

Commodity Futures Trading Commission
CEA CASES

NAME: HOHENBERG BROS. COMPANY AND JULIEN J. HOHENBERG

CITATION: Comm. Fut. L. Rep. (CCH) P20,271; [1975-1977 TRANSFER BINDER]

DOCKET NUMBER: 75-4; 223

DATE: FEBRUARY 18, 1977

DOCUMENT TYPE: DECISION AND ORDER

NOTE: FORMERLY CEA DOCKET # 223

[P 20,271] Hohenberg Bros. Company and Julien J. Hohenberg.

Commodity Futures Trading Commission. CFTC Dkt. No. 75-4. February 18, 1977. Opinion and order dismissing complaint charging attempted manipulation in full text. (For Administrative Law Judge opinion, see P 20,146).

Manipulation -- Elements of Violation -- Intention and Artificial Price. -- A finding of manipulation in violation of the Commodity Exchange Act requires a finding that the party engaged in conduct with the intention of affecting the market price of a commodity, which is determined by the forces of supply and demand, and as a result of such conduct an artificial price is created.

See P 10,025, P 10,065, P 10,175 and P 10,310, "Liabilities -- Prohibitions" division.

Attempted Manipulation -- Elements -- Intent and Overt Act. -- An attempted manipulation, which is a manipulation that has not succeeded, requires an intent to affect the market price of a commodity and some overt act in furtherance of that intent.

See P 10,025, P 10,065, P 10,175 and P 10,310, "Liabilities -- Prohibitions" division.

Manipulation -- Intent -- Proof -- Inferred from Objective Facts, Actions and Totality of Circumstances -- Credibility of Witnesses. -- Since intent is a determinative element of a punishable manipulation and it is a subjective factor requiring a determination regarding the attempted manipulator's state of mind, intent must of necessity be inferred from the objective facts, by a person's acts and considering the totality of the circumstances. Consequently, the credibility of witnesses is an important factor in inferring such intent.

See P 10,025, P 10,065, P 10,175 and P 10,310, "Liabilities -- Prohibitions" division.

Manipulation -- Dominant or Controlling Position -- Not Requisite Element. -- A dominant or controlling position in the market is not a requisite element to either manipulation or attempted manipulation, and is not essential to altering successfully the effect of the forces of supply and demand in establishing price.

See P 10,025, P 10,065, P 10,175 and P 10,310, "Liabilities -- Prohibitions" division.

Manipulation -- Profit Motive -- Demonstrated Capability of Realizing Manipulation -- Not Requisite Element. -- A profit motive or a demonstrated capability

of realizing a manipulation are not necessary elements of a manipulation or attempted manipulation.

See P 10,025, P 10,065, P 10,175 and P 10,310, "Liabilities -- Prohibitions" division.

Attempted Manipulation -- Manipulative Intent -- Insufficient Evidence -- Tendering of Notices of Delivery on First Notice Day. -- By tendering notices of delivery against their short positions in the December future, the respondents were attempting to obtain the best price for their certified cotton, which does not constitute, in itself, a violation of the Commodity Exchange Act. There was insufficient evidence of manipulative intent in the record to conclude that the respondents intentionally sought to depress the price of the future. In order to have found that they attempted to manipulate downward the price of the future by making such tender, it would have had to appear from the record, or be inferable from the totality of the circumstances surrounding the company's activities, that the respondents intended that their actions have such a depressant effect on the market, and that they took some action in furtherance of that manipulative intent.

See P 10,025, P 10,065, P 10,175 and P 10,310, "Liabilities -- Prohibitions" division.

Manipulation -- Standard of Proof -- Administrative Proceedings -- Preponderance or Weight of the Evidence -- Not "Beyond a Reasonable Doubt" -- Different from Standard of Judicial Review. -- At an administrative proceeding, the burden of proof that must be met by the Division of Enforcement is not the criminal burden of "beyond a reasonable doubt," but that of proving its case by a preponderance or weight of the evidence. This burden is different from the standard of judicial review (see P 11,305.20), which is generally limited to determining whether the evidence relied upon by the trier of the fact was of sufficient quality and substantiality to support the rationality of the judgment. The burden of proof includes not only the burden of going forward with the evidence, but also the burden of persuasion.

See P 10,065 and P 11,200, "Liabilities -- Prohibitions" division.

