

Commodity Futures Trading Commission
CEA CASES

NAME: ASA V. WILDER

CITATION: 28 Agric. Dec. 1403

DOCKET NUMBER: 154

DATE: NOVEMBER 4, 1969

DOCUMENT TYPE: DECISION AND ORDER

(No. 12,814)

In re ASA V. WILDER. CEA Docket No. 154. Decided November 4, 1969.

Deceiving customers -- False reports -- Losses -- Denial of trading privileges

Respondent's actions in selectively applying futures contracts in the account of a customer so that larger profits or smaller losses than actually existed were reported to the customer, thus deceiving the customer as to the actual amount of losses, are violations of the act for which all the contract markets shall refuse all trading privileges to the respondent for a period of three years.

Earl L. Saunders for Commodity Exchange Authority.

Respondent *pro se*.

Donald F. X. Finn, New York, N.Y., for intervenor, Mrs. Bertha Hecht.

John Curry, Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

DECISION AND ORDER

In this proceeding under the Commodity Exchange Act (7 U.S.C. Chap. 1), Hearing Examiner John Curry issued a recommended decision and order on April 28, 1969. After considerable difficulty in getting service of a copy upon respondent, this was finally accomplished on October 14, 1969. A letter to Hearing Examiner Curry from respondent objected to the conclusions in the recommended decision and asked that the case be dropped.

At the hearing upon the complaint respondent did not appear, no appearance was made through a representative and no evidence was introduced on his behalf.

The letter to Hearing Examiner Curry lacks merit and upon consideration of the entire record, the hearing examiner's recommended decision and order are adopted as the final decision and order herein, the order to become effective December 8, 1969.

Copies hereof shall be served upon the parties and upon the contract markets under the act.

HEARING EXAMINER'S RECOMMENDED DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), hereinafter referred to as the act, instituted by a complaint and notice of hearing issued under section 6(b) of the act (7 U.S.C. 9) on April 8, 1968, by the Assistant Secretary of Agriculture. The respondent is an individual, who at the time of the matters involved herein was the manager of

the commodity operations of the San Francisco, California, office of Harris, Upham & Co., a stock and commodity brokerage firm.

The principal allegations of the complaint are as follows: The respondent, while employed as the manager of the commodity operations of the San Francisco office of Harris, Upham & Co., personally handled the stock and commodity futures trading accounts of one Mrs. Bertha Hecht, a customer of that firm, and in so doing gained her confidence to the extent that the trading in such accounts was conducted on the respondent's advice or at his discretion. Acting for the purpose and with the intent of concealing from Mrs. Bertha Hecht the extent of the losses sustained by her in trading in commodity futures, the respondent: (1) in 14 instances during the period February 20, 1963 through July 25, 1963, selectively closed out certain offsetting long and short futures transactions for her account in a manner which reflected larger profits or smaller losses than would have resulted had the oldest trades been closed out and thereby for a period of time concealed from Mrs. Bertha Hecht the actual amount of her losses; and (2) on or about March 29, 1963, prepared and delivered a "SUMMARY OF OPERATIONS" statement to Mrs. Bertha Hecht purportedly showing the status of her trading accounts as of such date but did not show in such statement and concealed from Mrs. Hecht the fact that as of March 29, 1963, she had unrealized

losses in her commodity futures trading account of over \$ 34,000. The complaint charges that, by reason of such facts, "the respondent, in connection with the disposition or execution of commodity futures contracts, and in regard to acts of agency performed with respect to such contracts, deceived the person on behalf of whom such contracts were made, in wilful violation of section 4b of the Commodity Exchange Act (7 U.S.C. 6b); and applied and closed out offsetting long and short positions in wilful violation of section 1.46 of the regulations issued under the said act (17 CFR 1.46)."

