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PRICE-FIXING UNDER N. I. R. A. CODES

The National Industrial Recovery Act, effective June 16, 1933, empowers the President to formulate and establish so-called Codes of Fair Competition for trades and industries throughout the United States, either upon the application of trade groups or associations or upon his own initiative. The Act does not specify or even outline in a general way what provisions shall be put into the codes, and contains no limitation upon the President's power to incorporate in them anything he may think proper, except that no regulation under the Act shall prevent an individual from pursuing his vocation of manual labor or from marketing or trading the produce of his farm.

The Recovery Act starts out by declaring the existence of a national emergency "which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people." It then declares it to be the policy of the Act "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof;" and "to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups." The policy of Congress is further declared to be to induce and maintain united action of labor and management, to eliminate unfair competitive practices, to promote the fullest possible utilization of the productive capacity of industries, to avoid undue restriction of production, to increase consumption by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and conserve natural resources.

The Recovery Act does not contemplate that the binding force of the respective codes upon the individuals or corporations affected shall be, in any respect, dependent upon

their consent or voluntary choice; they are bound whether they agree or not. The Act says that the provisions of the codes, when approved and promulgated by the President, shall constitute the standards of fair competition for their respective trades and industries; that any violation of such standards "in any transaction in or affecting interstate or foreign commerce" shall be deemed an unfair method of competition, and that it shall constitute a misdemeanor subjecting the offender to a fine of not more than \$500 for each day that such violation continues. The Act also vests jurisdiction in the federal district courts to prevent and restrain such violations, in proceedings for that purpose instituted by the district attorneys in their respective districts under the direction of the attorney general.

The above-quoted references to interstate commerce indicate that Congress relied, for its power to enact this legislation, upon that part of Article 1, Section 8, of the Federal Constitution which says that Congress shall have power "to regulate commerce with foreign nations, and among the several states." The use of the words "to provide for the general welfare" in the declaration of policy in the first section of the Act might indicate that its authors had in mind, as a further source of congressional power, the words "in order to promote the general welfare" in the preamble to the Constitution.

It seems, however, to be generally conceded, even in the cases in which certain of the federal courts have sustained the validity of codes under the Recovery Act, that Congress cannot legislate for "the general welfare" except upon the subjects and within the limits to which its legislative power is confined by the specific provisions of the Federal Constitution. Nor did the courts, in the cases referred to, seem to regard the emergency declared by the Recovery Act to exist as creating or giving rise to any power which Congress did not otherwise possess. The decisions in all the cases in which the federal courts have considered the codes have turned

upon the question whether or not they were within the power of Congress to regulate interstate commerce.

The general nature and scope of the regulations and restrictions imposed by the President upon the various trades and industries, by means of the codes promulgated by him, are illustrated by the provisions of certain of these codes which have come up before the federal courts for consideration, either in criminal prosecutions or injunctive proceedings. Among these are the provisions of the cleaners and dyers code requiring that a certain minimum price be charged for such services; prohibiting the retail sale of building materials at less than actual cost; forbidding the giving away of premiums to customers in the retail sale of gasoline; limiting lumber mills to a certain percentage of their normal productive capacity and to certain weekly operating time; prescribing minimum wages and hours of labor in the bituminous coal industry; prohibiting the working of more than two shifts of forty hours weekly in the manufacture of hosiery; prescribing minimum wages and hours and other requirements in the sale of live poultry; and requiring petroleum producers to keep records, make reports, and submit to inspection, in order to prevent them from exceeding their production quotas.

It will be noted, therefore, that the powers asserted and exercised by the President in the codes established for the various trades and industries include the fixing of prices for commodities and services, the dictation of minimum wages and maximum hours for labor, and the restriction of output and production by allotments and quotas. The Recovery Act does not expressly empower the President to incorporate any of these things into the codes established by him; it merely authorizes him to promulgate codes for the various industries, without prescribing any of their provisions or limiting the President in any respect as to what he should put into them.

It will be impossible, within the limits of this article, to give attention to all the different features of the various codes that have been considered by the courts. This discussion will, therefore, be confined to two decisions in which it was directly held that Congress, by virtue of its power to regulate interstate commerce, could authorize the President to include provisions fixing the prices of commodities and services in the codes established by him.

