

Commodity Futures Trading Commission
CEA CASES

NAME: JULIAN M. MARKS, STUART A. NEWMAN, MARSHALL K. SMITH, IRWIN M. EISEN, AND JAMES S. SCHONBERG

CITATION: 22 Agric. Dec. 761

DOCKET NUMBER: 98

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(No. 8516)

In re JULIAN M. MARKS, STUART A. NEWMAN, MARSHALL K. SMITH, IRWIN M. EISEN, AND JAMES S. SCHONBERG, CEA Docket No. 98. Decided July 16, 1963.

Noncompetitive Trades -- Accommodation Trades -- Cross Trades -- Reciprocal Trades -- False Carding

Floor brokers' registrations suspended and trading privileges denied under the Commodity Exchange Act for transactions in futures trading on the Chicago Board of Trade that involve noncompetitive trades, accommodation trades, cross trades, reciprocal trades, and false carding of trades.

Messrs. Benj. M. Holstein and Earl L. Saunders, for Commodity Exchange Authority. *Mr. Harold A. Fein*, of Chicago, Illinois, for respondent Irwin M. Eisen. Remaining respondents *pro se*. *Mr. Jack W. Bain*, Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

PRELIMINARY STATEMENT

This is a proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1), instituted by a complaint filed by an Assistant Secretary of Agriculture January 13, 1961. Five respondents were charged with making noncompetitive trades in wheat for future delivery on the Chicago Board of Trade, and with improperly recording such trades, in violation of the act and the regulations thereunder.

Respondent James S. Schonberg, a member of the Chicago Board of Trade and a representative of a futures commission merchant registered under the act, filed a stipulation admitting facts alleged against him and consenting to the issuance of an order suspending his trading privileges on contract markets for 10 days, which order was issued on March 16, 1961 (20 Agric. Dec. 173 (20 A.D. 173)). Respondent Stuart A. Newman, a member of the Chicago Board of Trade and a registered floor broker, filed a stipulation admitting facts alleged against him and consenting to the issuance of an order suspending his trading privileges on contract markets for 30 days, which order was issued May 1, 1961 (20 Agric. Dec. 457 (20 A.D. 457)). The charges against these two respondents were disposed of by the consent orders, and such respondents are no longer involved here, except as they may have been on the other side of trades alleged as violations by the remaining three respondents, Julian M. Marks, Marshall K. Smith, and Irwin M. Eisen, members of the Chicago Board of Trade and registered floor brokers.

These latter three respondents filed answers in which they admitted the trades alleged, but asserted that they were made openly and competitively, not illegally. Marks and Eisen said that if there were any violations, they were the result of confusion and turmoil in the last two minutes of trading in the 1960 Chicago May wheat future, and not the result of any intent to violate the act or the regulations. Marks stated that he would take no further part in the

proceeding and would leave his address with the Board of Trade so that it could forward the decision to him when it is issued.

A session of the oral hearing was held June 5, 1961, in Washington, D. C., before Hearing Examiner Jack W. Bain, to hear testimony of a handwriting expert on trades involving respondents Marks and Newman. Benj. M. Holstein, Office of the General Counsel of the Department, appeared as counsel for complainant. No respondent appeared at this session. At sessions held in Chicago, Illinois, June 13, 14, and 15, 1961, Harold A. Fein of the law firm of Fein and Pesmen, Chicago, appeared as counsel for respondent Eisen, and respondent Smith appeared in person. Complainant presented documentary evidence and testimony showing how trades in futures are made on the Board of Trade, and how the trades in question were recorded. Except for one trade which Marks recorded but which the complaint charges

was made by another broker, about the only dispute of fact is whether the trades involved were made competitively by open outcry on the trading floor during a legal trading period. Complainant claims they were not, respondents claim they were. Some of the evidence on the issue will be discussed below in the Conclusions.

After the hearing, complainant and respondents Eisen and Smith submitted suggested findings and briefs.

The hearing examiner issued a report recommending that respondents be found to have violated the act and the regulations substantially as charged in the complaint. Respondents Eisen and Smith filed exceptions to the report. Complainant also filed exceptions directed to the failure of the hearing examiner to include in his report a conclusion to the effect that respondent Smith violated section 4b of the act by cheating or defrauding his buying customers. Respondent Smith requested oral argument upon his exceptions and oral argument was held before the Judicial Officer in Washington, D. C., May 6, 1963, with respondent Smith appearing for himself.