OPINION OF THE COMMISSION

In this proceeding under the Commodity Exchange Act, as amended (the "Act"), the Commodity Futures Trading Commission's n1 Division of Enforcement seeks review of the decision and order of an Administrative Law Judge ("ALJ") dismissing a complaint n2 charging respondents Hohenberg Bros. Company (the "Company") and Julien J. Hohenberg with attempted manipulation of the price of the December 1971 No. 2 cotton futures contract traded on the New York Cotton Exchange. n3 In our view, the record does not support a finding that the Company and Julien Hohenberg attempted to manipulate the price of the December 1971 cotton future on the New York Cotton Exchange and accordingly, we affirm the order of the ALJ dismissing the complaint on the merits.

n1 The Commodity Futures Trading Commission ("the CFTC") is an independent federal regulatory agency which began operation on April 21, 1975, pursuant to the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (October 23, 1974). Prior to the 1974 amendments, the Commodity Exchange Act was administered by the Commodity Exchange Authority (the "CEA") of the Department of Agriculture. Futures trading was then regulated in certain specifically-enumerated agricultural commodities, such as cotton, which is the commodity involved in the instant case. The CFTC took jurisdiction of this matter from its predecessor, the CEA, under authority of Sections 411 and 412 of Pub. L. No. 93-463.

n2 The complaint and notice of hearing brought by the CEA before the Secretary of Agriculture charged respondents with attempted manipulation of the December 1971 cotton future on November 23, 1971, 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). Prior to the amendments by the Commodity Futures Trading Commission Act of 1974, Section 6(b) of the Act, 7 U.S.C. § 9, provided that:

If the [Commission] has reason to believe that any person . . . has manipulated or attempted to manipulate the market price of any commodity . . . for future delivery on or subject to the rules of any contract market . . . [it] may serve upon such person a complaint stating its charges in that respect . . . [and] [upon] evidence received . . . may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order

And Section 9(b) of the Act, 7 U.S.C. § 13(b), provided that:

It shall be a felony punishable by a fine of not more than \$ 10,000 or imprisonment for not more than five years or both . . . for any person to manipulate or attempt to manipulate the price of any commodity . . . for future delivery on or subject to the rules of any contract market

And Section 6(c) of the Act, 7 U.S.C. § 13b, provided that:

If any person . . . is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity . . . for future delivery on or subject to the rules of any contract market . . . the [Commission] may, upon notice and hearing . . . make and enter an order directing that such person shall cease and desist therefrom

n3 The quality grade required under the No. 2 contract on the New York Cotton Exchange is Middling 1 1/16 inch cotton with premiums and discounts allowed between deliverable grades (Good Middling down through Low Middling White and Good Middling through Middling Light Spotted) and staples (1 1/32 to 1 3/32 and up). The price differences for deliverable grades and staples above and below Middling 1 1/16 cotton are based on the average of the commercial differences for corresponding grades and staples quoted by the USDA for Greenville, South Carolina; Greenwood, Mississippi; Memphis, Tennessee; Dallas, Texas; and Phoenix, Arizona.

Tenderable cotton must have a micronaire of between 3.5 and 4.9 and must be of United States growth. Rain-grown and nonrain-grown cotton are both tenderable on the No. 2 contract. The size of each contract is about 100 bales with a total weight of 50,000 pounds (net). Exchange rules permit a 1 percent weight variance, thus making the minimum deliverable weight 49,500 pounds and maximum weight 50,500 pounds.

New York Cotton Exchange Rules also provide for a No. 1 contract but the No. 1 contract has been inactive since the June 1969 future.

Facts:

The Company is a cotton merchandising firm, headquartered in Memphis, Tennessee with more than 300 employees. The Company has offices in the United States and in foreign countries. Julien Hohenberg was the President and chief executive officer of the Company at the time the alleged violations occurred and subsequently became Chairman of the Board. As a cotton merchant, the Company purchases cotton from farmers and ginners, classifies the cotton into uniform lots, and sells the cotton to textile mills in the United States and a number of foreign countries.

This case concerns attempted manipulation of a futures contract. As an aid in understanding the Company's position in the market at all relevant times, Appendix A shows, on various relevant dates, the Company's December 1971 futures positions; its percent of the open interest in the December 1971 future; the closing price of the December 1971 and March 1972 futures; the Company's net futures positions for all contract months; its net commodity position; n4 and the difference between its net commodity position and its short position.

n4 The Company's net commodity position includes current inventory plus commitments to purchase cotton at fixed prices less contracts to sell cotton at fixed prices. See Appendix A.

On May 14, 1971, the Company had 343,000 bales of cotton composed of actual stocks of 152,400 bales of cotton plus commitments to purchase at fixed prices (forward contracts) an estimated 190,600 bales of cotton. n5 As an offset against its inventory and forward contracts, the Company had contracted to sell 154,900 bales of cotton in the future at fixed prices. Thus, the net amount of the Company's inventory and forward contracts amounted to 188,100 bales of cotton on May 14. (See Appendix A -- Net Commodity Position).

n5 A large majority of the unfilled fixed price purchase commitments included "crop acreage contracts" which were contracts entered into with farmers for acres expected to be planted. The Company did not hedge in the futures market against the "crop contracts."

