

Commodity Futures Trading Commission
CEA CASES

NAME: DAVID G. HENNER

CITATION: 30 Agric. Dec. 1151

DOCKET NUMBER: 161

DATE: SEPTEMBER 15, 1971

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(No. 14,159)

In re DAVID G. HENNER. CEA Docket No. 161. Decided September 15, 1971.

Manipulation -- Interpretation -- Intent -- Wilfulness -- Artificially high closing price -- Egg futures -- Cease and desist order -- Denial of trading privileges -- Suspension of registration for 30 days

The respondent intentionally bid the price up of November 1968 egg futures on the Chicago Mercantile Exchange at the close of a trading period. This is manipulation prohibited by the act. The violation was willful. The respondent is ordered to cease and desist from manipulating prices, he is prohibited from trading for 30 days, and his registration as a floor broker is suspended for 30 days.

Earl L. Saunders and Richard W. Davis for Commodity Exchange Authority.

Bradley D. Steinberg, of Steinberg, Polacek & Steinberg, Chicago, Ill., for respondent.

John G. Liebert, Hearing Examiner.

Decision by Donald A. Campbell, Judicial Officer

PRELIMINARY STATEMENT

The issues in this case relate to a manipulation of the egg futures market that occurred within a few seconds. The price effect was erased the next day. Yet the issues have such far reaching and widespread implications, vital to the very existence of futures trading as it exists today, that an in-depth analysis is necessary and appropriate.

Complaint. This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1, 1964, ed., as amended, Supp. IV, 1969), instituted by a complaint filed by

Richard Lyng, Assistant Secretary, Marketing and Consumer Services, on May 29, 1969, against David G. Henner, a member of the Chicago Mercantile Exchange and a registered floor broker, for violation of the Act. The complaint was issued under §§ 6(b) and 6(c) of the Act (7 U.S.C. 9 and 13b, Supp. IV, 1969).

The complaint alleges that the respondent, in trading in November 1968 shell egg futures contracts on the Chicago Mercantile Exchange on June 25, 1968, "acted for the purpose and with the intent of causing prices in the November 1968 shell egg future which were distorted and did cause such prices." The specific transactions alleged in the complaint are as follows:

During the closing period of trading in the November 1968 shell egg future on June 25, 1968, the trading was conducted by means of "board trading." Shortly before the end of such closing period, there were the following offers posted on

the "offer board": 600 cases at 40.20 cent per dozen; 600 cases at 40.25 cents per dozen; 600 cases at 40.50 cents per dozen; 1800 cases at 40.75 cents per dozen; 600 cases at 41 cents per dozen; and 600 cases at 41.30 cents per dozen. During the final seconds of such closing period, the respondent, acting for his own account, "bought the board", *i.e.*, he simultaneously accepted all of the posted offers referred to above. The respondent then bid 41.85 cents per dozen for another 600 cases of shell eggs for future delivery. This bid was accepted by another floor broker within the one-minute period after the close of trading, during which the exchange rules permitted the acceptance of a bid made during the closing period of trading at a price higher than the price of the last trade.

The complaint alleged that by reason of these activities, the "respondent attempted to manipulate and did manipulate the price" of November 1968 shell egg futures n1 on the Chicago Mercantile Exchange on June 25, 1968, "in willful violation of sections 6(b), 6(c), and 9(b) of the Commodity Exchange Act (7 U.S.C. 9, 13b and 13(b), Supp. IV, 1969)."

n1. The terms "shell egg futures" and "shell egg futures contracts" are synonymous.

Answer and Motion. The respondent filed an answer admitting the jurisdictional allegations in the complaint. He admitted that he had bought the contracts described in the complaint, but denied violation of the Act and any price distortion or attempted or actual manipulation of the shell egg futures prices by virtue of his

trading activities on June 25, 1968. The respondent filed a motion for a bill of particulars with his answer. The motion was denied.

Hearing. The hearing was held in Chicago, Illinois, on September 30, October 1, November 12, 13, and 14, 1969, before John G. Liebert, Hearing Examiner United States Department of Agriculture. The respondent was represented by Bradley D. Steinberg, Esq., of Steinberg, Polacek & Steinberg, Attorneys, 33 North LaSalle Street, Chicago, Illinois. The complainant was represented by Earl L. Saunders, Esq., and Richard W. Davis, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C.

The record consists of 1,085 pages of oral testimony and 39 exhibits, many of which consist of multiple documents.

Hearing Examiner's Report. The Hearing Examiner concluded, in his Recommended Decision filed on November 30, 1970, that the respondent's activities did not constitute manipulation under the Commodity Exchange Act. He stated (Report, pp. 15-18):

Both supply and demand for a particular commodity vary during the year. Future contracts in the same commodity with differing maturity dates trade at different prices. Traders are quick to appraise relationships among and between the prices associated with the various futures and tend to trade in the future which at the moment seems to present the best opportunity for profit. The effect of all this is that the trends of prices of futures of the same commodity with varying maturity dates usually follow fairly clearly defined relationships to each other. This so-called "spread" often forms a basis in itself for a speculative trade, *i.e.*, sharp deviations from the normal range in spread between two futures may suggest to a trader that one or the other future is out of line pricewise with the general value which traders have associated with it.

* * *

* * * A free market, operating on the basis of the law of supply and demand, is, in effect, self-policing or self-correcting with respect to prices. Abnormal or artificially induced prices in a free market invite traders to take advantage of the trading opportunities presented. If traders are not dominated

or subverted, or the supply demand factor is not prevented from operating, the abnormal price must fall

before the impact of trades by professional traders seeking a profit. It must be borne in mind that market prices conform to and result from trades. One might say generally that manipulation takes place when a person so controls or effectively induces market prices that traders are forced to make trades in conformity therewith.

While it is conceivable that persistent and continuous bidding up of the price of a commodity over an extended period of time by itself, with no other influences at work, could result in manipulation of prices in violation of the statute, it is an absolute fact that the trades would have to be so numerous as to constitute domination of trading. We are not here concerned with that kind or degree of trading activity. The effect of respondent's trades was effectively and promptly negated in the free market by the very next trade on June 26, because the essential element of domination, control, or influence over the market price generally, was non-existent. The operation of the law of supply and demand was not circumvented or prevented from operating, nor was free market trading stifled by respondent's trades. It must be concluded, therefore, that he did not manipulate the price of November shell egg futures because of the trades in question.

The Hearing Examiner made no findings as to the complainant's contention that the "respondent's trades, made as they were at the final bell, were undertaken to and did cause an unrealistic price to be posted and circulated as the day's closing price" (Report, p. 19), stating:

That the price of respondent's last trade was posted as the closing price is a fact. The effect of the action, however, even if undertaken for the purpose asserted, was completely ineffectual to result in or constitute a manipulation or attempted manipulation. The market on June 26 simply did not pay any attention to the closing price because the first trade was 135 points lower and within the range of pricing before respondent's trades on the previous day. The closing price on June 25 was the correct and actual closing price and clearly reflected respondent's action. It was not in the nature of dissemination of false or misleading information prohibited by the statute.

The Hearing Examiner also "noted that the Floor Practices Committee of the Exchange did not find that respondent's actions

on June 25, 1968, constituted manipulation, or attempted manipulation, of prices on that day" (Report, p. 19), stating (pp. 19-20):

* * * By the 1968 amendments to the Act the Exchange was given authority and responsibility to police the actions of its members and enforce prescribed regulations. Altho they scrutinized respondent's trading activity on June 25, managing officials did not charge respondent with a violation of Exchange Rule 401(h) prohibiting manipulation. Managing officials, being professional traders themselves, have sophisticated and informed opinions on what constitutes manipulative acts by traders and their conclusions in the matter have considerable weight.

Tentative Decision and Order. A tentative decision and order was filed on May 7, 1971, by the Judicial Officer. It was found that the respondent manipulated the closing price of November 1968 shell egg futures on the Exchange on June 25, 1968. The tentative order provided for a cease and desist order and for suspending the respondent's registration as a floor broker and his trading privileges for 30 days. Exceptions were filed by the respondent.

The final decision and order is substantially the same as the tentative decision and order.

The Commodity Exchange Act. The Commodity Exchange Act is the amended name of the Grain Futures Act (Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by the Act of June 15, 1936, c. 545, 49 Stat. 1491, as amended, 7 U.S.C. 1964 ed. and Supp. IV, § 1 *et seq.*).ⁿ² With respect to futures trading in eggs

and other designated agricultural commodities the Congress found that transactions and prices on boards of trade "are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling [commodities] and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in [commodities] and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein." 7 U.S.C. § 5.

ⁿ². The Commodity Exchange Act (formerly the Grain Futures Act) has been interpreted and applied in numerous cases. See, *e.g.*, *Bartlett Frazier Co. v. Hyde*, 65 F.2d 350 (C.A. 7), certiorari denied, 290 U.S. 654; *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402 (C. A. 7), certiorari denied, 291 U.S. 680; *Moore v. Chicago Mercantile Exchange*, 90 F.2d 735 (C. A. 7), certiorari denied, 302 U.S. 710; *Board of Trade of Kansas City v. Milligan*, 90 F.2d 855 (C. A. 8), certiorari denied, 302 U.S. 710; *Nelson v. Secretary of Agriculture*, 133 F.2d 453 (C. A. 7); *General Foods Corporation v. Brannan*, 170 F.2d 220 (C. A. 7); *Irving Weis & Co. v. Brannan*, 171 F.2d 232 (C. A. 2); *Moore v. Brannan*, 191 F.2d 775 (C.A.D.C.), certiorari denied, 342 U.S. 860; *Great Western Food Distributors v. Brannan*, 201 F.2d 476 (C. A. 7), certiorari denied, 345 U.S. 997; *United States v. Grady*, 225 F.2d 410 (C. A. 7), certiorari denied, 350 U.S. 896; *Corn Products Refining Co. v. Benson*, 232 F.2d 554 (C. A. 2); *G. H. Miller & Company v. United States*, 260 F.2d 286 (C. A. 7), certiorari denied, 359 U.S. 907; *Goodman v. Benson*, 286 F.2d 896 (C. A. 7); *Volkart Brothers, Inc. v. Freeman*, 311 F.2d 52 (C. A. 5); *Laiken v. United States Department of Agriculture*, 345 F.2d 784 (C. A. 2); and *Kent v. Hardin*, 425 F.2d 1346 (C. A. 5). The validity of the Grain Futures Act was sustained in *Chicago Board of Trade v. Olson*, 262 U.S. 1, 31-43, and the validity of the Commodity Exchange Act was sustained in *Moore v. Chicago Mercantile Exchange*, 90 F.2d 735, 736-741 (C. A. 7), certiorari denied, 302 U.S. 710; *Board of Trade of Kansas City v. Milligan*, 90 F.2d 855, 857-860 (C. A. 8), certiorari denied, 302 U.S. 710; *Nelson v. Secretary of Agriculture*, 133 F.2d 453, 455-457 (C. A. 7); and *United States v. Grady*, 225 F.2d 410, 412-416 (C. A. 7), certiorari denied, 350 U.S. 896.

The Act provides, *inter alia*, for the designation of boards of trade as contract markets, and all trading in futures -- in the commodities referred to in the Act -- must be conducted on the designated markets. 7 U.S.C. §§ 2, 6 and 7. The Secretary of Agriculture may regulate boards of trade, futures commission merchants, floor brokers, and persons trading on regulated markets. 7 U.S.C. § 6 *et seq.*

It is a violation of the Commodity Exchange Act to manipulate or attempt to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade. 7 U.S.C. §§ 9, 13(b), and 13b. If the Secretary of Agriculture "has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market" he may file a complaint against such person. 7 U.S.C. §§ 9 and 13b. Any person who is named as a respondent in a complaint, by the administrative agency, is entitled to a hearing, and if the evidence reveals a violation of the Act (1) the Secretary may require all contract markets to refuse to such person all trading privileges thereon for such period as may be

specified in the order and (2) the Secretary may suspend, for a period of not to exceed six months, or revoke the registration of a futures commission merchant or floor broker who violated any of the provisions of the Act. 7 U.S.C. § 9. In addition, the Secretary may enter an order directing that such person shall cease and desist from the violation involved in the case. 7 U.S.C. § 13b.

The Commodity Exchange Act provides that any such order issued by the administrative agency, pursuant to the Act, may be reviewed by the United States court of appeals for the circuit in which the person is doing business and empowers the reviewing court to affirm, set aside, or modify the order of the agency. 7 U.S.C. § 9.

Final authority to decide cases under the Commodity Exchange Act has been delegated to the Judicial Officer. 36 F. R. 3210.

FINDINGS OF FACT

1. Respondent, David G. Henner, an individual whose business address is 110 North Franklin Street, Chicago, Illinois, is now, and has been since April 1951, a member of the Chicago Mercantile Exchange, a registered floor broker under the Commodity Exchange Act, and a trader in commodity futures for his own account.

2. The Chicago Mercantile Exchange (hereinafter referred to as the "Exchange") is now, and was at all times material herein, a commodity exchange duly designated as a contract market under the Commodity Exchange Act. It is an organization where traders meet and engage in trading in various commodities under rules promulgated by the Exchange, but the Exchange itself does not engage in any trading activity. Only members of the Exchange may trade on the Exchange, and they may trade for themselves or for customers. The monetary value of the futures contracts traded on the Exchange in 1968 exceeded \$ 17 billion. The value of all the futures contracts regulated under the Act in fiscal year 1971 was \$ 115 billion.

3. A futures contract made on or subject to the rules of a contract market is a standardized contract -- with respect to the purchase and sale of a commodity to be delivered in a specified month -- in which the terms, except for the price, are fixed by the Exchange. The seller, or "short", agrees to deliver in a specified month a definite quantity of the commodity. The purchaser, or "long", agrees to accept and pay for the commodity when it is delivered. If, for example, a November shell egg futures contract is executed during the month of June, the short has agreed that he will deliver a specified quantity of eggs on any business day in November. The corresponding long has agreed that when the eggs are delivered, he will accept and pay for them. After the purchase and sale on the Exchange have been executed, a portion

of the contract price (referred to as the initial margin) is deposited by each party with the Clearing House of the Exchange, and the Clearing House of the Exchange substitutes itself as the seller to the buyer and the buyer to the seller.

A short who delivers the cash (*i.e.*, actual) commodity on his futures contract has consummated the contract and his position in the futures market is thereby liquidated, *i.e.*, he is no longer in the market. The long who accepts and pays for the commodity has also consummated his contract thereby liquidating his position in the market. A long can insist on receiving delivery if he chooses, and a short can insist on making delivery if he chooses. In practice, however, actual delivery of the commodity seldom occurs; about 99% of the futures contracts are offset on the Exchange by making an opposite futures transaction, *i.e.*, the short in the example becomes the purchaser of a November shell egg futures contract, and the long becomes a seller of a November shell egg futures contract, thereby liquidating their positions. n3 The contractual provisions for delivery are, nonetheless, a necessary factor in establishing and

maintaining the relationship between futures prices and the prices of the cash commodities.

n3. Of the 53,767 November shell egg futures contracts entered into during the life of the future in 1968, only 376 (or 3/10 of 1%) were settled by delivery (computed from Comp. Ex. 20, pp. 19-22).

The total open interest at any time is the total number of contracts which have not been fulfilled by an offsetting futures transaction or by delivery. For example, if the total open interest in shell egg futures is 100 contracts, there are 100 long contracts and 100 short contracts open on the Exchange.

4. Trading in shell egg futures on the Exchange is conducted in units of one contract, or lot, consisting of 600 cases of 30 dozen eggs per case, or 18,000 dozen eggs. A futures contract for shell eggs is a commitment to deliver or receive a lot of shell eggs (18,000 dozen) of specified grade during a particular month.

The Exchange determines when trading in a particular futures contract begins. At all times material herein, the only shell egg futures in which there was any significant trading activity on the Exchange in 1968 involved the September, October, November and December delivery months. Trading in November shell egg futures began in January 1968 and ended on November 21, 1968, *i.e.*, several days before the last business day in the delivery month.

Under specifications of the Exchange rules governing deliveries on shell egg futures, par delivery consists of fresh eggs, large, described as U. S. Extras, Minimum 80 percent A grade, meeting certain weight and packaging requirements. Refrigerator, or storage, eggs could be delivered at a discount of 7 cents per dozen.

5. The minimum price multiple or fluctuation in shell egg futures on the Exchange is 5/100 cent per dozen, or five points, which is equal to \$ 9.00 per contract. A price of 41.85, for example, means 41 and 85/100 cents per dozen.

6. The trading session in shell egg futures on the Exchange opens at 9:15 a.m. and closes at 12:45 p.m., Monday through Friday. The "closing" period of trading is the one-minute period from 12:44 to 12:45 p.m. The beginning of the closing period and the end of the closing period are announced by the ringing of a bell. The closing prices in shell egg futures on the Exchange are sent to all parts of the country by means of a ticker system. If a commodity trades at more than one price during the one-minute closing period, the lowest price and the highest price are shown as the closing price, without regard to how many contracts traded at each price. For example, if during the one-minute closing period, 10 shell egg futures are executed at 40.20 cents per dozen and later, during the one-minute period, one is executed at 40.30 cents, the closing price would be "40.20-30". If, in the example, a contract was not executed at 40.30 but someone bid to buy at 40.30 (*i.e.*, higher than the executed contracts) and no one would sell at that price, the same closing price would be shown, with an asterisk after the "30" indicating that a bid was made at 40.30. Where there is a range of prices during the one-minute closing period, the trend upward or downward at the end of the closing period is shown by putting the price of the later transaction last. For example, a closing price of 40.20-30 indicates that the future traded at 40.20 and then advanced to 40.30 during the closing period whereas a closing price of 40.30-20 indicates that the future had traded at 40.30 during the closing period but had subsequently dropped to 40.20 during the one-minute closing period.