In *United States v. Spotless Dollar Cleaners*¹ the Federal District Court of the Southern District of New York enjoined the defendant from performing certain retail cleaning and dyeing services for less than the minimum prices fixed by the code. The defendant, a New York corporation, operated thirty-two stores in New York City, at which the service of dry-cleaning and processing incidental thereto was offered to the public. It delivered the clothing received from its customers to a corporation across the Hudson river in New Jersey, which was under the same control and management as the defendant. Customers came in contact only with the defendant in New York and were unaware that their clothing would be sent to New Jersey for processing; but every garment in fact went to New Jersey and was returned to New York. District Judge Knox said, in the opinion:

"I cannot but believe that service contracts made by the defendant with relation to physical subject matter which necessarily must move regularly, usually, and in large volume across the boundary line of adjoining states, is commerce, both in theory and in fact."

The evidence showed that there were a number of dry-cleaning establishments in New York which, like the defendant, habitually sent their customers' clothing to certain wholesale cleaning plants in New Jersey, and that, since the defendant refused to adhere to the minimum code prices, these New Jersey plants had lost the trade of retail stores situated in New York.

¹ 6 F. Supp. 725 (S. D. N. Y. 1934).

Judge Knox summed up by saying that "such price cutting as has occurred has seriously impeded and changed the customary and usual flow of interstate commerce in the dry-cleaning industry between the states of New York and New Jersey. If defendant be permitted to continue its unfair prices, further changes in such currents and flow are inevitable, and these will contribute to the frustration of the purposes of the National Industrial Recovery Act. . . . In order to overcome tendencies which divert and stem movements in interstate commerce, Congress may act as it has, and is competent to authorize this court to take such steps as will allow interstate trade to be conducted in smoother channels and in accordance with the execution of policies that are believed to be wise and expedient. . . . And who can rightly say, with assurance, that governmental price-fixing when confined to transactions in interstate commerce, is not a means reasonably adapted to the legitimate ends which Congress seeks to serve? . . . In rendering this decision, I know full well that it may be a distinct step beyond the boundaries which, in peace times, have been said to circumscribe the powers of the Congress."

That Congress, as incident to the power to regulate interstate commerce, may delegate to the President the power to fix the prices a merchant must charge for his goods is frankly asserted by Judge Donohoe of the Federal District of Nebraska in *United States v. Canfield Lumber Co.*² The defendant, a retail dealer in Omaha, was enjoined from selling building materials at less than actual cost, plus cost of handling and selling and administrative expense, as computed under the provisions of the retail lumber dealers' code. It put advertisements in Omaha newspapers circulating in Iowa and other states offering to sell lumber at prices below the minimum cost prices established under authority of the code. Its materials were purchased in the western timber country and shipped to its yard in Omaha, where they

² 7 F. Supp. 694 (D. C. Neb. 1934).

were sold in small lots to customers solicited to some extent through the advertisements referred to. The evidence showed one sale to an Iowa customer and prices quoted to another with knowledge that the lumber was to be used in Iowa. A witness from Iowa stated that the lumber trade in his community had fallen off, due to the prices advertised by the defendant, and it did not appear that the defendant, in selling lumber, took any precaution to find out whether it was to be transported to another state.

Judge Donohoe said:

“The defendant, like other lumber dealers, engaged in interstate commerce to obtain its stock or supplies for sale. Then in this case, this defendant in turn engaged in interstate commerce for the purpose of obtaining customers. Without employing interstate commerce, its business, like other dealers, could not exist. The whole operation is so closely allied and connected with interstate commerce and so affects interstate commerce generally that, to our mind, brings this business clearly within the regulatory power of Congress.”

In the New York case, the cleaner's regular course of business was held to “affect” interstate commerce, and therefore to be subject to price-fixing, because his cutting the price below the minimum fixed by the code caused certain New Jersey cleaning establishments to lose some of the business they formerly received from New York. In the Nebraska case, the selling by the Omaha lumber dealer below the code price caused the lumber trade in Iowa to fall off. Thus, according to the court's reasoning in each of these cases, interstate commerce was adversely affected. But Congress has never, in any law enacted by it, nor has any court, in interpreting a law of Congress, declared it to be the function of Congress, under its power to regulate interstate commerce, to see to it that the people of one state do more or less business than the people of another state, so long as the avenues and facilities of commerce are free and open to all upon equal terms. The theory that the ebb and flow of commerce from one state to another, caused by ordinary

competition, can be controlled or interfered with by Congress, through federal agencies, is entirely novel and unprecedented.