Its net futures position on that date was short 564 contracts or 56,400 bales. n6 Subsequently, on May 27, 1971, the Company

received notice that it was a successful bidder on 102,615 bales of cotton which had been sold by the Commodity Credit Corporation under the government price support program. n7 Consequently, by May 28, 1971, the Company's net position in actuals had increased from 188,100 bales to 294,100 bales.

n6 There are essentially two types of positions that may be taken in the futures market. A "long" position in the market is established by purchasing a standardized quantity and quality of a commodity for future delivery in a particular month. A "short" position is established by selling the commodity for delivery in a specified month in the future.

n7 Under the government price support program for cotton, the Commodity Credit Corporation is authorized to make non-recourse loans to farmers at a specified amount per bale of cotton and take the cotton as security. 7 U.S.C. § 1340(9). The Commodity Credit Corporation thus often acquired large amounts of cotton from farmers who failed to redeem their cotton when the price of cotton did not rise above the loan figure and then disposed of the cotton.

During the period May 4 through November 23, 1971, the Company's principal short hedge was in the December 1971 No. 2 cotton futures contract traded on the New York Cotton Exchange. From late May through early June, the price of the December 1971 futures contract declined, falling from 33.67 cents a pound on May 24 to 29.33 cents a pound on June 3. As a result of the declining cotton prices and its large inventory, the Company initiated an aggressive sales campaign for its cotton and by June 11, sold 92,000 bales of cotton, including 16,000 bales obtained from the Commodity Credit Corporation. From October 1, 1971 to November 22, 1971, the Company increased its short position in the December future so as to hedge its receipt of large amounts of cotton under previously-made contracts and commitments with farmers. Increases in the Company's hedging position generally corresponded to increases in its inventory and forward contracts position during this period.

When the Company settled its accounts with the Commodity Credit Corporation, it was able, at practically no extra expense, n8 to combine the processes of reweighing and reclassifying the cotton so that 65,000 bales of the cotton were also certified n9 for delivery on futures contracts. n10 This cotton was certified between July and September 1971. At that time, supplies of higher grades of cotton -- that is, good middling cotton through middling cotton and in staple lengths of 1 1/16" to 1 3/32" and up -- were abundant and therefore proving difficult to sell profitably. The lower quality cotton -- that is, middling down through low middling in shorter staple lengths of 1 1/32" -- was selling very well because supplies of lower quality cotton were not as abundant as supplies of higher grade cotton. A large portion of the cotton obtained from the Commodity Credit Corporation was in the difficult-to-sell higher quality grades. As a result, during the summer months of 1971, the value of the cotton

obtained from the Commodity Credit Corporation declined. The price of the December future also fell due to increased potential supplies of cotton then in the fields. As a result of the abundant supplies of higher grade cotton and the difficulties encountered in selling the higher grades, by October 1971 the Company was left with approximately 48,000 bales of certified cotton in these higher grades. n11

n8 Under the terms of purchase, the cotton obtained from the Commodity Credit Corporation had to be reclassified by the U.S. Department of Agriculture Board of Cotton examiners and be reweighed by the appropriate warehouse for final settlement with the Commodity Credit Corporation. The delivery requirement of the New York Cotton Exchange also required reclassing and reweighing.

n9 Certified cotton refers to cotton which has been inspected, weighed, and sampled under New York Cotton Exchange supervision, and which has been determined deliverable on futures contracts traded on the New York Cotton Exchange upon classification, review, and micronaire test under United States Department of Agriculture regulations.

n10 While the Company ordered 72,000 bales of cotton to be certified, only 65,000 bales obtained from the Commodity Credit Corporation qualified and during the months of July, August and September, were "certified for delivery." Continued efforts were made by the Company to merchandize the cotton. Rule 3.11(1) of the New York Cotton Exchange (designed to ensure that the stock of certified cotton turns over without unduly aging) imposes a penalty, at the rate of a specified number of pounds per bale a month, on cotton that has been certified for more than six months. Consequently, December was the last futures contract month in which the Company could tender its certified cotton without penalty.

n11 It was stipulated and the record reflects that throughout the period from May through December 1971, quotations for spot market cotton were lower than the price of the December 1971 cotton future.

It is uncontroverted that the Company established and maintained a large short futures position in the December 1971 cotton future. The ALJ found n12 and the evidence showed, as alleged in the complaint, that the Company's short positions at the beginning of trading on the dates set forth below were as follows:

May 5, 1971 short 376 contracts (6.6 percent of the short open interest);

June 9, 1971 short 914 contracts (9.8 percent of the short open interest);

Oct. 21, 1971 short 735 contracts (13.9 percent of the short open interest); n13 and

Nov. 23, 1971 (1st notice day) short 936 contracts (46.3 percent of the short open interest).

n12 CCH COMM. FUT. L. REP. P 20,146 (March 2, 1976) at p. 20,946.

n13 While the record generally supports the ALJ's findings as to the Company's short positions, on October 21, 1971, the Company was actually short 738 contracts and not 735 contracts as found by the ALJ.

