Commodity Futures Trading Commission
CEA CASES

NAME: VINCENT W. KOSUGA, SAM S. SIEGEL, AND NATIONAL PRODUCE DISTRIBUTORS, INC.

CITATION: 19 Agric. Dec. 603

DOCKET NUMBER: 73

DATE: JUNE 3, 1960

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AGRICULTURE DECISIONS

BEFORE THE SECRETARY OF AGRICULTURE

UNITED STATES DEPARTMENT OF AGRICULTURE

(No. 6572)

In re VINCENT W. KOSUGA, SAM S. SIEGEL, AND NATIONAL PRODUCE DISTRIBUTORS, INC. CEA Docket No. 73. Decided June 3, 1960.

Manipulative Intent -- Evidence

Evidence fails to establish respondent Kosuga attempted to manipulate upward prices of November 1955 onion futures on the Chicago Mercantile Exchange and prices of cash onions.

Manipulation -- Agreement -- Stabilization

Respondents are found to have attempted to manipulate onion future prices and cash onion prices in violation of the Commodity Exchange Act in November and December 1955 by virtue of an agreement with grower-shippers of onions to keep onions from being used for deliveries upon the exchange. This is so even if respondents only sought to peg or stabilize onion prices.

Manipulation -- Hedging

Respondents are found to have attempted to manipulate and to have manipulated downward the prices of March 1956 onion futures and prices of cash onions in violation of the Commodity Exchange Act even if respondent Kosuga was on the short side of the March future as a hedger.

Mr. Benj. M. Holstein, for Commodity Exchange Authority. *Mr. Lee A. Freeman,* of Chicago, Illinois, and *Mr. Michael A. Gurde,* of Middletown, New York, for respondent Vincent W. Kosuga. *Mr. Max Chill,* of Chicago, Illinois, for respondents Sam S. Siegel and National Produce Distributors, Inc. *Mr. John Curry,* Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1), instituted June 18, 1956, by a complaint and notice of hearing issued under section 6(b) of the act (7 U.S.C. 9) by an Assistant Secretary of Agriculture.

Respondent Vincent W. Kosuga is an onion grower and trader, a member of the Chicago Mercantile Exchange and a registered floor broker. Respondent Sam S. Siegel is a member of the Chicago Mercantile Exchange and is the president and general manager of the corporate respondent, which is engaged in the wholesale produce business.

The complaint charges that during October and November 1955, (1) respondent Kosuga attempted to manipulate upward prices of the November 1955 onion future on the exchange and cash onions; (2) that in November and December 1955 respondents attempted to manipulate upward prices of onion futures and cash onions; and (3) that in January and February 1956 respondents attempted to manipulate and did in fact manipulate downward prices of March onion futures and cash onions. The complaint alleges that such activities constituted violations of Sections 6(b) and 9 of the Commodity Exchange Act (7 U.S.C. 9, 13).

In connection with the charge of attempted manipulation by respondent Kosuga in November 1955, the complaint asserts that this respondent established and held a large long position in the November 1955 onion future, and took delivery of large quantities of cash onions so that he held about one-half of the total cash supply in Chicago available for delivery on the future, and that these transactions were undertaken with the intent of causing increases in the prices of the November future and cash onions.

With respect to the charge of attempted manipulation by the three respondents, the complaint alleges, in part, that in November and December 1955, when respondents held approximately 1,000 carlots of cash onions, including 98 percent of the available deliverable supply in Chicago, they entered into an agreement with a number of growers and shippers of onions, under which the grower-shippers agreed to buy approximately 285 carlots of the Chicago onions owned by respondents, in consideration of which the respondents agreed to make no deliveries on the Chicago Mercantile Exchange during the remainder of the onion season of any part of the remaining onions which they held in Chicago or elsewhere, but would accumulate additional cash supplies and support the long side of the market. The complaint further alleges that pursuant to this agreement the respondents delivered cash onions to the grower-shippers, received payment therefor, and temporarily supported the long side of the market.

The charges of attempted and actual manipulation of the March 1956 future by the respondents are based upon allegations that, pursuant to an agreement among themselves, they sold large quantities of March 1956 futures, established and held large short positions in the future, stood ready to deliver onions against these positions, and shipped onions out of Chicago for repacking and shipment back to Chicago and delivery on the exchange, all of which caused decreases in the price of the March future and of cash onions, whereupon the respondents covered their positions, in part, at such decreased prices. It is alleged that these transactions were undertaken for the purpose and with the intent of depressing cash and futures prices.

On September 13, 1956, respondent Kosuga filed an answer admitting the jurisdictional allegations of the complaint and his holdings of November futures as alleged in the complaint, but denying the remaining allegations thereof. Kosuga also contends in his answer that he had been improperly joined with the other respondents, that the aggregating of statistical data with respect to all the respondents is improper and that the complaint is vague and ambiguous. Kosuga further claims that the complaint does not set forth a cause of action under section 6(b) of the act and that, in the absence of regulations expressly defining manipulation, this section constitutes an unlawful delegation of legislative power and violates the Fifth Amendment to the Constitution. On September 25, 1956, an answer was filed by respondents Sam S. Siegel and National Produce Distributors, Inc., in which they deny the substantive allegations of the complaint and that any manipulation was intended or accomplished.

John J. Curry, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, was assigned as referee and presided at the hearing.

Respondent Kosuga was represented by Lee A. Freeman, Attorney at Law, Chicago, Illinois, and Michael A. Gurda, Attorney at Law, Middletown, New York, and respondents Sam S. Siegel and National Produce Distributors, Inc., were represented by Max Chill, of Max and Herman Chill, Attorneys at Law, Chicago, Illinois. Benjamin M. Holstein, Office of the General Counsel, United States Department of Agriculture, appeared as counsel for complainant. The hearing began November 14, 1956, in Chicago, Illinois, and continued at intervals until its conclusion November 1, 1957.