The opening price, and the high and low prices for the day are also sent throughout the country over the ticker system, but the closing prices are the prices that are most widely observed and followed throughout the whole field of futures trading. The "charters", *i.e.*, the people who plot futures prices, plot the

"closing" prices. Some charters also plot the opening price and the high and low price for the day.

The closing price also determines the "settlement" price, which is very important to persons who have an open position in the market. The settlement price is the price at which all contracts, old and new, are cleared each day. The settlement price is the average of the prices in the day's closing price. In the example above, where the closing price is 40.20-30, the settlement price would be 40.25. If the closing price is 40.20-35, the Exchange officials take into consideration the number of transactions at each price along with all relevant circumstances in determining whether to make the settlement price 40.25 or 40.30.

The settlement price determines whether a person must deposit additional margin or whether he can withdraw margin from his account. For example, a person must deposit an initial margin of \$ 500 for each shell egg futures contract. If, based on a day's settlement price, the margin is reduced below \$ 300, the person must restore the margin to \$ 500. If based on the settlement price, the person has a profit, he can withdraw the amount over \$ 500.

The settlement price also determines the extent to which the future can fluctuate the next trading day. The maximum permissible price fluctuation in shell egg futures during one trading session of the Exchange is two cents per dozen, or 200 points, above or below the previous day's settlement price.

7. There are two methods of trading in shell egg futures on the Exchange -- "pit trading" and "blackboard trading". Pit trading is generally used for the first few minutes of each session of trading and then, unless the volume is very heavy, the trading is conducted by means of blackboard trading. When trading is so conducted, the bids (to buy) and offers (to sell) are made by open outcry and are posted on "bid and offer" boards by employees of the Exchange. Offers at the same price have priority for acceptance in the order in which made. The same is true as to bids. Offers to sell at a better price (*i.e.*, a lower price) have priority over the other offers. Conversely, bids to buy at a better price (*i.e.*, a higher price) have priority over other bids. A contract will not be executed at a higher price than the lowest posted offer. For example, if an offer to sell at 40.30 is posted on the board, a person's bid to buy at 40.35 would not be executed at 40.35. He would have to (and would want to) buy the contract

at 40.30 before he would be permitted to buy at 40.35. If and when a bid is sold or an offering bought, the action is posted on a "salesboard" and the trade is consummated. Trades made in the course of blackboard trading are promptly recorded in chronological sequence on the salesboards. Each of these boards is designated by a different letter of the alphabet and contains numbered lines on which the trades are recorded. With respect to the recording of each trade, the time of the trade, the price at which it was made, the number of contracts involved, the initials of the selling broker, and the initials of the buying broker are recorded on the salesboard on the same line. The Exchange photographs the boards on which the trades are recorded and these photographs are thereafter maintained by the Exchange.

8. During the one-minute closing period of trading on the Exchange on June 25, 1968, trading in shell egg futures was conducted by means of blackboard trading, and there were the following offerings to sell November 1968 shell egg futures which had been previously posted on the offer board, and had not been accepted:

Offers To Sell November Shell Egg Futures Closing Period, June 25, 1968

No. of Contracts	Cents Per Dozen
1	40.20
1	40.25
1	40.50

No. of Contracts	Cents Per Dozen
3	40.75
1	41.00
1	41.30

Within the last few seconds of the closing period, respondent, acting for his own account, "bought the board", *i.e.*, he simultaneously accepted all of the posted offerings referred to above. (This is done by a single statement, such as "I will buy the board.") Then, at the ringing of the bell announcing the end of the closing period, the respondent shouted out a bid for one contract of November 1968 shell egg futures at a price of 41.85. The price of 41.85 was 55 points higher than the highest offer that the respondent had just bought (at 41.30) and 165 points higher than the lowest offer the respondent had just bought (at 40.20). The price of 41.85 was the high price for November shell egg futures for the day and the maximum to which prices were permitted to rise under the rules of the Exchange (*i.e.*, two cents over the prior day's settlement price). Immediately after this bid

of 41.85 was made, or substantially so, it was accepted by another floor broker. The rules of the Exchange permitted the acceptance, within one minute after the end of the one-minute closing period, of a bid to buy (made before the end of trading) at a price higher than the price of the last trade. n4 But no new bids or offers could be made after the bell announcing the end of the closing period.

n4. Conversely, the rules would have permitted the acceptance, within one minute after the end of the one-minute closing period, of an offer to sell (made before the end of trading) at a price lower than the last trade.

The last trade made on the Exchange in November 1968 shell egg futures on June 25, 1968, prior to those described above, was one contract at 40.30, and it occurred at 12:00 noon. Prior thereto, on June 25, 1968, all the trades (a total of 42 contracts, excluding the nine contracts bought by respondent in the final seconds) in November 1968 shell egg futures on the Exchange were made at prices within the range of 39.65 and 40.30, *i.e.*, the 42 prior trades during the day were between 155 points and 220 points lower than the respondent's final transaction at 41.85. In other words, at the price of 41.85, respondent bid from \$ 279 to \$ 396 more for the contract than had been paid by all of the other traders that day for November shell egg futures. At the time of respondent's bid of 41.85, the highest posted bid by any other trader was 40.15 (or 170 points lower than respondent's bid), and it was the highest bid left on the board after trading ended on June 25, 1968.

Respondent made no other purchases of November shell egg futures on the Exchange on June 25 other than those described in this Finding of Fact.

9. On June 25, 1968, shortly after respondent's trades described above in Finding of Fact 8, John Hoekstra, another floor broker, complained to the respondent that when he bought the board, he (Hoekstra) "got stuck" with three "stop loss" orders and was unable to execute them. n5 The respondent gave Mr. Hoekstra the last three contracts, *i.e.*, the respondent transferred to Mr. Hoekstra the last three purchases that respondent had made at the highest prices, *viz.*, 41.00, 41.30, and 41.85. Mr. Hoekstra's "stop loss" orders were to buy two contracts at the market price when the market rose to 40.50 (these were filled with the contracts transferred at 41.00 and 41.30) and to buy one

contract when the market rose to 40.60 (this was filled with the contract transferred at 41.85). Transferring the three contracts after the close of trading was in violation of the Exchange rules.

n5 A short who had sold a contract at a certain price might leave a stop loss order with his broker to liquidate his position, by executing an offsetting purchase, if and when the market rose to a certain level.

10. The Chicago Mercantile Exchange, without affording the respondent a hearing, fined respondent \$ 100 for impairing the dignity of the Exchange for violation of its Rule 402(c) because of his activities on June 25, 1968. The primary matter involved was the transfer of the three contracts to Mr. Hoekstra after trading closed on June 25, but also involved was "the fact that he (respondent) spirited a market, jumping over prices * * * which is also frowned upon, also considered bad practice" (Tr. 795). The Exchange did not charge respondent with attempted manipulation of prices in connection with the transactions under its Rule 401(h).

11. Respondent's trading activities in shell egg futures during 1968 were those of both a short term and a long term trader. He held a substantial number of November shell egg futures for a period of at least six months for the purpose of establishing a long-term tax position with respect thereto. He also made numerous short term trades in November as well as other shell egg futures. When the respondent purchased the November shell egg futures on June 25, 1968, described in Finding of Fact 8, he did not intend to hold them for a long-term capital gain.

12. The following table sets forth the consummated transactions in November shell egg futures on the Exchange on June 25, 1968 (all of which were by brokers other than the respondent) prior to the time when the respondent purchased all of the offerings on the board:

November Shell Egg Futures Transactions, June 25, 1968, By Traders Other Than Respondent

Number of Contracts	Price (Cents per Dozen)	Time
3	39.85	9:16 a.m.
1	39.70	9:18
	End of Pit trading	
1	39.65	9:20
1	39.80	9:25
1	39.80	9:27
2	40.00	9:45
1	40.15	10:05
1	40.20	"
1	40.05	10:35
1	40.00	"

Number of Contracts	Price (Cents per Dozen)	Time
1	40.10	11:00
1	40.15	11:25
1	40.20	"
2	40.20	"
1	40.20	"
1	40.20	"
1	40.25	11:30
1	40.20	"
1	40.30	12:00

In addition, 19 other November shell egg futures contracts were consummated on June 25, 1968, within the some price range shown above, as part of "spreading" transactions, in which the purchaser of the November shell egg future also had to simultaneously become the seller of an October shell egg future.

13. The respondent's trading for his own account in November 1968 shell egg futures on the Exchange consisted of the following transactions (excluding

"scalping" transactions in which respondent sold the same day he bought), all of which were speculative:

Respondent's Trading In November Shell Egg Futures (1968)

Date (1968)	Bought (No. of Contracts)	Price (Cents per Dozen)	Sold (No. of Contracts)	Price (Cents per Dozen)	Respondent's Total Open Position	
					Long	Short
Jan. 10	3	38.00			3	
" 11	1	37.00			4	
" 12	1	37.50			5	
" 25			4	37.50-37.75	1	
Feb. 9	9	38.50			10	
" 23	4	(38.65 38.70 38.75 38.90)			14	
" 26			14	38.85-39.20	0	
Mar. 11			2	38.60		2
" 13			3	39.00		5
" 14			3	39.05		8
" 15	5	38.70-39.50				3
" 19	2	39.00-39.05				1
Apr. 16	28	37.70-38.00			27	
" 18	5	39.30			32	
" 19	3)	39.25			36	
	1)	39.40				
" 22	1	39.25			37	
" 23	7	39.95			44	
					Respondent's Total Open Position	
Date (1968)	Bought (no. of Contracts)	Price (Cents per Dozen)	Sold (no. of Contracts)	Price (Cents per Dozen)	Long	Short
" 24	6	40.85-41.00				50
" 30	1)	39.85				55
	4)	39.90				
May 20	2	40.50				57
June 7			2	42.00		55
" 24	3)	39.75				59
	1)	40.00				
" 25	1)	40.20				
	1)*	40.25				65
	1)	40.50				
	3)	40.75				
July 1			3	41.00-41.50		62
" 10	10	42.05-42.50				72

Date (1968)	Bought (no. of Contracts)	Price (Cents per Dozen)	Sold (no. of Contracts)	Price (Cents per Dozen)	Respondent's Total Open Position	
					Long	Short
" 11			1	41.25-42.40 ** ** [Exact price unknown]	71	
" 15			9	41.85-42.25	62	
Aug. 13			7	40.00-40.80	55	

* [Excluding 3 contracts transferred to Mr. Holkstra at 41.00, 41.30 and 41.85].

Date (1968)	Bought (No. of Contracts)	Price (Cents per Dozen)	Sold (No. of Contracts)	Price (Cents per Dozen)	Respondent's Total Open Position	
					Long	Short
Sep. 10	7	44.50			62	
" 11			7	43.75-44.90	55	
" 13	14	43.80-44.00			69	
" 16			14	44.30-44.65	55	
Oct. 4	1	41.60			56	
" 9			1	41.40-42.10 *** *** [Exact price unknown]	55	
" 29			55	37.40-39.35	0	
" 31	25	37.55-38.25			25	
Nov. 1			24	38.40-40.25		
" 4	15	38.70			1	
" 6	30)	38.50			16	
" 7	4)	38.65			50	
" 7			50	38.70-39.85	0	

* [Excluding 3 contracts transferred to Mr. Holkstra at 41.00, 41.30 and 41.85].

14. Respondent's transactions in all shell egg futures on the Exchange on June 24, 25, and 26, 1968 (all of which were speculative), were as follows:

Future	Previous		June 24		Position at	
	Open Contracts		Bought	Sold	Close (No. of	
	Long	Short	(No. of Contracts)	(No. of Contracts)	Contracts)	
Sept.		52	56	54	Long	Short
Oct.						50

Future	Previous		June 24		Position at	
	Open Contracts		Bought	Sold	Close (No. of	
	Long	Short	(No. of Contracts)	(No. of Contracts)	Contracts)	Short
Nov.	55		4		59	
Dec.	27		1		28	
June 25						
Sept.		50	53	8		5
Oct.						
Nov.	59		6 *		65	
Dec.	28				28	

* [Excluding 3 contracts transferred to Mr. Hoekstra]

June 26

Respondent was not on the floor of the Exchange and made no trades on June 26, 1968.

15. On June 24, the day prior to the day involved in this proceeding, 52 November shell egg futures contracts were executed on the Exchange at prices ranging from 39.20 to 40.20. The four November shell egg futures bought by respondent on June 24 were bought at the close of trading, three at 39.75 and one at 40.00. The closing price for June 24 reflected the respondent's trades, i.e., the closing price was 39.75-40.00.

16. On June 26, 46 November shell egg futures contracts were executed on the Exchange at prices ranging from 40.10 to 40.60.

17. On June 27, the respondent was on the floor of the Exchange and entered into a "scalping" transaction in which he bought two November shell egg futures at 40.45 and sold them at 40.40. He bought no other November shell egg futures that day. On June 27, 38 November shell egg futures contracts were executed at prices ranging from 40.25 to 40.65(bid).

18. At the close of trading on June 25, 1968, the day involved in this proceeding, respondent held 65 open contracts in November

eggs out of 540 total open contracts, or approximately 12 percent. This was within the regulatory maximum of 75 contracts permitted and was not control of the market. Respondent was not in a position where he could exercise a squeeze or a corner on the market.

19. Generally, the closing price for shell egg futures on a trading day is a single price or, if there is a range, the range is small. During the entire life of trading in November shell egg futures in 1968, the future was traded on 212 days (January 10 - November 21, 1968). On 119 of the trading days, the closing price was a single price (showing that trading did not occur at more than one price during the one-minute closing period). On 207 of the 212 days, the range between the highest figure and the lowest figure of the day's "closing price" was 20 points, or less (see, e.g., the 20-point range on October 30, 37.75-.95; Comp. Ex. 20, p. 21). The following table shows the range, if any, between the highest figure and the lowest figure of the closing price for the 212 days on which the 1968 November shell egg future was traded.

Price Range Between Highest And Lowest Figure Of "Closing Price", November Shell Egg Future, 1968 (Points)	Number Of Trading Days At Each Price Range
0	119
5	24
10	38
15	18

Price Range Between Highest And
Lowest Figure Of "Closing Price", Number Of Trading Days
November Shell Egg Future, 1968 At Each Price Range
(Points)

20	8
25	2
30	1
50	1
55	1
90	1
165	1

The 165-point range occurred on June 25, 1968, the day involved in this proceeding, when the closing price was 40.20-41.85.

The following table shows the same information as to the price range between the highest and lowest figure of the closing prices for all of the trading days of the September, October, and December 1968 shell egg futures:

Price Range Between Highest And Lowest Figure Of "Closing Price", Shell Egg Futures, 1968 (Points)	Number Of Trading Days At Each Price Range		
	September Future	October Future	December Future
0	107	126	120
5	40	27	11
10	30	19	25
15	12	5	19
20	7	4	6
25	2	8	2
30	1	3	--
35	--	1	2
40	--	1	--
45	--	1	--

There were no price ranges in excess of 45 points.

20. During the month of June 1968, the closing prices for November shell egg futures on the Exchange were as follows:

Closing Prices Of November Shell Egg Futures, June 1968

Date (1968)	Price (Cents per Dozen)	Date (1968)	Price (Cents per Dozen)
June 3	39.90	June 17	41.70
" 4	40.95	" 18	41.40
" 5	41.15	" 19	40.50
" 6	41.50	" 20	39.65
" 7	42.00	" 21	39.40-50
" 10	42.10 (asked)	" 24	39.75-40.00
" 11	42.30	" 25	40.20-41.85
" 12	42.10	" 26	40.55 (bid)
" 13	41.90	" 27	40.65 (bid)
" 14	42.00	" 28	40.55 *-75 (bid)

The lowest price (intra-day) in June was 38.80 paid on June 21, and the highest price (intra-day) in June was 42.50 on June 11.

During the month of July 1968, the closing prices for November shell egg futures on the Exchange were as follows:

Closing Prices Of November Shell Egg Futures, July 1968

Date (1968)	Price (Cents per Dozen)	Date (1968)	Price (Cents per Dozen)
July 1	41.40-45	July 18	41.80

Date (1968)	Price (Cents per Dozen)	Date (1968)	Price (Cents per Dozen)
" 2	41.20	" 19	41.90
" 3	41.80-75	" 22	41.25-20
" 8	42.60	" 23	41.60
" 9	42.50	" 24	41.20
" 10	42.40-50	" 25	40.70-65
" 11	41.70	" 26	40.50
" 12	41.80-90	" 29	40.40
" 15	41.95	" 30	40.50
" 16	42.40 *-35 (asked)	" 31	40.30
" 17	41.70-55		

The lowest price (intra-day) in July was 40.10 paid on July 30, and the highest price (intra-day) in July was 42.90 paid on July 8.

During the entire year, the prices for November shell egg futures ranged between a high of 45.70 in September and a low of 36.75 in October. During November, the delivery month, the prices for the November shell egg futures ranged between a high of 40.45 and a low of 37.50.

