

Commodity Futures Trading Commission
CEA CASES

NAME: GEORGE F. FREY JR.

CITATION: Comm. Fut. L. Rep. (CCH) P24,578; [1987-1990 TRANSFER BINDER]

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[P 24,578] In the Matter of Frey.

Commodity Futures Trading Commission. No. 75-16. January 19, 1990. Opinion and Order in full text.

Equal Access to Justice Act -- Prevailing Party -- Fees -- Enforcement Proceedings. -- An individual applying for legal fees and costs under the Equal Access to Justice Act was a "prevailing party" for EAJA purposes, since the CFTC had previously dismissed the underlying enforcement complaint against the individual in its entirety. Although the Division of Enforcement emphasized the individual's failure to prevail on certain issues and argued that fees should not be recovered for the time spent on such issues, under settled law, however, the individual's degree of success may be considered only in determining the amount of an award, and not whether he is a prevailing party. Also, the underlying enforcement action was a "covered adjudication" and was prosecuted in part by CFTC attorneys in accordance with the applicable procedural rules.

See P 11,645, "Liabilities -- Prohibitions" division, Volume 1.

Equal Access to Justice Act -- Fees -- Enforcement Proceedings -- Showing of Net Worth. -- An administrative law judge erred in not requiring an individual applying for legal fees and costs under the Equal Access to Justice Act to make a more complete showing of net worth, as he was empowered to do, and in failing to enter an explicit finding as to the individual's eligibility. The abbreviated nature of the individual's financial presentation raised several questions about the exhibit's accuracy and completeness. Among other things, the individual did not certify the net worth exhibit. Moreover, the figures provided on the exhibit appeared to be no more than rough approximations. The absence of any liquid cash assets and the omission of any open trading equity from the futures markets were "striking."

See P 11,645, "Liabilities -- Prohibitions" division, Volume 1.

Equal Access to Justice Act -- Claims -- Substantial Justification. -- For purposes of an Equal Access to Justice Act claim, the government's position that a claimant, along with another individual, violated the Commodity Exchange Act by manipulating and attempting to manipulate the price of an expiring futures contract on its last trading day was "substantially justified," as revealed in the evidence adduced. The Supreme Court has now ruled conclusively that the issue is one of "reasonableness," and no more. Applying that test, an administrative law judge's imposition of a more stringent test was vacated. The ALJ's placing of exclusive reliance on the CFTC's opinion as "the dispositive source to evaluate whether there exists such substantial justification," was also reversible error. The substantial justification determination must be made "on the basis of the administrative record, as a whole, . . ."

. in the adversary adjudication." Finally, in finding that the CFTC's opinion leaves no doubt that the government made a mistake in instituting this action, the ALJ confused the very different concepts of substantial evidence and substantial justification (a different and lesser standard).

See P 11,645, "Liabilities -- Prohibitions" division, Volume 1.

Equal Access to Justice Act -- Claims -- Reasonable Government Conduct. -- It was reasonable for the government to issue a complaint against an individual in a manipulation case based upon the evidence known at the time: the concentrated nature of the long positions in the expiring contract in question; the tight supply of the cash commodity at or near delivery points; the steep futures price rise on the last trading day; the individual's stated price objectives -- all paralleling the circumstances of previous market congestions. These frequent regulatory difficulties with these contracts, coupled with the government's success in prior cases, suggested that the government's position in filing the case was reasonable. The government also acted reasonably in bringing the matter to trial, since it offered factual evidence and expert opinion testimony to support its allegations that the closing futures price for that specific commodity was abnormally high in comparison with other relevant markets. The government also introduced evidence to show that stocks of that deliverable commodity were inadequate for holders of short futures positions and that the individual's trading strategies contributed to a price rise on the final trading day, thereby exacerbating existing market congestion. In addition, the government presented circumstantial evidence in support of its theory that the respondent intended prices to rise as a result of his conduct. Furthermore, since the respondent also offered an affirmative defense, it was reasonable for the Division of Enforcement to question the respondent's expert and others on that defense. The Division was under no obligation to make a pre-trial determination that the respondent would prevail on this defense before it had the opportunity to probe the substance of that defense at hearing. The Division also acted reasonably in opposing the individual's appeal from the initial decision, since "substantial justification" would not require the Division to abandon its victory before an administrative law judge, and to forfeit its opportunity to shape the law of price manipulation, solely to avoid EAJA liability.

See P 11,645, "Liabilities -- Prohibitions" division, Volume 1.

Equal Access to Justice Act -- Claims -- Prior Agency. -- Equitable considerations precluded any fee award under the Equal Access to Justice Act against the CFTC for actions taken in an enforcement proceeding prior to a certain date, when the matter was under the control of the Department of Agriculture. Such a finding was not prejudicial to the EAJA claimant, since he could have sought timely EAJA relief from the agency initially involved.

See P 11,645, "Liabilities -- Prohibitions" division, Volume 1.