FINDINGS OF FACT

1. The Board of Trade of the City of Chicago, hereinafter called the Chicago Board of Trade, the Board of Trade, or the exchange, was at all times material herein a duly designated contract market under the Commodity Exchange Act. Contracts for the sale and purchase of wheat futures thereon can be used for hedging transactions in wheat or wheat products in interstate commerce, for fixing the price basis for such wheat transactions, or for delivering wheat in interstate commerce.

2. Respondent Julian M. Marks, an individual whose last known address is care of Trading Floor, Chicago Board of Trade, 141 West Jackson Boulevard, Chicago 4, Illinois, is now and was at all times material herein a registered floor broker under the act and a member of the Chicago Board of Trade.

3. Respondent Irwin M. Eisen, an individual whose address is care of Trading Floor, Chicago Board of Trade, 141 West Jackson Boulevard, Chicago 4, Illinois, is now and was at all times material herein a registered floor broker under the act and a member of the Chicago Board of Trade.

4. Respondent Marshall K. Smith, an individual whose address

is care of Trading Floor, Chicago Board of Trade, 141 West Jackson Boulevard, Chicago 4, Illinois, is now and was at all times material herein a registered floor broker under the act and a member of the Chicago Board of Trade.

5. Trading in wheat futures on the Chicago Board of Trade takes place in what is called the wheat pit. The trading session opens at 9:30 a.m. and closes at 1:15 p.m. The beginning and end of the trading sessions are announced by the

ringing of a bell. As changes in prices occur in the course of trading, such prices are recorded on pit slips by employees of the exchange, and the time, in intervals of 10 seconds, is registered on each pit slip by placing it in a time stamp. The pit slips are there after maintained by the exchange as permanent records. The prices shown on the pit slips are thereafter transcribed into a book in proper sequence, and this book is also maintained by the exchange as a permanent record.

6. On May 19, 1960, successive price quotations of \$ 2.02 1/2, \$ 2.02 1/4, \$ 2.02, \$ 2.01 3/4, \$ 2.01 1/2, \$ 2.01, \$ 2.00 1/2, \$ 2.00, \$ 1.99, \$ 1.98, \$ 1.97, \$ 1.96, \$ 1.95, \$ 1.94, and \$ 1.93 for the May 1960 wheat future were recorded between 1:14.10 and 1:15 p.m. The quotations of \$ 1.97, \$ 1.96, \$ 1.95, \$ 1.94, and \$ 1.93 were recorded during the last 10 seconds. On the final bell, the market closed with the future offered at \$ 1.93. Under a rule of the Chicago Board of Trade, this was the lowest price at which the May 1960 wheat future could be purchased or sold on May 19, 1960, which was the last day for trading in the future.

7. A transaction in futures is initially recorded on the respective trading cards of the floor brokers or traders who actually make the trade with each other. Each trading card bears the name of the executing floor broker or trader, or some indication thereof. Purchases are entered on one side of the card and sales on the other side. These entries show the date, the future, the quantity bought or sold, the price, and the name of the opposite clearing member. The trading card may or may not show the name of the opposite floor broker or trader. Trading cards are turned in to the clearing member by whom the purchase or sale is to be cleared and are kept as a part of the clearing member's records. The information on the trading card is transcribed into a street book or journal, which is a permanent record of the clearing member.

8. In the usual course of business, as soon as a brokerage

firm or futures commission merchant receives an order to buy or sell futures, an employee of the firm prepares an office order on a printed form, and enters the date, the order number, the identification of the account, the commodity and the future, the quantity to be bought or sold, the price, and the terms or conditions under which the purchase or sale is to be made. This information is then telephoned by an office employee of the firm to another employee of the firm stationed on the floor of the Chicago Board of Trade, known as the phone man, who transcribes the information onto another printed form called a floor order. The floor order is then given to a messenger who delivers it to a floor broker for execution in the pit. Upon execution, the floor broker notes on the face of the floor order the quantity bought or sold and the price, and hands the floor order to a messenger who returns it to the phone man. The phone man then reports the execution to the office of the firm by telephone and an office employee of the firm enters on the office order the quantity bought or sold and the price, and the customer or branch office is then notified of the execution. The transaction is then entered by the brokerage firm or futures commission merchant in its street book or journal, which is a permanent record.