The Division of Enforcement has not contended that maintenance of a large short futures position in and of itself constitutes an attempted manipulation in violation of the Act. The complaint before the Secretary of Agriculture did, however, contend that respondents acted "for the purpose and with the intent" of artificially depressing the price of the December 1971 cotton future on and after November 23, 1971. We are asked by the Division of Enforcement to infer that intent from a telephone call made by Mr. Hohenberg to Plains Cotton

Cooperative Association ("Plains"), n14 the Company's subsequent tender n15 of 357 transferable notices of delivery of spot cotton in satisfaction of the Company's short interest and from the totality of the facts and circumstances surrounding respondent's trading activity in the December futures contract.

n14 Plains was a grower cooperative principally engaged in marketing the cotton of its members, who were located in Texas and Oklahoma.

n15 A tender or notice of delivery is written notice delivered through the clearinghouse by the seller of a futures contract that he intends to deliver the physical commodity in satisfaction of the futures contract.

On November 22, 1971, the day before first notice day n16 of the December 1971 cotton future, Julien Hohenberg heard that Plains, which held a large, long position in the December 1971 cotton futures contract, n17 was intending to accept delivery. Mr. Hohenberg subsequently telephoned Henry C. Patton, Sales Manager of Plains, and in the course of the conversation with Mr. Patton, informed him that he intended to tender cotton in satisfaction of the Company's short futures position. n18 He also stated that some of the cotton to be tendered would be penalty cotton, n19 and was of grades and staples not in great demand by his Company's customers. From this conversation, the Plains officials concluded

that Mr. Hohenberg would probably tender cotton the following day. The Plains officials also inferred that Mr. Hohenberg would have preferred that Plains not "stop" the cotton (take delivery) if tendered. The Company, however, after confirming Plains' long position in the market and intention to take delivery, did not alter its decision to tender.

n16 First notice day is the first day on which notices of intention to deliver actual commodities against futures market positions can be tendered.

n17 Plains had not been known as a major futures market participant and was unknown in the Memphis area as a trader in the type of cotton that made up most of the certified stocks that the Company intended to tender. The cotton marketed by Plains for its members was of a shorter staple length than Memphis cotton.

n18 Dan W. Davis, General Manager and Executive Vice-President of Plains, testified that he had listened in on the conversation. Rudi E. Scheidt, who was the Company's Executive Vice President, also testified that he heard Mr. Hohenberg's end of the conversation. There was substantial agreement as to the substance of the conversation.

n19 Penalty cotton is cotton remaining under certification for a period exceeding six months. The deliverer of the cotton incurs certain "weight" penalties per bale of delivered "over-age" cotton as prescribed by the New York Cotton Exchange Rule 3.11(1). See note 10 *supra*.

On first notice day, November 23, 1971, the Company tendered 357 transferable notices of delivery of spot cotton in satisfaction of that much of its 936 open short December futures contracts. n20 Plains, which had a long position in the December futures contract, promptly commenced stopping Hohenberg's 357 notices shortly after the opening of trading at 10:30 A.M. on that date, and by noon, all of the Company's notices had been stopped -- that is, accepted for delivery. On November 30, 1971, the Company tendered an additional 105 transferable notices of delivery and on December 1, 1975, it tendered another 25 notices of its short December futures contracts. These were also stopped. n21 Thus, between November 23 and December 1, 1971, the Company tendered 48,700 bales of certified cotton in satisfaction of 487 of its short December futures contracts. n22 This constituted its remaining inventory of certified cotton obtained from the Commodity Credit Corporation. Its remaining short December futures

contracts were subsequently rolled over -- that is, transferred -- to the March futures contract.

n20 On November 19, 1971, the Company had 163,100 bales of raw cotton on hand, or the equivalent of 1,631 contracts. The Company also had unfilled fixed-price purchase commitments for 162,000 bales of cotton. It had unfilled fixed-price sale commitments for 175,600 bales and unfixed-price call sales for 2,900 bales so that its net commodity position amounted to 146,600 bales. See Appendix A. However, on that date, only approximately 48,000 bales were certified -- the equivalent of 480 contracts. On November 22, its short position in the December futures contract and total net short position amounted to 936 contracts or 93,600 bales so on the latter date it was less than 60 percent hedged. See Appendix A.

n21 Plains took delivery on approximately 700 contracts or 70,000 bales of cotton tendered and retendered against December 1971 short contracts.

n22 The weekly report entitled "Weekly Statement of Positions in Spot Cotton, Cotton 'On Call,' and Certified Stocks," required to be filed with the CEA under the Commodity Exchange Act, showed that on November 19 the Company had approximately 48,000 bales of certified cotton. The report, dated November 26, indicated that the Company had approximately 12,800 bales of certified cotton. Since the Company tendered 35,700 bales on November 23, it appears that an additional 700 bales were certified by the Company sometime between November 19 and December 1, 1971, when it tendered notices of delivery for 2,500 bales.