Equal Access to Justice Act -- Claims -- Amount of Award. -- An administrative law judge's Equal Access to Justice Act award to an individual for the full amount of fees and expenses sought, without any discussion or analysis, was erroneous. If the individual's conduct during a certain stage of the case unduly and unreasonably protracted the proceeding, then the amount of the award should have been substantially reduced. Alternatively, if the individual's fee application sought to recover for an unreasonable amount of attorney time, then any award should be

proportionately reduced on that basis as well. The ALJ also erred in awarding the full amount of expert witness fees sought since those fees exceeded the EAJA ceiling.

See P 11,645, "Liabilities -- Prohibitions" division, Volume 1.

The Division of Enforcement ("Division") appeals from the initial decision of an Administrative Law Judge ("ALJ") awarding legal fees and costs to George F. Frey, Jr. ("Frey") under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and the Commission's implementing regulations, 17 C.F.R. Part 148. n1 For the reasons discussed below, we grant the Division's appeal and vacate the award of fees and costs.

n1 On August 5, 1985, the President signed into law a permanent reauthorization and revision of EAJA, Pub. L. No. 99-80, 99 Stat. 183. The revised statute governs Frey's application because the underlying enforcement action was pending before the Commission on that date.

The Underlying Enforcement Action

On June 30, 1972, the Assistant Secretary, U.S. Department of Agriculture, issued a complaint charging Frey and Edward A. Cox, Jr. ("Cox"), two registered floor brokers, with manipulating and attempting to manipulate the price of May 1971 wheat futures contracts on the Chicago Board of Trade ("CBOT"), in violation of Sections 6(b), 6(c), and 9 of the Commodity Exchange Act ("Act"), 7 U.S.C. 9, 13b, and 13. Respondents denied any violations. n2

n2 Frey filed an answer on September 18, 1972. After obtaining new counsel, he filed an amended answer on November 28, 1973.

Following a pre-hearing conference, the Commodity Exchange Authority ("Authority") of the Department of Agriculture ("Department") provided the respondents with copies of the exhibits and a list of the witnesses in support of the complaint. Cox and Frey sought extensive discovery, to which the Authority objected. The Department's ALJ sustained the objections, and scheduled a hearing to commence on June 4, 1974.

Respondents then filed for declaratory and injunctive relief in federal district court, asserting an entitlement to pre-hearing discovery. On June 3, 1974, the district court granted the injunction "until [Cox and Frey] have the opportunity to pursue and complete pre-hearing discovery with respect to all facts which are relevant and material to the issues raised by the complaint."

The Authority appealed and, on December 16, 1976, the U.S. Court of Appeals for the Seventh Circuit reversed. *Frey v. CEA*, 547 F.2d 46. Among other things, the Court found it "evident" that the district court had "prematurely [interrupted] the administrative process." *Id.* at 47, 49. It reasoned:

Who knows whether the [ALJ] will find the evidence sufficient to sustain the charges, or whether the Secretary will agree with him if he does? If the final order were favorable to [Cox and Frey], the present contentions would be moot.

Respondents sought rehearing *en banc*, which the Circuit denied on January 11, 1977. The Department then faded from the scene and this Commission began to play an active role in the case. n3

n3 The CFTC did not commence operations as an independent regulatory agency until April 21, 1975. See Section 2(a)(2)(A) of the Act, 7 U.S.C. § 4a(a)(1). Section 411 of the CFTC Act of 1974, Pub. L. No. 93-463, provided that all pending administrative proceedings under the Commodity Exchange Act should be transferred

to the newly-created CFTC and "shall . . . continue to completion." The CFTC was not a party to the litigation before the Seventh Circuit.

The matter was reassigned to an ALJ of the Commission. Shortly before a hearing scheduled for February 28, 1978, respondents attempted to disqualify the Judge. The ALJ denied their motion, but the Commission stayed the proceeding pending interlocutory review. Dissatisfied with this turn of events, the Judge then recused himself. Because respondents' motion was moot, the Commission directed the Chief ALJ to reassign the case. We also "encouraged" the newly-assigned ALJ "to reevaluate carefully his predecessor's rulings on the admissibility of evidence and propriety of defenses offered by the respondents" See *In re Cox and Frey*, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) P 20,635 at 22,595 (June 21, 1978).

Eleven days of hearings were eventually held between November 1979 and March 1980. On January 10, 1983, the ALJ issued an initial decision sustaining the complaint in its entirety and imposing sanctions. *In re Cox*, [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) P 21,767.