21. On June 25, 1968, the day involved in this proceeding, the prices of the September, October and December 1968 shell egg futures on the Exchange advanced only moderately, closing at 38.55-60, 38.10-25 and 39.50 bid, respectively, while the November price closed up the limit allowed by the Exchange rules. On the following day, June 26, the opening price of November 1968 shell egg futures was 40.50, 135 points lower than the respondent's final purchase at 41.85 on the previous day, while the other shell egg futures on the Exchange opened almost unchanged. On June 26, the price of November shell egg futures ranged from 40.10 to 40.60. The following table sets forth prices of the shell egg futures contracts on the Exchange on June 25 and 26, 1968:

Shell Egg Futures Prices, June 25 and 26, 1968

	June 25		June 26		
Future	Open	High	Low	Close	Open
Sept.	38.15	38.75	37.95	38.55-60	38.70
Oct.	37.85	38.25	37.65	38.10-25	38.20
Nov.	39.85	41.85	39.65	40.20-41.85	40.50
Dec.	39.50	39.50	39.20	39.50 (bid)	39.50

22. Normally in trading on the Exchange in shell egg futures several months before the October, November, and December delivery months, there is a discernible price relationship among these futures. In the absence of some significant news affecting one particular month, the relationship (or spread between the prices of the futures) does not change substantially, e.g., 150 points in one day. There is a "spread" board on the Exchange where traders can trade based on the price differences, i.e., they can simultaneously buy one future (e.g., November eggs) and sell another future (e.g., October eggs). This type of trading in price differences tends to maintain the spread differences causing changes in the spreads to be gradual, rather than abrupt. (However, when trading is in or near the delivery month, more abrupt changes in the spreads may occur because the cash (actual egg) market has more influence on the prices of the future that is in or near the delivery month).

23. The change in the spreads between the prices of October and November 1968 shell egg futures and between November and December 1968 shell egg futures on the Exchange during the period from June 3 through July 31, 1968, is shown pictorially in the chart set forth on the following page. The November shell egg futures price is shown as the zero line. The line immediately under the zero line is the December shell egg futures price line, and it shows how much

the December price on each day was under the November price. The line immediately under the December line shows how much the October shell egg futures price on each day was under the November price. (Note that since the November futures price is shown as the zero line, what appears at first glance to be an abrupt drop in the price of October and December futures prices on June 25 is actually a sharp increase in the November price on June 25, relative to the October and December prices.)

Shell egg futures: Relation of closing prices* of the 1968 October and 1968 December futures to the 1968 November future, Chicago Mercantile Exchange, daily, June 3 - July 31, 1968

24. The spread between the prices of October and November shell egg futures and between November and December shell egg futures on the Exchange was sharply distorted (by about 150 points) on June 25, 1968, because of the respondent's trading activities in the last few seconds of trading on that date. The distortion disappeared on the next day, June 26. The respondent's trading activities caused the price distortion.

The closing price of November shell egg futures on the Exchange on June 25, 1968, was an artificially high, *i.e.*, manipulated price.

The respondent traded in the manner set forth above in Finding of Facts on June 25, 1968, for the purpose and with the effect of causing the closing price of November shell egg futures on the Exchange to be artificially high; *i.e.*, the respondent intentionally paid more than he would have had to pay for November shell egg futures for the purpose of causing the closing quotation on June 25, 1968, to be up the limit permitted by the Exchange rules.

The respondent wilfully manipulated the closing price of November shell egg futures on the Exchange on June 25, 1968.

CONCLUSIONS

The facts with respect to the respondent's trading activities are not in dispute.

There is no reason to question the respondent's testimony that he wanted to increase his long position in November shell egg futures on June 25. There is also no reason to question his testimony that he thought that the November shell egg futures would rise in price. But it is quite clear, and the inference is inescapable, that he increased his long position by intentionally trading in a manner that would raise the closing price of the November shell egg future on June 25 the full two cents permitted by the Exchange rules.

The only reasonable influence that can be drawn by the Judicial Officer from the facts is that the respondent, by his trading activities on June 25, 1968, purposely paid more than he would have had to pay for November shell egg futures in order to cause the closing price on the Exchange to be two cents more than the previous day's settlement price. The respondent succeeded in creating an artificially high closing price for November shell egg

futures on the Exchange on June 25. Such action is "manipulation" prohibited by the Commodity Exchange Act.

I. *The Respondent's Trading Activities in November Shell Egg Futures On The Exchange On June 25, 1968, Were For The Purpose And With The Effect Of Causing The Closing Price Of The Future On June 25 To Be Artificially High.*

A. *The Respondent's Motive*

At the outset, consideration should be given as to whether the respondent had a substantial motive for wanting to raise the closing price of November shell egg futures on June 25, 1968.

The respondent is an experienced floor broker and speculator n6 who has been trading in commodity futures on the Exchange since 1951 (Tr. 649, 737-738). n7

n6. Speculators perform a useful function on commodity exchanges and are essential to the exchanges in order to provide sufficient trading volume to assume the hedging risks. Baer and Saxon, *Commodity Exchanges and Futures Trading* (1949), pp. 53-54, 73; Clark and Clark, *Principles of Marketing* (3d ed. 1942), pp. 533-534; VII Report of the Federal Trade Commission on the *Grain Trade* (1926), pp. 13-15; *Hearings Before the Subcommittee on Domestic Marketing of the Committee on Agriculture, House of Representatives, 85th Cong., 1st Sess., on H.R. 376, H.R. 1933, H.R. 1935, H.R. 3418, H.R. 5236, and H.R. 5732 (1957)*, p. 10.

n7. Some record references are included in this decision for convenience, but no effort has been made to give complete record citations.

At the close of trading on June 24, 1968, the day prior to the day in issue, the respondent had an open long position of 59 contracts in November shell egg futures (Comp. Ex. 8), i.e., the respondent had purchased 59 contracts and he would profit by any increase in the market which permitted him to sell the 59 contracts at a higher price. An increase of one cent per dozen, or 100 points, would result in a profit to the respondent on the 59 contracts of \$ 10,620. n8

n8. An increase of one cent per dozen (100 points) on a contract of 18,000 dozen eggs would result in a profit of \$ 180. Multiplying \$ 180 by 59 equals \$ 10,620.

The respondent purchased his long position of 59 contracts (mostly during April) at an average price of about 39.01 cents per dozen. n9 When trading opened on June 25, the day in issue, the November shell egg futures price was 39.85 cents per dozen (Comp. Ex. 20, p. 20), resulting in a "paper" profit of \$ 8,920.80 on the respondent's 59 contracts at that moment. n10

n9. Computed from the respondent's testimony at Tr. 738-743.

n10. A profit of one cent per dozen (100 points) on 18,000 dozen eggs equals \$ 180 per contract. The profit for 1/100 of a cent (one point) would be \$ 1.80 per contract. The price had increased from 39.01 to 39.85, or 84 points. Multiplying 84 by \$ 1.80 equals \$ 151.20, and multiplying that by 59 contracts equals \$ 8,920.80.

At twelve o'clock noon on June 25, the last transaction in November shell egg futures prior to the respondent's trading at issue

in this case was consummated at a price of 40.30 cents per dozen (Comp. Ex. 5). At this moment, the respondent's "paper" profit on his 59 contracts was \$ 13,699.80. n11 If the respondent could raise the price from 40.30 to 41.85, he would increase his "paper" profit an additional \$ 16,461, n12 resulting in a total "paper" profit of \$ 30,160.80 on the 59 contracts.

n11. The price had increased by 129 points (from 39.01 to 40.30), and 129 multiplied by \$ 1.80 per point equals \$ 232.20. Multiplying this by 59 contracts equals \$ 13,699.80.

n12. The difference between 40.30 and 41.85 is 155 points. At \$ 1.80 per point, the increase would be \$ 279 per contract, which multiplied by 59 contracts equals \$ 16,461.

A "paper" profit is, of course, unrealized until a sale is made at a higher price. If a substantial number of buyers could be stimulated to buy a particular future thereby increasing the demand, it would have a natural tendency -- other circumstances remaining the same -- to cause the price to rise (Tr. 1037, 1032, 290, 636). As stated by the respondent's expert witness in one of his texts:

Reduced to its lowest common denominator, a commodity market approximates a giant computer which accepts only two kinds of inputs; positive and negative. The *positive* input is a *buy order*, the *negative* input, a *sell order*. So long as positive and negative influences are equal, prices neither rise nor fall; they remain stable. When positive inputs exceed negative inputs, prices rise. In the reverse situation, they decline. n13

n13. Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 64. See, also, Shepherd, *Marketing Farm Products* (4th ed. 1962), p. 177.

On April 11, 1968, the November shell egg future closed at 37.55 cents per dozen (Comp. Ex. 20, p. 19). It rose to 42.30 on June 11 and then started to decline. It declined from 42.00 cents on June 14 to about 39.50 cents on Friday, June 21 (Comp. Ex. 20, p. 20). On Monday, June 24, the market closed up slightly at about 40.00. n14 This showed to traders that the "market was turning around and it was a little bit of a change and they were getting a little bit of umph" (Tr. 317).

n14. The closing price on June 24 was 39.75-40.00 (Comp. Ex. 20, p. 20), and the settlement price was fixed at 39.85 (Tr. 41, 85).

The respondent testified that he formed the opinion in April that, sometime between July 10 and November 22, the November shell egg futures price would advance to 50 cents (Tr. 874, 940-941), or to 58 cents (Tr. 944; see, also, Tr. 750-755; Resp. Exs. 6-15). He based his opinion on the published statistics in the egg market, the number of laying hens, hatchery figures, and other

related information (Tr. 944, 956-970). The respondent's view was supported at the hearing by an expert witness, Mr. L. D. Belveal, an economist and president of a consulting firm involved in future trading. Mr. Belveal testified that "the case for price movement had preexisted the 25th of June for a good long time in terms of its fundamentals" (Tr. 1071).

The only problem, from the respondent's viewpoint, was that there were not sufficient traders who shared his opinion as to the fundamental supply and demand situation that would develop to be reflected in the future price. As the respondent's expert economic witness testified, "Forecasts do not make prices, traders do" (Tr. 1032; see, also, Tr. 844). With the market turning around on June 24 and appearing to get "a little bit of umph" (Tr. 317), if the respondent could make traders throughout the country believe that the free forces of supply and demand in the Exchange n15 on June 25 caused the closing price of November futures to rise the full two cents permitted by the Exchange rules, that might have stimulated sufficient interest by brokerage houses, commodity newsletter writers, traders, etc., to cause a sustained price advance, particularly if the respondent was correct in his belief that the existing market information as to the basic forces of supply and demand that would develop for eggs in November warranted a large increase (see Tr. 290, 314, 445-447, 636, 1032, 1037).

n15. See *infra*, pp. 1194-1200, 1206-07.

Speculators who watch the futures prices closely are particularly interested in the closing prices. The closing price is the most important price to traders, it is immediately disseminated by wire throughout the country and appears in newspapers and brokerage house letters (Tr. 431). The closing price is the principal price used by "charters", *i.e.*, the persons who plot prices on

graphs to aid in their speculative decisions (Tr. 38-40; see the graphs of the "closing" futures prices in the Chicago Mercantile Exchange's Yearbook, Comp. Ex. 20, pp. 10, 18, 55, 94, 103, 108, 195, 206, 225). "Many technicians use only the closing price as an indicator of the day's action." n16 The respondent's expert witness states in one of his texts:

n16. Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide* (1969), p. 93. Some chartists use a bar chart which reflects the opening, high, low and closing prices. *Ibid.*

Indeed, there are some chartists who insist that by analyzing *past* patterns traced out on a simple bar-chart, showing

only daily (or weekly) trading ranges and closes, they can reliably project *future* price behavior. n17

n17. Belveal, *Charting Commodity Market Price Behavior*, (1969), p. 49. See, also, Labys and Granger, *Speculation, Hedging and Commodity Price Forecasts* (1970), p. 224.

And in another text, he states:

Those who follow charts exclusively, or to some extent, are legion! They can "move" a market. n18

n18. Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 123.

The respondent's action was perfectly timed to have an impact on the chartists. The market had declined from 42.00 cents on June 14 to 39.50 cents on Friday, June 21 (Comp. Ex. 20, p. 20). It closed up slightly at 40.00 cents on Monday, June 24. By closing up the limit on June 25, chartists might have been looking for a "key-reversal". As explained by the respondent's expert witness in his text: n19

n19. Belveal, *Charting Commodity Market Price Behavior* (1969), p. 122.

KEY-REVERSAL

As this kind of charade plays itself out, the experienced traders will begin looking for the justly famous "key reversal day." In a nutshell, this is a trading session in which the last contingent of die-hard losers come to see the hopelessness of their situation. Something happens to sink their last vestige of hope, and they begin offsetting. Price soars, or plunges to a new contract high or low -- and trading volume goes ever higher. Suddenly, as quickly as the conflagration began, trade may almost come to a standstill. The pit traders are usually the first to recognize this symptom, and the scalpers who hold positions at the end of the price move now are doing the unloading.

Eventually volume begins to pick up once more, but price is now headed in the opposite direction from that of a few minutes ago. And if it is to come onto the chart as a fully trustworthy "reversal", the closing price for the session will be *significantly* higher or lower than the preceding day's close.

Even in the absence of all of the symptoms of a key-reversal, the fact that the market began to turn on June 24 and closed up the limit on June 25 could have significantly influenced chartists.

Chartists who plot "oscillators" might also have been misled by the respondent's action on June 25.

The term "oscillator" is given to a family of technical indicators which are based on the measurement of the price change rather than the price level. Such a tool is believed to indicate periods when price action has sown the seeds of an impending reversal. n20

n20. Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide* (1969), p. 99 (see pp. 99-107).

Other traders might have been inclined to buy November futures after the large increase on June 25 because:

Traders often remark that they want to buy strength and sell weakness on the theory that strength or weakness in a given price structure tends to perpetuate itself. n21

n21. Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide* (1969), pp. 122-123.

Also, --

it must be remembered that the traders in the market represent varying shades of opinion regarding the correctness of the existing price. Some believe that it is too high and have "sold short"; others believe that it is too low and have "bought long." Each one of these traders knows that others differ with them, else they could not have found anyone to take the other side of the transaction. Some traders have much confidence in their judgment of the situation; others, very little. The latter are just on the verge of reversing their decisions by making an offsetting purchase or sale, and, quite naturally, the slightest factor is likely to "push them over the line". n22

n22. Thomsen, *Agricultural Prices* (1986). p. 282.

In view of the respondent's large long position in November futures, the respondent had an obvious motive for wanting to raise the closing price of November shell egg futures on June 25 the full two cents permitted by the Exchange rules. He was in a position to profit substantially from additional buying strength in November futures which might have caused a sustained price rise.

If the respondent had not been confident that the supply and demand situation for eggs that would prevail in November justified a higher price for November futures on June 25, there would not have been as good a reason for wanting to create an artificially high closing price on June 25, because the price effects of any temporary flurry of buying interest would have been dissipated

before the respondent planned to sell his November contracts. n23 But if the respondent was confident of his judgment as to the basic supply and demand conditions for eggs that would later develop -- as he seemed to be -- then he could reasonably hope to gain a lasting benefit from stimulating buying interest in November shell egg futures.

n23. The respondent had purchased his contracts mostly during April and he would have to hold them until October for long term capital gain purposes (Tr. 860). He intended to liquidate his position before November 1 to avoid having to take delivery of actual eggs on the contracts (Tr. 747, 860, 908).

Another factor to be considered is whether the respondent might have wanted to raise the closing price of November shell egg futures in order to raise the settlement price. Raising the closing price automatically raises the "settlement" price since the settlement price is determined by the closing price. If the closing price is a range, the settlement price is halfway between

the range (Tr. 41). The settlement price is the price at which all trades, new and old, are cleared with the Exchange each day (Tr. 41; Comp. Ex. 20, p. 4). A person who had a large long position would be able to draw a substantial sum from the settlement funds (or from the firm that cleared his transactions) if the settlement price were increased (Tr. 123-124, 349-356).

The settlement price on June 25 was 41.00 cents, halfway between 40.20 and 41.85 (Tr. 357). In the absence of the respondent's transactions, it would have been about 40.20 or 40.30 cents (see Comp. Ex. 5). Hence the respondent increased the settlement price by about 70 or 80 points. As a result, an additional \$ 7434 to \$ 8496 was available to the respondent from the settlement funds based on the 59 contracts that he held at the close of trading on June 24.
n24

n24. \$ 1.80 per point, multiplied by 59 contracts, equals \$ 106.20. Multiplying \$ 106.20 by 70 points equals \$ 7434, and by 80 points equals \$ 8496.

However, the respondent did not draw any money from the settlement fund on June 25 (Tr. 356). The respondent's attorney stated during oral argument, p. 95, that he had no need for such additional money since the surplus in his total account was \$ 260,529.89. The complainant does not contend that the respondent raised the closing price of the future to affect the settlement price (Tr. 353). In these circumstances, no inference is drawn

that the respondent intended to take advantage of the increased funds available from the settlement fund. n25

n25. Another reason why some large speculators might want to raise (or lower) the futures price artificially is to set off stop-loss orders, which can cause the price to rise (or fall) even more (see Shepherd. *Marketing Farm Products* (4th ed. 1962), pp. 169, 177). "(G)unning for stop-loss orders" has been referred to as one of the "main forms of manipulation" Irwin, "The Nature of Risk Assumption in the Trading on Organized Exchanges", in *Am. Econ. Rev.*, Vol. XXVII, No. 2 (June 1937), p. 269. However, no inference is drawn from the record in this case that the respondent was "gunning for stop-loss orders"

Considering all of the circumstances, the most likely motive for the respondent wanting to raise the closing price of November shell egg futures on June 25 the maximum amount permitted by the Exchange rules was to attract additional buying power, which hopefully would have resulted in a sustained price advance. However, it is not necessary to determine the respondent's precise motive. If he intentionally traded in a manner to distort the closing price, that is manipulation, see, *infra*, pp. 1223-58, 1264-91. However, consideration of whether the respondent had a motive for wanting to distort the closing price is one of the circumstances to be considered, together with all of the facts in the case, in determining the respondent's intent. See *United States v. Spaeth*, 152 F. Supp. 216, 221 (N.D. Ohio), affirmed, 254 F.2d 924 (C. A. 6), certiorari denied, 358 U.S. 831.