The respondent filed an answer to the complaint. In his answer the respondent does not deny that the trading in the accounts of Mrs. Bertha Hecht was conducted on the respondent's advice or at his discretion, nor that he selectively closed out the futures transactions in question as described in the complaint. Nor does the respondent deny that he prepared and delivered to Mrs. Bertha Hecht on or about March 29, 1963, the "SUMMARY OF OPERATIONS" statement described in the complaint. By way of explanation, however, the respondent states in his answer that: "any close-outs of commodity futures contracts other than the oldest positions were made at the verbal request of Mrs. Hecht to show the profits whenever possible and to ride-out her paper losses to the last. Whenever confronted with a paper loss she would comment substantially as follows: there is plenty of time before the contract expires, there is no need to take the loss now." With respect to the "SUMMARY OF OPERATIONS" statement of March 29, 1963, the respondent states in his answer that this statement "was *picked* from a number of reports made to Mrs. Hecht, all of which were prepared on the same basis showing only the credit balance in her commodity account without showing *either* unrealized gains or unrealized losses."

The oral hearing was held in Washington, D. C. on September 17, 1968. John J. Curry, Office of Hearing Examiners, United States Department of Agriculture, was assigned as referee and presided at the hearing. Earl L. Saunders, Office of the General Counsel of the Department, appeared for the complainant. The respondent did not appear in person at the hearing and there was no appearance on his behalf. No evidence was adduced on behalf of the respondent by deposition or otherwise. Charles E. Robinson, Director of the Compliance Division of the Commodity Exchange Authority, testified for the complainant and 26 exhibits were received in evidence on behalf of the complainant.

The referee granted the complainant's motion that official notice be taken in this proceeding of the transcript of the trial in the case of *Hecht v. Harris*,

Upham & Co., N. D. Calif., 283 F. Supp. 417 (1968), n1 and certain excerpts from the testimony appearing in that transcript were received in evidence in this proceeding.

n1. Bertha Hecht, Plaintiff, v. Harris, Upham & Co., a partnership, Harris, Upham & Co., Inc., a corporation, Arthur R. Mejia, Asa V. Wilder, George Upham Harris, Henry Upham Harris, Jr., Frank L. Patty, et al., Defendants. The transcript of the trial in this case is cited herein as "(Court Transcript)"

At the outset of the hearing, a petition to intervene was filed on behalf of Mrs. Bertha Hecht. This petition was granted by the referee and Mrs. Bertha Hecht was represented at the hearing by Donald F. X. Finn, Attorney at Law, 63 Wall Street, New York City. Six exhibits were received in evidence on behalf of the intervenor. During the course of the hearing, counsel for the intervenor made an oral motion that Harris, Upham & Co., Inc. n2 be made a party respondent in this proceeding (Tr. 67, 72). The referee denied the motion (Tr. 72-74, 113). After the close of the hearing, counsel for the intervenor filed a written motion that Harris, Upham & Co., Inc. be made a party respondent in this proceeding. Complainant filed a reply to the intervenor's motion. A brief was filed by the complainant after the close of the hearing.

n2. At the time of the matters involved herein, Harris, Upham & Co. was a partnership. On or about September 1, 1965, a new corporation, Harris, Upham & Co., Inc., took over the business formerly conducted by the partnership of Harris, Upham & Co. (Court Transcript 171-172).

PROPOSED FINDINGS OF FACT

1. The respondent, Asa V. Wilder, is an individual, who at all times material herein, was the manager of the commodity operations of the San Francisco, California, office of Harris, Upham & Co., a brokerage firm dealing in securities and commodities. The said firm was at all times material herein a registered futures commission merchant under the act and entitled to membership privileges on the Board of Trade of the City of Chicago and various other contract markets (Tr. 17; Complaint, par. 1).

2. Mrs. Bertha Hecht, a resident of San Mateo, California, is now 78 years of age and a retired widow, her husband having died on January 12, 1955. During the relevant period of this case, she maintained stock and commodity futures trading accounts at Harris, Upham & Co. At that time she was inexperienced in futures trading and had little or no knowledge in that field.