Cox and Frey each appealed to the Commission and the Division replied in opposition. n4 On July 15, 1987, the Commission, with one member dissenting, granted the respondents' appeals, reversed the initial decision, and dismissed the complaint. *In re Cox*, [1986-87 Transfer Binder] COMM. FUT. L. REP. (CCH) P 23,786. The Commission found that the Division had failed to prove two of the four elements

of the offense of completed price manipulation: that the accused had the ability to influence market prices; and that artificial prices existed. In dictum, the Commission also questioned whether the accused had caused the price rise at issue. The Commission did not address the remaining element of the offense: whether the accused specifically intended to influence market prices. In view of the case's age and the parties' failure to address attempted price manipulation in their appellate pleadings, the Commission expressed no view on that offense.

n4 The Commission's only other opinion discussing the offense of completed price manipulation, *In re Indiana Farm Bureau Cooperative Assn., Inc.*, [1982-1984 Transfer Binder] (Dec. 17, 1982), had been issued some three weeks before the ALJ released the Cox initial decision. The application of *Indiana Farm Bureau* to the facts of the Cox case was a key issue on appeal. See Section II, *infra*.

The Fee Application

Following this resolution of the merits, Frey filed an application for fees and costs under EAJA. The Division opposed an award, arguing that its position was substantially justified; that Frey was not a prevailing party on significant, discrete issues; that Frey's delay of the proceeding made a fee award unjust; and that Frey failed to document the fees and costs claimed. Frey tendered a reply and supplemental affidavit from his attorney broadly summarizing the services performed.

Six days later, the ALJ granted the fee application in its entirety. Applying a standard "slightly more stringent . . . than one of reasonableness," the ALJ concluded that the Government's position was not substantially justified within the meaning of EAJA. *In re Cox*, [Current Transfer Binder] COMM. FUT. L. REP. (CCH) P 23,947 at 34,320 (Oct. 6, 1987). The ALJ relied exclusively upon the Commission's opinion as "necessarily the dispositive source to evaluate" the issue of substantial justification. *Id.* The Judge concluded that "[the] Government made a mistake in instituting this action" and that "the Commission's Opinion affords no latitude to hypothesize . . .

otherwise." *Id.* The ALJ ordered the Commission to pay Frey \$ 132,226. This appeal followed.

I. PRELIMINARY ISSUES

EAJA awards may only be made to eligible applicants who are prevailing parties in covered adjudicatory proceedings. In establishing such threshold matters, the fee applicant bears the burden of proof. *Ramos v. Haig*, 716 F.2d 471, 473 n.3 (7th Cir. 1983). The ALJ failed to discuss these issues, as required by 17 C.F.R. § 148.27. In lieu of a remand, we do so ourselves in the first instance.

Because we dismissed the underlying enforcement complaint in its entirety, we conclude that Frey is a "prevailing party" for EAJA purposes. The Division emphasizes Frey's failure to prevail on certain issues and it argues that fees should not be recovered for the time spent on such issues. Under settled law, however, Frey's degree of success may be considered only in determining the amount of an award, and not whether he is a prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985); *Southern Oregon Citizens v Clark*, 720 F.2d 1475, 1481 (9th Cir. 1983). We consider the Division's arguments for reducing the amount of the ALJ's award in Section IV, *infra*.

We are also satisfied that the underlying enforcement action against Frey was an "adjudication" under 5 U.S.C. § 544, and that it was prosecuted in party by Commission attorneys in accordance with the procedural rules in 17 C.F.R. Part 10. Our regulations recognize that such Part 10 proceedings are "generally covered" by EAJA. See 17 C.F.R. § 148.3(a). However, Frey has not met his burden of showing that this Commission conducted an adversary adjudication against him prior to January 11, 1977. See note 3, *supra*, and our further discussion in Section III, *infra*.

Frey's status as an eligible applicant also presents a close question. To qualify for a fee award, Frey must show that his net worth was less than \$ 2 million when the underlying enforcement action commenced. See 5 U.S.C. § 504(b) (1) (B).

A half-page exhibit attached to Frey's fee application asserts that his net worth at the relevant time was \$ 159,000 -- an amount far below the \$ 2 million statutory cutoff, and one which ordinarily would not warrant detailed examination. However, the abbreviated nature of Frey's financial presentation raises several questions about the exhibit's accuracy and completeness.

Among other things, Frey did not certify the net worth exhibit. While Frey's attorney signed and verified the application, whether the attorney had actual knowledge of Frey's financial circumstances cannot be determined from the face of the application or from the accompanying exhibit. Moreover, the figures provided on the exhibit appear to be no more than rough approximations: *i.e.*, rounded off to thousands of dollars. The absence of any liquid cash assets and the omission of any open trading equity from the futures markets are striking. The record in underlying enforcement case shows that Frey traded futures contracts at reportable levels and that he had, on several occasions, taken delivery of the physical commodities. We infer from this that he must have had liquid capital sufficient to meet margin calls. Yet none of these factors is addressed in the net worth exhibit.

We therefore conclude that the ALJ erred in not requiring Frey to make a more complete showing of net worth, as he was empowered to do under 17 C.F.R. § 148.12(a), and in failing to enter an explicit finding as to Frey's eligibility.