Summary of the ALJ's Findings and Conclusions:

In determining that the evidence did not support a finding of attempted manipulation, the ALJ generally accepted the credibility of respondents' witnesses. In particular, the ALJ: accepted respondents' reasons for certifying the cotton obtained from the Commodity Credit Corporation and the Company's position as a hedger in the market; n23 rejected the profit motivation advanced by the Division of Enforcement, concluding that the Company had no interest in the type of financial advantage which could result from a short-term fluctuation in the futures market; accepted the findings of the expert witnesses, with the exception of the CEA's investigator, that the "Company's decision to tender cotton in the circumstances was prudent and sound"; n24 declined to draw an inference that respondents had overlooked the possibility that their notices would be stopped; and consequently would not infer that respondents intended to manipulate the market.

n23 The ALJ found no evidence to indicate that the Company's position had changed from that of a cotton merchant to a speculator on November 23.

n24 See note 11 *supra*.

The ALJ thus concluded that the Division of Enforcement had failed to establish a motive for formulating the illegal intent which the ALJ held to be crucial to a finding of attempted manipulation. The ALJ also concluded that:

absent a demonstrated profit motive for an intent to manipulate, and absent a demonstrated capability of realizing a manipulation, it cannot be concluded that [Julien J. Hohenberg and the Company] intended to manipulate the market from the actions taken by [the Company] on first notice day and the facts presented in evidence. CCH COMM. FUT. L. REP. P 20,146 (March 2, 1976) at p. 20,952.

Finding that the charge in the complaint had not been proven, the ALJ dismissed the complaint on the merits. This appeal followed.

Issues:

Although the Division of Enforcement has challenged a number of the ALJ's findings of fact and conclusions of law on this appeal, the fundamental issue before the Commission is whether, on the record, it can properly be found that

respondents attempted to manipulate the price of the December 1971 cotton futures contract on the New York Cotton Exchange. We will also consider a second issue: whether the ALJ erroneously applied the criminal standard of proof of "beyond a reasonable doubt."

The Division of Enforcement's Position:

The essence of the Division of Enforcement's case is that the "inferences fairly drawn from respondents' tenders, when considered with the entire and total factual situation surrounding their tenders, [lead] to the conclusion that respondents intentionally acted and traded in a manner calculated to cause the price of the December cotton future to be depressed" to an artificial level and thereby attempted to manipulate the price of a commodity for future delivery in willful violation of the Commodity Exchange Act.

The attempted manipulation was alleged to have occurred on November 23, 1971, the first notice day for the December 1971 cotton futures contract. The Division of Enforcement asserts that the requisite intent to manipulate the price of the futures contract is evidenced by the following:

The Company's manner of trading in the December future evidenced an intention to manipulate. The size of the Company's first notice day tender, n25 according to the

common perception of the trade, could generally have had a depressant effect on futures prices. The Company maintained a large short position in the December future which consisted of 936 contracts on November 22, 1971. This amounted to approximately 46% of the open interest on that date. The Company also owned approximately 48,000 bales of certified cotton. The Company maintained its short position in the December future beyond the time when all other large short hedgers had already liquidated or shifted their hedge positions to a more distant future and on November 22, 1972, the day prior to first notice day, respondents added to their short position by selling an additional 21 contracts in the December future. The Company liquidated that portion of its short position not satisfied by deliveries only after it had tendered a large number of notices on first notice day, thus allowing it to maximize the benefit from any decline in the price of the December futures contract precipitated by the large tender. n26

n25 The Division of Enforcement has asked the Commission to infer an expectation by respondents that the tender would result in an artificially low price of the future and to infer further from that expectation an intention by respondents to depress the price of the futures contract to an artificially low level.

n26 Large tenders, particularly when notices of delivery are not stopped and are allowed to pass, can have a depressing effect on the price of an expiring futures contract. However, any depressant effect the Company's large tender of notices might have had apparently was dissipated by the fact that Plains stopped the notices and took delivery of 70,000 bales of cotton. Subsequently, the price of the December futures contract increased .82 cents. See Appendix A.

The Company's alleged motivation to depress the price of the cotton future in order to obtain a financial gain in its futures position has also been advanced as evidence of respondents' intention to manipulate the December future. The alleged motive for its trading activity was that the Company would have benefitted financially from a temporary depression in the price of the December 1971 cotton future since by successfully depressing the December cotton future, the Company would have been in a position to realize a financial gain of \$ 2,895 for each point the futures price was depressed. n27

n27 The aim of a short manipulation is to depress the price of the future and is effected by the threat of making substantial deliveries or actually making large deliveries early in the delivery period or by a combination of both. The essence of a short manipulation is either to deliver or effectively threaten to deliver a greater quantity of the commodity than a cash market can readily absorb, causing "panic" among the holders of long positions, particularly where "[the] deliveries fall into weak, unsuspecting hands who must not only redeliver but must sell long positions as well . . .", thus forcing them to liquidate their long positions at increasingly lower prices under threats of delivery. See Hieronymus, *Economics of futures Trading*, at 309 (1971).