Both sides offered oral and documentary evidence. Fifteen witnesses testified, and a number of exhibits were received on behalf of each side. After the hearing, all parties filed briefs. On April 2, 1959, the referee filed a report containing proposed findings of fact and conclusions and recommending that respondents be found to have violated the act as charged. Respondents filed lengthy exceptions to the report. Oral argument was held before the Judicial Officer January 15, 1960.

At this final stage of the proceeding it is apparent that there is little or no dispute about the basic facts put in evidence. The inferences and conclusions to be drawn from the basic facts are, however, subjects of controversy.

FINDINGS OF FACT

1. Respondent Vincent W. Kosuga is an individual whose address is Pine Island, New York. He is now and was at all times mentioned herein a grower and shipper of onions, a trader in onion futures and cash onions, a member of the Chicago Mercantile Exchange, and a registered floor broker under the Commodity Exchange Act.

2. Respondent Sam S. Siegel is an individual who was at all times material herein a member of the Chicago Mercantile Exchange, and the president, manager, and principal shareholder of respondent National Produce Distributors, Inc., hereinafter called National, an Illinois corporation engaged in the wholesale produce business with offices and a place of business at Franklin Park, Illinois. At all such times, respondent Siegel traded in onion futures and in cash onions in the name of National, and directed, controlled, and was responsible for the corporate transactions hereinafter described. At all such times, respondent Siegel was the vice-president and stockholder of the Dakota Chief Sales Company, a corporation which operates a cold storage warehouse located at Franklin Park, Illinois, and the vice-president of Auster-Siegel Trading Company, a registered futures commission merchant.

3. At all times material herein, the Chicago Mercantile Exchange was a duly designated contract market under the Commodity Exchange Act. Trading in onion futures on the exchange is conducted in units of one contract or carlot containing 600 50-pound bags, more or less.

4. Respondent Kosuga received 323 carlots of onions in November 1955 as final deliveries n1 on his long contracts in the November future on the Chicago Mercantile Exchange, and in addition, he took over at the delivered price 32 carlots received as final deliveries by other traders. Forty-six carlots were received as final deliveries by respondent National against long positions in the November future which it held. These 401 carlots of final deliveries constituted all the final deliveries on the Chicago Mercantile Exchange in satisfaction of November 1955 onion futures. Of these 401 carlots, 387 were shipped into Chicago during October and November 1955 and delivered on track, and the remaining 14 carlots were delivered in warehouses in Chicago. The 323 carlots received as final deliveries by Kosuga settled 335 long contracts held by him, or about 75.8 percent of the total of 442 contracts in the future which were settled by delivery. The 323 carlots received by Kosuga as above described were turned over by him to National for handling and sale.

n1 A long receiving a carlot on delivery may sell the future and redeliver the carlot against the resulting short futures contract, and this process may be repeated, or a long receiving a carlot on delivery may sell it for cash and the purchaser may deliver the carlot against his short position, or sell it to someone else for that purpose. The same carlot may therefore be delivered and received more than once in the same delivery month. An initial delivery takes place when a carlot is first delivered, and a carlot received on delivery which does not subsequently reappear in delivery channels is a final delivery. The number of initial (or final) deliveries plus the number of redeliveries equals the number of contracts settled by delivery.

5. During the latter part of November and early December 1955, as a result of the deliveries received on November futures as described in Finding of Fact 4, Kosuga owned and held 321 carlots of cash onions in cold storage warehouses and on track in Chicago. At the same time, National owned and held 250 carlots of cash onions in cold storage warehouses, and the combined cash holdings of these respondents in Chicago constituted practically the total supply of onions in Chicago which were available and could qualify for delivery on the Chicago Mercantile Exchange. In addition, Kosuga owned and held approximately 400 carlots of cash onions in common storage at country points, making a combined total of approximately 1,000 carlots of cash onions owned and held by the respondents which were or could be made available for delivery on the Chicago Mercantile Exchange in satisfaction of futures contracts.

6. Cold storage onions are onions held in warehouses under refrigerated storage. Common storage onions are onions held in nonrefrigerated facilities on the farm or at other country locations. Cold storage onions are generally inferior in quality to common storage onions, are less desired by the trade and command lower prices. The onions held in Chicago cold storage by respondents Kosuga and National, as described in Finding of Fact 5, were a large concentration of onions in Chicago insofar as the futures market was concerned, and the delivery of all or a substantial part of the onions on the Chicago Mercantile Exchange would have caused a drastic decline in futures and cash prices. The fact that the onions were concentrated in Chicago in position for delivery was known to the trade and would tend to have a depressing effect on futures and cash prices.

7. During the latter part of November and continuing into December, 1955, the respondents entered into negotiations with a group of grower-shippers, that is, individuals engaged in the business of growing, shipping, and trading in onions and onion futures, looking toward the purchase by and transfer to the grower-shippers of most of the onions held by the respondents in Chicago. Meetings were held in Chicago on or about November 27, December 10 and 17, 1955, at each of which there were present respondents Kosuga and Siegel, and from six to eight of the grower-shippers, including Veril Baldwin, Lacerne Dixon, Lyle Jordon, Jack Kelly, William Gehring and Michael Minardo. As a result of these negotiations, it was agreed between respondents Kosuga and Siegel and the grower-shippers that the grower-shippers would purchase and take title to 287 carlots of the onions at $ 1.60 per bag or $ 960 per carlot, for a total sale price of $ 275,520, and merchandise them in regular channels of trade. Absent such purchase, some or all of these onions would have been delivered against futures positions on the Chicago Mercantile Exchange. Kosuga agreed and committed himself to make no deliveries on any exchange for the balance of the onion season (December 1955-March 1956) of any remaining onions which he owned in Chicago or elsewhere, and Siegel agreed and committed himself to make no deliveries on the Chicago Mercantile Exchange during such period of the remaining Chicago cold storage onions held by National. Kosuga and Siegel suggested and it was generally understood by all the parties that the restrictions against delivery assumed by respondents Kosuga and Siegel were not to be publicized. The respondents were aware

of the fact that the 287 carlots which were being sold included certain quantities which were to be allotted and billed to various other grower-shippers who had not attended any of the meetings, but who had been notified of the proposed arrangement and had agreed to participate therein and to buy a part of the 287 carlots. The terms of payment called for an immediate deposit of $ 300 per car, an additional deposit of $ 200 per car on or before a specified date, and payment of the balance as and when each car was withdrawn from cold storage by the grower-shippers.