If the eligibility question were pivotal, we would remand the application to the ALJ with the instructions to develop the record in

more detail. See *Knights of the Ku Klux Klan v. East Baton Rouge*, 679 F.2d 64, 68-69 (5th cir. 1982); *Continental Web*, 767 F.2d at 323 (net worth should be determined with reference to generally accepted accounting principles); *Berman v. United States*, 534 F. Supp. 641, 642 (N.D. Ohio 1982); *United States v. J.H.T., Inc.*, 872 F.2d 373, 376 (11th Cir. 1989); and *American Air Parcel Forwarding Co. v. United States*, 697 F. Supp. 505, 506 (CIT 1988). Because we resolve the application on other grounds, we decline to pursue the matter further.

II. WHETHER THE POSITION OF THE UNITED STATES WAS SUBSTANTIALLY JUSTIFIED.

In relevant part, EAJA provides for a fee award unless the government's position was "substantially justified." 5 U.S.C. § 504(a)(1). The burden of demonstrating substantial justification rests with the government. *Ramos v. Haig*, 716 F.2d at 473 n.3.

In this case, the government acted through two agencies: the Department of Agriculture (1972-77) and the CFTC (1977-87). It is far from clear that EAJA grants this Commission the power to judge whether the Department's conduct was substantially justified. See note 3, *supra*. Nevertheless, for purposes of the substantial justification analysis, we will assume that such jurisdiction exists (recognizing, as we must, that the Department is not a party before us and that nothing herein is *res judicata* as to it).

The government's position in this case was that Frey, along with Cox, violated the Act by manipulating and attempting to manipulate the price of an expiring futures contract on its last trading day. After reviewing the entire, we are satisfied that this position was substantially justified.

A. Applicable Legal Standards.

The ALJ held that the test for substantial justification "is a slightly more stringent measure than of of reasonableness." P 23,947 at 34,320. That test, however, has never been the standard applied in the Seventh Circuit, where appellate venue lies in this case. See, e.g., *Ramos*, 716 F.2d at 473 n.3 (an agency's position is substantially justified if it has a reasonable basis in law and fact). While the criterion may have been different in the District of Columbia Circuit at the time of the initial decision, the Supreme Court has now ruled conclusively that the issue is one of reasonableness, and no more. *Pierce v. Underwood*, 108 S. Ct. 2541, 2550-51 (1988) (citing *Ramos* with approval and rejecting the test used by the ALJ as "unadministrable"). We therefore apply that test here, and vacate the ALJ's imposition of a more stringent test.

The ALJ also placed exclusive reliance on the Commission's opinion as "the dispositive source to evaluate whether there exists such substantial justification." P 23,947 at 34,320. That, too, was reversible error. As EAJA clearly states, the substantial justification determination must be made "on the basis of the administrative record, as a whole, . . . in the adversary adjudication." See 5 U.S.C. § 504(a)(1); 17 C.F.R. § 148.26.

Finally, in finding that the Commission's opinion leaves no doubt that the government made a mistake in instituting this action, the ALJ confused the very different concepts of substantial evidence and substantial justification. It is well settled that substantial justification is a different and lesser standard than substantial evidence. *Hadden v. Bowen*, 851 F.2d 1266, 1268-69 (10th Cir. 1988) (collecting cases); cf. 21 Weekly Comp. Press. Doc. at 967 (Aug. 5, 1985) (remarks of President Reagan). Our opinion on the merits held only that the allegations in the complaint had not been proven by the preponderance of the evidence. P 23,786 at 34,061. It did not establish that the Division's position, or that of the Department before it, was

unreasonable. The decision on a fee application must be a judgment independent of the results on the merits. EAJA is not intended to be an automatic fee-shifting device in cases where the applicant prevails. *Luciano Pisoni v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988).

B. *Whether The Position of the United States Was Reasonable.*

We turn now to the critical question of whether the government's position was reasonable. The clarity of the applicable law is an important factor in determining whether the government's position was substantially justified. *Foster v. Tourtellotte*, 704 F.2d 1109, 1112 (9th Cir. 1983); *Boudin v. Thomas*, 732 F.2d 1107, 1116 (2d Cir. 1984); *Porter v. Heckler*, 780 F.2d 920, 923 (11th Cir. 1986). Thus, if precedent clearly dictates a certain result, the government should not persist in litigation opposing that result. Conversely, unsettled law militates against EAJA relief.

