

Commodity Futures Trading Commission
CEA CASES

NAME: SECRETARY OF AGRICULTURE V. MOSES EISEMANN

DOCKET NUMBER: 23

DATE: JULY 19, 1941

DOCUMENT TYPE: DECISION AND ORDER

UNITED STATES OF AMERICA

BEFORE THE SECRETARY OF AGRICULTURE

COMMODITY EXCHANGE ADMINISTRATION

CE-A Docket No. 23

Secretary of Agriculture, Complainant, v. Moses Eisemann, Respondent.

Proceedings, Findings of Fact, Conclusions, and Order.

PROCEEDINGS

On November 7, 1940, complaint was issued by the Under Secretary of Agriculture, pursuant to the Commodity Exchange Act (7 U.S.C. and Supp. V. §§ 1-17a), against Moses Eisemann, of Chicago, Illinois, the respondent. It was alleged that Eisemann, during the first few months of 1940, had made numerous wash sales in Chicago grain futures; had taken the other side of customers' trades in Chicago grain futures without the prior consent of the customers; had offered to make and made transactions in privileges in grain futures which were executed for him in Canada; and had acted as floor broker without having registered as such. A hearing was set for December 9 in Chicago, and it was ordered that an answer be filed in 15 days. A copy of the complaint was served upon the respondent by registered mail on November 11, 1940.

The time for filing an answer was extended by the referee to December 3, 1940, but motions for a continuance and a bill of particulars were denied. In his answer, the respondent said that the trades alleged to have been wash sales were transfer trades and not wash sales; denied that the trades in which it was alleged he took the other side without consent were in violation of the act; denied that any privileges executed were in violation of law; and admitted that he was not registered, but denied that he acted as a floor broker in violation of the act.

The hearing was held in Chicago on December 9 and 10, 1940, and January 28, 1941, before Jack W. Bain, the referee. Charles W. Bucy, Office of the Solicitor, Department of Agriculture, appeared for the Government, and Harry N. Gottlieb and Maurice Rosenfield, of Gottlieb and Schwartz, Chicago, for the respondent. It was admitted that the trades set out in the complaint were made. Eleven witnesses testified. For the purpose of clarity, their testimony is summarized according to its subject matter, rather than in the sequence in which it was given.

Wash Sales

Douglas B. Bagnell, in charge of the Division of Investigations, Commodity Exchange Administration, testified that the alleged wash sales could be used for fixing the price basis of an interstate transaction in the grain involved. Set out in the complaint are 271 trades, made within less than three months, in which respondent was both buyer and seller of a total of 3,264,000 bushels of grain. It is claimed in the answer that

these were transfer trades made in accordance with Chicago Board of Trade rules, as authorized by section 4c of the act, but no evidence was offered to support the claim. It seems likely that, if the trades were really legitimate ones, evidence would have been produced showing them to be within the exception claimed for them.

Taking Customers' Trades

According to Dr. George Perl, called as a witness by the Government, he informally authorized respondent to trade for him during 1940. An account was opened at Faroll Brothers. Respondent was instructed to do what he liked, and made Chicago futures trades for Perl. Respondent did not ask for consent to take the other side of Perl's trades. On cross examination, he said he had no reason to object, and would not have objected at any time to respondent's taking his trades. He would have given consent if asked, and interprets the authority given as authorizing respondent to take the other side. Respondent testified that he discussed the matter with Perl three or four times, and Perl agreed he could take the other side. Where he took Perl's trades, they were favorable to Perl. He was paying a debt he owed Perl in this way, it being the most convenient way to repay him, although commissions had to be paid.