8. Pursuant to and in furtherance of the agreement described in Finding of Fact 7, and in order to effectuate the purposes thereof, the respondents received and accepted deposits and subsequent payments from the grower-shippers in the total sum of approximately $ 175,000, and released or caused the release of onions to the grower-shippers from time to time. The quantity of onions which each of the grower-shippers agreed to purchase, the quantity withdrawn from storage by each, and the sums paid to the respondents were as follows:

Name	Quantity Purchased (carlots)	Withdrawn from Storage (carlots)	Total Amount Paid Including Storage Charges
Veril Baldwin & Son	35	14-1/2	$ 20,797.00
Sterling Johnson	3		1,500.00
John Eucker and Herm Huff	5		1,500.00
Lacerne Dixon	30	3	16,421.00
Lyle Jordon	12		6,000.00
Jack Kelly	50	13	12,500.00
William Gehring	60	60	63,511.52
R. Ulrich & Son	2	2	1,958.80
Henry Ankeny	15		5,000.00
Jarson and Zerilli	25		12,500.00
Mike Minardo	35	12	18,588.00
Porter Cave	5	5	5,087.60
Simplot Western Idaho Produce Co.	10	10	9,600.00 *
Total	287	119-1/2	$ 174,963.92

* Estimated amount. Payment made directly to National Produce Distributors, Inc.

9. A purpose of the agreement was to remove the potential deliverability upon the Chicago Mercantile Exchange of 287 carlots

of onions and to enable the respondents to withhold other onions which they owned from delivery on the Chicago Mercantile Exchange, thereby strengthening and supporting the market and increasing or preventing a decrease in the prices of futures and of cash onions. It was expected by the parties to the agreement that such would be its effects. During the course of the negotiations, Kosuga expressed the opinion that onion futures prices would be increased substantially as a result of the agreement, cited prior occasions when similar agreements had had such an effect, and, together with respondent Siegel, exerted pressure upon the grower-shippers to purchase the onions.

10. Kosuga maintained a commodity futures account with the firm of Kelly-Black Company, Inc., a registered futures commission merchant under the Commodity Exchange Act. This firm was composed of Jack Kelly and Don Black, and it also had among its customers some of the other grower-shippers described above. Prior to the agreement set forth in Finding of Fact 7 and for some time thereafter, Kosuga caried on substantial trading activities in his account with Kelly-Black Company, Inc., and maintained office facilities on the premises of

that company. In accordance with arrangements made as a part of the agreement between the respondents and the grower-shippers, Kosuga transmitted to Jack Kelly or to Kelly-Black Company, Inc., a list of car numbers or lot numbers of the 400 carlots of Chicago cold storage onions held by him, and Siegel transmitted a similiar list of the 200 carlots in Chicago cold storage warehouses held by National, whereupon Jack Kelly selected from each list certain car numbers which were then allotted to each of the grower-shippers in the quantity which each had agreed to purchase. Don Black, acting for and on behalf of respondent Kosuga and at his request, arranged for the release of the allotted carlots when and as requested by the grower-shippers, transmitted invoices to the grower-shippers in the name of respondent Kosuga, received payments from them in the form of checks drawn to respondent Kosuga's order, kept records of all releases and of original and subsequent payments by the grower-shippers, and reported to respondent Kosuga from time to time with respect to such matters.

11. Sometime during January or February 1956, a dispute arose between respondents Kosuga and Siegel and the grower-shippers as to whether the respondents were observing the commitments

which they had made in connection with the agreement, and the grower-shippers, with the exception of William Gehring, thereupon refused to make further withdrawals of the onions from cold storage or pay any further sums to the respondents.

12. Between November 27, 1955, the date of the first meeting with the grower-shippers, and December 20, 1955, which was shortly after the final meeting, Kosuga purchased a net total of 383 carlots of onion futures and Siegel purchased a net total of 294 carlots of onion futures. During the month of January 1956, Siegel took delivery of 56 carlots of onions against long January futures positions, and Kosuga took delivery of 44 carlots.

13. Between November 1955 and early March 1956, respondents traded actively and held substantial short positions in March 1956 onion futures on the Chicago Mercantile Exchange. At the same time, the respondents had control of and the sole beneficial interest in short hedging positions held in the names of commodity brokerage firms as security for margins or other funds advanced to the respondents. Between November 25 and December 15, 1955, which was substantially contemporaneous with the period of negotiation and agreement between the respondents and the grower-shippers, respondents made covering purchases of March futures and each of the respondents reduced his short position, with the result that the combined short position of the respondents in such future decreased from 549 to 227 carlots, or from 38.7 to 13.6 percent of the open interest. During the latter part of December 1955, the respondents resumed selling operations and made substantial sales of March futures. During the period between December 27, 1955, and February 2, 1956, the respondents sold 858 carlots of March futures and increased their combined short position from 303 carlots, or 17 percent of the open interest, to 1161 carlots or 44.3 percent of the open interest. During the month of January and up to and including February 9, 1956, the combined short position of the respondents in the March 1956 future averaged 42 percent of the open interest.

14. Shortly after February 2, 1956, respondents began to make covering purchases in the March future and continued to make such purchases through February 17, 1956, as a result of which respondents' combined short position was reduced from 1161 to 641 carlots, or from 44.3 to 25.4 percent of the open

interest. Thereafter and until about March 1, 1956, each respondent stopped covering operations. Between February 17 and March 1, 1956, inclusive, the open interest in the March 1956 onion future decreased from 2525 to 1416 carlots, or by about 51 percent, and total short contracts in the future held by traders other than the respondents decreased from 1884 to 766 carlots, or by about 59 percent. During this period, the respondents' short position increased from 641 to 650 carlots, or from 25 to 46 percent of the open interest. In view of the cash holdings of the respondents on March 1, 1956, as set forth in Finding of Fact 15, these 650 carlots of March futures constituted an extremely large interest to carry into the delivery month. The 650 short carlots were covered by the purchase of 542 carlots between March 2 and 6, and by the delivery of onions by respondents as described in Finding of Fact 18.