The developing nature of the law of price manipulation is a significant factor which weighs against an EAJA award here. Price manipulation is not defined in the Commodity Exchange Act. In half a century, there have been only five appellate court opinions analyzing

the elements of the offense. n5 As the Eighth circuit has recognized, "[the] methods and techniques of manipulation are limited only by the ingenuity of man. " *Cargill*, 452 F.2d at 1163. We may also consider whether the government has previously prevailed in similar cases. See, e.g., *North Georgia C.O.P.S. v. Reagan*, 587 F.Supp. 1506, 1509 (N.D. Ga. 1984); *Hoang Ha v. Schweiker*, 707 F.2d 1104, 1106 (9th Cir. 1983); *Underwood*, 108 S.Ct. at 2552 (" . . . a string of losses can be indicative; and even more so a string of successes.")

n5 See *General Foods Corp. v. Brannan*, 170 F.2d 220 (7th Cir. 1948); *Great Western Food Distributors, Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), cert. denied, 345 U.S. 997 (1953); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), cert. denied, 359 U.S. 907 (1959); *Volkart Brothers, Inc. v. Freeman*, 311 F.2d 52 (5th Cir. 1962); *Cargill, Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972).

The justification for pressing an enforcement action against Frey must be reviewed in its historical context. As explained in our underlying opinion, the month of May represents a transitional period in the cash wheat market because the old crop wheat supply is nearly depleted. P 23,786 at 34,059. Allegations of price manipulation in the May wheat contract have been a source of concern to Congress and to regulators since the 1920's:

. . . the same thing happens year after year at almost exactly the same time, becoming so familiar that the "May squeeze" is marked on Chicago's calendar as methodically as Easter or Decoration Day . . . n6

n6 From the *Northwestern Miller* as quoted in *Grain Futures Hearings on H.R. 11843 before the Senate Committee on Agriculture and Forestry*, 69th Cong., 2d Sess. 37 (1922).

In the mid-1960's, the Department's *Cargill* complaint alleged that a dominant long had manipulated the May 1963 wheat futures contract. *Cargill* had been conclusively resolved in the Department's favor only six weeks before the complaint against Frey was issued. n7 See also *In re Cate*, 18 Agric. Dec. 884 (18 A.D. 884) (1959) (settling charges of a long-side manipulation in the CBOT's March and May 1959 wheat futures contracts). These frequent regulatory difficulties with the May wheat contract, coupled with the government's success in *Cargill* and *Cate*,

also suggest that the government's position in filing this case was reasonable.

n7 Cargill's petition for certiorari was denied by the Supreme court on May 15, 1972.

In our view, Frey confuses the issue by seeking to distinguish the facts of *Cargill* from the facts of his own case. However, it is the legal analysis in *Cargill* that is important: *Cargill* discusses the sort of evidence that will sustain a price manipulation complaint and questions the Fifth Circuit's analysis in *Volkart*.

Against this backdrop, the evidence known to the Department from 1971 -- including the concentrated nature of the long positions in the expiring wheat contract, the tight supply of cash wheat at or near delivery points, the steep futures price rise on the last trading day, and Cox's and Frey's stated price objectives -- paralleled the circumstances of previous May wheat market congestions. Thus, it was reasonable to issue the complaint.

We must next consider whether the government acted reasonably in bringing the matter to trial. When Frey's case was heard, the government offered factual evidence and expert opinion testimony to support its allegations that the closing futures price for May wheat was abnormally high in comparison with other relevant markets. The government also introduced evidence to show that stocks of deliverable wheat in Chicago were inadequate for holders of short futures positions, n8 and that's Frey's and Cox's trading strategies contributed to a price rise on the final trading day, thereby exacerbating existing market congestion. Finally, the government presented circumstantial evidence in support of its theory that the respondents intended prices to rise as a result of their conduct.

n8 As an illustration, an important issue before us on the merits was whether to exclude from the calculation of deliverable supply: (1) premium grades of wheat stored at out-of-town locations and (2) barge-loaded wheat controlled by the dominant short. Frey urged us to define the relevant wheat supply broadly. The Division urged us to define it narrowly.

On the facts presented, we accepted Frey's arguments. § 23,786 at 34,061-64. Nevertheless, the Division's position was reasonable. Indeed, in the "closely related" field of antitrust law, see *Cargill*, 452 F.2d at 1166, the Supreme Court has often recognized the difficulty of such fact-intensive inquiries. See *United States v. Philadelphia National Bank*, 374 U.S. 321, 360 n. 37 (1963) (an element of "fuzziness would seem inherent in any attempt to delineate the relevant geographical market"); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) (the government is not required to define geographic markets by "metes and bounds").

Although the essential facts were largely undisputed, the inferences to be drawn from these facts were not. n9 This situation is not uncommon in manipulation cases. For as the Seventh Circuit has recognized, price manipulation is the type of offense where it is reasonable to proceed with a hearing:

. . . it is almost impossible to prove by direct evidence that the acts and transactions of the [accused] were undertaken pursuant to an

understanding or agreement to act collectively and in a uniform manner. Proof of such concerted action and the intent to so act must generally

be circumstantial unless one or more of the participants would so admit. *Miller*, 260 F.2d at 290.

