand of labor for collective bargaining. The call is for correction due to a lapse from Rostow's competitive norm.

In terms of soft coal the exposure of his position is even more manifest. In his abstract formulation, the consumer is the beneficiary of an unregulated competition; the operator is the victim but he can take care of himself. Actually, about 20 per cent of the total supply finds its way into household and building heating. The great bulk of the commodity is processed into industrial energy. Its purchasers contract for it in large quantities; they are skilled in the art of buying; and they have not hesitated to turn bargaining advantage to account.<sup>23</sup> In ordinary manufacture the cost of power is a microscopic item in the retail price of the good. It hits the channels of marketing with too imperceptible an impetus ever to be felt by the common man. In railroads and public utilities it looms somewhat larger; but even there energy expense is almost negligible compared with the devices of high finance habitually employed to elevate rates.<sup>24</sup> In their demands for higher rates, the magnates of such enterprises regard coal costs as small change worthy of minor attention. Across the bargain the major fraction of the operator's receipts go into the pay envelope. Is it not possible, then, to inquire whether one among the arguments for control is not a demand that industries be compelled to pay a minimum wage to the workers who produce their fuel? As thus stated, the consumer interest becomes the labor interest. For the consumer interest, I take it, is only another word for the standard of life, and nowhere else is the standard of life a term in the coal question.

The author recognizes — and would relieve — the plight of labor. His dominant reliance, now that Northern and Southern fields are in a single union, is upon collective bargaining. But admitting that the Mine Workers may at times need help, he concedes — where I should insist upon — a wage control. A sanction from the government would serve as a ready weapon for policing the trade agreement; and if no such provision now adorns the Act, the want rests with the Supreme Court and not with coal control.<sup>25</sup> But in terms of the interrelationship of wages and prices, it is of only slight consequence whether wage rates are fixed by collective bargaining or by government action. Neither an official

---

23. The superior bargaining position of the large industrial consumers has tended to place a heavier burden upon the purchasers of lump coal for household use. The operators have sought to recoup where they could. A major function of government control is to narrow the differentials between coals for industrial and domestic use. It can never be accomplished by the industry.

24. A host of railroads, thanks to improvident moves in the past, are afflicted with an interest charge upon a capital which has long since rusted away and performs no current function. A fiction, sustained by due process of law, has again and again augmented the rate base of a public utility without any benefit of investment whatever.

25. Rostow assumes that the opinion of the Court in *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936) is not now the — and never was good — law. I concur that no legal barrier denies a public control over wages.



agency nor a council of miners and operators can fix wage rates without regard to the industry's ability to pay. In either instance ability-to-pay is an ultimate beyond which settlement cannot go. And the problem of converting the schedules into food, shelter, clothing, is much the same however the rates are arrived at. Neither process is automatic; neither is endowed with an innate vitality; neither is immune to dissipation, if it is seriously at odds with the source whence it derives. Rostow is content to throw a legal fortification about the wage structure. It seems to me imperative, as an additional safeguard, to insure the integrity of the price structure. If it stands, wage fixing becomes an orderly process; if it falls, he can hardly build fortifications strong enough to withstand the impact of disorder. All that an agreement for the industry can do is to name wage-rates, but that is not enough. They must be protected against forces which, in mine after mine, can beat them down.

But the problem of control is larger than the questions of wage, price, railroad rate; and the author has failed to make explicit—if only to deny—the constructive possibilities that lie in regulation. A setting of standards, by which the word “coal” would come to have meaning in the trade, would be a boon to all concerned. In the inter-fuel competition—coal v. oil et al.—the agency has a role of consequence.<sup>26</sup> The threat is not to be met by firm after firm; all anyone save the largest concern can do is to cut the price or lose the business. An authority can meet the situation with a positive program. Coal can be better suited to its uses; improved methods of combustion may be developed; the raw material may be processed into a more concentrated fuel. An agency presents the only chance for converting an agglomeration of operations into an articulate industry. Surveys can be made; cross-hauls eliminated; as decision follows decision, lines of symmetry may be given to the pattern. And control alone can make articulate the need for conservation. In response to competitive pressures, operators take off the low-cost coal and leave the rest. As section after section of the mine is abandoned, it becomes unworkable through roof cave-ins and water seepages; a later operation necessitates a high—often a prohibitive—expense. The coals now mined are of high quality, easy to recover, available through rates which permit their use. In enabling producers to secure a return which promises more efficient exploitation, the Coal Act points a way. It is a step toward a policy for a vital natural resource.

It is to be regretted that Eugene Rostow's attention to coal has prevented an adequate exposition of his general prescription. I should have

---

26. In connection with this problem, the statistics presented of the sharp reduction of coal's proportion in total energy supply are somewhat misleading. The figures used represent the entire output of crude petroleum and gas, much of which is converted to uses not competitive with coal. Fuel used in the gasoline tank of the automobile does not compete with coal.

liked to have learned far more about his program for deficit finance. Is it a tentative stimulus, to be withdrawn as soon as the lagging economy has made its response? And what if the response never arrives or comes like the torrent in the twenties, too turbulent to be controlled, and then a thud as its force is spent? Or is it to take its place as an enduring policy of state? If so, how is it to be converted into a going institution? And now that defense points towards spending for non-productive goods, how is the quick-step to be harnessed to the standard of life when the crisis is past? And I wish that the practical operation of the plan had been more fully explored. At one place Rostow states that "it may be said positively that these techniques have worked"; but almost at once he falls back upon confession and avoidance. The techniques have "not always been well used"; their employment has been marked by "mistakes" and "lack of skill."

Nor am I more able than I was at the beginning to see how deficit finance will cure the ills of bituminous coal. The author insists that the channels of trade must be cleared of all obstructions for the recipe to work. Then the impulse to business enterprise will stimulate a demand which presently will overtake surplus capacity — and all will be well. But soft coal is feverish with an excess of competition and wide open to an artificial stimulus. If he can devise a technique which at once will keep the demand for coal susceptible to his contagion and immunize mine capacity against it, his medicine may have its chance. But, unless that is done, is not the patient likely to die of the cure?