9. A brokerage firm or futures commission merchant usually records on the face or reverse side of the office order, by means of a time stamp, the time when the order is received in the office of the firm, the time when it is telephoned to the exchange floor, the time when a report of execution of the order is received by the office from the floor of the exchange, and the time when such execution is reported to the customer or branch office of the firm. In some cases, the time when the order is initially received and transmitted to the exchange floor may be indicated by a single time stamp, and in some cases the time when the firm receives a report of execution from the floor and reports such execution to the customer or branch office may be indicated by a single time stamp.

10. An order to buy or sell a future on the close requires the purchase or sale to be made during a specified period of time just prior to the end of the

trading session. On the last day for trading in a future, this period is determined by the Chicago Board of Trade and announced to all traders in advance. On May 19, 1960, the close for the May wheat future was the two-minute period from 1:13 to 1:15 p.m.

11. Shortly before the close of trading in the Chicago May 1960 wheat future, on May 19, 1960, a floor broker for Uhlmann Grain Company was unable to execute an order to buy 25,000 bushels of May wheat. At 1:21.10 p.m., after trading had closed at 1:15, the order was reported by telephone from the trading floor to Uhlmann as unexecuted. Thereafter, the order was "executed" by direct and noncompetitive negotiation by which respondent Eisen sold 25,000 bushels of May wheat at \$ 1.94 to respondent Schonberg, who purchased it for Uhlmann.

12. After the close of trading in the Chicago May wheat future, on May 19, 1960, and after the transaction mentioned in Finding 11, respondent Marks "executed" part of an order to sell 350,000 bushels of May wheat for D. R. Comenzo & Company, a registered futures commission merchant, by selling for Comenzo 35,000 bushels of May wheat to respondent Eisen at \$ 1.94 and purchasing for Marks' account 35,000 bushels of May wheat from Eisen at \$ 1.94, thus putting Marks on the other side of his customer's order by an accommodation trade by Eisen. Subsequently, at the request of Marks, Eisen reduced the 35,000 bushel sale to Marks to 30,000 bushels.

13. On May 19, 1960, respondent Marshall K. Smith received from Lamson Brothers & Company, a registered futures commission merchant, various orders to sell and to buy, as a floor broker, for Lamson's account, Chicago May wheat futures on the close. After executing some of these orders, Smith still had orders to sell 40,000 bushels and orders to buy 25,000 bushels for Lamson. He filled 25,000 bushels of the sell orders and the 25,000 bushel buy orders by a transaction with respondent Eisen, after direct and noncompetitive negotiation, in which Smith, for Lamson, simultaneously sold 25,000 bushels at \$ 1.98 to, and bought 25,000 bushels at \$ 1.98 1/2 from, Eisen, who made the purchase and sale for his own account. At the time of the transaction, the price of the future was not in excess of \$ 1.98.

14. On May 19, 1960, respondent Julian M. Marks, as a floor broker, had orders to sell 25,000 bushels Chicago May wheat futures on the close for Goodbody & Company and Paine, Webber, Jackson & Curtis, registered futures commission merchants, and orders to buy 25,000 bushels Chicago May wheat futures on the close for Goodbody & Company. Marks filled such orders by offsetting them against each other through direct and noncompetitive negotiations with respondent Stuart A. Newman as a

result of which Marks sold Newman 20,000 bushels at \$ 1.96 1/2 and 5,000 bushels at \$ 1.97 and simultaneously bought 25,000 bushels from Newman at \$ 1.97.

15. On May 19, 1960, respondent Julian M. Marks, as a floor broker, had an order to sell 5,000 bushels Chicago May wheat futures for Paine, Webber, Jackson & Curtis. He did not execute the order, but made an entry on his trading card indicating a purchase of 5,000 bushels May at \$ 2.02 for his own account; got Max Nierman, another floor broker, to make entries on Nierman's trading card indicating that Nierman had executed the order for Paine, Webber by a sale to Marks at \$ 2.02; and reported to Paine, Webber that Nierman had executed the order.

