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ADMINISTRATIVE LAW - JUDICIAL REVIEW - STATUS OF CAPTIVE MINES UNDER THE NATIONAL BITUMINOUS COAL ACT -

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RECENT DECISIONS

ADMINISTRATIVE LAW — JUDICIAL REVIEW — STATUS OF CAPTIVE MINES UNDER THE NATIONAL BITUMINOUS COAL ACT — Petitioner railroad company held a renewable short-term lease of a coal mine, and engaged an independent contractor to extract the coal for its exclusive use. The lease and the agreement with the contractor were coextensive in time, the railroad having an option to terminate the agreement whenever the contractor failed to meet the prevailing market price. Petitioner applied for an exemption of the coal thus obtained from the provisions of the National Bituminous Coal Act,¹ relying upon the section which excludes coal consumed by the "producer" ("captive coal") from the Coal Code regulations.² Held, the order of the commission³ denying the exemption is affirmed on the ground that the Court will not reverse the commission's interpretation of the term "producer." The Court declared: "Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the task entrusted by the Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed." *Gray v. Powell*, 314 U.S. 402, 62 S. Ct. 326 (1941) (quotation from p. 413).⁴

¹ National Bituminous Coal Act of 1937, 50 Stat. L. 72 (1937), 15 U. S. C. (1940), §§ 828-851. The Bituminous Coal Act was enacted for the purpose of "stabilization of the industry primarily through price fixing and the elimination of unfair competition." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 at 388, 60 S. Ct. 907 (1940). It provides for establishment of a code in which producers of bituminous coal may become members. A penalty tax of 19½% on the price or market value is imposed on all bituminous coal sold or distributed in the United States, but such tax is waived with respect to producers who accept the code. 50 Stat. L. 75 (1937), 26 U. S. C. (1940), § 3520(b). Thus the tax is an effective inducement for the coal producers to become members of the Coal Code subject to the regulation of the commission.

² "The provisions of . . . this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him." 50 Stat. L. 77 (1937), 15 U.S.C. (1940), § 833(l). By virtue of this provision the coal consumed by the producer ("captive coal") is exempted from the marketing regulations (especially price fixing) under the Coal Code set up by the commission in pursuance of the act. Under 53 Stat. L. 430 (1939), 26 U. S. C. (1940) § 3520(b)(1), the producer of such coal is also exempted from the duty to pay the penalty tax, which exemption in turn eliminates the inducement for his joining the code. The code membership is burdensome not only because of the dues and assessments imposed for the purpose of covering the expenses of the code administration, but also because of the duties to file reports and to take part in expensive price-fixing proceedings. 50 Stat. L. 72 (1937), 15 U. S. C. (1940), §§ 832(b), (c), 833, 840.

³ The National Bituminous Coal Commission has been abolished and its functions transferred to the Secretary of Interior. 53 Stat. L. 1431 at 1433 (1939), 15 U. S. C. (1940), note to § 829. The term "commission" will be used throughout this note for the purpose of simplification as it is used in the principal case.

⁴ In the earlier history of the case, the order denying the exemption was reversed by the circuit court of appeals, *Powell v. Gray* (C. C. A. 4th, 1940) 114 F. (2d) 752. The United States Supreme Court first affirmed the decree below by an equally divided court, 312 U. S. 66, 61 S. Ct. 824 (1941), then granted rehearing, 313 U. S. 596, 61 S. Ct. 938 (1941).