15. On December 31, 1955, respondents owned and held a combined total of 556 carlots of cash onions in Chicago cold storage warehouses, representing 98 percent of all cold storage stocks in Chicago. On January 31, 1956, respondents owned and held 444 carlots of such onions, or 97 percent of such total stocks, and on February 29, 1956, they owned and held 321 carlots or 88 percent of total stocks. These combined holdings included onions taken on delivery by the respondents in satisfaction of long November 1955 and January 1956 futures. During February Kosuga found that most of the onions which he owned in cold storage were decayed and would not qualify for delivery. Figures showing cold storage holdings in Chicago warehouses were posted on the floor of the Chicago Mercantile Exchange and were known to the trade and the general public.

16. During January and February 1956 respondent Siegel shipped or caused the shipment to Davenport, Iowa, of approximately 57 carlots of the onions held by National in Chicago cold storage, and 3 carlots owned and held by respondent Kosuga in Chicago cold storage, for the purpose of reworking, i.e., eliminating spoilage and rebagging the remaining onions to make them saleable or deliverable on the Chicago Mercantile Exchange. The onions were reworked and approximately 25 carlots of the reworked onions were then returned to Chicago and some of these were delivered on the exchange. The fact that the onions were shipped out of Chicago, reworked and returned to Chicago was known to the trade and had a depressing effect upon futures prices.

17. About February 1, 1956, respondent Kosuga had a telephone conversation with Dave Slinger, a grower-shipper who acted as a consultant to the purchasers of the onions in the transactions outlined in Finding of Fact 10 above. At the hearing Slinger testified as follows:

"Q. Did he [Kosuga] have any conversation with you which indicated that he proposed to support the short side of the market?

"A. Yes, he did. Along about the 20th of January, I had onions, I had my onions all hedged, and I got rid of all of them, and then I went on a ski trip and broke my leg, and I was confined to the hospital in Wausau, and along about the first of February I received a call from Mr. Kosuga, and he wanted me to call William Gehring and *suggest to him that he go short the market.* [Emphasis supplied.]

I was completely dumfounded because I thought they were on the long side of the market. I do not know exactly what was said after he made that suggestion, but I was left with the impression that he had reversed his position; *that he was short the market,* and possibly his conscience was bothering him and he wanted Gehring also to get in on the short side. n2 I told him that I didn't think that -- I thought that if they were going to reverse their position *and go short the market,* the group should be called together and should do it together. Mr. Kosuga answered that that would would never do, it would wreck the market in a matter of minutes, and go down to fifty cents; *that the only way to do it was to control it somewhat,* and only one person know about it. [Emphasis supplied.]

I said, all right, I will call William Gehring, and so I called him and William Gehring absolutely wouldn't have anything to do with it. He said 'I won't do anything unless all the group acts together.'

I don't think I called Mr. Kosuga back. I believe that that was the last conversation I had with him until some time in the summer." [Transcript of hearing, pp. 1204-1205.]

n2 Gehring was the only grower-shipper who purchased a substantial number of onions and took and paid for all the onions he contracted to buy pursuant to the agreement reached in December 1955 (see finding of Fact 8).

18. Deliveries in satisfaction of March 1956 onion futures on the Chicago Mercantile Exchange consisted of 171 carlots of initial deliveries and 362 carlots of redeliveries, for a total of 533 contracts settled by delivery. Of the 171 carlots initially delivered and received on a final receiver basis, Kosuga and Siegel delivered 108 carlots or about 63 percent. Of these, 72 carlots were delivered by Kosuga and the remainder by Siegel. March 1, 1956, was the first day on which deliveries against the March future could be made, and on March 1 and 2 respondents delivered 86 carlots as against 47 carlots delivered by all other traders. The month of March is near the end of the marketing season for cold storage onions, and the two-to-one preponderance of redeliveries over initial deliveries indicated the unwillingness of the longs to keep the cold storage onions which they received on delivery in March.

19. Between December 27, 1955, and February 2, 1956, the price of the March future ranged between $ 1 and $ 1.84, with the exception of one day, January 19, when it fell to 92 cents. During this period the respondents sold 858 carlots of March futures net, as described in Finding of Fact 13. A total of 478 carlots net were sold between December 27 and January 10, when the price ranged between $ 1.21 and $ 1.84. Between February 2 and 17, the price of the March future ranged between 90 cents and $ 1.28, and during this period the respondents made net covering purchases in the amount of 520 carlots, as described in Finding of Fact 14. Between March 2 and 6, respondents covered 542 short carlots by the purchase of futures and during this period the price ranged from 44 cents to 58 cents.

20. Prices of the March 1956 onion future on the Chicago Mercantile Exchange during the period from February 2 to 17, 1956, fluctuated between 90 cents and $ 1.28. Thereafter, during the last 18 trading days in the future, these prices declined drastically and steadily. On February 28, the March future closed at 80 cents, on March 2 it closed at 58 cents, on March 5 at 44 cents, and on March 15, the last trading day, it reached a low of 10 cents and closed at 15 cents. The last two prices were the lowest ever recorded on the Chicago Mercantile Exchange.

During the 12 years of trading previous to March 1956 the lowest price recorded for any onion future was 43 cents for the March 1954 future in August 1953. During the last 18 trading days in March 1956, cash onion prices also declined in a similar, but less drastic, fashion. The prices of March futures and cash onions from about mid-February until the end of trading in the future were not the result of the free play of supply and demand factors, but were artificial prices owing to the activities of respondents.