Lawrence M. Stein, called by the Government, testified that he orally gave respondent authority to trade for him, and accounts

were opened at Faroll Brothers and at Sincere & Company. \$ 10,000 was put into the Faroll account, and respondent was to trade there in any way so long as there was no further loss. He did not remember that the question of respondent's taking the other side of his trades came up. Respondent did not advise him of taking his trades, nor of purchases and sales made. On cross examination, he said there were no strings on the authority given respondent, and that he thought he would have given consent if it had been requested. Respondent said he had full authority to trade for Stein's Faroll account, but was not to call on Stein for more money. He traded so that the account would not be out of position more than 20,000 or 30,000 bushels overnight, and traded for himself to about the same extent. He would trade during the day, and at the end of the day allocate the trades, about evenly, to Stein and himself. Doing this, to even up, he took from or gave to the Stein account, and interpreted his authority as giving him the right to do so. He lost about \$ 2,500 as the result of taking Stein's unprofitable trades into his own account. His compensation for trading for Stein was that if the account showed a profit, Stein was to donate ten percent to refugees, allowing respondent to name the donees. Stein closed out the account with a loss of about \$ 7,000. Respondent had similar authority over Stein's Sincere account.

Respondent testified that W. A. Anderson gave him full authority to trade for him, including consent to take the other side of his trades.

He produced an affidavit by Anderson in which it is stated that respondent's "discretion and authority included the right to" take the other side of Anderson's trades. He said that sometimes Anderson's orders were received after the close of trading, and he would take the other side in order to get a trade made.

The testimony of Perl and Stein indicates that respondent did not have the specific consent required before he took the other side of their trades. Perl's interpretation that the authority he conferred gave respondent the right to take the other side, and respondent's thought that he had that right on Stein's trades, are conclusions which can not override the provision of the act which requires prior consent, not mere general authority to trade. The words used in Anderson's affidavit indicate that he made a similar conclusion, as there is no mention of the consent required.

Trading in Privileges

Arthur R. Grosstephan, investigator for the Commodity Exchange Administration, produced his report of an examination of the records of North Star Grain Company, Winnipeg, Canada, relating to Winnipeg privileges in the Stein account operated by respondent, and in respondent's own account.

Peter F. Welch, city commercial manager for Western Union Telegraph Company, called for the Government, produced telegrams sent

to Winnipeg and charged to respondent's account, but could not say who sent the telegrams. Alphonso Fiedler, assistant manager for Western Union on the exchange floor, testified that he knew respondent's writing, and identified one of the telegrams produced by Welch as having been sent by respondent in Chicago. This telegram, introduced in evidence, dated December 23, 1939, signed "E", and addressed to North Star, Winnipeg, reads: "buy twenty May Rye offers 81 5/8 wire what best." It is marked "Ch'g tax Continental Grain Company". After this telegram was received in evidence, counsel stipulated that respondent sent to Winnipeg, by telephone and telegraph, during the time alleged in the complaint, for himself and for others, orders for privileges to be executed on the Winnipeg Grain Exchange.

Mr. Bagnell testified that privileges could be used in hedging transactions in grain.

Respondent voluntarily testified on the charges as to floor brokerage and taking customers' trades only. He was subpoenaed to testify regarding the privilege transactions, but claimed his constitutional privilege of refusing to give evidence that might tend to incriminate him. At the Government's request, the referee required respondent to testify, pursuant to the statutory provision giving him immunity from prosecution or penalty for the matter testified to. In compliance with the referee's requirement, respondent produced records called for in the subpoena. These records show that he conducted an

extensive business in privileges with the North Star Grain Company.

The stipulation and the documentary evidence leave no doubt of the truth of the allegations as to privileges.

Acting as Floor Broker

John E. Rudnik, of Continental Grain Company, called by the Government, testified that Continental paid, to Irwin P. Skolly, brokerage on the Anderson trades set out in the complaint. Irwin P. Skolly testified that he paid this to the respondent, as it was brokerage on trades respondent had executed. W. C. Perry and Edward C. Stech, of Faroll Brothers, produced records showing that respondent was credited with brokerage on trades for which he turned in cards. This was not because of specific instructions as to respondent's trades, but was in accordance with the general custom of crediting brokerage to the broker who turned in the card, and the witnesses did not know whether respondent had asked for brokerage. Unless requested, itemized statements are not sent out, and regular statements sent to respondent showed his total credit or debit, not indicating that some credit was for brokerage. Respondent's name was not on the cards he turned in, Respondent said he did not know, until he heard it at the hearing, that he was credited with brokerage at Faroll's. He had not discussed brokerage nor asked for it, had not sent bills for it, and had never seen a statement showing that it was credited to him. He had not intended to get any brokerage, but Skolly had credited him with some

on the Anderson trades, to reduce a debt respondent owed Skolly.