. . . [The] intent of the parties during their trading is a determinative element of a punishable corner. . . . Consequently, the demeanor of the witnesses, as they expound the reasons behind their operations, is of substantial significance . . . In addition, the technical and complex nature of the charges . . . [necessitates] recourse to extensive use of expert testimony . . . for the evidence is largely of a dual nature: statistical and parol interpretation of the statistics [As] the several experts testify, [the ALJ] is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts. *Great Western*, 201 F.2d at 479.

n9 When the outcome turns on the proper inferences to be drawn from undisputed facts, the government's position is reasonable in fact. *Donovan v. DialAmerica, Inc.*, 757 F.2d 1376, 1389 (3d Cir. 1985).

See also *In re Abrams*, [Current Transfer Binder] COMM. FUT. L. REP. (CCH) P 24,577 at 36,493 (CFTC Oct. 13, 1989).

The need to make inferences and to evaluate the parties' expert witnesses was not the only reason for conducting a hearing in this case. Since Frey also offered an affirmative defense -- that the dominant short was the sole cause of the price rise at issue on the last trading day -- it was reasonable for the Division to question Frey's expert and others on that defense. The Division was under no obligation to make a pretrial determination that Frey would prevail on this defense before it had the opportunity to probe the substance of that defense at hearing. *Accord, First National Monetary Corp. v. CFTC*, 860 F.2d 654, 660 (6th cir. 1988) ("*FNMC*") (cross-examination of adverse witnesses is "particularly appropriate" when the Division is attempting to disprove a defense).

We again take note of the case's historical context. As this matter went to trial in 1979-1980, two more disruptions occurred in the wheat futures market. n10 Taking these disruptions into account and the previous factors just described, we conclude that the Division acted reasonably in pursuing this case through a hearing. n11

n10 In early 1979, concerns about the threat of a long-side manipulation led the Commission to declare a market emergency, to suspend trading, and to liquidate an expiring March wheat contract (the delivery month immediately preceding the May contract). See *Board of Trade of City of Chicago v. CFTC*, 605 F.2d 1016, 1018 (7th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980). See also *In re Polonyi*, CFTC Docket No. 82-38 (April 26, 1983) (settling charges that respondent manipulated May 1980 wheat futures prices on the Kansas Board of Trade).

n11 The fact that the Division prevailed before the ALJ is not conclusive evidence that its position was reasonable, but it is another factor that must be weighed in the Division's favor. *Sigmon Fuel Co. v. TVA*, 754 F.2d 162, 167 (6th Cir. 1985); *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1104 (D.C. Cir. 1986).

Finally, we must consider whether the Division acted reasonably in opposing Frey's appeal from the initial decision. The application of our just-issued *Indiana Farm Bureau* opinion to the present facts was certainly a legitimate matter for the Division to pursue in its answering brief. See generally *Abrams*, P 24,577 at 36,494 n.3. The three opinions in *Indiana Farm Bureau* reflected broadly divergent majority and minority viewpoints within the Commission on key issues.

n12 Thus, it was reasonable for the Division to argue that *Indiana Farm Bureau* should be refined and sharpened in a manner favorable to it. When the Division filed its answer to Frey's appeal brief in October 1983, three of the five members who had participated in *Indiana Farm Bureau* were no longer on the Commission. n13 Thus, the Division was also presenting its arguments to a differently constituted Commission.

In these circumstances, even though the Division has an ongoing obligation to ascertain whether its case remains reasonable, "substantial justification" would not require the Division to abandon its victory before the ALJ, and to forfeit its opportunity to shape the law of price manipulation, solely to avoid EAJA liability. *Accord, FNMC*, at 660.

n12 Under settled EAJA principles, the justification for the government's position must be measured against the law as it existed when the Division was litigating the underlying case, and not against any "new law" that may have been enunciated as a result of Frey's appeal. *See, e.g., Westerman v. NLRB*, 749 F.2d 14, 16-17 (6th Cir. 1984); *Kay Mfg. Co. United States*, 699 F.2d 1376, 1379 (Fed. Cir. 1983); *Donovan v. Dillingham*, 668 F.2d 1196, 1199 (11th Cir. 1982), *rev'd on other grounds*, 688 F.2d 1367 (11th Cir. 1982).

The ALJ rejected the Division's argument that the evolving character of manipulation law ought to be considered in weighing the reasonableness of its position. He reasoned as follows (P 23,947 at 34,320):

. . . [The] asserted departures [from prior decisions] are not specifically recognized by the Commission [The] Commission did not state that it was establishing new law, amending the CEAct, or otherwise departing from the applicable and dispositive principles

The ALJ's inability to discern any evolution in the law of price manipulation is curious. *See, e.g., Indiana Farm Bureau*, P 21,796 at 27,290-92 (Johnson, concurring)(". . . . the factors cited by the majority are broader than those recognized in the judicial precedents The majority adopts a position similar to the broadest reading of the *Volkart* case."); *Id.* at 27,297 (Stone, concurring)("One can only hope that the sharp division of the Commission will be duly noted by the Enforcement Division and future Commissions. . . . The majority's pronouncements with respect to . . . artificial price and intent . . . represent a departure from a tradition and a body of case law . . ."); *Cox*, P 23,786 at 34,070 (West, dissenting)("the majority opinion appears to step far beyond the Commission's reasoning in *Indiana Farm Bureau* . . ."). We agree with the Division on this point.

n13 Chairman Johnson, and Commissioners Gartner and Stone.