B. *The Respondent's Trading Activities*

On June 25, between the opening of trading and twelve noon, 23 November shell egg futures contracts were executed at prices ranging from 39.65 to 40.30 (Finding 12; Comp. Ex. 5). In addition, 19 other November shell egg futures contracts were executed within the same price range on June 25 as part of "spreading" transactions (Tr. 77). n26 The respondent had the same opportunity to buy those 42 contracts as the brokers who actually purchased them. Instead of purchasing those contracts at lower prices, the respondent waited until the last few seconds of the one-minute closing period. At that time, offers to sell eight contracts, scaled up in price from 40.20 to 41.30 cents per dozen, were posted on the board as follows:

n26. In the spreading transactions, the purchaser of the November future had to simultaneously sell an October future (Tr. 77-79). A broker who wanted just the November future could have immediately closed out the October future by an offsetting transaction in that future, at a cost of \$ 1.50 in commissions. The risk of price change would have been minimal on June 25 in view of the fact that the October future traded that day in a narrow price range (Comp. Ex. 20, p. 16). But even a loss of a few points on the October contracts would still have given the respondent his November contracts at a much lower price than he paid for them on June 25.

Number of Contracts	Cents Per Dozen
1	40.20
1	40.25
1	40.50
3	40.75
1	41.00
1	41.30

Within the last few seconds of trading, the respondent simultaneously "bought the board" and just as the bell rang closing the trading period, he shouted out a bid for one more contract at 41.85 (Tr. 90-92, 949). This was the maximum price that the respondent could bid under the rules of the Exchange (Tr. 85). It was 165 points (or \$ 297) higher than the cheapest contract the respondent had just purchased a few seconds earlier (at 40.20) and 55 points (or \$ 99) higher than the most expensive contract that the respondent had just purchased a few seconds earlier (at 41.30). It was 181 points (or \$ 325.80) higher than the average of the prices paid that day for the November contracts bought by persons other than the respondent. n27

n27. The average price paid for the other contracts was 40.04 cents (computed from Comp. Ex. 5), and 181 points at \$ 1.80 per point equals \$ 825.80.

By shouting out a bid to buy a single contract at the highest price permitted by the Exchange rules just as the bell rang, the respondent insured that 41.85 would be shown that day as the highest part of the closing price, and that the closing price would show that the market was trending upward during the closing period (Finding 6, *supra*), viz., "40.20-41.85." No one else had an opportunity to enter into a transaction or make an offering at a lower price, since trading ended with the bell except for the one-minute period in which the respondent's closing bid could be accepted (Tr. 48).

Since the respondent's bid of 41.85 was so much higher than the November future had been trading that day, the respondent was reasonably assured that his bid would be accepted. But even if the respondent's bid had not been accepted, the closing price would have shown the respondent's closing bid of 41.85 with an asterisk indicating that it was the bid price (see the footnotes at the bottom of any of the pages of Comp. Ex. 20, showing prices). This would have given the impression of an even stronger market because it would appear that the bid of 41.85 was not high enough to induce sellers to sell at that price.

By bidding for only one contract at 41.85, the respondent got that price shown as the top of the closing price at a cost to him of only one contract purchased at that price. The respondent could have bid for eight contracts at 41.85 instead of one and still be within the 75-contract limit established by the Commodity Exchange Commission. n28 The respondent had \$ 260,529.89 surplus in his trading account on June 25, so he could easily have paid the \$ 500 margin per contract on the additional seven contracts. n29

n28. The respondent had a long position of 59 contracts before he bought the board (Comp. Ex. 8). The eight cars purchased when he bought the board

increased his position to 67 contracts (before he transferred 3 to Mr. Hoekstra), leaving him 8 short of the 75-contract limit.

n29. If they had increased from 41.85 to 50.00 cents, as respondent testified he expected (Tr. 874, 940-941), it would have meant a profit of \$ 1467 per contract, or an additional profit of \$ 10,269 on seven more contracts at 41.85. If they had increased to 58 cents, which is the top price the respondent testified he expected (Tr. 943-944), the profit on seven additional contracts purchased at 41.85 would have been \$ 20,349 (1,615 points at \$ 1.80 per point equals \$ 2907; times 7 equals \$ 20,349).

The respondent testified that he bought the nine contracts on June 25 because he planned to be out of town for a few days and that he thought that the November shell egg futures price would go to 50 cents (Tr. 874-875), or 58 cents (Tr. 943-944) and, therefore, he thought the eggs were "worth the money" when he paid 41.85 (Tr. 701, 874-875; Resp. Ex. 4, p. 2). The respondent's explanation as to why he wanted just one more contract in addition to the eight he acquired when he bought the board, and why he bid the limit to get the last contract, was unconvincing. The respondent was questioned by the Referee as follows (Tr. 971-974):

Q. Mr. Henner, I have a couple of questions that I am not clear on at all.

Turning your mind back to June 25th, when you bought the board, I am not clear as to the reason you gave why you bought the one additional contract when you had a very substantial long position.

What is the importance of this one additional car to your position, long term position?

A. Well, actually the contracts that were bought on June 25th would have to be carried to December 26th which would have meant [taking] delivery. It would be reasonable to assume those nine contracts were bought for a short term profit, not a long term profit.

Q. Yes, that's what I wanted to get at because you had indicated your position in going into the market substantially in April was to have a long term position and that colored your entire attitude towards November futures?

A. That's correct.

Q. To get a long term position. Now, you had established that position in April substantially?

A. Yes.

Q. According to your records and the information here. Now, to establish a short term position as you have just indicated, you bought the board during the last minute of trading on June 25th. Now, we are now concerned with short trading positions. After you had bought the board, you then within a period of one minute changed your usual trading pattern and made an offer to buy, did you not, an additional car?

A. That is correct.

Q. And the offer that you made was 50 n30 points higher than the previous purchase you had made from the highest price on the board?

n30. Actually 55 points (Comp. Ex. 5).

A. Yes, sir.

Q. What impelled you to make this last transaction at substantially higher prices than any preceding trade during the day?

A. I wanted to buy another contract. There were no more sellers at any lower prices on the board trading. The sellers post their offers and buyers post their bids.

If you are going to buy the offerings, you buy them. If nobody wants to sell any more, according to the rules --

Q. You had another contract for your short term position?

A. That is correct.

Q. Is there any -- perhaps in my lack of understanding, it doesn't come through to me -- is there any magic in having 9 cars over 8, or 10 over 9?

Why 9 precisely?

A. I would say it is a combination of factors. One, at times traders are superstitious about numbers and positions. Two, I was at a point where I had to be careful, because 75 is the maximum number under the rules of the Exchange and the Commodity Exchange Authority, that a person can own. And when you get up over 65 contracts, you are constantly aware, you don't want to get over 75.

Q. At the time you made that short term trade of 9 cars, including the last one which you bought, was it your feeling that the market, immediately in terms of short term trading would go up?

A. Yes it was.

The respondent also testified in this respect as follows (Tr. 949-950):

Q. You bid the limit up at 41.85, right at the close, right at the closing bell, isn't that right?

A. Yes.

Q. Now, you told us that you had the opinion that the price of those eggs would go up to about 57 cents per dozen?

A. Right.

Q. Now, if you felt that, why did you wait until right at the bell and bid the limit up, rather than posting a bid earlier in the day at a substantially lower price?

A. There weren't any more sellers at that point. Nobody wanted to sell the eggs. There was only one person on the whole floor that was willing to sell the bid at 41.85.

Q. Are you telling us, sir, that you knew that somebody would take a bid at a lower price all day long, and that is --

A. No. We have a free market. There is no way of knowing what price people are willing to buy or sell.

Q. Why didn't you put up a bid at a lower price, sir, is all I am asking?

A. What would be the advantage of putting a bid up if nobody is willing to sell.

Q. Did you know nobody was willing to sell?

A. I don't trade that way.

Q. You never put a bid up on the board?

A. Rarely. Unless I am accumulating a position on a break. Usually, when I am short, I'll do that.

Earlier in the day there were obviously sellers willing to sell at much less than 41.85 inasmuch as 23 contracts, plus 19 spreading contracts (or a total of 42 November shell egg futures) were sold at prices ranging from 39.65 to 40.30 (Comp. Ex. 5; Tr. 77). Also, in the last few seconds of trading on June 25 there were brokers willing to sell eight contracts at prices of 40.20, 40.25, 40.50, 40.75, 41.00, and 41.30 (Comp. Ex. 5; Tr. 90-92). So there obviously were sellers available even up to the closing seconds of trading. The respondent had no way of knowing how many sellers would have been willing to sell to him at 41.85 because his bid for one contract at that price was made just as the bell rang and, under the Exchange rules, the bell ended the trading period and no one else was permitted to make any further offers or bids that day (Tr. 48, 90-93). If the respondent had wanted to stimulate more offers, he could have bought the board before the last few seconds of trading which undoubtedly would have stimulated additional offerings.

Mr. Irving Manaster, a member of the Exchange who traded for his own account since 1941 (Tr. 469), testified that he did not sell to the respondent at 41.85 because "there wasn't enough time. Nobody knew what was going on" (Tr. 486). When the respondent's counsel replied: "Mr. King sold at 41.85," Mr. Manaster stated: "He is faster than me. I can't think that fast." Mr. Manaster testified that "a dozen" people accumulated when the respondent bid 41.85 (Tr. 487).

Mr. Manaster testified that he did not know how much time elapsed between the respondent's bid of 41.85 and Mr. King's acceptance (Tr. 487). Upon further questioning, he said: "I would say there was ten or fifteen seconds" (Tr. 487). An Exchange employee who was recording egg transactions on the blackboard on June 25 stated in an interview with two investigators for the

Commodity Exchange Authority in July of 1968 that when the respondent bid 41.85, another "board marker posted this bid and it was immediately accepted by Marlowe King" (Comp. Ex. 16). He did not remember, however, when he testified 14 months later whether the bid was immediately accepted or not (Tr. 462-468). It is clear that the respondent's bid was accepted either immediately, or within a few seconds after it was made, and no further bids or offers could be made under the Exchange rules.

The respondent testified (Tr. 950) that he rarely put a bid on the board and preferred to accept the offerings of other persons. This makes his bid of 41.85 even more unusual considering his own prior trading conduct of generally not making bids.

If the respondent had stopped at buying the board, the closing price would have been 55 points lower than the price which was created by the respondent's last bid of 41.85. But the respondent was not content with eight contracts. In fact, the respondent would have us believe that he was so eager to have the ninth contract (which would raise his position to 68 contracts) that he bid 55 points higher than the highest price he had just paid (41.30) and 165 points higher than the lowest price he had just paid (40.20). At that moment, there is no basis for believing (and the respondent does not contend) that the respondent knew that he would transfer three contracts to Mr. Hoekstra a few minutes later. Presumably in order to preserve Mr. Hoekstra's good will, the respondent transferred to Mr. Hoekstra the three highest priced contracts, thereby reducing to six the respondent's purchases for the day, and making his total open position 65 contracts (Tr. 200, 279, 292-300, 445, 879, 951).

Nonetheless, the next morning, June 26, when the price opened at 40.50, down 135 points, the respondent made no effort to replace the three contracts that he had transferred to Mr. Hoekstra. In fact, on June 26, 46 November shell egg futures were sold at prices ranging from 40.10 to 40.60 (Comp. Ex. 20, p. 20) -- substantially below the respondent's final bid of 41.85. Yet the respondent did not buy a single contract at that cheaper price to replace the three contracts that he had transferred to Mr. Hoekstra.

If the respondent was really so anxious to buy nine November shell egg futures on June 25, instead of eight, that he was willing to pay 41.85 to be sure of getting the ninth contract, why did

he not replace, at a lower price on June 26, the three contracts that he transferred to Mr. Hoekstra? Although the respondent was not at the Exchange on June 26, he could have ascertained the prices and executed the transactions by telephone. Or, if that would not have been practical, he could have arranged with Mr. Hoekstra or another broker on the afternoon of June 25 to buy the three contracts on June 26, if the price was appropriate.

The respondent argues that "the fact Respondent was not present at the Exchange that day [June 26, the day after the transactions at issue] weighs heavily against any showing on Respondent's part of an intent, calculation or plan to manipulate the market in November" shell egg futures (Answer to the Complainant's Exceptions to the Referee's Report, p. 7). But the respondent's long position, acquired mostly during April, was being held with the hope of a long term capital gain and, therefore, it was to the respondent's advantage to stimulate more interest in November futures for the long term. His absence from the Exchange on June 26 is, therefore, irrelevant.

Moreover, when the respondent returned to the market on June 27, he bought two November contracts at 40.45 and sold the two contracts at 40.40, *i.e.*, the respondent was merely "scalping" on a daily transaction rather than increasing his position. This left the respondent's position at 65 contracts, still three contracts less than he would have had if he had not transferred the three contracts to Mr. Hoekstra. On June 27, a total of 38 contracts of November shell egg futures were sold at prices ranging from 40.25 to 40.65 and, yet again, the respondent made no effort to replace the three contracts that he transferred to Mr. Hoekstra. This further demonstrates that when the respondent bid 41.85 at the ringing of the bell on June 25, it was not because he was so eager to have nine contracts instead of eight (which would have given him a position of 68 contracts instead of 67). It was to establish the closing quotation to be circulated throughout the country for that date at 41.85. n31

n31. No inference should be drawn from the fact that the respondent transferred the three highest priced contracts (*i.e.*, 41.00, 41.30 and 41.85) to Mr. Hoekstra because the respondent undoubtedly had no idea of making this transfer at the time he traded in the manner at issue in this case (Tr. 280-281). But a strong inference is drawn from the fact that the respondent claims that he was so eager for one more contract on June 25 that he hid the limit up, and then after giving away three contracts, he did not replace any of the three at much lower prices on June 26 or June 27. Moreover, the transfer to Mr. Hoekstra was consistent with the respondent's purpose since it enabled him to raise the closing price to 41.85 without having to pay for the three highest-priced contracts (see, also, Tr. 290-291).

The respondent admits that the basic factors as to expected supply and demand conditions in November that influenced his thinking were in existence long before June 25 (Tr. 826-871, 939-940). There was no change in those basic factors during the latter part of June (Tr. 320, 1071). In fact, the commodity futures newsletter for June 28, relied on by the respondent (Resp. Ex. 13, p. 2; Tr. 849, 870; see also, Tr. 898-900), stated: "We envision upward price action from current levels and would purchase September and November contracts." Hence, the failure of the respondent to replace at lower prices on June 26 or June 27 the three contracts transferred to Mr. Hoekstra is a strong circumstance, to be considered along with all of the other circumstances, in determining the respondent's intent when he bought the board and bid 41.85 for one more contract on June 25.

On the preceding day before the transactions at issue, June 24, the respondent also bought four contracts of November shell egg futures at the close of trading which was reflected in the closing price for June 24 (Tr. 215, 329; Comp. Ex. 10; Comp. Ex. 20, p. 20). This is another circumstance to be considered along with all of the others in determining the respondent's intent on June 25 with respect to the closing price.

The respondent's activity on June 24, the day before the transactions at issue in this case, is also relevant from the standpoint of what he did not do on that date. Specifically, he only purchased four November shell egg futures on June 24 even though 52 were traded that day at prices ranging from a low of 39.20 to a high of 40.20, much below the 41.85 paid by the respondent the next day. If, as the respondent testified, he had formed the opinion in April that the November price would go to 50 cents, or to 58 cents, why did he suddenly decide that he needed one more contract at 41.85 on June 25 when he was not very eager to buy at lower prices the day before?

Mr. Charles E. Robinson, Director, Compliance Division, Commodity Exchange Authority, testified as an expert witness for the complainant. He is an expert in the field of economics and futures trading, and has been with the Commodity Exchange Authority for 28 years (Tr. 16-25).

Mr. Robinson concluded that the respondent intentionally distorted the price on June 25 (Tr. 214-226, 290, 348-349), either in an "attempt to influence the price of the November futures" or "just because he wanted to do it" (Tr. 314). Mr. Robinson explained

(Tr. 290) that the respondent "had a substantial long position" in November eggs, and his trading on June 25 may --

have been to influence the trends of prices, show a little bit of strength in this future. As I have testified, the closing prices are disseminated all through the country, so it's entirely possible that he did this to affect or attempt to affect the November prices. * * * The way he bought the board and bid 41.85, it seems to me that he must have attempted to affect the November prices.

Mr. Robinson explained that it was not because the respondent held 11 percent of the open November contracts that "enabled him to force the market"; rather it was his method of trading -- buying the board in the final seconds of trading and bidding for one additional contract just as the closing bell rang -- that "forced the market" (Tr. 348-349).

Mr. Robinson testified that the respondent, being an experienced speculator, would have bought December futures rather than pay 41.85 for November futures on June 25 (Tr. 222-223). n32 This is not to suggest that the respondent cannot make a reasonable or even a capricious judgment that he would prefer to buy November futures rather than any other future. Such a judgment, whether reasonable or capricious, would be legal. However, he cannot intentionally pay more than he has to for November futures for the purpose of raising the closing price, *infra*, pp. 1223-58. Mr. Robinson's testimony is directed at the point that the respondent paid more than he had to for November futures -- not that he cannot legally prefer to trade just in November futures on a particular date.

n32. The respondent had a long position of 28 December shell egg futures on June 25 (Comp. Exs. 8 and 9).

