

Commodity Futures Trading Commission
CEA CASES

NAME: EDWARD A. COX JR. AND GEORGE F. FREY JR.

CITATION: Comm. Fut. L. Rep. (CCH) P23,947; [1987-1990 TRANSFER BINDER]

DOCKET NUMBER: 75-16; 192

DATE: OCTOBER 6, 1987

DOCUMENT TYPE: INITIAL DECISION

NOTE: FORMERLY CEA DOCKET # 192

[P 23,947] In the Matter of Cox, et al.

Commodity Futures Trading Commission. No. 75-16. October 6, 1987. Initial Decision and Order in full text.

Previous opinions located at P 23,786, 1986 -- 1987 Tr. Binder; P 22,130, P 21,809, and P 21,767, 1982 -- 1984 Tr. Binder; and P 20,635, 1977 -- 1980 Tr. Binder.

Liability -- Commodity Futures Trading Commission -- Attorneys' Fees -- Proper Application of Law. -- The Commission's Division of Enforcement was liable for the attorneys' fees of a respondent because a proper application of the law would not have resulted in the institution of the complaint. It had been found that the respondent did not engage in price manipulation because the market never reached an artificially high price. The Commission also held that the mere fact that the Division of Enforcement prevailed on the merits of an initial decision did not exempt liability for the respondent's attorneys' fees and costs.

See P 11,701, "Liabilities -- Prohibitions" division. Volume 1.

Robert F. Klein, Esq., Susan R. Cornell, Esq., and Rebecca Nyren, Esq., Commodity Futures Trading Commission, Washington, DC., for the Division of Enforcement.

Lee A. Freeman, Jr., Esq., Raymond J. Mengler, Esq., and Albert F. Ettinger, Esq., Freeman, Freeman & Salzman, P.C., Chicago, Illinois, for the respondent, George F. Frey, Jr.

Opinion of DUNCAN, Administrative Law Judge.

The Commission's Opinion and Order in this case was filed on July 15, 1987. On August 14, 1987, Respondent George F. Frey, Jr. ("Frey") filed an Application for Award of Fees pursuant to Commission Regulations -- Part 148, § 148.27, 17 C.F.R. § 148.27. See also, Equal Access to Justice Act, 5 U.S.C. § 504 ("EAJA"). Respondent Edward A. Cox, Jr. ("Cox") did not file an application for fees under the provisions of Commission Regulations -- Part 148, § 148.14, 17 C.F.R. § 148.14. Respondent Frey's application seeks to obtain an award of attorney's fees and costs in the amount of \$ 132,226.22. The Division of Enforcement filed an Opposition to Respondent Frey's Application for Award of Fees on September 15, 1987. Respondent Frey filed a Reply on September 30, 1987.

ISSUE

Whether Respondent Frey is entitled to recover attorney fees and other costs.

Findings of Fact and Conclusions of Law

The complaint against Respondent Cox and Respondent Frey was filed under Sections 6(b) and (6c) of the Commodity Exchange Act ("CEAct") on July 6, 1972. n1 The complaint alleged that the Respondents, while both individuals

were floor brokers on the Chicago Board of Trade, manipulated the market price of May 1971 wheat futures in an upward direction, in violation of the CEAct.

n1 The complaint was originally filed by the United States Department of Agriculture. The proceeding was transferred on April 21, 1975, to the Commodity Futures Trading Commission pursuant to Section 411 of the Commodity Futures Trading Commission Act of 1974, Pub L No 93-463, 88 Stat 1389 (1974) See, Division of Enforcement's Opposition to Award p 3, fn 2

2. Respondent Cox and Respondent Frey denied any violations of the CEAct.

3. Hearing sessions were held in 1979 and 1980. On January 3, 1983, an Initial Decision and Order was issued, holding that the Respondents had violated the CEAct by their manipulation of the May 1971 wheat futures price. *In re Cox and Frey*, [1982-1984 Transfer Binder] COMM. FUT. L. REP (CCCH) P 21,767 (Administrative Law Judge 1983).

4. On January 20, 1983, Respondent Frey filed a Notice of Appeal and subsequently submitted his appeal brief on August 22, 1983. Division of Enforcement's Opposition to Award p. 5.

5. The Commission reversed the Initial Decision on appeal and dismissed the complaint on July 15, 1987, with Commissioner West filing a dissenting opinion.

The Government by commencing this case against Respondent Frey was not substantially justified.