After the death of her husband, there was a progressive deterioration of Mrs. Hecht's mental and physical well-being and she was treated on a number of occasions for various nervous or mental disorders (Tr. 17-18, 50-52, 98-101; Comp. Ex. 19, 20, 23; Court Transcript 300-382, 748-811, 1798, 1806-1808, 1810-1811, 1853, 1887, 2451, 2470-2472, 2702-2705, 2735, 2912-2913).

3. The Board of Trade of the City of Chicago is now and was at all times material herein a duly designated contract market under the act. The transactions in soybean, wheat and rye futures hereinafter described were made on or subject to the rules of the Board of Trade of the City of Chicago and were speculative. Such transactions were capable of being used for hedging transactions in interstate commerce in such commodities or the products or by-products thereof, or for determining the price basis of transactions in interstate commerce in such commodities or the products or by-products thereof, or for delivering such commodities sold, shipped, or received in interstate commerce (Tr. 33, 101-102).

4. At all times material herein, the respondent personally handled the stock and commodity futures trading accounts of Mrs. Bertha Hecht at Harris, Upham & Co., and in so doing gained her confidence to the extent that the trading in

such accounts was conducted on the respondent's advice or at his discretion (Tr. 18, 92-93).

5. In 14 instances during the period February 20, 1963 through July 25, 1963, in closing out offsetting transactions in soybean, wheat and rye futures for the account of Mrs. Bertha Hecht, the respondent selectively closed out certain transactions in a manner which reflected larger profits or smaller losses than would have resulted if the transactions had not been closed out selectively (Tr. 34). In the usual course of business and in conformity with section 1.46 of the regulations under the act (17 CFR 1.46), Harris, Upham & Co. prepared and delivered to Mrs. Bertha Hecht, in connection with the close out of each such transaction, a purchase and sale statement showing the financial results of such close out (Tr. 27-28, 46). With respect to such purchase and sale statements, the following table shows the date of each such statement, the transaction that was offset thereon against the previously held position, the financial results that would have been shown on such statement if the offsetting transaction had been applied to the oldest portion of the previously held position (Comp. Ex. 1-14; Tr. 19-34; Answer, par. 1):

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Date 1963	Offsetting Transaction	Profit or Loss Shown on		Profit or Loss If Oldest Trades Had Been Closed Out	
		P & S Statement Profit	Loss	Profit	Loss
February 20	Sale 20,000 bushels March 1963 soybeans		\$ 1,327.25		\$ 2,477.25
March 13	Purchase 20,000 bushels July 1963 soybeans	\$ 660.25			2,546.00
March 14	Purchase 20,000 bushels July 1963 soybeans	354.00		\$ 4.00	
March 15	Purchase 20,000 bushels May 1963 wheat	274.00			501.00
March 22	Sale 10,000 bushels July 1963 wheat	106.00			637.75
March 28	Sale 10,000 bushels July 1963 wheat	68.50			681.50
March 28	Sale 20,000 bushels May 1963 soybeans	370.50			6,442.00
March 28	Sale 10,000 bushels August 1963 soybeans	89.50			2,098.00
April 18	Sale 20,000 bushels May 1963 soybeans	104.00			2,346.00
May 8	Sale 20,000 bushels August 1963 soybeans	129.00			3,446.00
May 15	Purchase 10,000 bushels May 1963 rye	168.50			544.00
May 21	Purchase 20,000 bushels July 1963 soybeans	133.00			567.00
May 28	Purchase 20,000 bushels July 1963 soybeans	204.00			196.00
July 25	Sale 50,000 bushels August 1963 soybeans	1,010.00			5,340.00

6. On or about March 29, 1963, the respondent prepared and delivered a "SUMMARY OF OPERATIONS" statement to Mrs. Bertha Hecht purportedly showing the status of her trading accounts as of such date, but the respondent did not show in such statement and concealed from Mrs. Hecht the fact that as of March 29, 1963, she had unrealized losses in her commodity futures trading account of \$ 34,306.25 (Comp. Ex. 15, 16, 21, 24; Tr. 34-44, 56-57; Court Transcript 76-82, 1279-1281, 1325-1326).