Finally, the phone call to Plains on November 22 is proffered to show that respondents would have preferred that Plains not take delivery of the cotton which the Company was preparing to tender and as evidence of their intent to manipulate the December future. The Division of Enforcement would have the Commission infer from Mr. Hohenberg's reference to penalty cotton and the composition of the cotton that he was attempting to dissuade Plains from taking delivery of the cotton.

The Division of Enforcement maintains that up to the day prior to first notice day, when Mr. Hohenberg called Plains, respondents were unaware that there might be substantial longs in the market. n28 It is urged that respondents knew that tender of notices for delivery of 35,700 bales of cotton on first notice day, if allowed to circulate, would have the effect of depressing the price of the December futures contract relative to the price of the March futures contract.

n28 Respondents' knowledge of the longs in the market and their capacity to stand for deliveries is a critical factor in determining whether an attempt to manipulate the futures price occurred, since where holders of substantial long positions are ready to stop delivery of notices, the price depressant effect of large deliveries will generally be muted.

In summary, the Commission is asked to infer manipulative intent from the Company's alleged profit motive, its large tender on first notice day, its manner of trading in the December future, and by Mr. Hohenberg's telephone call to Plains.

The Division of Enforcement contends, contrary to the conclusions of the ALJ, that the evidence in this proceeding establishes by the preponderance of the evidence, that the Company and Julien Hohenberg intentionally acted and traded in a manner calculated to cause the price of the December 1971 cotton futures contract to be artificial and thus attempted to manipulate the price of a commodity in violation of the Act.

The Company's Position:

In response to the Division of Enforcement's charges, respondents maintain that the tender of 35,700 bales of cotton for delivery against December futures contracts was for sound business reasons. n29 The Company had been unable to sell a substantial part of the cotton obtained from the Commodity Credit Corporation. The Company did not initially liquidate its short position in the December future nor switch its December short position forward to the next futures month (March 1972), because it reasonably had expected that, at some time before first notice day, the difference between the price of the December future and the price of the March future would reach full carrying charges, n30 thereby permitting its short December futures to be economically rolled over. Consequently, the Company's large December short position was carried into the delivery period. However, according to the evidence presented by respondents which the ALJ accepted, the difference between the December and March prices did not reach full carrying charges prior to November 23, thereby precluding the Company from switching its December futures forward without additional cost. n31 When it became apparent, in respondents' view, that the short December futures could not be economically switched forward, the decision to tender the certified

cotton obtained from the Commodity Credit Corporation was made, inasmuch as delivery on the futures markets presented the best available price for the cotton. n32 On November 23 and succeeding trading days, the Company switched its short futures in excess of its certified stocks from December to March even though the difference in the prices of

the two was substantially less than the carrying charge.

n29 Respondents concede, however, that an intent to manipulate may co-exist with sound business practices and, in that sense, "an uneconomic act" is not a necessary element of manipulation.

n30 Carrying charges consist of the cost of storing a physical commodity over a period of time and include insurance, storage, and interest on investment as well as other incidental costs. Full carrying charges are attained when the price of the next futures month is such that a futures contract may be switched forward without additional expense.

n31 The spread between December and March futures prices was consistently above 90 points after October 15 and reached 105 points on November 12. The ALJ heard testimony from four witnesses as to carrying charges. Three of the witnesses testified that the carrying charges for the 92 days between the first delivery day for the December future, December 1, 1971, and the first delivery day for the March future, March 1, 1972, were at least 120 points (1.20 cents a pound of cotton at an arrived price of 32 cents a pound). The Company's calculation of carrying charges was 124 points plus 36 points to cover the average over-age penalties on the 357 contracts tendered on November 23, 1971, while the CEA's investigator recited carrying charges from 90-105 points. However, the figures proffered by the CEA investigator were apparently obtained from unnamed sources and were not accorded much credibility by the ALJ. See Appendix A -- closing prices of December 1971 and March 1972 futures.

n32 See note 11 *supra*.

The Company's tender of notices against its 357 contracts amounted to slightly less than 18% of the total open interest in the December future on November 22, the day before first notice day. n33 The Company also withheld 13,000 additional bales or 130 contracts against which it could have initially tendered notices of delivery in order to continue attempts to sell them commercially.

n33 At the close of trading on November 22, and consequently at the opening of trading on November 23, 2,025 December 1971 futures contracts were open.