CONCLUSIONS

I

The first charge in the complaint is that respondent Kosuga attempted to manipulate upward prices of November 1955 onion futures on the Chicago Mercantile Exchange and prices of cash onions.

Complainant has shown most of the usual indicia of attempted manipulation upward. Kosuga built up a very large long position n3 and added to it while the open interest was declining and the market was liquidating, he carried a large long line into the delivery month, he did not reduce his long position at as rapid a rate as other long traders and he accepted final delivery of 323 carlots, an extraordinarily large quantity of deliveries to one trader. He also took over 32 carlots delivered to other traders.

n3 There was no trading limit and the act had just become effective in September 1955 with respect to futures trading in onions.

Drawing a line between legitimate trading and trading with manipulative intent is sometimes a very difficult task. We have here the physical facts of Kosuga's trading in the November 1955 future and some statements by Kosuga to grower-shippers (at the time of the events leading to the second charge of the complaint) to the effect that he had received more deliveries in November than he had expected. Moreover, from the record it appears that manipulations in onion futures upon the exchange were not uncommon. On the other hand, Kosuga's statements to the grower-shippers could be interpreted to mean that Kosuga had not forecast market movements correctly as well as being open to the inference argued by complainant. We also have Kosuga's case for trading long in the November future, principally

extensive flood damage to harvested onions, and his defense for taking deliveries, namely that for him, a large long, to do otherwise would have demoralized the market to his financial detriment.

We conclude that the evidence falls just a bit short of tipping the scale enough to warrant an inference of manipulative intent in a quasi-judicial proceeding such as this. Consequently the charge in this connection should be dismissed.

II

Concerning the second charge of attempted manipulation by Kosuga and Siegel in November and December 1955, it is clear that Kosuga and Siegel entered into a "deal" with a number of grower-shippers to sell 287 cars of storage onions owned by respondents to the grower-shippers, that the purpose of the "deal" was to keep the onions from being used for deliveries upon the exchange in the satisfaction of short futures contracts, that as a part of the "deal" Kosuga agreed not to deliver any of the other onions owned by him upon any exchange and that the objective of the deal was to influence onion prices in an upward direction.

While respondents concede practically everything stated in the Findings of Fact above concerning the "deal," they claim that the inspiration for it came not from respondents but from the grower-shippers and that, at any rate, respondents were merely attempting to "stabilize" onion prices, a nonmanipulative purpose in view of *General Foods Corporation* v. *Brannan,* 170 F.2d 220 (7th Cir. 1948.)

Whether or not respondents were the original proponents of the deal, and there is some evidence to the effect that Kosuga was the moving party, they participated in the operation.

As to the alleged "stabilization" purpose of the "deal," it is true some elements of price support were present but it was not limited to such purpose. Kosuga testified that once the nondelivery agreement became known "naturally the market would go up," and that this was his hope and his expectation. Slinger, an adviser to the purchasers, testified that "both Mr. Kosuga and Mr. Siegel used the highest kind of pressure to sell their part of the deal to the growers," that the grower-shippers "had been sold on the idea that there was no reason why the market couldn't go to three or four dollars" as a result of the arrangement,

and that Kosuga quoted figures at the meetings to show "that statistically the deal was as good as it was in 1952 when Marches sold as high as $ 4.75." This testimony is consistent with that of Gehring, a participating grower-shipper, who testified that both Kosuga and Siegel made statements at the meetings that they expected prices to rise as a result of the arrangement being made with the grower-shippers. Jordon, another purchaser, testified that at one of the meetings either Kosuga or Siegel stated, "We have got this market under control if you boys want to cooperate." These statements by respondents made at the time they were entering into the agreement are the best evidence of what the respondents intended to accomplish by means of the agreement and are not denied by respondents.

The respondents' intentions and expectations were shared by the grower-shippers. Gehring testified that he went into the "deal" with the expectation that it would "stimulate the market." When asked specifically whether he expected the price to go up as a result of this agreement, he replied, "I expected it would go up 25, 30, probably 35 cents." Minardo testified that he purchased futures on the strength of the agreement. Jordon testified that he did likewise. Such purchases are strong evidence that a price advance was expected, rather than merely a holding of the price where it was.

Respondents and the grower-shippers were concerned about the 600 carlots of onions overhanging the futures market, and the depressing effect upon prices which the presence of these onions had and which would result from the delivery of part or all of the 600 carlots on the exchange but they also expected that the elimination of these and additional onions from the delivery picture would brighten the prospects on the long side of the market. The magic word "stabilization" or "stabilize" was utilized at times in the questions propounded to the witnesses and their replies thereto, but it would be naive to believe that the parties to the agreement were *solely* interested in maintaining an existing price. The testimony set forth above indicates otherwise. None of the participants would have considered the agreement to have been diverted from its purpose if it raised prices instead of merely holding them where they were. It is concluded that the agreement and sale were intended to raise onion prices and not merely to stop a decline or to stabilize.

If, however, respondents sought only to peg or stabilize onion prices, they nevertheless violated the act by an attempt to manipulate. It is manipulation of prices to *keep a price from moving* in accordance with free supply and demand conditions just as much as it is to *move* a price to an artificial level. A previously-existing natural price kept from moving by abnormal or artificial means deliberately employed thereby becomes an *artificial* or *manipulated price. United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 223 (1940). n4 Under our own act, this was recognized in *Great Western Food Distributors* v. *Brannan,* 201 F.2d 476 (7th Cir. 1953), *cert. denied,* 345 U.S. 997 (1953), in which manipulation of December 1947 egg futures prices was found because due to cornering efforts the futures prices did not drop to a normal relationship with fresh egg and other egg prices. In *In re Zenith-Godley Company,* 6 Agric. Dec. 900 (6 A.D. 900) (1947), prevention of a price decline in butter in New York by purchases of all butter offered was found to be a manipulation of butter prices. See also *In re Fox DeLuxe Foods, Inc.,* 18 Agric. Dec. 582 (18 A.D. 582) (1959).

n4 "But in terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." [Emphasis supplied.]