16. On May 19, 1960, respondent Julian M. Marks, as a floor broker, had orders to sell Chicago May wheat futures for Paine, Webber, Jackson & Curtis, a registered futures commission merchant. Marks turned these over to respondent Stuart A. Newman for execution. Newman sold 10,000 bushels at \$ 1.96 and 25,000 bushels at \$ 1.93 to various other floor brokers for the account of Paine, Webber, and reported to Marks that Newman had sold 40,000 bushels. Marks then entered sales totaling 40,000 bushels on his own trading cards and reported to

Paine, Webber that he had executed the sales, and Paine, Webber entered the transactions in its records as having been executed by Marks.

17. On May 19, 1960, respondent Julian M. Marks, as a floor broker, had an order to buy 5,000 bushels Chicago May wheat futures at \$ 2.01 for Paine, Webber, Jackson & Curtis, a registered futures commission merchant. Marks turned the order over to respondent Stuart A. Newman for execution. Newman took the other side of the order and entered on his trading card and reported to A. J. Riffel & Company, a registered futures commission merchant through whom Newman cleared, a sale of 5,000 bushels by Newman to Paine, Webber. Marks entered on his trading card and reported to Paine, Webber that he bought the 5,000 bushels from Riffel. Paine, Webber entered the purchase as having been made by Marks in its permanent records. Because of the complaint of the customer who had entered the order to buy at \$ 2.01, on the basis that a subsequent order had been entered to cancel the order to buy at \$ 2.01 and substitute one to buy at the close, the price was adjusted to \$ 1.98, and the final records show the transaction as at \$ 1.98.

18. On May 19, 1960, respondent Julian M. Marks, as floor broker, had an order to buy 15,000 bushels Chicago May wheat futures at \$ 2.01 1/2 and 10,000 bushels at \$ 2.01 1/8 for Ralston Purina Company, a registered futures commission merchant. Marks filled the orders by taking the sale side of them for his own account through direct and noncompetitive negotiations with respondent Stuart A. Newman as a result of which Marks bought 15,000 bushels at \$ 2.01 1/2 and 10,000 bushels as \$ 2.01 1/8 from Newman for Ralston, his customer, and simultaneously sold the same quantities to Newman for Marks' own account.

19. On May 19, 1960, respondent Stuart A. Newman bought and sold a total of 60,000 bushels of Chicago May wheat futures for his own account with A. J. Riffel & Company. Of the 60,000 bushels (60 May wheat), respondent Julian M. Marks was the broker on the other side for 55,000 bushels, only 5,000 bushels being bought from and sold to a broker other than Marks.

20. For his trading in the Chicago May wheat future on May 19, 1960, respondent Julian M. Marks recorded 16 separate sales and 2 separate purchases at prices ranging from \$ 1.97 down to \$ 1.93. These prices occurred on that day during only the last 10 seconds of the trading session. The recorded transactions involved varying quantities, totaling 60,000 bushels bought and 230,000 bushels sold, and were with 8 different brokers. Of the 18 transactions, 4 were with respondent Newman and 7 with respondent Eisen. The transactions described in Findings 12, 14, and 16 are included in recorded transactions concerned in this Finding 20.

21. For his trading in the Chicago May wheat future on May 19, 1960, respondent Irwin M. Eisen recorded 14 separate purchases and 8 separate sales at prices ranging from 1.95 down to 1.93. These prices occurred on that day during only the latter part of the final 10 seconds of the trading session. The recorded transactions involved varying quantities, totaling 175,000 bushels bought and 175,000 bushels sold, and were with 8 different floor brokers. Of the 22 transactions, 1 was with respondent Smith, 1 with respondent Schonberg, and 7 with respondent Marks. The transactions described in Findings 11 and 12 are included in the recorded transactions concerned in this Finding 21.