Mr. Arthur J. Parz, a member of the Chicago Mercantile Exchange and a floor broker for about 15 years, testified that he "thought Henner (*i.e.*, the respondent) was trying to bull the market on June 25th, hoping that November eggs would continue to go higher" (Tr. 636). Mr. Parz testified on cross examination (Tr. 648):

Q. Now, if a person is a speculator and he buys, why is he buying?

A. Because he thinks that the price of November eggs is going to go higher.

Q. Is that bulling the market, so to speak?

A. At this particular time, yes, it is.

Mr. Parz undoubtedly had in mind the nature of the respondent's purchasing activities at the "particular" time involved in this case. His expression "bull the market" is a familiar trade expression. As stated in one text:

If a short seller should be able and willing to make a series of large short sales progressively under the market, the price would decline unless there were enough "bulls" ready to absorb everything offered under the "true" supply and demand price. The reverse of this would apply to "long" purchases by speculators trying to "bull" the market in an effort to attract a public following or to generate a more favorable market in which to dispose of at a profit futures that were bought in during a preceding period when prices were lower. n33

n33. Thomsen, *Agricultural Prices* (1986), pp. 292-293. In this case, the respondent was able to raise the price 155 or 165 points by purchasing only nine contracts in view of the manner in which he executed the transactions.

Mr. John Hoekstra, who received the three cars transferred by the respondent, stated in an interview to Commodity Exchange Authority investigators that he felt that when the respondent bought the board and bid 41.85 on the close, he was "raiding the market" (Tr. 445-447; Comp. Ex. 15).

Mr. Leo Melamed, Chairman of the Board of Governors of the Exchange, in characterizing the respondent's conduct, stated that he "spirited" the market (Tr. 795).

Mr. L. D. Belveal, the respondent's expert witness, when asked if the respondent's purchase at 41.85 was a "bad purchase" replied: "I would say it was an atrocious purchase" (Tr. 1040). A trade witness expressed the view that the respondent would have to be "emotionally disturbed" or "plead insanity, or something, to carry on a transaction of this type" (Tr. 485). However, the respondent was an experienced trader, and his conduct cannot be passed off merely as an "atrocious" or "emotionally disturbed" purchase.

The respondent contends that if he had been attempting to manipulate the closing price, he could have bought the board before the one-minute closing period and then bid for one contract

at 41.85 at the end of the closing period. Presumably, his theory is that if he had done that, the only price shown for the closing period would have been the one price of 41.85 rather than a range of 40.20-41.85. However, if the respondent had bought the eight offerings posted on the board just before the beginning of the one-minute closing period, that would have increased the respondent's long position in November shell egg futures to 67 contracts, permitting him to buy only eight more within the 75-contract limit. If he had bought the board before the closing period, in all probability that would have stimulated additional offerings to be posted on the board. If eight additional contracts were offered on the board, the respondent could not have again bought the board and bid for one more contract at 41.85 because he would be at the 75-contract limit. He could not buy a contract at 41.85 as long as there were lower offerings on the board and, therefore, he had to be sure that he could buy the board and still be one contract short of the 75-contract limit. Even if fewer than eight additional offerings were stimulated by the respondent buying the board before the one-minute closing period, the respondent would have had to buy the board again before bidding 41.85, and if some of the offerings were

lower than 41.85, such lower prices would also have been included within the closing price range. Hence, the respondent executed the maneuver in the only practical way in order to raise the closing price to 41.85.

Based on all of the relevant circumstances in this case, the only reasonable inference that the Judicial Officer can draw from the facts is that the respondent intentionally traded in the manner that he did on June 25 in order to cause the closing price of November shell egg futures to be up the limit permitted by the Exchange rules. He intentionally paid more than he would have had to pay for November futures because he wanted to raise the closing price on the Exchange to 41.85. This conclusion is fortified by that portion of the evidence relating to the abnormal closing price discussed, *infra*, pp. 1208-19.

This conclusion is not contrary to any of the findings or conclusions of the Hearing Examiner. The Examiner made no finding that the respondent did not intentionally trade in a manner to cause the closing quotation to be artificially high. The Examiner stated (Report, pp. 18-19):

Respondent in an experienced professional trader. It is not reasonable to conclude that he undertook the controversial trades on June 25 with *any degree of confidence* that his action would result in the establishment of a *prevailing price in contravention of the law of supply and demand*.ⁿ³⁴ In fact, respondent did not attempt to make other trades of the same type; he did not even put in an appearance at the Exchange on the following day. Admittedly, respondent made bad trades on June 25. He lost money as a result. His trades, however, were within the 2-cent limit imposed by regulation on a single trading session. Respondent contends that at the time he thought the contracts were worth the prices paid. Evidence of higher prices paid by others before and after his trades lends credence to his statement. The evidence is insufficient, therefore, to support a conclusion that respondent by his trades attempted to manipulate the price of November shell eggs on June 25,

n34. As explained *supra*, pp. 1179-80, the more confident the respondent was that the basic forces of supply and demand that would develop for eggs warranted a higher price than he paid on June 25, the more reason he had for distorting the closing price on June 25.

Some argument was made by complainant that respondent's trades, made as they were at the final bell, were undertaken to and did cause an unrealistic price to be posted and circulated as the day's closing price. That the price of respondent's last trade was posted as the closing price is a fact. The effect of the action, however, even if undertaken for the purpose asserted, was completely ineffectual to result in or constitute a manipulation or attempted manipulation. The market on June 26 simply did not pay any attention to the closing price because the first trade was 135 points lower and within the range of pricing before respondent's trades on the previous day. The closing price on June 25 was the correct and actual closing price and clearly reflected respondent's action. It was not in the nature of dissemination of false or misleading information prohibited by the statute. [Emphasis supplied.]

Hence the conclusion in this decision that the respondent intentionally traded in a manner to cause the closing price to be up the limit permitted by the Exchange rules is not inconsistent with the Examiner's Findings of Fact based on his observation of the witnesses.

C. The November Shell Egg Futures Closing Price on June 25, 1968, Was Artificially High

I

The closing price of November shell egg futures on the Exchange on June 25, showing 41.85 cents per dozen as the highest price paid during the closing

period, was plainly caused by the respondent's action in buying the board in the last few seconds of trading and bidding 41.85 for one contract just as the closing bell rang. The respondent is an experienced trader who has been trading on the Exchange as a floor broker and for his own account since 1951 (Tr. 737-738). The respondent could have purchased November shell egg futures on June 25 cheaper than he did. Without the respondent's intentional action to raise the closing price, the closing price would have been about 40.20 or 40.30, or 155-165 points lower than 41.85. The inference is inescapable that the respondent paid more than he had to for November futures on June 25 for the purpose of causing the closing price to be at that high level. No further proof is needed to show that the closing price of November shell egg futures on June 25 was artificially high.

In other words, the fact that the closing price was raised to 41.85 by the respondent intentionally paying more than he had to in order to raise the price higher than it would otherwise have been is the best possible proof that the closing price was artificially high on June 25. A normal November shell egg futures price on June 25 would be based on the actions of buyers on the Exchange trying to buy as cheaply as they can and sellers trying to sell as high as they can (Tr. 51). Both the buyers and sellers would be using their informed judgment as to supply and demand conditions *for eggs* that would exist four or five months later. If such buyers try to buy as cheaply as they can and such sellers try to sell as high as they can, the free forces of supply and demand on *the Exchange* as reflected by the trading activities of such buyers and sellers will result in a normal price (see Tr. 1037-1038).

The respondent's expert economic witness, Mr. Belveal, recognized that the relevant supply and demand forces are the actual forces of supply and demand on the market represented by buying and selling orders. He testified (Tr. 1037):

The efficiency of a market is a price discovery mechanism, and has to do with the supply and demand forces that are represented in it. On the basis of buy and sell orders.

This is explained more fully in the texts written by the respondent's expert witness, as follows:

The fundamental elements in a market are only two: demand, as measured by buying orders; and supply, as measured by selling orders. There are those who hold that all selling orders do not represent supply, and all buying orders do not represent demand, since speculators are selling and buying with no intention of ultimately making or accepting delivery. The point, even if true, is not pertinent. As already noted, a selling order from a speculator is given the same weight in the market's pricing function as a selling order from a producer or a commercial handler who has -- or wants -- a warehouse full of the commodity in question. Likewise, a buying order placed by a speculator -- who has never taken delivery of any commodity, and never intends to do so -- carries the same weight in the market as a buying order from a flour miller who needs the physical product desperately. n35

n35. Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 93.

It is imperative that in considering the economic function and the operational methods of commodity markets, the examiner keep his viewpoint completely clear as concerns these basic inputs: The positive element in the market is the *order to buy*. It makes no difference who originates a buy order, or what his motives or justification may be. The buy order is definitely positive because the very act of buying reflects a *new demand* element which was not communicated in the market until the order arrived. Once known, a buy order urges prices upward.

The negative force in the market is the *order to sell*. Again, we need spend no time trying to qualitatively differentiate between the several classes of sellers. An order to sell represents *new supply* availability which was not in

the market until the order arrived. Once entered, a sell order urges prices downward. n36

n36. Belveal, *Commodity Speculation with Profits in Mind* (1967), pp. 93-94.

It should be seen that in selling "short" the speculator is contributing to *demonstrated supply*; in buying "long" he

is adding to *demonstrated demand*. Price stands as a measurement of these opposing forces, and the role of the market is to *discover* prices. n37

n37. *Id.* at 289.

Supply and demand stand eyeball-to-eyeball in the pits and rings, in the form of orders to buy and sell for future delivery. n38

n38. Belveal, *Charting Commodity Market Price Behavior* (1969), p. x. See, also, *Commodity Trading Manual, Board of Trade of the City of Chicago* (1966), p. 6 (edited by Mr. Belveal).

A noted economist similarly explains, as follows, that the forces of supply and demand on the Exchange consist of the buy and sell orders of the traders:

Each speculator has a different set of expectations, and a different demand-supply function for futures contracts. We may add them together to get the aggregate demand for (say) May futures in the previous December, as a function of the price of futures contracts; it is denoted D in Figure 5-5. If the futures price is above the price that speculators anticipate, they will supply futures contracts, and at lower futures prices they will demand contracts.

The supply of futures contracts is provided by hedgers -- of whom it is sufficient to notice those who buy the wheat from farmers and supply storage. If they do not wish to speculate, they can eliminate their risks by selling futures contracts at prices equal to at least the current price plus carrying costs. Their supply together with the speculators' demand (D) fix the present price of futures contracts. n39 A well read futures trading text states:

n39. Stigler, *The Theory of Price* (3d ed. 1966), pp. 100-101.

Every contract entered into by every trader, speculative or non-speculative, who sells or buys on a commodity exchange is an obligation, enforceable by law, to deliver or to accept and pay a definite price for a stated quantity of the commodity at a definite time. Each purchase or sale temporarily adds to the total demand or supply of the commodity.

The buyer or seller of a commodity future, at the instant he makes the purchase or sale, is an integral part of the marketing machinery of some commodity trade. He increases either the supply of or the demand for the commodity at the moment. n40

n40. Baer and Saxon, *Commodity Exchanges and Futures Trading* (1949), p. 59.

The fact that the buy and sell orders of the traders are the real forces of supply and demand that determine the price on the Exchange has been recognized by many other economists. n41 It is obvious that a normal price results on the Exchange only if the free forces of supply and demand on the Exchange -- *viz.*, the sellers and the buyers -- act rationally, *i.e.*, the buyers try to buy as

cheaply as they can and the sellers try to sell as high as they can. As stated by a noted economist:

n41 See, e.g., Brace, *The Value of Organized Speculation* (1913), pp. 70-71; Hubbard, *Cotton and the Cotton Market* (1928), p. 436; Blau, "Some Aspects of the Theory of Futures Trading", in *Review of Econ. Studies*, Vol. XII(1) No. 31, 1944-45, pp. 16-23.

A perfect market is one characterized by perfect knowledge on the part of the traders. Or stated differently, in a perfect market no buyer ever pays more than any seller will accept, and no seller accepts less than any buyer will pay. These conditions can be met only in a completely centralized market, which is approximated by a few exchanges such as the New York Stock Exchange. n42

n42. Stigler, *The Theory of Price* (3d ed. 1966), p. 87.

An agricultural economist states:

The necessary conditions for a perfect market are that all the buyers and sellers in it have perfect knowledge of demand, supply, and prices, and act rationally upon that knowledge. n43

n43. Shepherd, *Marketing Farm Products* (4th ed. 1962), p. 19.

Another agricultural economist refers to "free competition, among rational buyers and sellers fully informed and equally skilled in evaluating the supply-demand relationships." n44

n44. Bakken, *Theory of Markets and Marketing* (1953), p. 222.

Two futures trading texts state:

An efficient market is defined as one in which there are large numbers of equally informed actively competing people attempting to maximize profits. n45

n45. Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide* (1969), p. 114.

Organized future exchanges in a very few of our agricultural commodities are probably the leading examples today of purely competitive markets. Here the law of one price still truly prevails and buyers and sellers vie with one another in the keenest kind of competition. n46

n46. Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), p. 251.

The respondent's expert economic witness recognizes that buyers always seek the lowest price and sellers always seek the highest price. He states in one of his texts:

All markets, of which commodity exchanges represent perhaps the most sophisticated examples, can best be viewed as arenas in which functional compromises are worked out between the seekers of high prices (sellers) and seekers of low prices (buyers). n47

n47. Belveal, *Charting Commodity Market Price Behavior* (1969), p. 81.

* * *

Small price fluctuations above or below an identifiable equilibrium level can, at most, be viewed as an indication of *relative compromise*, as between buyers and sellers at the moment at which a given price is posted. Obviously,

sellers always want the *highest price*, and *buyers* always seek the *lowest price*. Every transaction, therefore, must represent a compromise of greater or lesser degree, on the part of one or both of the traders involved. When the price moves higher, it does so because the sellers are pressing their case successfully -- and the buyers are giving ground by "paying up" for the merchandise. When prices move lower, it is due to the relatively greater strength of the buyers, who are insisting on a better (lower) price -- and the sellers feel constrained to yield to some degree. n48

n48. *Id.* at 191-192.

In short, the very essence of a normal price on a futures market is a price arrived at by the free forces of supply and demand on the Exchange (*viz.*, the sellers and the buyers) acting rationally, *i.e.*, the buyers trying to buy as cheaply as they can and the sellers trying to sell as high as they can. n49

n49. Of course, if the forces of supply and demand on the Exchange are not "free", *e.g.*, in the case of a corner or squeeze, the price determined by buyers and sellers acting rationally would not produce a normal price, see, *infra*, pp. 1206-07.

Whenever a buyer on the Exchange intentionally pays more than he has to for the purpose of causing the quoted price to be higher than it would otherwise have been (or, conversely, a seller on the Exchange intentionally sells cheaper than necessary for the purpose of causing the quoted price to be less than it would otherwise have been), the resultant price is an artificial price not determined by the free forces of supply and demand on the Exchange.

Since the respondent intentionally paid more than he had to for November eggs for the purpose of causing the closing price to be up the limit on June 25, the respondent caused the closing price to be artificially high, not reflective of the uninspired or natural forces of supply and demand on the Exchange.

On June 25, the actual information as to the supply and demand conditions for eggs in November will not be known for four or five months. Expert witnesses could always be found to testify that, in their opinion, the November futures price on June 25 was too low and other expert witnesses could always be found to testify that, in their opinion, the price was too high. n50 That is what makes futures trading possible, and necessary. n51 The speculators who are long think that the supply and demand conditions that will exist four or five months later for eggs will cause the price to go higher, and the speculators who are short think that such supply and demand conditions will cause the price to go lower (see Tr. 782-784, 844, 851). n52 In these circumstances, the best "expert opinion" evidence as to what the normal November futures price should be on June 25 is the price established by the free forces of supply and demand on the Exchange, *i.e.*, by buyers trying to buy as cheaply as they can and sellers trying to sell as

high as they can. This is better proof than the testimony of experts who are trying to predict from the fragmented information available on June 25, first, what the actual supply and demand conditions will be four or five months later and, second, what price would result four or five months later if such conditions did prevail. n53

n50 For example, in *Great Western Food Distributors v. Brannan*, 201 F.2d 476 (C. A. 7), certiorari denied, 345 U.S. 997, in which the Court sustained the Judicial Officer's decision as to a manipulation of the egg futures market by means of a corner, five trade witnesses and one expert witness testified that the price was not manipulated but was the result of

competitive supply and demand conditions (see the brief filed by the Government in the *Great Western* case, pp. 96-103). See fn. 53, *infra*, p. 1200.

n51 The uncertainty as to the price that will prevail for a commodity during a future month is what makes futures trading an important part of the marketing system enabling merchants and processors, etc., to hedge their business activities by transferring the price risk to speculators. See, e.g., *Corn Products Refining Company v. Benson*, 232 F.2d 554, 656-558, 563 (C. A. 2); Baer and Woodruff, *Commodity Exchanges* (3rd ed.), pp. 83-121; *Report of the Federal Trade Commission on the Grain Trade* (1920), Vol. I, pp. 207, 210; *Report of the Federal Trade Commission on the Grain Trade* (1926), Vol. VII, pp. 33, 53-54; Lesar *Hedging, An Insurance Medium in Marketing Agricultural Commodities*, pp. 4-5; Merrill Lynch, Pierce, Fenner & Beane, *How to Hedge Commodities*, pp. 10, 14-16, 33; Howell *Analysis of Hedging and Other Operations in Grain Futures* (U.S.D.A. Technical Bulletin No. 971, August 1948), p. 3; Hoffman, *Future Trading upon Organized Commodity Markets in the United States* (1932), pp. 143, 377-418; Hoffman, *Hedging by Dealing in Grain Futures* (1925), pp. 33-93, 114, 123-124; Hoffman, *Future Trading and the Cash-Grain Markets* (U.S.D.A. Circular No. 201, January 1932), p. 22; Emery, *Speculation on the Stock and Produce Exchanges of the United States* (1896), pp. 159-170; Clark and Weld, *Marketing Agricultural Products* (1932), pp. 422-432; Holtzclaw, *The Principles of Marketing* (1935), pp. 566-571; Frederick, *Agricultural Markets* (1937), p. 54; Smith, *Organized Produce Markets* (1922), pp. 86, 91; Hardy, *Risk and Risk-Bearing*, pp. 71, 222, 226; Hardy & Lyon, "The Theory of Hedging" (*Journal of Political Economy*, 1923), pp. 276, 287.

n52. Short term speculators who are trading for a quick profit are not as much concerned as to what the actual supply and demand conditions are going to be in the delivery month as long term speculators. The short term speculators are more concerned with what other traders will, in the immediate future, think or forecast as to the supply and demand conditions that will ultimately prevail in the delivery month. Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), pp. 136-137.

n53. Here, again, a distinction must be made between a case involving the delivery month of the future and a case involving a future which does not mature for four or five months. A corner or squeeze ordinarily involves the delivery month and, in such cases, economists would be in a much better position to testify as to the price that should prevail in view of the current supply and demand conditions for the actual commodity. The futures price, in the delivery month, should be practically the same as the price of the actual commodity (*infra*, p. 1218). But in a case like the present case, the economists would have to predict the supply and demand conditions for eggs four or five months away.