See also United States v. Trenton Potteries Company, 273 U.S. 392 (1927); United States v. United States Alkali Export Ass'n, Inc., 86 F.Supp. 69, 79-80 (S.D. N.Y. 1949); United States v. Swift & Company, 62 F.Supp. 476, 479 (D. Colo. 1943). For economic treatises see Dice and

Eiteman, The Stock Market, 305 (3d ed. 1952); Frey, Federal Regulation of the Over-the-Counter Securities Market, 106 U. Pa. L. Rev. 19 (1957); Irwin, The Nature of Risk Assumption in the Trading on Organized Exchanges, 27 Am. Econ. Rev. 267-278 (1987); Jones and Lowe, Manipulation, The Security Markets, 444-445, 503-504 (1985); VII Report of the Federal Trade Commission on the Grain Trade, 242-274 (1926).

The holding in *General Foods* v. *Brannan,* 170 F.2d 220 (7th Cir. 1948) n5 to the effect that supporting or pegging a natural or legitimate price is not manipulation in violation of the act was overruled in effect by *Great Western, supra.* In any event it has been validly criticized and does not persuade. *Federal Regulation of Commodities Futures Trading,* 60 Yale L.J. 822, 842 n6 (1951); Campbell, *Trading in Futures under the Commodity Exchange Act,* 26 Geo. Wash. L. Rev. 215, 233-236 (1958); n7 Note 97 U. Pa. L. Rev. 572 (1949).

n5 In the General Foods case, the so-called stabilizing operation consisted of the purchase and sale of two million bushels of "distress rye" to keep it from being offered on the open market. This was the entire transaction. There was no commitment or agreement affecting additional supplies of the commodity as there is in this proceeding. Here the purchase and sale was not the entire transaction. The agreement involved herein reached out to and covered some 700 carlots of onions which were not being sold and the respondents committed themselves to withhold the onions from delivery. To this extent, the facts in the General Foods case differ from the facts of this proceeding.

n6 "The court offered as another basis of distinction the fact that the Socony-Vacuum case involved 'a statute [the Sherman Act] which made it illegal per se to combine for the purpose of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity."' 170 F.2d at 230. But there is no such provision in the Sherman Act, the relevant portion of which simply declares combinations in restraint of trade to be illegal. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1946). This has been construed by the Supreme Court to make price fixing illegal per se. And in the Socony-Vacuum case price fixing is implicitly equated to manipulation, which is there held to include raising, depressing, fixing, pegging, or stabilizing prices. 310 U.S. at 224. The prohibition of these acts, attributed by the court in the General Foods case to the Sherman Act, is actually quoted from the interpretation of that statute in the Socony-Vacuum opinion. Thus, in fact, the Socony-Vacuum case holds price stabilization to violate a much more general and ambiguous provision than the Commodity Exchange Act prohibition of manipulation involved in the General Foods case."

n7 pp. 235-236: "Additional support for the position that 'stabilization' is included within 'manipulation' is found in the Securities Exchange Act of 1934. The federal regulation of commodity exchanges under the Commodity Exchange Act is comparable to the regulation of security exchanges under the Securities Exchange Act of 1934. United States v. Grady, 225 F.2d 410, 411 (7th Cir.), cert. denied, 350 U.S. 896 (1955), and the Congress has expressly included in the Securities Exchange Act of 1934, under the heading of manipulation, the 'pegging, fixing, or stabilizing' of security prices unless authorized by administrative regulations. 48 Stat. 890 (1934), 15 U.S.C. § 78i(a)(6)(1952). The House Committee Report on the bill which became the Securities Exchange Act of 1934 expressly refers to 'pegging and stabilizing operations' as 'manipulation.' H.R. Rep. No. 1383, 78d Cong., 2d Sess. 10 (1934). The Securities and Exchange Commission has stated that it is 'unanimous in recognizing that stabilizing is a form of manipulation.' Securities and Exchange Commission, Securities Exchange Act of 1934, Release No. 2446, at 2, March 18, 1940."

Respondents' reliance upon the court opinions in the civil action (*Kosuga* v. *Kelly* (N.D. Ill. 1957), *aff'd,* 257 F.2d 48 (7th Cir. 1958), 358 U.S. 516 (1959)) which arose out of the agreement with the grower-shippers is of little assistance. Such opinions did not directly pass upon the legal status of the nondelivery agreement.

III

The complaint further charges that respondents attempted to manipulate and did manipulate downward the prices of March 1956 onion futures on the exchange and prices of cash onions.

Prior to the latter part of December 1955, there was a period of about three or four weeks during which Kosuga and Siegel were reducing their short positions while the open interest was increasing, indicating that other traders were adding to their positions. On December 27 and 28, 1955, each of these respondents stopped covering, resumed selling operations, and continued selling until about February 2, 1956. During this period, respondent Kosuga sold 565 carlots and respondent Siegel sold 239 carlots. Their combined short positions of 1,161 carlots on February 2 represented over 44 percent of the open interest. During the next two weeks, each of these respondents again reversed his operations and did a substantial amount of covering. Between February 3 and 17, Kosuga reduced his short position by buying 250 carlots of March futures and Siegel bought 270 carlots.

Between February 17 and March 1, the last seven trading days before the delivery month, respondents again stopped covering and held substantially what they had, while the open interest declined sharply. During these seven days, the open interest fell from 2,525 to 1,416 carlots, and the positions of all other traders declined from 1,884 to 766 carlots, while Kosuga's position went from 396 to 407 carlots and Siegel's position from 245 to 243 carlots, for a net increase of nine carlots in both positions combined. The holding tactics of the respondents during these seven days increased their combined percentage of the open interest from 25 to 46 percent. The 407 carlots which Kosuga held on March 1 were liquidated between March 2 and 7, and the 243 carlots which Siegel held on March 1 were liquidated between March 2 and 5. Kosuga and Siegel offer little or no explanation for their similar pattern of trading in March onion futures. n8

> n8 In addition to the trading of respondents described above as an indication of an intent or attempt by them to manipulate the prices of March 1956 futures and cash onions, is the shipment by Siegel of approximately 57 carlots of onions owned by National and three carloads belonging to Kosuga to Iowa for reconditioning and the return of 25 of these carlots to Chicago. Siegel defended this movement to Iowa as merely an attempt to find a market for the onions, failing which the 25 carlots were returned to Chicago. However, Dave Slinger, a recognized expert in the field of onion marketing, testified that the handling of onions in this way was not economically feasible and that, to his knowledge, it was never done except to bring about a squeeze. While free transportation was available to Iowa, it does not appear that such was the case for the return trip.