Although we ultimately granted Frey's appeal on the merits, our vote was not unanimous. The Division persuaded one member of the Commission to sustain the complaint and to author a separate dissent. While a dissent is not conclusive proof of substantial justification, the fact that reasonable minds differed on the merits is further evidence that the Division's position was reasonable. *Underwood*, 108 S. Ct. at 2552; *Wyandotte Savings Bank v. NLRB*, 682 F.2d 119, 120 (6th Cir. 1982); and *League of Women Voters of California v. FCC*, 798 F.2d 1255, 1260 (9th Cir. 1986).

Viewing the entire record in its historical context, we conclude that the government's position was substantially justified throughout the underlying proceeding.

III. WHETHER SPECIAL CIRCUMSTANCES MAKE AN AWARD AGAINST THE COMMISSION UNJUST PRIOR TO JANUARY 1977.

EAJA provides that an agency should not be liable for a fee award where "special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). The relevant legislative history emphasizes that an agency has "discretion to deny awards where equitable considerations dictate an award should not be made." S. Rep. No. 96-253, 96th Cong. 2nd Sess., at 7; H.R. Rep. No. 96-1418, 96th Cong. 2nd Sess., at 11. See *Taylor v. United States*, 815 F.2d 249, 252 (3rd Cir. 1987), and *Devine v. Sutermeister*, 733 F.2d 892, 896 (Fed. Cir. 1984). In our judgment, such equitable considerations preclude any fee award against the commission for actions taken in this proceeding prior to January 1977, when the matter was under the control of the Department of Agriculture. n14

n14 The ALJ ordered the Commission to pay Frey's entire award, which includes \$ 25,334 for the period before January 11, 1977. He failed to explain why he was holding the Commission responsible for this phase of the case. See generally *Nash v. Chandler*, 848 F.2d 567, 573 (5th Cir. 1988) (discussing apportionment of fee awards when there are several responsible parties).

The complaint against Frey was issued by the Assistant Secretary of Agriculture in 1972 and bore Commodity Exchange Authority Docket No. 192. For the next four and one-half years, the matter was prosecuted by Department attorneys, under Department rules of practice, before a Department ALJ. By the time the CFTC was created as an independent regulatory agency in 1975, Frey had already obtained an order enjoining the Department from conducting a hearing. Moreover, the Department's appeal from the injunction had already been briefed and argued before the Seventh Circuit. It was not until January 1977, when the Seventh Circuit denied Frey's petition for rehearing, that this Commission began to move forward with the case. As all litigation before then was controlled by the Department, this Commission cannot be considered to have "conducted an adversary adjudication" against Frey for that period. See 5 U.S.C. § 504(a)(1).

Our conclusion that these are special circumstances making an EAJA award against the Commission unjust for fees incurred prior to January 11, 1977 does not prejudice Frey. If Frey believes that the Department's position from June 1972 to January 1977 was not substantially justified, he could have sought timely EAJA relief from that agency. See 7 C.F.R. §§ 1.180-1.203. This is not a case, like the one envisioned in 17 C.F.R. § 148.8, where the Department "participated" as a party "before the Commission." Frey has cited no authority -- and our own research has found none -- to suggest that this Commission has the jurisdiction to render an EAJA award against the Department for the period the underlying action was on that agency's docket. Nor would it be equitable, within the meaning of the special circumstances clause, for this Commission to enter an EAJA award against itself for a time when it did not control the underlying case. We therefore reverse the initial decision to extent that it held otherwise. n15

n15 The Division argues that the fee application should be denied for the period June 1974 - January 1977, when Frey pursued injunctive relief on an issue the Seventh Circuit characterized as premature and moot. Its theory is that Frey unreasonably protracted the proceeding for two and one-half years and, alternatively, that this discovery-related litigation was a discrete aspect of the case, as to which Frey did not prevail. Our "special circumstances" holding makes it unnecessary to consider this argument.

IV. ASSUMING AN AWARD WERE WARRANTED, WHETHER THE AMOUNT AWARDED IS SUPPORTED BY THE APPLICATION.

The ALJ awarded Frey the full amount of fees and expenses sought, without any discussion or analysis. Our review of the record persuades us that this was error. n16

n16 Once the questions of substantial justification and special circumstances have been resolved against an applicant, there would ordinarily be no need to review the validity of specific line entries in the application. Because we have not had occasion to address the matter previously, we do so here to provide guidance for our ALJs in the future.