6. It is established, through legislative history and judicial interpretation, that the task here is to determine whether the Government's position, when the enforcement case was commenced, was substantially justified. This standard is a slightly more stringent measure than one of reasonableness. *Spencer v. NLRB*, 712 F.2d 539, 558 (D.C. Cir. 1983), *cert. denied*, 446 U.S. 936 (1984). Respondent Frey is correct in his argument that the Division of Enforcement has the burden of establishing that its actions were substantially justified under the EAJA. Respondent Frey's Reply Brief for Award p. 4. The Commission's decision is necessarily the dispositive source to evaluate whether there exists such substantial justification. The Commission said that the "essential elements of unlawful price manipulation have been described in a series of federal appellate court decisions * * *." (Commission Opinion and Order, p. 6, July 15, 1987). In applying the recognized law to the facts the Commission made no concession of a possible validity to any portion of the Government's case. No uncertainty is expressed that the threshold elements were not established. This is not a close case. The Commission held that the Respondents did not engage in price manipulation because there was clearly no shortage of deliverable supply and the market never reached an artificially high price. The Commission went on to say that the cause of the price rise could not be attributed to Respondents on the facts of the record. There is no margin of reservation or indication of doubt by the Commission in its review of the appeal. The Government made a mistake in instituting this action against the Respondents and the Commission's Opinion affords no latitude to hypothesize that there was any substantially justified grounds to conclude otherwise. The Commission's Opinion illustrated the

unambiguous and inescapable outcome of this case by its holding that (Commission Opinion and Order, p. 15, July 15, 1987):

* * * Frey could not foreclose the shorts delivery option and thus lacked the ability to influence market prices. [Frey's] conduct in the futures market (*i.e.*, evidence suggesting that [his] trading activity created or exploited market congestion) is not dispositive, because market congestion cannot exist when deliverable supplies are adequate. *Indiana Farm Bureau*, P 21,796 at 21,283-86.

7. I find and conclude that the record establishes that the position of the Government was not substantially justified. I further find and conclude that the proper application of the law set forth in the Commission's Opinion to the facts, would not have resulted in the institution of a complaint against Respondent Frey, I further find and conclude that Respondent Frey was damaged in the amount of \$ 132,226.22, the allowable amount of attorney's fees and costs under Commission Regulations § 148.6(b), 17 C.F.R. § 148.6(b).

8. The Division of Enforcement argues that its actions concerning this case were reasonable, "both factually and legally, in light of existing law." Division of Enforcement's Opposition to Award p.8. The Division of Enforcement contends that because it prevailed in the initial decision on the merits its actions were reasonable. This contention is not supported by established law. The Division of Enforcement cited the holding in a recent district court decision within the Seventh Circuit, which held that "[the] [district] court is not wedded to the underlying judgment on the merits in assessing' an EAJA application for costs and attorney's fees . . . 'Only through a fresh look occasioned by application of the 'substantially justified' standard can the court honor Congress' intent . . .'" Division of Enforcement's Opposition to Award p. 7, quoting, *Neveaus v. Bowen*, 652 F. Supp. 719, 721 (E. D. Wis. 1987), and referring to *Federal Election Commission v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986). The mere fact that the Division of Enforcement prevailed on the

merits in the initial decision does not exempt liability for Respondent Frey's attorney's fees and costs. *Martin v. Heckler*, 754 F.2d 1262, 1264 (Ct. App. 5th Cir. 1985).

9. The Division of Enforcement stated that the Commission's "majority opinion differs from earlier decisions in at least two general areas" Division of Enforcement's Opposition to Award p.11. The asserted departures are not specifically recognized by the Commission. It is the contention of the Division of Enforcement that the Commission has applied "new law", or principles, to the "then existing law" at the time of the alleged violations by Respondent Frey. The Commission did not state that it was establishing new law, amending the CEAct, or otherwise departing from the applicable and dispositive principles in its Opinion concerning this case. Its decision was reached "[after] reviewing the record, the appellate pleadings and the judicial and regulatory precedent * * *" (Commission Opinion and Order, p. 1, July 15, 1987). The law in existence on May of 1971, is the same law applied by the Commission in this case. The Government is charged with the knowledge of the law. Simply stated, ignorance of the law on the part of the Government is not a valid bar to a claim for an award.

10. The Division argues that the less clear the governing law on a particular issue is, the more likely the Government's position was substantially justified. Division of Enforcement's Opposition to Award p. 11, in. 4. While the Division's argument is supported by some case law, it is not applicable in this matter. As noted, *supra*. § 6, the standard applied to such requests is "one slightly more stringent than

one of reasonableness." There is no basis in the Commission's Opinion to say that the Government's actions met this standard.

Based upon the foregoing Findings of Fact and Conclusions of Law, I make the following:

ORDER

1. George F. Frey, Jr.'s Application for Award of Fees should be and hereby is GRANTED, good cause having been shown.

2. The Commodity Futures Trading Commission shall pay to George F. Frey, Jr., an award of attorney's fees and costs in the statutory amount of \$ 132,226.22, in accordance with the provisions set forth in Commission Regulation § 148.30, 17 C.F.R. § 148.30.

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