Contrary to the previous practice of circuit courts of appeals⁵ which freely undertook to review the commission's interpretations, the United States Supreme Court has by self-limitation narrowed to the minimum the range of judicial

⁵ In two cases with almost identical facts a railroad company wholly owned and controlled a coal mine subsidiary and consumed all the coal produced by the latter. *Keystone Mining Co. v. Gray*, (C. C. A. 3d, 1941) 120 F. (2d) 1, noted in 90 UNIV. PA. L. REV. 219 (1941); *Consolidated Indiana Coal Co. v. National Bituminous Coal Commission*, (C. C. A. 7th, 1939) 103 F. (2d) 124. In both cases the railroad applied for exemption, claiming to be both producer and consumer under the "captive mines" provisions. The commission rejected the applications. Upon review of of the commission's order in the *Keystone Mining Co.* case, the court found that the subsidiary coal company was the "producer" of the coal because it was a corporate entity separate from the consumer railroad. [See also *Northwestern Improvement Co. v. Ickes*, (C. C. A. 8th, 1940) 111 F. (2d) 221.] The court proceeded on the assumption that (a) the purpose of the Bituminous Coal Act is to regulate producers of coal by means of price fixing and (b) the price-fixing regulations could operate only upon such "sales" or "disposals" of coal as involve a transfer of title in the technical sense. Since the sales of the coal from the subsidiary to the parent railroad company, though being mere bookkeeping operations, involved a technical transfer of title, they were held to be subject to the code regulations. The order denying the exemption was affirmed.

The interpretation that the code provisions were intended to operate only upon disposals involving technical transfer of title is based on the language of the following sections of the act: §§ 3(a), 3(b), 4(II) (b), 4(II) (g), 50 Stat. L. 75 (1937). On the hearing before the Subcommittee of the Senate Committee on Interstate Commerce, Mr. Hosford, Chairman of the Coal Commission, declared: "if the consumer of coal, a legal entity, is also a producer of coal, then there is no *sale*; there is merely a production and use of coal. Where, however, coal is produced by one corporation, even though it be a subsidiary or affiliate of the consumer corporation, in that case there is *technically a transfer of title and sale and, therefore, there is commerce*; and in that event it would be subject . . . to regulation under the code and would be also subject to the penalty provisions. . . ." HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE COMMERCE ON S. 1, 75th Cong., 1st sess. (1937), pt. 1, p. 25 (italics added). See also 51 YALE L. J. 114 (1941).

The bill for the National Bituminous Coal Act was amended in the Senate so as to bring a "wholly owned subsidiary or other legal entity having identical ownership" within the meaning of the term "producer" in the exemption provision. The amendment was finally rejected. H. REP. 578, 75th Cong., 1st sess. (1937), pp. 1, 8; 81 CONG. REC. 3136 (1937). It has frequently been held that where a proposed amendment has been defeated the legislative intent is not to be construed as embracing the provision rejected: *Northwestern Improvement Co. v. Ickes*, (C. C. A. 8th, 1940) 111 F. (2d) 221; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 S. Ct. 527 (1908); *Pennsylvania R. R. v. International Coal Co.*, 230 U. S. 184, 33 S. Ct. 893 (1912); *Lapina v. Williams*, 232 U. S. 78, 34 S. Ct. 196 (1913). The court in the *Keystone Co.* case, *supra*, pointed out that this legislative history is one of the reasons for the decision.

In *Consolidated Indiana Coal Co. v. National Bituminous Coal Commission*, (C. C. A. 7th, 1939) 103 F. (2d) 124, the reviewing court took a view contrary to that taken in *Keystone Mining Co. v. Gray*, *supra*. It disregarded the corporate entity of the subsidiary mining company and considered the latter to be an agent of the parent railroad, which thus was found to be both producer and consumer of the coal. The commission's order was reversed and exemption granted. Cf. *New Colonial Ice Co. v. Helvering*, 292 U. S. 435, 54 S. Ct. 788 (1934). See also *United States v. Delaware*,

review.⁶ The decision falls in line with the tendency to broaden the area of administrative discretion in technical questions.⁷ Moreover, it seems that this decision goes beyond the practice of giving due weight to the commission's determination and constitutes a grant to the commission of a "carte blanche" authority.⁸ The Court indicated that allowance of exemption will depend upon whether the "full consumer-producer identity" has been breached. In fact, the inquiry into the consumer-producer relation will be a matter of economic analysis influenced mainly by the opinion of the commission as to the effect which the decision will have upon the coal industry. Thus the commission undoubtedly will continue to use its broad discretion toward restricting to a minimum the

Lackawanna & Western R. R., 238 U. S. 516, 35 S. Ct. 873 (1915). Cf. *Edwards v. Chile Copper Co.*, 270 U. S. 452, 46 S. Ct. 345 (1925). The Court repudiated the implication from the legislative history on which the court in the *Keystone* case partly based its decision.