As stated by the respondent's expert witness in his texts:

There is no measurement which can be effectively applied to the market and which will subjectively prove that a given price is right or wrong. The *right price* for anything is that price which represents the composite market level at which *buyers will buy it*, and *sellers will sell it*. Influences from the supply and demand sectors will alter prices upward or downward, and occasionally such a change in market value appraisal will be highly predictable. But the market is the *only authority* on price. n54

n54. Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 143.

The market is the only authority on price, and traders who forget this fact pay dearly for their lapses. n55

n55. Belveal, *Charting Commodity Market Price Behavior* (1968), p. 46.

The respondent testified that he thought that the November shell egg futures price would rise to 50 cents (Tr. 874, 941), or to 58 cents (Tr. 944), and he points out that the price rose to 42.90 on July 8 (Tr. 325). The price reached a high of 45.70 on September 11 (Comp. Ex. 20, p. 21). But that does not detract in any way from the fact that the price on June 25 was artificially high (see Tr. 326, 488, 733-736). The normal forces of supply and demand on the Exchange on June 25 -- reflected in the price arrived at by buyers trying to buy as cheaply as they could and sellers trying to sell as high as they could -- caused a November futures price of about 40.20 or 40.30 cents before the respondent intentionally raised the price (see Comp. Ex. 5).

The normal price for November shell egg futures on June 25 can only be determined by looking at the market on June 25 -- not later. A normal price on June 25 for November futures is

based on the forecast by traders (which may or may not be accurate) of the supply and demand conditions for eggs that will exist in November (Tr. 329-335). As recognized by many economists:

A futures market should generate prices, which are the best available estimates of prices expected to prevail during the respective delivery months. This is a simple concept, but it can be a best estimate only in terms of the fact that you have only a certain amount of current information available on which to form these prices. Therefore, the most that can be expected of a futures price quotation, even on the better-traded markets, is that it is unbiased and based on all possible information that is currently available. n56

n56. Ehrich, "The Role of Market Prices", in *Futures Trading in Livestock* (1970), p. 84.

From this it is clear that future prices reflect not only the actual conditions of supply and demand but also the opinions, beliefs, hopes, and fears of changes in supply and demand entertained by speculators. n57

n57. Converse and Huegy, *Elements of Marketing* (3d rev. ed. 1946), p. 250.

The fact that in March, the July future wheat contract is quoted at \$ 1.30 does not mean that wheat will sell at that price during July, but it means that supply and demand factors as known in March indicate a July price of \$ 1.30. n58

n58. *Id.* at p. 253.

Before analyzing one effective tool used in fundamental analysis, the basic market factors for any commodity should be discussed briefly. The supply-and-demand factors for any price model should include most of the major components which may affect equilibrium over a given period of time. The further into the future that the analyst forecasts, the higher is the expected error, because both total supply and demand are elastic in the long run. For this reason, the shorter the forecasting period, the greater is the probability that the short-run supply factor is relatively "set in concrete," or inelastic. n59

n59. Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide* (1969), p. 83.

In such a market, price, at any moment in time, reflects all information which is known, as well as those events *expected* to transpire in the foreseeable future. In the mind of the fundamentalist, therefore, an efficient market price approximates intrinsic value. n60

n60. *Id.* at 114.

Price must necessarily be viewed as the economic measurement of supply/demand balance; but for the market technician, we submit that its greatest significance is in the "domino effect" it triggers in the course of its fluctuations. The market pragmatist has little room in which to argue against the hypothesis that, while *supply/demand equilibrium* indicates *economic price/value*, the *trading interests* (buyers, sellers, and non-buyers and non-sellers) create the *effective market price*. Since reality never quite succeeds in attaining the "perfect market's perfect dissemination of total information", traders must always make their decisions from an uneven amalgam of hard facts and wispy conjecture. n61

n61. Belveal, *Charting Commodity Market Price Behavior* (1969), p. 233.

If speculators could buy and sell futures contracts in the exclusive frame of reference of changing supply/demand balances, the fundamentalists who understand price elasticity theory and projective techniques would "own the market" in short order. But it doesn't work this way. The market may not be human, but its users are -- and they render human judgments. Knowledge, ignorance, fear, sagacity, charity and greed are all part of the complex equation that is spelled out in the form of "market price." n62

n62. *Id.* at 234.

To begin with, futures prices *precede* cash prices by a considerable period of time. Trading in wheat futures for delivery in May, 1967 began in May, 1966. The price at which trading in this contract commenced represented the market's composite judgment of the available supplies likely to be on hand a year later, as compared with projected demand on the delivery date. Development of this "price" idea had to take into consideration such things as harvest expectations, projected usage, possible export requirements, and a host of lesser factors. As each day in the life of such a contract passes, new information comes to light which bears on all of these things. Each new bit of information refines and sharpens the traders' individual opinions -- which all make up the market's perspective about the price of wheat in May. n63

n63. Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 28.

There is no doubt that the futures markets are affected by unimportant events -- not so much in degree as in frequency

of change. If one examines the position of the individual traders, a rather logical explanation may be observed. The market at no time is starting from scratch in the process of price discovery. The principal ingredients of supply and demand bearing on the current price have been weighed during the months and even years of the immediate past during which they were developing, and a price has been arrived at as a result of this gradual experience. Therefore, any new development, such as showers in parts of a drouth area, does not represent merely its proportionate share of a complicated world situation which must be completely evaluated at the moment. It is an additional or marginal factor which under these circumstances can be expected to exert a more than proportionate influence. n64

n64. Thomsen, *Agricultural Prices* (1936), p. 282.

A line of argument that is commonly accepted is false because it involves supposing that in the absence of a futures market the price is "determined by supply and demand" in some automatic way, independently of human judgments, and that speculation in a futures market interferes with that "invisible hand."

In fact, the price of any storable commodity in a free and competitive market is determined only indirectly by physical supply and by demand for final use. Its direct determinants at any given time are human judgments, influenced by more or less accurate knowledge of supply and demand conditions. If prices formed initially on such judgments are wrong, the basic facts of supply and demand will presently change those judgments, but the new price that results still will be determined directly by human judgments, based on currently available information. Hence the price is subject to essentially the same influences whether a futures market exists or not. n65

n65. Working, "Futures Markets Under Renewed Attack" in *Food Research Institute Studies* (Vol. IV, No. 1, 1963), pp. 20-21.

It is therefore not accurate to say that future prices determine cash prices nor that cash prices determine future prices. Both are broadly determined by the same fundamental market information.

This statement will need to be qualified somewhat if it is not to be misleading. Fundamental market information

determines prices only through the opinions and actions of traders composing the market. If then this information is not accurately interpreted (and this is usually the case at least in some measure), the level of cash and future prices will be affected thereby. In other words, while future and cash prices are broadly determined by the same market information it should not be implied that their price level at any given time is exactly where it should be. n66

n66. Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), p. 259.

Since a normal futures price on any date is based on the forecast on that date by traders of future supply and demand conditions, it is unsound to say that the futures price on that date was improper or abnormal merely because the price that prevailed later was higher or lower.

The adequacy of the market's forecast on a particular crop can not properly be judged merely on the basis of what actually happened in the particular year because exceptional or disturbing factors of decisive importance may emerge between the time when the future trades in question are made and the dates of maturity of the options. n67

n67. *Report of the Federal Trade Commission on the Grain Trade* (1924), Vol. VI, p. 217.

The obvious shortcoming of this theory is that conditions change between the time of forecast and the time of fulfillment of the forecast. A perfect estimate may have been made in the month of May of probable prices in September; but since weather conditions cannot be foretold beyond the limits of a few days, it follows that this forecast must fail if growing conditions change. n68

n68. Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), pp. 437-438.

The term "futures" is rather unfortunate in its connotation that a future price level is being predicted. A futures price is better regarded as the present price of an article for future delivery, thereby emphasizing the function of reflecting known and knowable factors in present prices rather than peering into the unknown. Viewed in this light, price levels which are seen in retrospect not to have been warranted by subsequent events do not constitute "mistakes," nor evidence that speculation causes unnecessary price fluctuations. n69

n69. Gray, "Fundamental Price Behavior Characteristics in Commodity Futures", in *Futures Trading Seminar* (1966), Vol. III, p. 84.

Conceiving the "fluctuations" of futures prices to be mainly appropriate responses to valid changes in expectations produces a great change in thought regarding them, as compared with regarding the price movements as mainly lacking economic justification.

Further discussion of the evidence that futures prices are reliably anticipatory requires dealing with a problem of the meaning of "reliability" in this context. Custom has established the idea that reliability of uncertain expectations is to be tested by correspondence between the expectation and the event, but we need here to consider reliability of expectations in the sense of correspondence between the actual expectation and what ought to be expected in the light of available information. At times, in order to avoid confusion, I shall speak of the latter as *anticipatory reliability*. n70

n70. Working, "New Concepts Concerning Futures Markets and Prices", in *Journal of the American Economic Association* (June 1962), p. 447.

Futures prices tend to be highly reliable estimates of what should be expected on the basis of *contemporarily available information* concerning present and probable future demand and supply; price changes are mainly appropriate market responses to changes in information on supply and demand prospects. n71

n71. Labys and Granger, *Speculation, Hedging and Commodity Price Forecasts* (1970), p. 34.

Contrary to the assumptions of pure competition which underlie market exchange, traders do not have perfect knowledge of the market. As a result, they must search constantly for new information which will give them some indication of future changes in supply and demand. Yet, new information is unpredictable or emerges randomly. With this knowledge, Working establishes the final link for a model relating anticipations to price behavior. It is the random quality of new information and not changes in supply or demand which is responsible for the irregular behavior of futures prices. n72

n72. *Id.* at 113.

The respondent concedes that the cash (actual) egg prices broke about 18 cents from September to November because of supply and demand conditions that could not have been "reasonably anticipated or foreseen as far back as June 25" (Tr. 872). This emphasizes the impropriety of trying to justify the futures price on June 25 by citing prices that later prevailed in the future.

As shown, *supra*, pp. 1194-1200, even if a trader thinks that the futures price will subsequently rise to a much higher level, the price he creates by purchasing futures contracts is a normal price only if he acts rationally, *i.e.*, only if he buys as cheaply as he can.

When a trader intentionally raises (or lowers) a futures price to an abnormal level on a particular date several months before the delivery date of the future, if the mere fact that the futures price later moved even higher (or lower) than the price artificially caused by the trader on that particular date were regarded as proof that the price was not artificially high (or low) on the prior date, the opportunities for manipulation, without punishment, would be legion. A graph of futures prices generally looks like an ocean wave, rising and falling, sometimes trending upwards, sometimes downwards. On any particular date four or five months from the delivery date, it would be quite normal to expect the price on some subsequent dates to be higher than that price and on other subsequent dates to be lower than that price (see, *e.g.*, the charts in the Chicago Mercantile Exchange Yearbook, Comp. Ex. 20, pp. 10, 18, 94, 103 and

108). Hence a doctrine that would give validity to an artificially created price merely because the price later rose higher (or fell lower) than the level of the artificially created price would make it usually, or at least frequently, impossible to prove that any price four or five months from the delivery date was artificially high (or low).

As the November shell egg futures situation actually developed in November 1968, the November futures traded during November from a low of 37.50 cents to a high of 40.45 cents, *i.e.*, at no time did the futures price reach 41.85 cents during the month of November. In other words, the respondent's forecast was ultimately proven to be wrong. But that is, of course, totally irrelevant in this case. The normality, or abnormality, of the November shell egg futures price on June 25 must be judged by the supply and demand conditions on June 25 on the Exchange reflected in the price that would have been created on June 25 solely by buyers trying to buy as cheaply as possible and sellers trying to sell as high as possible.

At the conclusion of this section of the present decision, it is important to note that this case involves a future several months away from the delivery month. The expressions in this decision are to be regarded as relating only to such a situation!

Several months from the delivery month, the supply and demand conditions that will later prevail in the delivery month for the actual commodity are not known. In such a situation, the best proof of a normal futures price is the price arrived at by the free forces of supply and demand on the Exchange (the buyers and the sellers) acting rationally, *i.e.*, the buyers trying to buy as cheaply as they can and the sellers trying to sell as high as they can. The speculators in such transactions are trading on the basis of their opinions as to the supply and demand conditions that will later prevail for the actual commodity.

If the forces of supply and demand on the Exchange are not free, *e.g.*, because of a corner or some other technical condition that causes the traders to be concerned with the technical supply and demand conditions on the Exchange rather than with their best estimate of the supply and demand conditions that will later develop for the actual commodity, then their trading will not produce a normal price. In *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 478 (C. A. 7), certiorari denied, 345 U.S. 997, the Court refers to the "creation of an artificial demand" in the case of a corner, and an artificial demand will, of course, create an artificial price. n73

n73. Any type of artificial demand (or supply) will create an artificial price. For example, an artificial demand created by a series of rapid and successive bids made on an ascending scale (or offers made on a descending scale) with the intent and for the purpose of raising (or lowering) the price would create an artificial price.

During the delivery month, in the absence of a corner or some other technical condition, the supply and demand conditions for the actual commodity should control the traders' actions (see, *infra*, pp. 1218-19), and, therefore, the price that would be caused by the free forces of supply and demand for the actual commodity would, ordinarily, at least, be the best proof of what the normal price on the Exchange should be.

In *In re Volkart Brothers, Inc., et al.*, 20 Agriculture Decisions 306, 334, reversed, *Volkart Brothers v. Freeman*, 311 F.2d 52 (C. A. 5), the Judicial Officer said:

The intimation by intervenor New York Cotton Exchange that supply and demand for *futures contracts* as distinguished from actual cotton should be considered legitimate price-making factors for futures prices is patently lacking in merit. Such a position would justify as valid corners, "squeezes" and all kinds of manipulation up and down.

That statement was made with respect to (1) the delivery month of the future and (2) an alleged corner. n74 The present decision is not intended to be inconsistent with that expression made in a totally different context. The views set forth in this section as to a normal price apply only when the traders on the Exchange are acting normally and are not trying to distort prices in any manner.

n74. Words of an opinion "are to be read in the light of the facts of the case under discussion. * * * General expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 133.

II

Although no further proof is needed that the respondent caused the closing price of the November shell egg future to be artificially high on June 25, other convincing proof is present in this case.

Under normal conditions, there is a discernible price relationship, several months prior to the delivery months, between the October, November and December shell egg futures (see Findings 22-23, *supra*, p. 1172). Mr. Charles E. Robinson, Director, Compliance Division, Commodity Exchange Authority, an expert in the field of economics and futures trading (Tr. 16-25), testified (Tr. 30):

The futures prices reflects the current expectancy of traders in the market as to the value of the commodity during the delivery months, which will be some months hence.

So that people are looking now at what they expect to be the situation, supply and demand situation, four or five months hence. Absence some unusual occurrence, I can't think offhand -- you wouldn't find any market changes within seconds or minutes in these relationships. These people, I guess, change over periods of time so that these relationships tend to -- well, there will be some individuals in them, they tend to be steady, They will widen out or they will close in, but from one date to the next, you don't expect to see any change in relationship to or among succeeding futures in the absence of some remarkable bit of news. (See, also, Tr. 364, 376-379, 813-814).

In this case, the respondent's trading caused the spread relationships between the October and November futures and between the November and December futures to be completely out

of line on June 25. This is apparent at a glance from the chart on page 1173, *supra*. The November shell egg futures price is shown as the zero line and the December and October prices are shown relative to the November futures price (Tr. 206). It is obvious that on June 25 the normal spread relationship between the October and November futures prices and between the November and December futures prices was drastically altered. The drastic change was caused solely by the respondent's activity in purchasing the board and bidding for the additional contract at 41.85 (Tr. 213-226, 259, 318, 324, 326, 341-346, 374-382, 617-623, 657, 661).

The October shell egg future opened on June 25 at 37.85 and varied only slightly that day, closing at 38.10-25; it opened on June 26 at about the same price, 38.20. The December shell egg future opened on June 25 at 39.50, closed at 39.50 (bid), and opened on June 26 at 39.50, or no change. The November shell egg future, on the other hand, rose the full two cents permitted by the Exchange rules on June 25, from 39.85 to 41.85, and then opened 135 points lower on June 26 at 40.50 (Comp. Ex. 20, pp. 16, 20, 23).

Mr. Charles E. Robinson, Director, Compliance Division, Commodity Exchange Authority, concluded that the price caused by the respondent on June 25 was artificial and manipulated in view of the abrupt change in price and the price

relationships on June 25 between the October, November, and December price spreads (Tr. 213-226, 259, 318, 324, 341-346, 374-382).

It was significant to Mr. Robinson that the abrupt change in price was unsustainable the following day, and that this situation occurred about four or five months before the delivery months (Tr. 214, 225-226, 324). The velocity of the price change on June 25 was also significant to Mr. Robinson (Tr. 259, 346, 374-375).