CONCLUSIONS

Section 4b of the act (7 U.S.C. § 6b) is as follows:

Sec. 4b. It shall be unlawful for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of (1) any contract of sale of any commodity in interstate commerce, or (2) any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market for or on behalf of any person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or

the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce of such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof --

(A) to cheat or defraud or attempt to cheat or defraud such person;

(B) willfully to make or cause to be made to such person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

* * * *

Section 4c of the act (7 U.S.C. § 6c) provides in part as follows:

Sec. 4c. It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate

commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof --

(A) if such transaction is, is of the character of, or is commonly known to the trade as, a "wash sale", "cross trade", or "accommodation trade", or is a fictitious sale;

* * * *

Section 4g of the act (7 U.S.C. § 6g) is as follows:

Sec. 4g. If any person registered hereunder as futures commission merchant or floor broker shall violate any of the provisions of this Act, or any of the rules or regulations of the Secretary of Agriculture thereunder, or shall fail or refuse to make any report required by the Secretary of Agriculture regarding the transactions of such person, or the transactions of the customers thereof, in commodities for future delivery on any board of trade in the United States or elsewhere, or shall fail or refuse to keep the books and records pertaining to such transactions in the form and manner required by the Secretary of Agriculture, or shall fail or refuse to keep such books and records open to inspection by any representative of the United States Department of Agriculture or the United States Department of Justice, the registration of such person may be suspended or revoked after notice and hearing in accordance with the procedure and subject to the judicial review provided in paragraph (b) of section 6 of this Act. [Emphasis supplied.]

Section 1.35 of the regulations (17 CFR 1.35) under the act provides in pertinent part as follows:

Sec. 1.35. *Records of cash commodity and futures transactions.* (a) *Futures commission merchants and members of contract markets.* Each futures commission merchant and each member of a contract market shall keep full, complete, and systematic records of all commodity

futures transactions and cash commodity transactions, made by or through him, on or subject to the rules of a board of trade. * * *

Section 1.38 of the regulations (17 CFR 1.38) under the act provides in pertinent part as follows:

Sec. 1.38. *Execution of transactions -- (a) Competitive execution required; exceptions.* All purchases and sales of any commodity for future delivery on or subject to the rules of a contract market shall be executed openly and competitively as to price by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity * * * *

The first 10 findings are either admitted by the pleadings or established by the uncontradicted evidence.

As to Finding 11, LaVerne W. Mittelstadt testified that he received a floor order to buy 25,000 bushels May wheat for Uhlmann at \$ 1.93 1/4, was unable to execute it when the price went down to \$ 1.93. (This price was not reached until 1:15, at the close.) He wrote "unable" on the order and gave it to Schonberg. The floor order shows the "unable." The office order at Uhlmann, and the testimony of the phone man for Uhlmann at the Board of Trade, show that the failure to execute was telephoned to Uhlmann at 1:21.10, at which time the floor order did not contain 25 over 194, which now appears upon it, indicating that it was filled by a purchase at \$ 1.94. Respondent Eisen argues that the floor order may have been on the telephone man's desk for some time before he telephoned its failure of execution to Uhlmann. This, however, fails to explain the testimony that the execution at \$ 1.94 was not on the floor order at 1:21.10, when the report was telephoned. The conclusion is inescapable that the "execution" was made some time after the trading had closed, and not on outcry in the pit during legal hours. Such "execution" constituted a violation of section 1.38 of the regulations (17 CFR 1.38) by respondent Eisen.

It is undisputed that purchases and sales of 35,000 bushels May wheat at the same price were made between respondents Marks and Eisen, mentioned in Finding 12, and that the 35,000 bushels sold by Eisen to Marks was later reduced to 30,000.

Eisen's argument that the transactions were made before, but carded after, the close, is not convincing. They were carded after the carded "execution" of an order made after 1:21.10, over six minutes after legal trading had closed, as shown in Finding 11. It is not believed that Eisen, even if he carded some earlier trades after legal trading closed, would have waited to card a legal trade until after making the illegal one of Finding 11. This was an accommodation trade by Eisen and Marks, and a cross trade by Marks, in violation of section 4c(a) of the act, and a noncompetitive trade by both respondents, in violation of section 1.38 of the regulations. Eisen must have known that this would enable Marks either to take the other side of a customer's trade or to cross customers' trades, either of which would be a violation by Marks, in which he was assisted by Eisen. By taking the other side of his customer's trade, Marks was also in violation of section 4b(D) of the act.