⁶ The section providing for judicial review contains the usual provision declaring the findings of facts made by the commission to be conclusive if supported by substantial evidence. 50 Stat. L. 85, § 6(b) (1937), 15 U. S. C. (1940), § 836(b). The determination of the concept "producer" can be classified either as a pure question of law (i.e., interpretation of statute) or as a mixed question of law and fact. In either case there is nothing on the face of the statute which would stand in the way of the court to review the commission's determination if it should choose to do so.

⁷ Compare *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 60 S. Ct. 1021 (1940); also the implication from the cases of *Brown & Sons Lumber Co. v. Louisville & Nashville R. R.*, 299 U. S. 393, 57 S. Ct. 265 (1937), and *Santa Fe Pacific R. R. v. Fall*, 259 U. S. 197, 42 S. Ct. 466 (1922). See also *Shields v. Utah, Idaho Cent. R. R.*, 305 U. S. 177, 59 S. Ct. 160 (1938), determination of what is an "interurban electric line"; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 S. Ct. 907 (1940), "bituminous coal"; *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 S. Ct. 595 (1904), "periodical"; *Northern Pacific Ry. v. McComas*, 250 U. S. 387, 39 S. Ct. 546 (1918), "swamp land"; *Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R.*, 220 U. S. 235, 31 S. Ct. 392 (1911), "discrimination." The minority opinion in the principal case suggested that the term "producer" is not a technical term at all.

For the interpretation of the term "producer" by the federal courts under other statutes, see *Allen v. Smith*, 173 U. S. 389, 19 S. Ct. 446 (1899); *Klepper v. Carter*, (C. C. A. 9th, 1923) 286 F. 370; *Pampanga Sugar Mills v. Trinidad*, 279 U. S. 211, 49 S. Ct. 308 (1929); *Foss-Hughes Co. v. Lederer*, (D. C. Pa. 1919) 287 F. 150; *Thurman v. Swisshelm*, (C. C. A. 7th, 1929) 36 F. (2d) 350; *United States v. Gamble-Skogmo*, (C. C. A. 8th, 1937) 91 F. (2d) 372; *Sancho v. Bowie*, (C. C. A. 1st, 1937) 93 F. (2d) 323; *Clawson & Bals v. Harrison*, (C. C. A. 7th, 1939) 108 F. (2d) 991; *Skinner v. United States*, (D. C. Ohio, 1934) 8 F. Supp. 999; *Armature Exchange v. United States*, (D. C. Cal. 1939) 28 F. Supp. 10; *Con-Rod Exchange v. Henricksen*, (D. C. Wash. 1939) 28 F. Supp. 924; *Charles Marchand Co. v. Higgins*, (D. C. N. Y. 1940) 36 F. Supp. 792.

⁸ ". . . with regard to judicial review for error of law, it is essential that the courts should retain the power in unrestricted form, but in its exercise they may well . . . refuse to disturb administrative rules and principles of decisions where the latter lie within specialized technical fields and transgress no established principles of legal justice." Dickinson, "Judicial Review of Administrative Determinations: A Summary and Evaluation," 25 MINN. L. REV. 588 at 603 (1941).