Mr. Robinson testified (Tr. 214-215):

I reached by conclusion that the price was [a] manipulated price by an abrupt change in price and price relationships on June 25th, which was an unsustainable change. * * * [At] the close of trading on June 25th, there was a very drastic change in the relationship among the futures in the November, December, and October futures * * * [and] the next day a large part of this abrupt change was erased. Now, we know from Exhibit No. 5, that this abrupt change happened in a matter of seconds, so we have in a situation such

as here some 4 or 5 months before the delivery months, [an] abrupt change in the price, an abrupt change in price relationship, and unsustainable. This happens in a few seconds. These are indicating a price manipulation. We have by that the intent to cause by an individual like Mr. Henner, who bought a Board and bid the limit up at the last second of trade on June 25th, that it is obviously a manipulation.

* * * Mr. Henner had * * * long positions in November and December futures. These positions and in relation to the open interest or open contracts at that time was substantial. He bought at the close of trading where the market price or the price [at] which he bought would be disseminated all through the country.

You might also note from Exhibit 10, that on the previous day, he bought [at] 39.75 and 40 cents. This was on the close on the previous day. He bought [at] 39.75, three of them, and one at 40 cents, the prices the previous day.

So, on two days running, he made purchases on a [close] of trading at the time when the prices would receive the widest possible dissemination throughout the country so that if you just look at Exhibit 5, and if Mr. Henner hadn't bought the Board, what happened is shown in Exhibit 11, the drastic, abrupt change in the price relationships would not have come about. So that all things together, I see no other explanation of what happened other than what I have just given you.

Mr. Robinson pointed out that "In markets such as we have here, you will have fluctuations between futures from day to day, but you don't have abnormal fluctuation in price relationships which is completely erased, such as you have on June 25. This is a very unusual situation" (Tr. 341-342).

The chart which appears on page 1173, *supra*, prepared under Mr. Robinson's direction (Tr. 206), shows the October-November and November-December spreads only for the months of June and July 1968. But Mr. Robinson also examined the October, November, and December price spreads through October of 1968, and he examined the similar spreads for the months of June and July in 1966 and 1967. He found no similar price action such as occurred on June 25, 1968 (Tr. 374-375).

Mr. Robinson could recall of no other situation that had ever occurred such as in this case where the particular shell egg future advanced during one day to the price limit with no substantial advance in the other shell egg futures, and the price advance occurring approximately four to six months prior to the delivery month, with the change in the spread erased on the next business day (Tr. 375). Mr. Robinson testified (Tr. 376-379):

Q. I'm not talking about the situation where you are in the delivery month in a future. I understand that there can be violent price changes in a delivery month. But I'm talking about the situation such as we have here, where we are looking at the various prices on June 25 of the November, October, September and December futures. You understand that, sir?

A. Yes, the price -- there is a price relationship. It changes over periods of time, but at any given time there's a relationship.

I mentioned there is a spread board on the exchange. I think I also testified that on June 25 there were 19 contracts of November eggs executed at a price difference. I believe it was 200 points over the October future. This is the type of trade which helps to maintain these spread differences, and while they change, they tend to change gradually.

Q. Now, Mr. Robinson, in laymen's terms, why should there be some price relationship between these futures that I mentioned on this particular day; that is, June 25? Just tell us in ordinary terms why there should be some relationship there?

A. Well, the people who are trading in the market are trying to figure out what's going to happen some months hence.

As news is assimilated in the market, it affects their thinking. But absent some startling news, it affects their thinking over a period of time. So these relationships change from day to day, but they don't change 200 points in one day, or 150 points in one day. You have to have something unusual, something out of the ordinary in order to have a sharp change in people's

thinking, if that's what is causing the change in relationships.

Q. In other words, Mr. Robinson, the eggs which you buy on December future are to be delivered in December; is that correct?

A. That is correct.

Q. Eggs which you buy on the November future are to be delivered in November?

A. That is correct.

Q. And so on through the other futures, namely October, September and August; is that correct?

A. Right.

Q. Now, you are saying, sir, that because of the closeness in time in which the eggs are to be delivered, there should be some price relationship?

A. Yes, because people see what they expect to happen between now and October, November and December. And when their idea as to what -- if some change in November comes about, it will also affect their ideas of October and December. So that basic conditions which affect their ideas about one future tend to also affect their ideas about other futures. Not to the same extent in all types, but it does when you are well ahead of the delivery month.

Q. And would it be your opinion when you are well ahead of the delivery month, that while there may be some different considerations as to why a trader or traders would consider one future more valuable than another future, that there will be no violent changes in the price relationships of the various futures unless something startling happens such as news about a shortage or news about an unusual anticipated consumption of the commodity; is that correct?

A. I would not expect a violent change absent something unusual, some unusual news.

By violent change, I mean a change such as we have here and when you have a change which is unsustainable,

there's no logical explanation for that other than what we have in this case, a manipulation.

The respondent's economic expert, Mr. Belveal, admitted that on June 25, 1968, "there was a distortion in the price of November 1968 futures" and that the distortion was caused "partly" by the respondent's purchases and partly by the "lack of sellers" (Tr. 1063). Mr. Belveal admitted that there was no news of any kind on June 25 (except for the respondent's activities) to account for the November futures price increasing drastically with respect to the December and October futures prices. Specifically, he testified (Tr. 1071):

Q. Was there any news given about that time which could possibly account for that drastic change?

A. There certainly was. And without intending to be facetious, it was the only kind of news the market will listen to; namely, the news was that somebody wanted to buy the board and bid 41.85 for a bunch of contracts. This is the only communications the market understands.

Q. What you are saying is that the reason for the change that you have mentioned is the fact that this gentleman bid the price up. Isn't that what you are saying?

A. I know of no other basis to approach it on.

Q. Can you think of any change that occurred along about this time and the basic supply and demand factors that would have accounted for the change in price in question?

A. No, because the case for price movement had preexisted the 25th of June for a good long time in terms of its fundamentals. * * *

Mr. Charles E. Robinson, Director, Compliance Division, Commodity Exchange Authority, also testified that there was no market information on June 25 that would justify the change in price that occurred (Tr. 320).

The respondent argues in his brief, pp. 70-71, that:

It is equally untrue, contrary to the views of Mr. Robinson (rec. 379), that substantial market price fluctuation must be attributable in each instance to unusual news. It is apparent

that a re-appraisal of conflicting interpretations of existing information and data that cannot or reasonably should not be ignored is truly at the heart of professional trading and speculation.

Although a change in market price generally results from additional market information available to traders, n75 at times there is no news to explain a change. n76 However, Mr. Robinson was not referring merely to a price fluctuation in the November future in the absence of unusual news -- he was referring also to a substantial change in the relationship between the October, November, and December futures in the absence of any news to account for such change (Tr. 376-379).

n75. See Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 28 (quoted *supra*, p. 68); Thomsen, *Agricultural Prices* (1936), p. 282 (quoted *supra*, p. 68); Working, "Tests of a Theory Concerning Floor Trading on Commodity Exchanges", in *Food Research Institute Studies* (Supp. to Vol. VII, 1967), p. 14; Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide* (1969), p. 115.

n76. Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), pp. 337-338.

Moreover, in this case there was admittedly no re-appraisal of existing information on June 25. The respondent admits that he held the opinion "since April" of 1968 that the November future would rise to 50 cents (Tr. 941). Since the respondent was the only person who bid the price up on June 25, the price rise on June 25 was admittedly not based on any re-appraisal of existing information.

The analysis of the chart on page 1173, *supra*, relating to the October-November and November-December price spreads by the respondent's expert witness, Mr. Belveal, is obfuscated by his continuous references (Tr. 1041-1049) to the relationship between spreads of a relatively non-perishable, stored commodity, such as wheat, where you would normally expect each future to be higher than the prior one "based on the carrying charge theory" (Tr. 1043). Mr. Belveal admitted that the carrying charge theory has no relevancy to future prices in eggs, where the supply is continuous and storage is not a significant factor (Tr. 1042, 1044-1045).

When Mr. Belveal did confine his remarks to the question of a perishable commodity, he expressed the view (Tr. 1045) that the --

spread relationships in a perishable commodity, a non-storable commodity to all extents and purposes, are based on

what the trade thinks the various contracts are worth over the time continuum over which you are plotting these things. And to say that it is only proper for one futures price to follow another futures price up or down, to say that only convergence is reasonable behavior on the part of the two futures prices, or with respect to cash prices and any futures price, to say that any divergent behavior is indicative of wrongdoing on the part of somebody in the marketplace while it may be, the case is so tenuous as concerned a non-storable product in a thinly traded, not very liquid market, that I can't imagine how anyone who knows anything about markets could conceivably endorse it.

However, Mr. Belveal misses the point. The chart is evidence of an abnormal price on June 25 because of the suddenness or velocity of the change in the spreads on June 25, which was eliminated the next day, the extent of the change (about 150 points) the fact that this occurred four or five months from the delivery months in the absence of any significant news on or about June 25 of expected economic conditions that would account for such a change, and the facts that are known as to the respondent's activities on June 25 (Tr. 30, 213-226, 259, 318, 324, 341-346, 364-365, 374-382, 617, 620, 657, 661).

Mr. Belveal was, of course, correct when he said that he could not determine by looking at a chart alone whether there had been price manipulation (Tr. 1025-1033). Each chart must be considered in the light of all the relevant circumstances in the case.

Mr. Irving Manaster, a member of the Exchange since 1941, who traded in shell egg futures in June 1968, testified that he did not believe that the market warranted the respondent's bid of 41.85 and that his bid threw the spreads between November and other egg futures "completely out of line" (Tr. 471-472, 1078). Mr. Manaster testified that the price of 41.85 was "all out of proportion" (Tr. 487).

Mr. Raymond L. Elster, Jr., a member of the Exchange and a floor broker for 15 years, testified that the market for November futures closed out of line on June 25, as far as the spreads between other futures were concerned, and that he bought at 40.50 on June 26 because the market was back in line (Tr. 609-619). Mr. Elster did not testify that the price of 41.85 was out of line as far as the potential was that eggs ultimately might reach in November (Tr. 616-623) -- only that 41.85 was out of line with

the other futures on June 25 (Tr. 609-619). However, as shown *supra*, pp. 1200-05, it is not important for the purpose of determining the normal price on June 25 to consider what price might later develop closer to the delivery month.

Mr. Arthur J. Parz, a member of the Exchange and a floor broker for 15 years, testified that for the November future during the month of June to go up 150 points more than the October price is "out of proportion completely" (Tr. 661). Mr. Parz admitted on cross-examination that he did not know whether the "price of 41.85 was or was not realistic to the actual market conditions relative to November eggs at the time they were to be delivered in November" (Tr. 661), but that does not detract from his view that on June 25 the respondent put the November future out of line with the other futures (Tr. 657-665).

In other words, neither Mr. Parz nor Mr. Elster knew on June 25 whether the supply and demand conditions that would ultimately develop in November would justify a price in November as high as 41.85, or higher, but both witnesses knew that the respondent caused the spreads to be completely out of proportion on June 25, which is a recognized method of determining whether the price was abnormal on June 25.

The abnormality of the October-November and November-December price spreads is, considering all of the facts in the case, clear evidence that the closing price of November shell egg futures was artificially high, or manipulated, on June 25. A squeeze or corner is one of the methods of manipulating a futures market, *infra*, pp. 1223-33, and it has been recognized that "the effect of the squeeze or corner upon prices" should be looked for "in spreads between current-delivery and later-maturing options" n77 and, also, that the existence of an abnormal price spread "affords a test of the existence of a corner." n78

n77. *Report of the Federal Trade Commission on the Grain Trade* (1926), Vol. VII, p. 248.

n78. *Id.* at 245; see, also *id.* at 77.

In a situation involving a corner or a squeeze occurring at the end of the wheat season, a recognized futures trading authority (see Tr. 1019) stated that: "Because the culmination of the squeeze occurred when the price tendency of wheat in other markets and in other Chicago futures was downward, the squeeze

did not manifest itself in the rising prices usual in such instances; its price effects are clearly discernible only in price spreads." n79

n79. Working, "Price Relations Between July and September Wheat Futures at Chicago Since 1885" (in *Wheat Studies of the Food Research Institute*, Stanford University, Vol. IX, No. 6, March 1933, p. 211); see, also, Working, "Price Relations Between May and New-Crop Wheat Futures in Chicago Since 1885" (in *Wheat Studies of the Food Research Institute*, Stanford University, Vol. X, No. 5, February 1934, p. 184).

In the case of *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 482-483 (C. A. 7), certiorari denied, 345 U.S. 997, the Court upheld the finding of a manipulated price largely on the basis of the abnormal spread in 1947 between the price of December and January egg futures. There is, however, a vital distinction between the factual situation involved in the *Great Western* case and the present facts. The Court said in the *Great Western* case that "before we can conclude that the 1947 spread was abnormal, it must be established that the 1932-1948 average was 'normal'" (201 F.2d at 482). However, we do not have in this case the same type of problem, in this respect, as was involved in the *Great Western* case.

In the *Great Western* case, the Government relied, *inter alia*, on the fact that the average December-January spread at the close of trading in the December future during the years 1932-1948 (excluding 1944-1945) was 1.85 cents per

dozen, and in December 1947 -- at issue in the case -- the spread was 5.94 cents per dozen (201 F.2d at 482). But the petitioners in the *Great Western* case contended, *inter alia*, that the average spread from 1944 through 1948 was approximately 3.6 cents per dozen as compared to 5.94 cents per dozen in December 1947, and that during the years 1944 and 1945, the spread was in excess of six cents (201 F.2d at 482-483). In view of the conflicting contentions based on a conflict in the testimony of expert witnesses as to the appropriate average to be compared with 1947, it was of course, necessary for the Court to determine that the average relied on by the Government was the normal or appropriate average with which to compare the 1947 spread.

In the case at bar, however, the complainant is not relying on the average spread for any years. In fact, there is no contention here that the October-November or November-December spreads should not exceed a certain amount of money, *e.g.*, two, three, or four cents per dozen. The difference in economic theory in the present case from that in the *Great Western* case is due primarily

to the marked change in the pattern of egg production since 1947. n80

n80. "The seasonal variation in egg prices has been decreasing * * * because the seasonal variation in egg production has been decreasing. * * * In 1948, egg production in the peak month of April was * * * about twice as great as it was in the low month of November. * * * By 1956, it was only 33 percent greater." Shepherd, *Marketing Farm Products* (4th ed. 1962, p. 422). By 1968, production in the peak month of March was only 13 percent greater than the low month of September (computed from Comp. Ex. 20, p. 41). The change in the pattern of egg production prompted the Commodity Exchange Commission in 1969 to revise the speculative limits on shell egg futures, increasing the 75-contract limit applicable to November futures that had been in effect on June 25, 1968, to 150 contracts. 34 F.R. 6777. See the explanation as to the changed economic conditions in the Notice of Proposed Rule Making, 34 F.R. 624. Also, since the *Great Western* case involved the delivery month and the present case involves a future four or five months from the delivery month, the economic situations are distinguishable.

The evidence in the present case shows, clearly, that under present conditions of egg production, four or five months from the delivery month, there is a discernible price relationship between the spreads which does not change drastically by 150 points on a single day in the absence of economic news affecting one of the futures, *supra*, pp. 1208-14. Hence the drastic change in the spreads on June 25 is, in the light of all the facts, strong proof of manipulation. The fact that the spreads were back in line the next day after the respondent's purchases is further evidence that the respondent created an abnormal closing price on June 25, *supra*, pp. 1209-13. n81

n81. For the reasons just given, *supra*, pp. 1217-18, the complainant's evidence of price manipulation is not weakened by the fact that Mr. Robinson had made no study to determine "the way in which historically December eggs moved relative to November eggs" (Tr. 339) or to determine which month historically ends up higher than the others (Tr. 308). The important "historical" fact is that there is normally a discernible relationship between the futures which is not distorted by 150 points on one day (and back to normal the next day) four or five months from the delivery month in the absence of any economic news to account for the sudden change.

In the *Great Western* case, *supra*, the Government analyzed the December egg futures price (at that time the December future was a refrigerator egg contract -- but in 1968 the November future was a fresh egg contract) with the supply and demand conditions for actual refrigerator eggs in December. This is because the manipulation occurred during the delivery month (December) when the cash and

futures prices are almost identical inasmuch as a person can sell a future and promptly deliver the cash commodity (Tr. 379-382 n82). Close to, or in, the delivery month, the supply and demand conditions for cash (actual) eggs would (in the absence of manipulation) have the same effect on the traders on the Exchange as on the dealers in cash eggs (Tr. 27,

379-380, 1049). Hence evidence as to the supply and demand conditions for actual refrigerator eggs was relevant in the *Great Western* case. n83

n82. See, also, Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 28. Slight differences between the futures price and the cash price during the delivery month result from such factors as differences in delivery terms, grade differences, and geographical location. Ehrich, "The Role of Market Prices," in *Futures in Livestock* (1970), p. 85.

n83. The Court held that the Government's evidence, in this respect, was insufficient (201 F.2d at 482), but the Court held that other evidence demonstrated price abnormality.

In the present case, however, it is not appropriate to consider the relationship between the cash egg prices (*i.e.*, actual egg prices) and the November shell egg futures prices because where the futures are four or five months prior to the maturing month, the relationship between the cash prices and the futures prices is not significant (Tr. 26). The November futures price, on June 25, reflects the traders' opinion as to what the supply and demand conditions for cash (actual) eggs will be four or five months later (Tr. 329-335).

Albeit irrelevant, the supply and demand conditions for large cash eggs in Chicago, which is the size deliverable at par on the futures contracts (Comp. Ex. 20, p. 5), resulted in a steady price from June 21 through June 28 of 30 cents per dozen (Comp. Ex. 20, p. 31). Hence even if it were relevant, the supply and demand conditions for actual eggs in June would afford no basis for explaining the sudden rise in the futures price on June 25.