In the case of the Omaha lumber company, the court laid stress upon the fact, also, that its stock in trade had been transported to its yard from the western timber country through the medium of interstate commerce. The lumber, however, had come to rest in its Omaha yard, and therefore had lost its interstate character, before it was offered for sale or sold in the transactions complained of as violations of the code in the case referred to. Whether the dealer acquired his stock in interstate commerce or not could certainly have no bearing on the power of Congress, through the codes under the Recovery Act, to fix the price that he must get for it after it was no longer in transit and had become his absolute property.

The court held that the lumber was subject to code price-fixing because the dealer's course of business permitted it to be sold and moved across the state line into Iowa, just as in the New York case the cleaner's regular routine was to send his customers' clothing across the line into New Jersey. Assuming, however, that these incidental movements across state lines did partake, in some degree, of the nature of interstate commerce, it does not follow that the regulatory power of Congress with respect to such commerce would extend to fixing the price of the articles of merchandise or of the services entering into it.

The same reasoning would justify the President in proclaiming a code fixing the price a tailor in New York must charge for a suit of clothes, where, for example, he takes his customer's measure and sells him a suit from a bolt of cloth in his shop in New York, but afterwards sends it to a journeyman in New Jersey to be cut out and made up. It is impossible to imagine any transaction in commodities or

services involving fabrication, repairing or processing in which some such incidental movement across state lines might not occur.

Let us consider for a moment the mail-order business, where the customer in New Jersey, for instance, sends his order to the merchant in New York for some article to be shipped to him in New Jersey. Judge Knox said, with regard to the cleaning contracts in the case above referred to, that they were properly subject to code price-fixing because they were made "with relation to physical subject matter which necessarily must move regularly, usually, and in large volume across the boundary line of adjoining states." That statement would be even more true of the contracts resulting from orders received by mercantile concerns in one state for goods to be shipped to customers in another state. So, if the fact that the merchandise bought and sold must necessarily be moved across state lines is to be the criterion, the President's price-fixing power under the Recovery Act would be practically boundless.

The opinions in the New York and Nebraska cases just discussed, as well as the opinions in other cases wherein the federal courts have sustained the validity of various code provisions under the Recovery Act, cite a number of decisions of the Supreme Court of the United States involving the power of Congress over interstate commerce. In none of the legislation considered and interpreted in those decisions did Congress assert the right to regulate interstate commerce by fixing the price of commodities moving therein, or anything approximating such power. The subjects considered in the Supreme Court decisions cited in the cases upholding the Recovery Act and code provisions thereunder may be classified as follows:

Orders of the interstate commerce commission requiring intrastate railroad rates to be increased, in order not to discriminate against interstate rates for substantially the same distances;

The federal employers' liability law, upheld for the reason that it is within the power of Congress to regulate the relations between railway carriers and their employees while both are engaged in interstate commerce;

The Act of Congress punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce;

The Mann Act, prohibiting the transportation of women in interstate commerce for immoral purposes;

Rates and charges for facilities and services in stockyards, and practices in connection with live stock passing through the same, under the Packers and Stockyards Act and the regulations of the Secretary of Agriculture pursuant thereto;

Regulation of boards of trade by the Secretary of Agriculture under the Grain Futures Act;

The Webb-Kenyon law, forbidding the interstate transportation of intoxicating liquors intended to be shipped into a state where its possession or sale is unlawful;

The Act of Congress forbidding the interstate transportation of stolen automobiles;

The Act of Congress forbidding the interstate transportation of lottery tickets;

Order of the Federal Trade Commission declaring it unfair for concerns blending flour purchased from others to do business under names indicating that they were grinders of the grain; and

Combinations in restraint of interstate commerce in violation of the Sherman Anti-Trust Law.

It is evident from the foregoing summary that Congress, in legislating under its power to regulate interstate commerce, has heretofore gone no farther than to guard against unfair, discriminatory and dishonest practices in the management and operation of the facilities and instrumentalities

by which such commerce is carried on, such as railways, stockyards and boards of trade; to prevent interstate transportation facilities from being used for certain unlawful, immoral and contraband purposes, and to forbid monopolies and conspiracies in restraint of interstate commerce. Clearly, therefore, Congress has never hitherto interpreted its power to "regulate" interstate commerce to mean anything more than to keep it and its channels and instrumentalities free from unfair, dishonest, immoral and illegal practices and uses. No precedent is to be found in what Congress up to the present time has done in the regulation of interstate commerce to support the theory that, under the power to "regulate," it can fix prices. Even the Recovery Act itself is silent as to any such enlargement of congressional power.