The ALJ granted Frey \$ 36,106 in fees connected with appealing the initial decision to the Commission. n17 To be sure, Frey's appeal on the merits was ultimately successful. However, if Frey's conduct during this state of the case unduly and unreasonably protracted the proceeding, then the amount of the award should have been substantially reduced. See 5 U.S.C. § 504(a)(3) and 17 C.F.R. § 148.5(b). Alternatively, if Frey's fee application seeks to recover for an unreasonable amount of attorney time, then any award should be proportionately reduced on that basis as well. See 5 U.S.C. § 504(b)(1)(A); 17 C.F.R. § 148.6(c), *Action on Smoking and Health v. CAB*, 724 F.2d 211, 220-21 (D.C. Cir. 1984).

n17 See Fee Application, entries for Aug. 1983 and June 1984, seeking recovery for 481 hours of attorney time.

After the initial decision on the merits, Frey tendered a 163-page brief -- more than two and one-half times the maximum length permitted by the Commission's Rules of Practice. See 17 C.F.R. § 10.12(e)(5). Only after the division moved to strike his brief did Frey seek *nunc pro tunc* relief from the page limitation. n18 The Commission struck Frey's pleading, finding it to be "simply excessive." *In re Cox*, [1982-84 Transfer Binder] COMM. FUT. L. REP. (CCH) P 21,809 (CFTC July 20, 1983). Particular criticism was directed at Frey's extensive quotation from the hearing transcript. At the same time, the Commission recognized that "some relaxation of the page limitation is appropriate" and offered Frey more time to file an appeal brief of 100 pages or less.

n18 *Contrast* Division's Motion to Strike, filed May 3, 1983, with Frey's Motion for Leave To File, submitted May 9, 1983.

Frey's revised brief, 96 pages length, was filed and served on August 19, 1983. It differed from the earlier, rejected version only in superficial respects: for example, the revised brief used smaller typeface, more characters per line, and more lines of text per page. Notwithstanding the Commission's admonition to cite only to transcript pages, quotations from the record were merely replaced with paraphrased material. In sum, Frey complied with the letter, but not the spirit, of the Commission's directive to pare down his pleading to manageable size.

The appellate briefing process took a fully year to complete. Thereafter, the Commission's resolution of the merits was slowed by the bulk of Frey's pleadings, among other factors. n19 EAJA does not contemplate that applicants recover for submitting pleadings in clear violation of the rules of practice or for re-doing work a second time. Accordingly, if a fee award were appropriate for the appellate stage of the case, we conclude that the \$ 36,106 sought should have been substantially reduced. The precise amount of any such reduction would be more properly addressed on remand.

n19 We do not suggest that Frey alone is responsible for the 15 year life of the underlying proceeding or the two year life of the fee application. Many others, inside and outside the Commission, rightfully share portions of the responsibility. We hold only that Frey's identifiable contributions to this delay should reduce the size of any award he may recover under EAJA.

The ALJ also erred in awarding Frey the full amount of expert witness fees sought: \$ 8,759, billed at the rate of \$ 500 per day. We are bound by the ceiling of EAJA: "no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved." See 5 U.S.C. § 504(b)(1)(A)(i). Section 12(b) of the Act, 7 U.S.C. § 16(b), and 17 C.F.R. § 148.6(b) limit such compensation to the maximum daily rate prescribed for GS-18 government employees. The present record does not allow us to measure the difference between the \$ 500 per day awarded and the relevant fee cap. Moreover, because the expert witness testified for both Cox and Frey, the ALJ should have determined if Frey alone paid his fee.

The ALJ further erred in failing to give careful attention to other aspects of the fee application. For example, Frey seeks to recover for district court litigation under the Freedom of Information Act in July 1974. Based on the date and the description provided, it appears that Frey's FOIA complaint was actually directed against the Department, and not the CFTC. The application fails to state if this satellite litigation was successful. In any event, FOIA has since 1974 contained its own attorney fee provisions, see 5 U.S.C. § 552(a)(4)(E), which EAJA is not designed to modify or repeal. See Section 206 of EAJA, Pub. L. No. 96-481, 28 U.S.C. § 2412 note. n20

n20 We recognize that *Natural Resources Defense Council, Inc. v. EPA*, 703 F.2d 700, 713 (3d Cir. 1983), interprets EAJA as permitting recovery of fees incurred in obtaining information through FOIA at the agency level, even though "that route to information is not conventional discovery." However, 5 U.S.C. § 552(a)(4)(E), not EAJA, governs the recovery of fees for FOIA litigation at the district court level.

These illustrations are not intended to provide an exhaustive analysis of Frey's application. They simply highlight the type of issues the ALJ should have examined once he had determined that some award was appropriate. Given our decision to deny the application on other grounds, a remand to develop the record on these and other issues raised by the Division is not warranted.

* * *

For the reasons stated in this opinion, the Division's appeal is granted and the initial decision of October 6, 1987 is vacated. Frey's application for fees and expenses is denied.

By the Commission (Chairman GRAMM, and Commissioners HINEMAN, WEST, DAVIS, and ALBRECHT).

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