As to Finding 13, the testimony and exhibits show that shortly after respondent Eisen had purchased 115,000 bushels May wheat at \$ 1.98, respondent Smith offered 25,000 at \$ 1.98, but Eisen refused it. Smith had 40,000 bushels to sell, but offered only 25,000. Smith could not sell at \$ 1.98. Eisen had just bought at \$ 1.98. The market was declining steadily and fast. But then Eisen did buy from Smith at \$ 1.98 and Smith bought from Eisen at \$ 1.98 1/2. Both Eisen and Smith stated that the purchase and sale were simultaneous. Smith recorded the sale after a sale at \$ 1.95, which price was not reached until after the price of \$ 1.98. After Eisen refused to buy at \$ 1.98, Smith said "I'll give you a half," whereupon the sales of 25,000 bushels at \$ 1.98 and \$

1.98 1/2 occurred. Although he had difficulty selling at \$ 1.98, Smith bought at 1/2 cent more.

Respondent Smith claims that the sale preceded the purchase by about 10 seconds and that these were not meant to and did not constitute reciprocal transactions. Respondent Eisen, however, testified at the hearing that the purchase from Smith at \$ 1.98 1/2 took place before the sale to Smith at \$ 1.98. While Eisen testified at the hearing that sale and purchase were not reciprocal and not an accommodation trade, he had told a Commodity Exchange Authority official in an investigatory interview that Smith had offered to "give a half" on a 25,000 bushel trade, that this meant to him that Smith offered a 1/2 cent profit on a purchase and sale of 25,000 bushels and that the deals were simultaneously

made. Eisen denied at the hearing that he told this to the official but in addition to the testimony of the official introducing the report to this effect into evidence, another Commodity Exchange Authority official who was present at the interview also testified that Eisen described the transaction with Smith as related in the report.

We conclude with the hearing examiner, who saw and heard the witnesses testify, that Smith, to get selling orders off, made a deal with Eisen for the sale and purchase of 25,000 at one-half a cent more to Eisen for Smith's purchase. This may be an effective method for a floor broker to get his orders filled on the close but it happens to be a violation of the act. Both respondents engaged in an accommodation trade in violation of section 4c(A) of the act and a noncompetitive transaction in violation of section 1.38 of the regulations.

By making the 25,000 bushel purchase at \$ 1.98 1/2 when the maximum going price was \$ 1.98 Smith also breached section 4b(A) of the act. The principals for whom Smith bought the 25,000 bushels were entitled to have the orders executed on their merits. Smith was in a fiduciary relationship to his buying customers and when he made the deal with Eisen causing these customers to pay more for the purchase than they should have paid in order to get selling orders off for his own interests, the matter comes within the meaning of section 4b(A). "It is established law that acts in violation of the fiduciary duties of an agent are regarded as fraudulent." *Ramey v. Myers*, 159 Cal. App. 2d 82, 323 P. 2d 805, 808 (1958). Acts which tend to violate the "fiduciary obligation" of an agent to a principal "are considered, in law, as 'frauds upon confidence bestowed.'" *Myers v. Ellison*, 249 Ala. 367, 31 So. 2d 353, 355 (1947). The "vital principle [relating to agency] is good faith; without it the relation of principal and agent cannot exist; and so sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed." *Nagel v. Todd*, 185 Md. 512, 45 A2d 326, 328 (1946).

Exhibits and testimony show and explain the orders to buy and sell for the commission merchants in the trades involved in Finding 14, the trading cards showing the respondents' executions of the trades, etc. Respondent Marks in his answer states that he bought and sold at the same time. In an investigation of these trades by the Board of Trade, Marks admitted that he had

offset his buy and sell orders through trades in which Newman accommodated him. It is clear that by the trades Marks made offsetting and noncompetitive trades in violation of section 4b(D) of the act and section 1.38 of the regulation.

No evidence was offered at the hearing to prove the facts set forth in Finding 15. They are admitted in the answer of respondent Marks. Respondent says that because he had so many orders to execute, he asked Max Nierman to fill Paine, Webber's order to sell 175,000 bushels May wheat at the market. Marks executed other orders, and very near or at the close, Nierman told Marks he had executed the order, and handed Marks his cards. Marks saw from the cards that