Thus the federal courts which have upheld the price-fixing provisions of codes under the Recovery Act on the ground that they are within the power of Congress to regulate interstate commerce have done so without any actual precedents to guide them. The question is really new and no previous pronouncement by the Supreme Court can be relied upon to solve it. The power asserted under the price-fixing codes is to go into the local merchant's place of business and dictate the price of the commodities that he sells, not alone the price of those commodities that the customer intends to or may incidentally remove across the line into another state, but also the price of those commodities which are intended to remain, and do remain, wholly within the state in which they are purchased.

A sale and delivery wholly within a particular state to a customer who does not remove the commodities purchased into another state is a purely intrastate transaction. But the right to fix the price in such a transaction is nevertheless asserted on the ground that Congress may regulate intrastate business if it "affects" interstate commerce. The theory is thus expressed by Judge Knox in the *Spotless Dollar Cleaners* case: "If the defendant engages in interstate commerce

directly, or if its intrastate business affects the free flow of the interstate trade of others, its acts are subject to the restraint here sought." (Italics are mine.) And Judge Donohoe, in the *Canfield Lumber Company* case, says that he is brought to the inevitable conclusion that "that which affects interstate commerce in a substantial or a direct way, whether it be wholly interstate commerce or partly interstate and partly intrastate, or even an intrastate transaction alone, may be regulated by Congress." (Italics are mine.)

The power of Congress under the Constitution is to "regulate" interstate commerce. In determining the validity of the price-fixing codes as an attempted exercise of that power, the first question that arises is whether, even if Congress has the power itself to fix prices as a means of regulation, that power was, in fact, delegated to the President by the Recovery Act. That the Act does not explicitly do so is certain. Assuming, however, that the Recovery Act delegates to the President all the power that Congress itself might exercise in the premises, the next question that arises is whether the word "regulate" is broad enough to include the power to fix the prices of commodities even if they are unquestionably within the scope of interstate commerce. And when it is sought to extend that power to the fixing of prices in purely intrastate transactions, there arises the further question whether or not it constitutes an invasion of the reserved rights of the several states.

The second question just referred to, as to whether the power to fix prices is included within the power to regulate, requires us to consider the meaning and effect of price-fixing. The right to determine for oneself, by the exercise

of personal judgment, the price at which to sell merchandise or other property is the vital characteristic of ownership. To compel a merchant to hold his goods until he can obtain a certain fixed price for them, and to refrain from selling them at a price satisfactory to him, is to divest him of all *control* over his property and business and vest it in the superior power. Control is the most essential element of ownership, and it might well be argued that such an assertion of authority by Congress would violate the due process clause of the Federal Constitution.

As previously stated, the government asserts the right under the Recovery Act to establish codes fixing the price of commodities sold in purely intrastate business, on the theory that they "affect" interstate commerce. Under the Agricultural Adjustment Act, also, the same contention was made with regard to the price to be paid by local distributors for locally produced milk. The Secretary of Agriculture promulgated a price-fixing code for milk in the Oklahoma City area, which came before the Federal District Court of the Western District of Oklahoma in the case of *Douglas v. Wallace*,³ decided October 17, 1934. It was admitted that none of the milk in question passed beyond the limits of the state, but that all of it was produced, sold and consumed within the state. The court held that the fixing of prices to be paid by the local distributors was an unwarranted attempt to regulate purely intrastate commerce, and therefore unconstitutional.

A number of other decisions not yet fully reported, some upholding and others denying the validity of price-fixing codes, have been rendered by some of the federal district

³ 8 F. Supp. 379 (W. D. Okla. 1934).

courts, but as yet none of these cases have reached the circuit courts of appeals or the Supreme Court. It is announced, however, that at least one case involving some of the provisions of the codes under the Recovery Act will be submitted to the Supreme Court in the near future, and a decision is to be expected before the expiration of the Act next June, when Congress will be called upon to determine what part, if any, of the Recovery Act it will continue in force. Never since its foundation has the Supreme Court been faced with a more serious responsibility, nor have the people of the United States ever had more at stake than now hangs upon the court's solution of the constitutional issues involved.

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