"captive mine" exemption which has permitted large quantities of coal to be withdrawn from its regulatory power.⁹ It may safely be said that where the owner of a mine operates it through his employees and consumes its entire output, he will be within the exemption provision. Similarly, a long-term lessee operating the mine through his employees will normally enjoy the same advantages as the owner. But in all other situations characterized by decreasing interest of the consumer in the mine¹⁰ and increasing independence of the instrumentality engaged by the consumer for operating the mine,¹¹ the commission will be free to find that the instrumentality became a "producer" and that the consumer-producer identity was therefore breached. Thus in the principal case the shortness of the lease, the absence of risk and limited interest on the part of the railroad in the mine and in the mining operations, as well as the railroad's right to cancel the agreement with the contractor when cheaper coal could be obtained in the market, all pointed to the conclusion that the contractor was the "producer" and the railroad merely a consumer.¹² In order to subject the coal produced by the contractor to the Bituminous Coal Act, the Court had to brush away the limiting interpretation suggested in the *Keystone* case¹³ that only coal the title to which is transferred in technical sense by the producer to the consumer falls within the reach of the statute. It has been suggested that the effect of the removal of such

⁹ According to the estimate of Mr. Charles F. Hosford, Chairman of the Coal Commission, given before the Senate Committee on Interstate Commerce, approximately 10% of all coal is produced in "captive mines." HEARINGS BEFORE THE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 4668, 74th Cong., 2d sess., (1936), pp. 32, 33. Industrial consumers already supply one-fourth of their requirements from mines which they control. Report by the National Resources Commission, HEARINGS BEFORE A SUBCOMMITTEE OF THE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1417, 74th Cong., 1st sess. (1935), p. 386, cited in 51 YALE L. J. 114 at 115, note 6 (1941).

¹⁰ Where, e.g., the consumer is only a co-owner or short-term lessee of the mine.

¹¹ Where, e.g., the consumer operates the mine through an independent contractor or through his subsidiary.

¹² Just which captive relations the Congress intended to be covered by the exemption is difficult of determination from the Congressional record. It seems that there was not a crystallization of opinion within the Senate Committee itself as to the desirability of the exemption. Said the chairman of the committee (Wheeler): "the man who has a captive mine can still get his coal more cheaply, but the man who has to buy it will not be able to get his coal cheaper, because you raise the price of the coal to him. . . ." Senator Minton: "The man who has a captive mine is not competing at all." Chairman: "Yes, he is, he is competing in the industry. . . ." Mr. Hosford: "It [captive coal] does not compete directly, sir." HEARINGS BEFORE THE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 4668, 74th Cong., 2d sess. (1936), p. 33.

The following argument for the broad interpretation of the "captive mine" exemption was made: "Coal from captive mines unquestionably affects the market; but it is not sold or purchased on the market and therefore does not enter into direct competition with coal which is so sold or purchased." *Powell v. Gray*, (C. C. A. 4th, 1940) 114 F. (2d) 752 at 755.

¹³ *Keystone Mining Co. v. Gray*, (C. C. A. 3d, 1941) 120 F. (2d) 1. See note 5, supra. See also *Powell v. Gray*, (C. C. A. 4th, 1940) 114 F. (2d) 752.

restrictions is to broaden the commission's power, contrary to the legislative intent, and to open the door to administrative control of features of the coal industry other than prices and methods of market competition.¹⁴

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¹⁴ Minority opinion of principal case. Compare the statement of Secretary of Interior Ickes that the effective control of the coal trade will require price regulation of oil and gas. Cited in Rostov, "Bituminous Coal and the Public Interest," 50 *YALE L. J.* 543 (1941). For general discussion of the National Bituminous Coal Act, see Rostov, *supra*; Hamilton, "Coal and the Economy—A Demurrer," 50 *YALE L. J.* 595 (1941); Rostov, "Joinder in Demurrer," 50 *YALE L. J.* 613 (1941); Reeder, "Some Problems of the Bituminous Coal Industry," 45 *W. VA. L. Q.* 109 (1938); Curry, "Regulation of the Bituminous Coal Industry," 13 *ROCKY MT. L. REV.* 304 (1941). For the procedure see ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. 10, 77th Cong., 1st sess. (1941), pt. 10 (Monograph 23); Fitzpatrick, "Practice Before the Bituminous Coal Division," 6 *JOHN MARSHALL L. Q.* 437 (1941).