Nierman had sold two lots, 120,000 and 50,000 at \$ 2.03 or \$ 2.02. Realizing that Nierman had sold only 170,000 bushels of the 175,000 ordered sold. Marks thought the customer was entitled to have 5,000 more sold when the 170,000 were sold and the price had been \$ 2.02, instead of getting only the closing price of \$ 1.93. Then he carded 5,000 as bought by him at \$ 2.02 and got Nierman to card 5,000 as sold to Marks at \$ 2.02 to complete the order for 175,000. Marks says he lost \$ 450 by the transaction, but made it because he thought that the customer was entitled to it and that he was acting for the best interests of his houses, his customers, and the exchange. If he felt that he was in some way responsible for a customer's failure to get a favorable trade, he might be commended for wanting to make good the customer's loss in some open and legal way. The fact remains, however, that he bucketed the order, took the other side of the customer's order without prior consent, deceived his principal concerning execution of the order, and caused a false record and report to be made, in violation of section 4b of the act and section 1.38 of the regulations. As to the additional charges of violations of section 4g of the act and section 1.35 of the regulations by failing to keep *full* and *complete* records, it is not made clear just how these requirements have been breached and so we refrain from making conclusions of violation in these respects. See *In re Daniel J. Shelley et al.*, 22 Agric. Dec. 8, 18-19 (22 A.D. 8, 18-19) (1963); *In re Daniel J. Shelley et al.*, 22 Agric. Dec. 352 (22 A.D. 352) (1963).

The facts shown in Finding 16 are supported by the answer of respondent Marks, who expresses surprise that the transaction was charged as a violation by him. The documentary evidence and testimony show that Newman wrote the report of execution on one of the orders; that at least two of the five brokers

on the opposite sides of the trades made their trades with Newman, not Marks; and that Marks entered the trades on his trading cards and reported to his customer that he made the trades. In carding and reporting that he made trades he did not make, Marks made false record entries and deceived his customer in connection with the execution of an order for a futures contract, in violation of sections 4b(B) and 4b(C) of the act. The assertion by Marks in his answer that brokers often make trades for others and the others record the trades as made by them (others) is not supported by record evidence. Even if others should be shown to have violated the law, this would be no excuse for Marks to do so.

As to Finding 17, the exhibits and uncontradicted testimony show that Newman wrote 5 over 201 on the sell side of the floor order to buy. This was later marked over, and Marks wrote 5 over 201 on the buy side. Later this also was scratched over, leaving no execution shown on the floor order. Another floor order to buy 5 on the close and cancel an order to buy 5 at 201 has 5 over 198 (on the sell side), in Marks' handwriting.

In his answer, Marks says that he actually bought the 5,000 bushels from Newman at \$ 2.01, and was so busy that he handed his order to Newman "and told him to get rid of it." Had this been so, Newman would have noted the execution on the order (5 over 201) and had it sent to the Paine, Webber phone man, and it is not likely that it would have gone back to Marks. The evidence shows, however, that it must have gotten to Marks after Newman had it. If Marks had put his 5 over 201 on it before he gave it to Newman, all Newman would need to have done was have it delivered to the phone man: it is unreasonable to believe that he would have scratched out the Marks 5 over 201 on the buy side and substituted his own on the sell side when the order executed was to buy, not sell. On the other hand, it is reasonable to conclude that Newman's 5 over 201 was on it when Marks got it, Marks preferred the 5 over 201 to be on the sell side, and placed it there. It is also reasonable to conclude that this was done before the price was adjusted to \$ 1.98, and before the trade was entered at \$ 1.98 on the Marks trading card.

Of course, the statements in Mark's answer are not evidence. They were not made under oath and subject to cross-examination. In the answer, Marks did not

mention that both his and Newman's 5 over 201 appeared and had been marked over on the

floor order. Concerning the adjustment in price, he said: "I did not receive any cancellation of the 201 order, nor did anyone else, nor was it, as far as I know, ever found. In addition it wasn't entered in the Chicago office until the last few minutes of the session, and hence probably didn't even reach the Pit." Complainant's exhibit 34 B shows that the cancellation order was a part of the market order which Marks marked executed at 198. If Marks had testified to what he asserted in his answer, cross-examination very probably would have shown at least that his memory of what happened was not entirely accurate. The record supports Finding 17, even if the statements in the Marks answer could be considered as in the nature of testimony. By the transaction involved, Marks entered false records and deceived his customer, in violation of sections 4b(B) and 4b(C) of the act. As to the additional charges of violations of section 4g of the act and section 1.35 of the regulations by failing to keep *full* and *complete* records, it is not made clear just how these requirements have been breached and so we refrain from making conclusions of violation in these respects. See *In re Daniel J. Shelley et al.*, 22 Agric. Dec. 8, 18-19 (22 A.D. 8, 18-19) (1963); *In re Daniel J. Shelley et al.*, 22 Agric. Dec. 352 (22 A.D. 352) (1963).