The evidence of record indicates that by Friday, November 19, 1971, the Company had reason to believe that there were long positions in the market able and willing to take delivery of cotton that might be tendered. This judgment was deduced from the size of the open interest, its failure to diminish as first notice day approached, and the reported certified stocks which were quite large. n34 The telephone call to Plains simply confirmed to the Company's officials that Plains was one of several long positions that they thought must be in the market. The decision to tender cotton was not altered since it had been made with knowledge of the likelihood or at least the possibility that the notices would be fairly promptly stopped. Notwithstanding the existence of a large free supply of cotton, n35 in light of the fact that the Company's short position exceeded its certified stocks of cotton and considering the number of notices stopped by Plains, n36 there is little reason to doubt that when Mr. Hohenberg called Plains' officials, there was reason for his concern that if Plains, which was an unknown quantity in the marketplace, were long as reported and stood for delivery, the Company could be squeezed. n37

n34 The open interest on November 19 amounted to 2,277 contracts (227,700 bales), and the reported available certified stock amounted to 83,229 bales.

n35 On November 15, 1971, the total free supply of cotton amounted to approximately 7.5 million bales. On November 19, spot sales amounted to 112,289 bales. However, only certified cotton is available for delivery on a futures contract and on November 19, certified cotton available for delivery amounted to 83,229 bales.

n36 See note 21 *supra*.

n37 A squeeze generally occurs when those who are short cannot repurchase their contracts, except at a price substantially higher than the value of those contracts in relation to the rest of the market. Mr. Hohenberg testified that the fear of a squeeze, though not very reasonable in retrospect, was genuine at the time.

Manipulation:

While neither manipulation nor attempted manipulation is defined by the Commodity Exchange Act, the terms have been discussed in a number of cases arising under the Commodity Exchange Act. n38 Cases involving charges of attempted manipulation under Sections 6(b), 6(c) and 9(b), 7 U.S.C. §§ 9, 13b and 13(b), generally also included charges of manipulation, n39 and have involved manipulation by longs n40 rather than a short-sided manipulation as has been alleged in the instant case. Consequently, the allegations of an attempted short manipulation appear to present a case of first impression to this Commission. While the courts have not had occasion to define or address the elements of an attempted short manipulation, manipulation has been defined generally as conduct intentionally engaged in resulting in an artificial price, *i.e.*, a price that does not reflect the basic forces of supply and demand. n41

n38 See generally *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); *Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 57, 58 (5th Cir. 1962); *Great Western Food Distributors, Inc. v. Brannan*, 201 F.2d 476 (7th Cir.), *cert. denied* 345 U.S. 997 (1953).

n39 The litigated cases to date have all involved allegations of actual manipulation in addition to attempted manipulation with the exception of *Moore v. Brannan*, 191 F.2d 775 (D.C. Cir.) *cert. denied* 342 U.S. 860 (1951), which involved a pure attempted manipulation by a long. However, since in that case the respondent offered no evidence in his defense, neither the Judicial Officer nor the court had occasion to discuss the elements of attempted manipulation.

n40 In the classic squeeze or corner, a long buys and holds a large proportion of contracts outstanding in a future and gets possession of all or a significant part of the supplies of the commodity available for delivery on futures contracts. The long stands for delivery, and the price mounts up as the shorts, unable to deliver, bid to buy in their contracts. See, *e.g.*, *Cargill, Inc. v. Hardin supra*; *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907.

n41 See *Cargill, Inc. v. Hardin, supra*, 452 F.2d at 1163. The court also stated at 1158:

In order for the futures market to perform its functions effectively, prices must reflect as nearly as possible market factors of supply and demand. Manipulation of prices by means not reflecting basic supply and demand factors creates conditions which prevent the futures market from performing its basic economic function and hence diminishes its utility to those members of the trade and general public who rely on its basic purposes.

See also *General Foods Corp. v. Brannan*, 170 F.2d 220, 231 (7th Cir. 1948).

A finding of manipulation in violation of the Act requires a finding that the party engaged in conduct with the intention of affecting the market price of a commodity (as determined by the forces of supply and demand) and as a result of such conduct or course of action an artificial price was created.

Attempted Manipulation:

An attempted manipulation, on the other hand, is simply a manipulation that has not succeeded -- that is, the conduct engaged in has failed to create an artificial price. An attempted manipulation requires only an intent to affect the market price of the commodity and some overt act in furtherance of that intent.

Intent:

As recognized by the court in *Great Western Food Distributors*, *supra* 201 F.2d at 479, the intent of the parties is a determinative element of a punishable manipulation. Intent is a subjective factor and since it is impossible to discover an attempted manipulator's state of mind, intent must of necessity be inferred from the objective facts and may, of course, be inferred by a person's actions and the totality of the circumstances.

It is important to note that in a case such as the case at bar, where we are asked to infer an intent to manipulate the price of a futures contract from the facts and circumstances, the credibility of the witnesses is an important factor. The court observed in *Great Western Food Distributors*, *supra*, that the credibility and demeanor of the witnesses is "[often] the 'most telling part' of the evidence."