That brokerage was received from Skolly and Faroll, as compensation for the execution of futures trades, is established. If respondent thought that receiving brokerage from one firm only did not make him subject to registration, he failed to keep himself in that status.

Time was allowed, after the close of the hearing, for filing suggested findings of fact and briefs. The time elapsed, but neither party filed any.

The referee's report was served on respondent's counsel on June 16, and upon Government counsel and the Commodity Exchange Administration. The referee, in the report, proposed the findings of fact contained in this order, and recommended that respondent's trading privileges be denied for a period of six months. On July 3, respondent filed a statement that he took no exception to the referee's report, but requested that the Secretary suspend five of the six months' denial of trading privileges, upon the condition that, if, within two years, the Secretary had reason to believe that respondent had again violated the act, the five months' denial would be made immediately effective by supplemental order, without further formal hearing. On July 8, counsel for the Government filed a statement that neither he nor the Commodity Exchange Administration would except to the referee's report,

and that they had no objection to the granting of respondent's request of July 3.

FINDINGS OF FACT

1. The respondent, Moses Eisemann, of Chicago, Illinois, from December 22, 1939, to April 4, 1940, was a member of the Board of Trade of the City of Chicago, a contract market.

2. On January 2, 1940, respondent purported to buy for his own account, and to sell for his own account, 40,000 bushels of wheat for future delivery in July, on the Chicago Board of Trade, at \$ 1.02 per bushel. He cleared the purchase of 10,000 bushels and the sale of 30,000 bushels through I. P. Skolly, and cleared the purchase of 30,000 bushels and the sale of 10,000 bushels through W. D. Hagerty & Company.

3. From January 2 to April 4, 1940, inclusive, respondent made 271 trades, for a total of 3,264,000 bushels of Chicago wheat, rye, and corn futures, in each of which trades he was both buyer and seller for his own account, clearing the purchase and sale through different houses. The totals in this finding include the purchases and sales mentioned in finding 2.

4. On January 3, 1940, respondent sold for George Perl, his customer, 10,000 bushels of corn for future delivery in July, on the Chicago Board of Trade, at 59 3/4 cents per bushel, and bought such corn for his own account.

5. From January 3 to April 3, 1940, inclusive, respondent,

in 22 separate trades, sold a total of 60,000 bushels of Chicago wheat and corn futures, and bought 55,000 bushels of Chicago wheat, corn, and oats futures, for George Perl, his customer. He bought the 60,000 bushels and sold the 55,000 bushels for his own account. The totals in this finding include the trade involved in finding 4.

6. Respondent was authorized to trade for George Perl, but did not receive Perl's consent to become the seller on his orders to buy or the buyer on his orders to sell, or, in other words, to take the other side of his trades, prior to the execution of the purchases and sales involved in findings 4 and 5.

7. On January 3, 1940, respondent sold for L. M. Stein, his customer, 10,000 bushels of rye for future delivery in July, on the Chicago Board of Trade, at 74 3/4 cents per bushel, and bought such rye for his own account.

8. From January 3 to March 18, 1940, inclusive, respondent, in 35 separate trades, sold a total of 300,000 bushels of Chicago rye and wheat futures, and bought 185,000 bushels of Chicago corn, rye, and wheat futures, for L. M. Stein, his customer. He bought the 300,000 bushels and sold the 185,000 bushels for his own account. The totals in this finding include the trade involved in finding 7.