Finding 18 shows purchases and sales of two lots at identical prices between Marks and Newman. In his answer, Marks denies that these purchases and sales were related, and then proceeds to express surprise that anyone could be so ignorant and foolish as to charge a violation here. In view of the absence of any evidence submitted by Marks or anyone else that the trades were as claimed in the Marks answer, and in view of the pattern of trading of Marks with Newman, as shown in Findings 14 through 17, 19, and 20, it seems rather clear that the trades were as set out in Finding 18. By the transaction, Marks took the other side of his customer's trades, participated in accommodation trades, and made noncompetitive trades, in violation of sections 4b(D) and 4c(A) of the act and section 1.38 of the regulations.

Findings 19, 20, and 21 are established by the undisputed written records of the respondents involved and the houses through whom they cleared their trades. The facts shown shed further light on some of the claims of respondents that all trades involved in this proceeding were made openly and competitively and in accordance with the act and the regulations. They show that Marks recorded 18 separate trades at varying prices and

quantities with 8 different brokers in 10 or 12 seconds. That is nearly 2 trades a second, continuing without intermission through 18 trades. Eisen recorded 22 trades in less than 10 seconds at varying prices and quantities with 8 different brokers, or nearly 3 trades a second without let up through 22 trades. Their claim that each of these trades could have been and was made as futures trades are required to be made is not convincing.

Respondents say that trading was very difficult toward the end of the close of the May 1960 wheat future due to unusual activity, the crowd of brokers and messengers, noise, and confusion. In their pleadings and through their witnesses, however, they never did quite come to saying that such a difficult situation would authorize or excuse a noncompetitive trade, cross trade, accommodation trade, etc. The record indicates quite clearly that there was an unusual congestion at the close, but the statute and regulations apply to such a situation just as they do to less trying situations. Also, the difficulty of trading at the time makes even less impressive the claim, shown above, that 22 trades were then made in less than 10 seconds.

Respondent Eisen asserts in his brief that willfulness has not been proved in any of the transactions. Each respondent in each transaction intentionally and

knowingly made and recorded his trade. The trades were admitted in the answers, and there was no claim that they were accidental or made unknowingly. Under a regulatory statute, intentionally or negligently doing a prohibited act is "willful." *In re Crilly et al.*, 20 Agric. Dec. 178 (20 A.D. 178) (1961); *Benedict K. Goodman V. Benson*, 286 F. 2d 896 (7th Cir. 1961). In making the trades considered unlawful, each respondent willfully violated the statute and the regulations.

Respondent Eisen also asserts in his brief that violations in this proceeding must be proved "beyond all reasonable doubt." That is not the law. This is not a criminal proceeding, and there is no requirement that violations must be proved beyond a reasonable doubt. *The Board of Trade of the City of Chicago V. Wallace*, 67 F. 2d 402 (7th Cir. 1933), *cert. denied*, 291 U.S. 680 (1933); *Nelson V. Secretary of Agriculture*, 133 F. 2d 453 (7th Cir. 1943).

The charges against respondents Eisen, Smith, and Marks are well proved by the weight of the evidence. These were deliberate and willful violations, and they were substantial and serious. For

the violations, the registrations of respondents Marks and Eisen as floor brokers should be suspended for a period of 60 days, the registration of respondent Smith as a floor broker should be suspended for a period of 20 days, and all contract markets should be directed to refuse all trading privileges to each of these respondents for the same respective periods.

ORDER

Effective August 15, 1963, the registrations of Julian M. Marks and Irwin M. Eisen as floor brokers under the Commodity Exchange Act are suspended for a period of 60 days.

Effective August 15, 1963, the registration of Marshall K. Smith as a floor broker under the Commodity Exchange Act is suspended for a period of 20 days.

Effective August 15, 1963, all contract markets shall deny all trading privileges to Julian M. Marks and Irwin M. Eisen for a period of 60 days, and to Marshall K. Smith for a period of 20 days, such refusal to apply to all trading done and positions held by such individuals, directly or indirectly.

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

LOAD-DATE: June 8, 2008