7. The respondent selectively closed out the transactions, described in Finding of Fact 5, and prepared and delivered to Mrs. Bertha Hecht the "SUMMARY

OF OPERATIONS" statement, described in Finding of Fact 6, for the purpose and with the intent of concealing from her the extent of the losses sustained by her in trading in commodity futures, and thereby did conceal from Mrs. Bertha Hecht the extent of such losses (Tr. 46-47, 94-95, 97-98).

PROPOSED CONCLUSIONS

I

During the relevant period of this case, section 4b of the act (7 U.S.C. 6b) declares it to 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 . . . any contract of sale of any commodity for future delivery made, or to be made . . . for or on behalf of any person . . . (C) wilfully 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."

During the relevant period of this case, section 1.46 of the regulations (17 CFR 1.46), insofar as pertinent, read as follows:

Application and closing out of offsetting long and short positions. (a) *Application of purchases and sales.* Any futures commission merchant who, on or subject to the rules of a contract market:

(1) shall purchase any commodity for future delivery for the account of any customer (other than the "Customers' Account" of another futures commission merchant) when the account of such customer at the time of

such purchase has a short position in the same future of the same commodity on the same market, or

(2) shall sell any commodity for future delivery for the account of any customer (other than the "Customers' Account" of another futures commission merchant) when the account of such customer at the time of such sale has a long position in the same future of the same commodity on the same market, shall on the same day apply such purchase or sale against such previously held short or long position, as the case may be, and shall promptly furnish such customer a purchase and sale statement, or account sale, showing the financial result of the transactions involved.

(b) *Customer's instructions.* In all instances wherein the short or long position in such customer's account immediately prior to such offsetting purchase or sale is greater than the quantity purchased or sold, the futures commission merchant shall apply such offsetting purchase or sale to such portion of the previously held short or long position as may be specified by the customer. In the absence of specific instructions from the customer, the futures commission merchant shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position, as the case may be. n3

n3 Section 4b of the act was amended on February 19, 1968, and section 1.46 of the regulations was amended on April 18, 1966, but the amendments are not relevant here. The matters involved occurred and were prohibited prior to the amendments and after the amendments.

The evidence in this case proves beyond question that Mrs. Bertha Hecht's comprehension of futures trading was virtually nil, that she relied completely on the respondent to decide what futures transactions were made for her account, and that her knowledge of the financial results of the futures trading in her account was limited to the information shown on the purchase and sale statements rendered to her by Harris, Upham & Co. (Tr. 46-47, 52-55, 94-95, 97-98; Comp. Ex. 22, 23, 25, 26; Court Transcript 173-175, 394-398, 1179-1184, 1142, 1129, 1436-1438, 1808, 1809, 2451, 2470-2472, 2702-2705, 2735, 2783). Indeed, the

respondent has admitted that every futures transaction that was made for Mrs. Hecht's account was made on his recommendation or at his discretion (Comp. Ex. 22; Court Transcript 1436-1438). In his answer to the complaint, the respondent does not

deny the fact that the trading in Mrs. Hecht's accounts was conducted on his advice or at his discretion. He claims, however, that he selectively closed out the transactions in question "at the verbal request of Mrs. Hecht to show profits whenever possible and to ride out her paper losses to the last" and that "[whenever] confronted with a paper loss she [Mrs. Hecht] would comment substantially as follows: there is plenty of time before the contract expires, there is no need to take the loss now" (Answer, par. 1). With respect to the merit of such a claim, it is simply not credible that a person such as Mrs. Hecht, who lacked any knowledge in the field of futures trading and who relied completely on another person to decide what transactions were made for her account, would have decided the manner in which her transactions were offset. There was no advantage to Mrs. Hecht in having her transactions offset selectively and no credible motivation can be advanced for offsetting her transactions in this manner except that the respondent wanted to conceal from Mrs. Hecht the extent of her losses. In this connection, Charles E. Robinson, Director of the Compliance Division of the Commodity Exchange Authority, testified (Tr. 44-45):