Respondents had an almost complete monopoly of the cold storage onions in Chicago during the period discussed above. They entered the delivery month with 650 short futures contracts and 321 carlots of cash onions or 88 percent of the cold storage holdings in Chicago. The number of onions in cold storage in Chicago was a matter of common knowledge in the trade as was the fact that Kosuga and Siegel held the bulk of such onions. The trade also knew that March is the end of the marketing season for cold storage onions and that such onions are by then relatively low in quality, not easily marketed in competition with new crop onions and generally undesirable. A large crop of early spring Texas onions was on, or due on, the market. While the bulk of the onions owned by respondents in Chicago cold storage had deteriorated so that most of the onions were undeliverable against the futures contract, the trade was not necessarily aware of this fact. The potential threat of these onions overhung the market. The possibility of delivery of Chicago cold storage onions owned by a substantial short and, in fact, the possibility of the delivery of old crop onions generally in a declining futures market clearly constituted a price depressing factor.

Kosuga and Siegel did deliver 36 carlots of the Chicago cold storage onions against their short March positions. In addition, 72 carlots of old crop onions which had been stored in the country were delivered by respondents on track in satisfaction of short futures contracts. On March 1 and 2, 1956, Kosuga and Siegel delivered a combined total of 86 carlots of their old crop holdings. During the next few days, an additional 22 carlots were delivered by respondents for a combined total of 108 carlots out of 171 carlots of initial deliveries by all traders, or about 63 percent. These 171 carlots of initial deliveries were involved in 362 redeliveries, that is, the longs who received these onions sold futures and redelivered the onions against the resulting short positions, or sold the onions to other shorts who redelivered them, until a total of 362 such redeliveries had taken place. The 171 carlots of initial deliveries plus the 362 carlots of redeliveries settled 533 contracts. In other words, each of the 171 carlots was delivered, on the average, more than three times, which is substantial proof of the undesirable quality of the onions and the unwillingness of the longs to take delivery.

Respondents did not cover their positions as other shorts were doing between February 17 and March 17, 1956, and they entered the delivery month with 650 carlots of March futures short. This is especially significant as respondents owned the great preponderance of the cash onions in a deliverable position in Chicago. *On the first two days* of trading in the delivery month respondents delivered n9 86 carlots or approximately 65 percent of the onions delivered on March 1 and 2, 1956. The prospect of the receipt of old crop onions as deliveries on the futures market and the early and relatively heavy deliveries made by respondents would naturally have a depressing effect upon the market. In short, the dominant short position respondents developed in the future, the maintenance of this position during the weeks just prior to the beginning of the delivery period while other shorts were covering, the large short interest which respondents carried into the delivery month, their almost complete monopoly of cash supplies in a deliverable position in Chicago and the deliveries which they made as soon as the delivery period opened clearly describe an *attempt* to manipulate downward the price of March 1956 onion futures and cash onions in Chicago.

n9 At the oral argument before the Judicial Officer counsel for respondent Kosuga argued that the delivery of 72 cars on Kosuga's short futures was not made by Kosuga but by the brokers who had financed them. A stipulation in the record, however, shows that the brokers delivered the cars upon instructions from Kosuga.

In addition to the very strong circumstantial evidence of manipulative intent there is the testimony of Slinger about a telephone conversation with Kosuga about February 1, 1956, in which Kosuga revealed his plan to control the market on the short or downward side. (See Finding of Fact 17.) This testimony was not challenged by respondent Kosuga and, in fact, he did not testify with respect to this telephone conversation. See *Adamson* v. *California,* 332 U.S. 46, 60 (1947); *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 225-227 (1939); *Miller*

& Company v. United States, 260 F.2d (7th Cir. 1958), *cert. denied,* 359 U.S. 907 (1959).

Kosuga argues that he was on the short side of the March future merely as a hedger because he owned more cash onions than his short sales. Whether or not Kosuga was hedging his cash onions by short sales is immaterial. Hedges may be used for manipulative purposes. But the pattern of his trading and the nature of the market with its sizeable and fluctuating differentials between futures and cash prices show that he was not doing *bona fide hedging.*

Kosuga also asks the question as to why he should be seeking to depress onion prices when he owned a large quantity of cash onions. The evidence demonstrates that he was attempting to do just this and presumably he expected to make money at it. A good deal of his holdings in cold storage onions had deteriorated. And as a professional trader familiar with futures trading he no doubt knew that technical manipulations within the futures market often do not have permanent results on cash prices generally. Complainant points out too that while cash and futures prices *tend* to move together it is axiomatic that they seldom if ever move exactly the same. To the extent that the

spread between futures and cash onion prices widened, Kosuga would profit. For example, if the March futures price declined by 15 cents while the cash price went down only ten cents, Kosuga could buy in his short futures position at a 15 cent profit and take a ten cent loss in the sale of his cash onions (if he sold them at that time).

Respondent Siegel contends that his trading activities were primarily scalping operations. A scalper seeks to profit on price fluctuations within the trading day. Normally his purchases and his sales equal each other during any one day, and he tries to avoid carrying a position from one day to the next. Siegel's daily purchases and sales equalled each other only once or twice, and they came approximately close only on rare occasions. On the great majority of trading days he bought or sold large *net* quantities of March futures. In addition, he carried a substantial short position continuously throughout the entire 1955-1956 onion season. Respondent Siegel was not a scalper, but a substantial speculative trader on the short side.