As explained *supra*, pp. 1195-1200, the relevant supply and demand conditions for a future several months away from the delivery month are the supply and demand on the Exchange (*i.e.*, buyers and sellers). When the buyers try to buy as cheaply as they can and the sellers try to sell as high as they can, this produces a normal price on the Exchange based on the traders' judgment as to what the supply and demand conditions for eggs will be in the delivery month.

III

An additional circumstance indicating that the closing price of November futures was abnormal on June 25 is that the price range between the highest and lowest figure in the closing price was 165 points. The closing price was 40.20-41.85 solely because of the respondent's action during the one-minute closing period. Usually, the price change in shell egg futures during the closing period does not exceed 20 points, and very rarely does it exceed 40 points (see Finding 19, *supra*, pp. 1169-70). n84 This is another way of saying that traders do not usually bid the price up (or

lower it) more than 20 points during the closing period, and very rarely do they bid the price up more than 40 points during the closing period.

n84. The figures in Finding 19 are computed from Comp. Ex. 20, pp. 11-25.

During the entire life of trading in September, October, November and December shell egg futures in 1968, 786 closing prices were reported. The price

range of the closing prices exceeded 40 points on only five of the 786 closing prices, and those price ranges were one at 45 points; one at 50 points; one at 55 points; one at 90 points, and one at 165 points. The 165-point range was the one involved in this case. This is a further circumstance, when viewed in the light of the entire factual situation, showing the abnormality of the closing price caused by the respondent on June 25.

This also demonstrates how unusual it was for the respondent to wait until the last few seconds of trading and then buy the board when the highest-priced offer was 110 points more than the lowest-priced offer. To then jump the price another 55 points for one additional contract demonstrates clearly that the respondent was intentionally raising the closing price the maximum amount permitted by the Exchange rules. If it had not been for his intent to raise the price, he would have bought one or more contracts at 40.20 or 40.30 early enough to stimulate additional offerings at, or about, those prices.

Considering the facts that the respondent intentionally traded in a manner to cause the closing November shell egg futures price, to be 41.85 on June 25, and the facts as to the drastic distortion of the October-November and November-December price spreads on June 25 without any economic news to account for the distortion, and the unusual 165-point range in the closing price, it is concluded that the closing November shell egg futures price on June 25 was an artificial or distorted price not caused by the normal forces of supply and demand on the Exchange.

D. Summary Of Pivotal Facts And Conclusions As To The Purpose And Effect Of The Respondent's Trading Activities

In determining inferences to be drawn from facts, each fact is not be considered in isolation, but the entirety or totality of the factual situation must be considered. *United States v. Patten*, 226 U.S. 525, 544; *American Tobacco Co. v. United States*, 147 F.2d 93, 106-107 (C. A. 6), affirmed, 328 U.S. 781; *Carlson v. United States*, 187 F.2d 366, 371-372 (C. A. 10), certiorari denied, 341

U.S. 940; *Bond Crown & Cork Co. v. Federal Trade Commission*, 176 F.2d 974, 979 (C. A. 4); *United States v. Armour & Co.*, 137 F.2d 269, 270 (C. A. 10).

In this case, the following are the principal items to be considered as a whole:

-- The respondent had a long position of 59 contracts in November shell egg futures at the close of trading on June 24 and would profit by a sustained price advance;

-- The respondent bought only four November futures on June 24 when the prices were much lower than 41.85; and the four contracts were bought at the close of trading which was reflected in the June 24 closing price;

-- The closing price is the most significant price followed by futures traders;

-- The respondent waited until the last few seconds of trading on June 25 to buy nine November futures instead of buying some of the 42 contracts sold earlier in the day between 39.65 and 40.30;

-- The respondent bought the board in the last few seconds of trading consisting of eight contracts priced from 40.20 to 41.30 and then bid the limit up, 41.85, for one more contract just as the final bell ended trading for the day;

-- The price of 41.85 was 165 points higher than the respondent had just paid for the cheapest contract on the board (40.20) and 55 points higher than the most expensive contract that the respondent had just purchased (41.30);

-- The respondent did not ordinarily place bids for futures contracts;

-- The respondent claims he bought the board and bid the limit up because he thought the November futures would go to 50 cents, or higher, but when he transferred the three highest priced contracts to Mr. Hoekstra after the close of trading on June 25, he did not replace them on June 26 or 27 at much lower prices; and he bid for only one contract at 41.85 when the trading limits would have permitted him to bid for seven more;

-- The October and December futures prices did not advance significantly on June 25;

-- The spreads between the prices of October and November futures and between November and December futures were drastically out of line (by about 150 points) on June 25; they were back in line the next day;

-- In the absence of significant news affecting one particular future, the relationship between October, November, and December futures does not normally change substantially on a day several months before the delivery months;

-- There was no significant news on or about June 25 as to expected supply and demand conditions for eggs in October, November or December that had any effect on the futures prices on June 25;

-- The November future opened on June 26 at 40.50, down 135 points from the respondent's bid the prior day;

-- The closing price for shell egg futures is normally either a single price, or if there is a range, the range is usually small (not over 20 points). On June 25 the range was 165 points, much higher than on any other trading day in 1968.

The respondent testified that he did not intend to manipulate the November shell egg futures price and that his trading on June 25 was merely to increase his long position "nine more contracts" (Tr. 873-874), but "[objective] circumstances are the chief criteria used by the courts and the [Securities and Exchange] Commission in establishing manipulative intent and frequently are accorded greater probative value than testimony by the offenders of a 'normal business purpose'." 99 U. of Pa. L. Rev. 651, 664 ("Manipulation of the Stock Markets Under the Securities Laws" (1951)).

Here, as in *R. J. Koeppe & Co. v. Securities & Exchange Commission*, 95 F.2d 550, 552 (C. A. 7), the objective facts as to manipulative intent are more persuasive than the protestations of innocence by the respondent. See, also, *Wright v. Securities & Exchange Commission*, 112 F.2d 89, 92 (C. A. 2). "Behavior rather than words among men and women is most significant in ascertaining intent." *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 821 (D. Del.).

Persons "must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary" (*United States v. Patten*, 226 U.S. 525, 543; *United States v. Masonite Corp.*, 316 U.S. 265, 275), and it is sufficient, for the purpose of manipulative intent, that the necessary consequence of their actions was an unlawful result. *United States v. Griffith*, 334 U.S. 100, 105-106; *United States v. Masonite Corp.*, 316 U.S. 265, 275; *Interstate Circuit v. United States*, 306 U.S. 208, 226-227. A willful intent may be inferred from the conduct of a person. *Graves v. United States*, 191 F.2d 579, 582 (C. A. 10). A person's intent to manipulate may be clearly ascertained by his conduct in his business transactions. See *United States v. Patten*, 226 U.S. 525, 543; *Allen v. United States*, 164 U.S. 492, 496; *United States v. Anderson*, 101 F.2d 325, 330 (C. A. 7), certiorari denied, 307 U.S. 625; *Dunlap v. United States*, 70 F.2d 35, 37 (C. A. 7), certiorari denied, 292 U.S. 653; *Crews v. United States*, 160 F.2d 746, 750 (C. A. 5); *Stone v. United States*, 113 F.2d 70, 74-75 (C. A. 6); *House v. United States*, 78 F.2d 296, 301 (C. A. 6),

certiorari denied, 296 U.S. 608; *Harris v. United States*, 48 F.2d 771, 781 (C. A. 9); *United States v. Ford*, 34 Fed. 26, 27 (W.D.N.Car.).

Considering the entirety or totality of the relevant factual situation, the only reasonable inference that can be drawn is that the respondent intentionally traded on June 25 in a manner to cause the closing price of November shell egg futures to be artificially high. The respondent succeeded in creating such an artificially high closing price not responsive to the normal forces of supply and demand on the Exchange.

II. *The Respondent Manipulated the Closing Price on the Exchange of November Shell Egg Futures on June 25, 1968.*

The word "manipulate" is not defined in the Commodity Exchange Act. In the absence of a definition, it is presumed that the word is used in its ordinary signification. *Volkart Brothers, Inc. v. Freeman*, 311 F.2d 52, 58 (C. A. 5). Accord: *Miller v. Robertson*, 266 U.S. 243, 250; *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560; *United States v. Stewart*, 311 U.S. 60, 63; *Jones v.*

Liberty Glass Co., 332 U.S. 524, 531; *Bruhn's Freezer Meats v. U. S. Department of Agriculture*, 438 F.2d 1332, 1338 (C. A. 8). n85

n85 Although the term "manipulate" is not defined in the Commodity Exchange Act, the term is not so vague and indefinite that the statute is void. *Bartlett Frazier Co. v. Hyde*, 65 F.2d 350, 354 (C. A. 7), certiorari denied, 290 U.S. 654. Congress was not required to define or specifically limit the methods by which unlawful manipulations might be accomplished, since any effort at definition might "result in some unexpected limitation." *Spies v. United States*, 317 U.S. 492, 499; *Robinson v. United States*, 324 U.S. 282, 286; *United States v. Petrillo*, 332 U. S. 1, 5-8; *Lichter v. United States*, 334 U.S. 742, 785-787; *Sproles v. Binford*, 286 U. S. 374; *Boyce oMtor Lines, Inc. v. United States*, 342 U. S. 337; *Charles Hughes & Co. v. Securities and Exchange Comm.*, 139 F.2d 434, 436 (C. A. 2), certiorari denied, 321 U. S. 786.

One of the best and most frequently cited definitions of manipulation on a commodity exchange was given by Mr. Arthur R. Marsh, a former President of the New York Cotton Exchange, in a hearing before a Congressional Sub-committee (*Cotton Prices, Hearings Before a Sub-committee of the Committee on Agriculture and Forestry, U. S. Senate 70th Cong., 1st Sess., pursuant to S. Res. 142, at pp. 201-203 (1928)*).

Mr. Marsh stated:

Manipulation, Mr. Chairman, is any and every operation or transaction or practice, the purpose of which is not primarily to facilitate the movement of the commodity at prices freely responsive to the forces of supply and demand; but, on the contrary, is calculated to produce a price distortion of any kind in any market either in itself or in its relation to other markets. If a firm is engaged in manipulation it will be found using devices by which the prices of contracts for some one month in some one market may be higher than they would be if only the forces of supply and demand were operative; or using devices by means of which the price or prices of some month or months in a given market may be made lower than they would be if they were freely responsive to the forces of supply and demand. Any and every operation, transaction, device, employed to produce those ad-normalities of price relationship in the futures markets, is manipulation.

Mr. Marsh's definition of manipulation is consistent with the common understanding of the term. n86 His definition was quoted in *Volkart Brothers*,

Inc. v. Freeman, 311 F.2d 52, 58 (C. A. 5), where the Court stated: "As Mr. Marsh's testimony indicates, there must be a purpose to create prices not responsive to the forces of supply and demand; the conduct must be 'calculated to produce a price distortion.'" Similarly, in *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 479 (C. A. 7), certiorari denied, 345 U.S. 997, the Court stated that the "intent of the parties during their trading is a determinative element of a punishable manipulation."

n86 See Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 Geo. Washington Law Rev. (1958), pp. 234-242; Dice and Eiteman, *The Stock Market* (3d ed. 1952), p. 305; Frey, "Federal Regulation of the Over-the-Counter Securities Market," 106 U. Pa. L. Rev. (1957), p. 19; Irwin, "The Nature of Risk Assumption in the Trading on Organized Exchanges," in 27 *Am. Econ. Rev.* (1937), pp. 267-278; Jones and Lowe, "Manipulation," *The Security Markets* (1935), pp. 444-445, 503-504; *Report of the Federal Trade Commission on the Grain Trade* (1926), Vol. VII, pp. 242-274; S. Rep. No. 212, 67th Cong., 1st Sess. (1921), p. 4; Emery, *Speculation on the Stock and Produce Exchanges of the United States* (1896), pp. 171-191; Clark and Clark, *Principles of Marketing* (3d ed. 1942), p. 537.

The Judicial Officer has consistently held that "manipulation of prices occurs when a person or group causes prices to go up or down by means directed to either such end or prevents prices from going up or down by means directed to either such end." *In re Cargill, Inc., et al.*, 29 Agriculture Decisions 880, 912 (1970), appeal pending. Accord: *In re General Foods et al.*, 6 Agriculture Decisions 288, 305 (1947), reversed, 170 F.2d 220 (C. A. 7). See, also, *infra*, pp. 1235-38.

Manipulation has been defined as --

planned effort by an individual or group of individuals to make the market price of a security behave in some manner in which it would not behave if left to adjust itself to uncontrolled or uninspired supply and demand. n87

n87. Jones and Lowe, "Manipulation," in *The Security Markets* (1935), p. 444.

The objects of manipulation are:

(1) To regularize a declining market; (2) To stabilize the open market price of a particular issue; (3) To force the price of a security upward; and (4) To force market prices down. n88

n88. *Id.* at 445.

"The manipulator is a speculator who attempts to force conditions". n89
There are many different ways in which the futures price can be manipulated.

n89. *Report of the Federal Trade Commission on the Grain Trade* (1926), Vol. VII, p. 242, fn. 1.

Manipulation is the process of artificially causing the price of one or more securities to be above or below that which otherwise would result from the normal operation of supply and demand. The methods of manipulators are legion but certain patterns frequently emerge. n90

n90. Frey, "Federal Regulation of the Over-the-Counter Securities Market," 106 U. of Pa. L. Rev. (1957), p. 19.

"Manipulation" is a vague term used in a wide and inclusive manner, possessing varying shades of meaning, and almost always conveying the idea of blame-worthiness deserving of censure. There is usually also an implication of

artificiality and of skillful and ingenious management. In its most common use it has reference to a speculator, or to a group of speculators who buy or sell produce, in such a way as to give outsiders the impression that such buying or selling is the result of natural forces. Hence the term includes excessive speculation, the spreading of false rumors, the working of syndicates to increase or depress prices, "wash sales", "matched orders", and "corners". n91

n91. Smith, *Organised Produce Markets* (1922), pp. 109-110.

The creating of false opinions is one of the chief means of manipulation. n92

n92. *Id.* at 110.

Manipulative devices, such as artificial corners, wash sales, spreading of false rumors, and the "bucketing" of orders are all illegal. n93

n93. Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide*, (1969), p. 9.

In *General Foods Corporation v. Brannan*, 170 F.2d 220, 231 (C. A. 7), the Court stated:

We are favored with numerous definitions of the word "manipulation". Perhaps as good as any is one of the definitions which appears in the government's brief, wherein it is defined as "the creation of an artificial price by planned action, whether by one man or a group of men."

The source of that citation is given on pages 26 and 27 of the "Brief for Respondents" in the *General Foods* case (Nos. 9367, 9368) as Irwin, "The Nature of Risk Assumption in the Trading on Organized Exchanges", in *Am. Econ. Rev.* (June 1937), Vol.

27, No. 2, pp. 267-268, and Irwin was quoting from Dice, *The Stock Market* (1926), p. 414. n94 Mr. Irwin states in the article relied on by the Court that the manipulator causes prices "to be either higher or lower than they should be," n95 and he explains, after giving the definition adopted by the Court in *General Foods*:

The definition of "manipulation" by Mr. Irwin (adopted in *General Foods*), viz., the "creation" of an artificial price by planned action, is sound only if one regards a price which is artificially held constant when it normally would have fallen as an artificially "created" price. That is, if the price of eggs on Monday is 40 cents per dozen, and it would have fallen to 39 cents on Tuesday because of normal supply and demand conditions, if a person artificially causes the price on Tuesday to remain at 40 cents, e.g., by artificially controlling the market by means of a corner, he has "created" an artificial price of 40 cents per dozen on Tuesday.

n94. In the second and third editions of *The Stock Market* (the first edition of which formed the basis of the definition of "manipulation" adopted by Mr. Irwin, and in turn, by the Court in the *General Foods* case, manipulation is explained in greater detail as follows (Dice and Eiteman, *The Stock Market* (3d ed. 1952), p. 305; (2d ed. 1941), p. 301):

Frederick W. Jones defines manipulation as any activity by an individual or group of individuals designed "to make the market price of a security behave in some manner in which it would not behave if left to adjust itself to uncontrolled or uninspired supply and demand." Manipulation may take place on the bear side as well as on the bull side. In either case the result is a price different than would come into being without the activities of the manipulator. Manipulation always implies the use of

special powers and ingenious methods in handling the market for the stock manipulated.

n95. Irwin, "The Nature of Risk Assumption in the Trading on Organized Exchanges," in *Am. Econ. Rev.* (June 1937), Vol. 27, No. 2, p. 275.

"* * * Manipulation always implies the use of special power and ingenious methods in handling the market" To this may be added the elements of secrecy and deception employed by the manipulator against the other traders actually or potentially in the market, including the tactics employed at times to attract outsiders into the market. Some of the main forms of manipulation are: (1) Corners, squeezes, etc.; (2) Bear raids, "shake-outs", and "gunning for stop-loss orders"; (3) Buying or selling in a manner calculated to produce the maximum effect upon prices, frequently in a concentrated fashion and in relatively large lots. n96

n96. Irwin, "The Nature of Risk Assumption in the Trading on Organized Exchanges," in *Am. Econ. Rev.*, Vol. XXVII, No. 2 (June 1937), pp. 268-269. The use of the phrase "special power" was clearly not intended to set forth "control of the market" as a requirement of "manipulation" because in the examples given of some of the "main forms of manipulation," control of the market is an element of only the first category, *i.e.*, corners and squeezes. Control of the market is completely non-existent in the other examples of manipulation referred to by Mr. Irwin (see, *infra*, pp. 1234-41).

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