In my opinion there is no advantage to Mrs. Hecht to have her trades selectively closed out. The investigation disclosed that she was on a calendar year tax basis. Now the only time, in my experience, that there has been an advantage from selective closing out of trades has been in connection with tax purposes, but the investigation disclosed no possible tax advantage to Mrs. Hecht in the selective closing out of trades, so that in my opinion there was no advantage.

Continuing, Mr. Robinson testified that in his opinion the only possible reason for selectively closing out the transactions in question was "to conceal from her [Mrs. Hecht] for a period of time the extent of her losses, to put off the day of reckoning, and to keep her happy for a while longer" (Tr. 47). Mr. Robinson made clear in his testimony the respondent's motivation for keeping Mrs. Hecht "happy". His testimony, in this respect, is as follows (Tr. 47-48):

According to information furnished the Commodity Exchange Authority by Harris, Upham & Co., Mr. Wilder, when he was employed in May of 1957, was employed at a salary of \$ 1250 a month. The letter goes on -- I am reading from a letter of December 5, 1967 from Harris, Upham & Co.

to the Commodity Exchange -- it says "Administration". "Commissions received by the firm from transactions that Mr. Wilder accomplished for his customers in securities and commodities were substantially in excess of his salary. Therefore, in fairness to Mr. Wilder, in March 1961 the salary was increased to \$ 1500 a month and he was paid a bonus of \$ 5,000 in June of that year." Then the letter goes on to state: "In March 1963 his salary was reduced to \$ 1250 a month. This was because he had been less active. He had become 65 and the volume of his business had declined through 1962 and 1963." Now in this letter they state that his salary was reduced in March 1963 because he had become less active. These selective close-outs occurred during the period from February 20th through July 25, 1963, and this "Summary of Operations," Complainant's Exhibit 16, was rendered as of March 29, 1963, so it seems quite apparent to me that he could very well have had a motive here that his salary is being cut because of having less business and he wanted to keep Mrs. Hecht happy as long as he could because he might lose her account.

In his answer, the respondent stated that he selectively closed out the transactions in question in accordance with Mrs. Bertha Hecht's instruction "to

show profits whenever possible". However, the respondent did not act in accordance with such an instruction. As shown in Finding of Fact 5, the offsetting sale of February 20, 1963, was selectively applied so as to decrease the apparent size of a loss, not to show a profit instead of a loss. Further, as shown in Finding of Fact 5, the offsetting purchase of March 14, 1963, was selectively applied so as to increase the apparent size of a profit, not to show a profit instead of a loss.

The facts and circumstances in this record compel the conclusion that as charged in the complaint, the respondent deceived Mrs. Bertha Hecht in wilful violation of section 4b of the act (7 U.S.C. 6b), and applied and closed out offsetting long and short positions in wilful violation of section 1.46 of the regulations (17 CFR 1.46). The respondent's offenses were deliberate, serious and flagrant and cannot be too strongly condemned. They were contrary to the principles of honesty and fair dealing and violated basic provisions of the act. Section 4b of the act is a basic part of the measures designed for the protection of customers of futures commission merchants. Considering all of the

facts and circumstances of this case, including the recommendation of the agency charged with administering the provisions of the Commodity Exchange Act, it is concluded that in order to effectuate the purposes of the act, the respondent should be denied all trading privileges on all contract markets for a period of three years.