Respondents protest the joining of their trading positions as they contend that there was no collaboration or agreement between them. However, the matters in evidence herein indicate otherwise. Briefly, the record indicates that Kosuga and Siegel took all deliveries in November 1955; that Siegel handled all the cash onions, including Kosuga's and arranged financing thereof; that Kosuga and Siegel entered into an agreement with the grower-shippers to sell these onions to the grower-shipers with all payments to clear through Kosuga; that the major portion of these onions was not accepted by the grower-shippers and was still in the possession of Kosuga and Siegel in January and February 1956 and, together with other onions owned by Kosuga and Siegel, constituted a near monopoly of cold storage onions in Chicago; that Kosuga and Siegel held these onions throughout January and February, during which time each of them traded in a substantially similar manner in the March 1956 future, their combined positions representing a significant portion of the open interest throughout these two months; and that Kosuga and Siegel each liquidated his futures position during the first week of March at a profit.

Jorgensen, complainant's expert witness, concluded that respondents' attempt succeeded, that is, that the prices of March futures and cash onions in Chicago after mid-February were not the result of supply and demand but were artificial because

of such trading by respondents and we agree with that conclusion. That respondents succeeded in their attempted manipulation can be seen by the price structure during the period involved. On February 15, 1956, the March onion future price closed at $ 1.16 and on March 15 reached a low of ten cents representing a decline of 91 percent during this period. Price movements in the March future during comparable periods for the preceding eight years were substantially less spectacular. During these preceding eight years the price of the March onion future declined in only two years and in each case the decline was substantially less percentagewise than it was in 1956. In 1951 and 1954 the decline was 67 and 39 percent, respectively. In the remaining six of the preceding eight years, the price of the March future *increased* between mid-February and mid-March.

Also, prices of the March 1956 onion future on the Chicago Mercantile Exchange during the period February 2 to 17, 1956, fluctuated between 90 cents and $ 1.28. Thereafter, during the last 18 trading days in the future, such prices declined drastically and steadily. On February 28 the March future closed at 80 cents, on March 2 it closed at 58 cents, on March 5, at 44 cents, and on March 15, the last trading day, it reached a low of ten cents and closed at 15 cents. The last two prices were lowest ever recorded on the Chicago Mercantile Exchange. During the 12 years of trading previous to March 1956 the lowest price recorded for any onion future was 43 cents for the March 1954 future in August 1953. During the last 18 trading days in March 1956, cash onion prices declined in a similar, but less drastic, fashion.

Undoubtedly, the Texas onion crop had some depressing effect upon the March 1956 futures price and the price of cash onions in Chicago. But, as concluded by Jorgensen, the prices of March futures and cash onions in Chicago after mid-February were not the result of supply and demand but were artificial owing to the activities of respondents. Even respondents' witness Kleinman does not contend that the Texas onion crop was the only reason for the March price collapse. It is enough, for purposes of a finding of manipulation in violation of sections 6 (b) and 9 of the act, that respondents' action contributed to the price decline. *United States* v. *Socony Vacuum Oil Co., supra,* at p. 219.

IV

Respondent Kosuga challenges section 6(b) of the act as an unlawful delegation of legislative power. We are in disagreement with this contention. *Bartlett Frazier Co.* v. *Hyde,* 65 F.2d 350 (7th Cir. 1933). But, in any event, this respondent cannot expect an agency charged with administering a statute to hold the statute unconstitutional. *Panitz* v. *District of Columbia,* 122 F.2d 39 (D.C. Cir. 1940); *In re Corn Products Refining Co.,* 13 Agric. Dec. 1117 (13 A.D. 1117), 1139 (1954); *In re Edward R. Byer,* 13 Agric. Dec. 873 (13 A.D. 873), 874 (1954). See also *Engineers Public Service Co.* v. *Securities and Exchange Commission,* 138 F.2d 936, 952-953 (D.C. Cir. 1943), ordered dismissed as moot on motion of parties, 332 U.S. 788 (1947).

The parties have raised many issues, objections, etc., herein. All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, objections, exceptions, etc., inconsistent with this decision are denied.

We now address ourselves to the disagreeable but necessary task of determining the sanction to be imposed upon respondents for the violations of the act found. Complainant recommended that the registration of respondent Kosuga as a floor broker be revoked and that all trading privileges be denied to the respondents for a period of one year. The referee adopted these recommendations except that he proposed denial of trading privileges to Siegel and National for ten months. We have concluded that the evidence is not quite adequate to infer manipulative intent in Kosuga's trading activities in connection with the November 1955 future. The violations found, however, on the part of respondents are, of course, serious and of far-reaching consequences. We conclude that the proposals of the referee be followed except that the period of suspension of trading privileges be ten months for Kosuga as well as the other respondents. Trading in onion futures has been prohibited by Act of Congress (Public Law 85-839, 85th Congress, August 28, 1958, 72 Stat. 1013) so that there is no practical effect to the sanctions of denial of trading privileges insofar as trading in onion futures is concerned.

ORDER

The charge that Kosuga attempted upward manipulation of the November 1955 future and cash onion prices is dismissed.

Effective 30 days after the entry of this order, the registration of Vincent W. Kosuga as a floor broker is revoked.

Effective 30 days after the entry of this order, all contract markets shall refuse all trading privileges to Vincent W. Kosuga for a period of ten months, such refusal to apply to all trading done and positions held by him and also to all trading done and positions held indirectly through persons owned or controlled by him.

Effective 30 days after the entry of this order, all contract markets shall refuse all trading privileges to Sam S. Siegel and to National Produce Distributors, Inc., for a period of ten months, such refusal to apply to all trading done and positions held by them, and also to all trading done and positions held indirectly through persons owned or controlled by either of them.

A copy of this decision and order shall be served upon each of the parties and upon each contract market.

LOAD-DATE: June 8, 2008