9. Respondent was authorized to trade for L. M. Stein, but did not receive Stein's consent to take the other side of his trades prior to the execution of the purchases and sales involved in findings 7 and 8.

10. On January 2, 1940, respondent sold for W. A. Anderson, his customer, 10,000 bushels of wheat for future delivery in May, on the Chicago Board of Trade, at \$ 1.07 per bushel, and bought such wheat for his own account.

11. From January 2 to March 18, 1940, inclusive, respondent, in 81 separate trades, sold a total of 490,000 bushels, and bought 510,000 bushels, of Chicago wheat and rye futures, for W. A. Anderson, his customer. He bought the 490,000 bushels and sold the 510,000 bushels for himself. These totals include the purchase and sale involved in finding 10.

12. Respondent was authorized to trade for W. A. Anderson, but did not receive Anderson's consent to take the other side of his trades prior to the execution of the purchases and sales involved in finding 10 and 11.

13. From December 22, 1939, to February 1, 1940, respondent transmitted, by telephone and telegraph, from Chicago, Illinois, to Winnipeg, Manitoba, Canada, for himself and for others, orders for privileges for execution on the Winnipeg Grain Exchange. At about this same time, respondent engaged in trading in privileges between Chicago and Winnipeg, conducting extensive business in privileges with North Star Grain Company, Limited, of Winnipeg, by mail, telegraph, and telephone. Respondent was served with a subpoena duces tecum directing him to produce evidence concerning these privilege dealings,

duly claimed his privilege of refusing to give evidence which might tend to incriminate him, and was required by the referee to produce the evidence called for in the subpoena, pursuant to the provisions of the Interstate Commerce Act, as amended, relating to attendance and testimony of witnesses (49 U.S.C. and Supp. V, §§ 12, 46, 47, 48), adopted by Section 6(b) of the Commodity Exchange Act.

14. During January, February, and March 1940, respondent, on the trading floor of the Chicago Board of Trade, executed orders for Chicago wheat and other grain futures for George Perl, L. M. Stein, and W. A. Anderson. He cleared these trades through Faroll Brothers, Continental Grain Company, and other clearing members. As compensation for executing such orders, brokerage was credited to respondent's accounts with I. P. Skolly and with Faroll Brothers. Respondent was not registered with the Secretary of Agriculture as a floor broker.

CONCLUSIONS

The evidence shows that respondent made many wash sales, or fictitious trades, in which he was both buyer and seller. These transactions were in violation of Section 4c(A) of the Commodity Exchange Act. Without obtaining the prior consent of his customers expressly required by section 4b(D), he represented both buyer and seller in executing a large number of their trades. He acted as a floor broker, as defined in section 2(a), without registering with the Secretary of Agriculture, contrary to the provisions of section

4e. For these violations, his trading privileges on contract markets should be suspended for six months, but five of the six should be held in abeyance, upon his good behavior, for two years. Respondent traded extensively in privileges, in violation of section 4c(B), but was given immunity to any penalty therefor. But for that immunity, the period of suspension of his trading privileges should be much greater.

ORDER

IT IS ORDERED that all contract markets refuse Moses Eisemann all trading privileges thereon for a period of one calendar month, beginning on the effective date of this order.

IT IS FURTHER ORDERED that respondent's trading privileges on contract markets are denied for an additional period of five calendar months, but that the denial for this additional period shall not become effective unless the Secretary of Agriculture, within two years after the effective date of this order, shall have reason to believe that respondent has again violated the act, and shall issue a supplemental order, in this proceeding, requiring contract markets to refuse respondent trading privileges for the additional period.

IT IS FURTHER ORDERED that a copy hereof be sent by registered mail to the respondent and to each contract market, and that this order shall be effective 10 days after its date.

(SEAL)

Done at Washington, D. C., this 19th day of July 1941. Witness my hand and the seal of the Department of Agriculture.

/s/ Grover B. Hill

Assistant Secretary of Agriculture.

LOAD-DATE: June 11, 2008