II

As previously stated at page 4 hereof, official notice was taken of the transcript of the trial in the case of *Bertha Hecht v. Harris, Upham & Co., et al.*, N.D. Calif., 283 F. Supp. 417 (1968). In that case plaintiff Bertha Hecht, a widow of 77 years of age, instituted an action against Harris, Upham & Co., Harris, Upham & Co., Inc., Asa V. Wilder and others to recover \$ 1,109,000 damages arising from the defendants' fraudulent handling of her securities and commodities accounts and their breach of fiduciary duties. After a 27 day trial without a jury a Memorandum of Decision in favor of Bertha Hecht was rendered and a judgment entered thereon in the amount of \$ 504,391.02 against Harris, Upham & Co., Harris, Upham & Co., Inc. and Asa V. Wilder.

In the course of the administrative hearing counsel for the Intervenor Bertha Hecht made a motion to amend the complaint to include Harris, Upham & Co., *et al.*, as parties respondent. In such motion and elsewhere counsel averred the record shows: (1) that Harris, Upham & Co. violated the Commodity Exchange Act by cheating and deceiving Mrs. Hecht and by failing to institute and maintain an adequate system of supervision of its San Francisco and New York offices; (2) that all P&S instructions, close-out instructions, and requests to determine the buying power in the account were wired by Mr. Wilder over Harris, Upham & Co.'s private wire system from San Francisco to various individuals in New York; (3) that close-outs were actually effectuated in New York by someone other than Mr. Wilder; (4) that the New York office of Harris, Upham & Co. had the primary and ultimate responsibility for maintaining an adequate system of supervision and internal control in order to protect customers against fraud and to ensure against violation of Commodity Exchange Act rules and regulations; (5) that even in the absence of actual knowledge, Harris, Upham & Co. is responsible to exercise reasonable supervision, and it is not at all clear nor is there any real proof that Harris, Upham & Co. has taken any

corrective action which will ensure the exercise of reasonable supervision in the future; and (6) that officials of Harris, Upham & Co. in New York had or should have had actual knowledge of the selective close-out scheme and of the *churning and unsuitable transactions in Mrs. Hecht's account.*

In reply to the motion, counsel for the Complainant stated for the record that the Commodity Exchange Authority has taken corrective action to avoid a re-

occurrence of the activities involved in this administrative proceeding; that the evidence does not reveal that any official of Harris, Upham & Co., other than Asa V. Wilder, had knowledge of these activities; and that in view of these circumstances and the lapse of time since the activities took place, it is the view of the Commodity Exchange Authority that it is not necessary to include Harris, Upham & Co. as a party respondent in this administrative proceeding in order to effectuate the purposes of the Commodity Exchange Act (Tr. pp. 68, 69).

The Referee denied the motion to join Harris, Upham & Co., *et al.*, as respondents, stating that he had no authority under the Rules of Practice to amend the complaint which had been issued by an Assistant Secretary of Agriculture, but added that counsel in due course could file such a motion with the proper authority. Subsequently, counsel on September 30, 1968 filed a written motion with the Referee again requesting joinder of the aforesaid parties as respondents, and on December 16, 1968, the Referee certified the Motion to the Secretary for decision, as provided by the rules of practice governing proceedings under the act. On February 11, 1969, the Commodity Exchange Authority informed Counsel for Intervenor by letter that, "We submitted your motion on behalf of Mrs. Bertha Hecht to the Assistant Secretary with the recommendation that it be denied. In so doing, we restated our position as set forth at the oral hearing and in our answer to the Motion. On January 14, 1969, the Assistant Secretary concurred in our recommendation and denied the motion."

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

PROPOSED ORDER

Effective 30 days after the receipt of this Order, the said Asa V. Wilder is prohibited from trading on or subject to the rules of any contract market for a period of three (3) years, and all contract markets shall refuse all trading privileges to him for the said period of three years, such prohibition and refusal to apply to all trading done and positions held by the said Asa V. Wilder directly or indirectly whether for his own account or for the account of other persons.

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

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