We discern no difference in the intent required to accomplish a manipulation and that required by an attempted manipulation, which is simply the performance of an act or conduct which was intended to effect an artificial price. n42

n42 In *Volkart Bros., Inc. v. Freeman*, 311 F.2d 52 (5th Cir. 1962), the court set aside an order of the Judicial Officer of the Department of Agriculture which had found petitioners guilty of manipulating and attempting to manipulate the price of cotton futures. The court accepted the definition of manipulation offered by Arthur R. Marsh, former President of the New York Cotton Exchange, in testimony before a subcommittee of the Committee on Agriculture and Forestry, indicating that "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.'" 311 F.2d 58. Mr. Marsh had defined manipulation as:

'any and every operation or transaction or practice . . . calculated to produce a price distortion of any kind in any market either in itself or in 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. . . . Any and every operation, transaction [or] device, employed to produce these abnormalities of price relationship in the futures markets, is manipulation.' (Hearings on Senate Resolution 142 Before the Subcommittee on Agriculture and Forestry, 70th Cong., 1st Sess., at 201-202.)

In advancing its own interpretation of manipulation, the court stated at 311 F.2d 58 that "the term 'manipulate' means more than charging of what some may consider to be unreasonably high prices." While *Volkart* involved a squeeze by a long purchaser, the court, at 59, was emphatic that "it must appear . . . that they intentionally brought about the squeeze by planned action." This is consistent with the position of the court in *Great Western Food Distributors* *supra*, 201 F.2d at 479, which had previously held that "the intent of the parties during their trading was a determinative element of a punishable corner."

Capacity or Dominant Position Not Required:

A dominant or controlling position in the market is not a requisite element to either manipulation or attempted manipulation and is not essential to altering successfully the forces of supply and demand. The court in *Cargill, supra*, 452 F.2d at 1163, noted "that one of the most common manipulative devices, [is] the floating of false rumors, which [can] affect futures prices"

Profit Motive and Manipulative Intent:

While affirming the ALJ's order dismissing the complaint on the merits and generally accepting the ALJ's findings of fact, particularly where questions of credibility are involved, we do not agree with the ALJ that a "profit motive" or a "demonstrated capability of realizing a manipulation" are necessary elements of a manipulation or an attempted manipulation. The court in *Cargill, supra*, at 1163, found that a profit motive is not an essential requirement to manipulation, and we agree. n43 The court stated that "the question of whether an alleged manipulator has made a profit is largely irrelevant, for the economic harm done by manipulation is just as great whether there has been a profit or a loss in the operation." *Cargill, supra*, at 1163.

n43 See however, *Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 59 (5th Cir. 1962), where the court held that a showing that petitioner had profited from a squeeze was necessary to sustain the order of the Judicial Officer.

Although not requisite to a finding of attempted manipulation, the financial motive advanced for respondents' alleged attempt to manipulate downward the price of the December future is dubious at best since the Company was less than 60% hedged and its overall position was net long. n44 The Company was a hedger and not a speculator, and the value of its futures account in itself was not material to it. In that sense, the Company did not stand to realize a financial gain from a drop in futures prices or suffer a financial loss from an increase in futures prices. That is not to say, however, that a large trader who is short in the futures market could not profit from a short manipulation by creating artificially low prices through large deliveries while not seriously impairing the price of the commodity in the spot market. A sudden "bear raid" would not necessarily affect spot prices for any great length of time unless the deliverable supply also represented a large percentage of the spot market.

n44 See Appendix A.

While the Company's activities leading up to and following first notice day were apparently consonant with prudent business practices, that in itself is not sufficient to refute the allegation of attempted manipulation. In order to find that respondents attempted to manipulate downward the price of the December 1971 cotton futures contract by the Company's tender of notices of delivery on first notice day, it must appear from the record, or be inferable from the totality of the circumstances surrounding the Company's activities, that respondents intended their actions to have a depressant effect on the market and that they took some action in furtherance of that manipulative intent.

Crucial to determining whether respondents intended to depress the futures price with their tenders of notice of delivery is whether they believed there were sufficient "strong hands" in the marketplace who would stand for delivery. The Company's tender of notices of delivery on first notice day was large in light of previous tenders by a single account on the No. 2 cotton contract on the New York Cotton Exchange, but nevertheless amounted to less than 18% of the total open interest. n45 It is well recognized in the cotton trade that if notices of delivery are issued and allowed to circulate, it is likely that the futures price will go down. n46 However, there is generally no way of determining in advance whether notices will in fact circulate. The evidence reflects that at least by November 19, and possibly even earlier, a judgment had

been made by respondents regarding the long traders who held positions in what was considered to be a large open interest in the December future. That judgment, based on the size of the open interest on November 19, and the reported available certified stocks, was that there were trade longs in the market willing and able to take delivery of long cotton that might be tendered. The record below does not indicate that respondents reconsidered the decision to tender after the phone call to Plains or that the tender was made without full knowledge of the likelihood or at least the possibility that the notices would be fairly promptly stopped. In this regard, it is not apparent from the record of the proceedings that the Company at the time it decided to tender its notices of delivery thought it would "fall into weak, unsuspecting hands."

n45 Respondents acknowledged that on November 23, 1971, they tendered more cotton than any previous single account had tendered. While the magnitude of a single tender is of some significance, its importance in terms of effect on the market is dependent on the size of the open interest and the ability and willingness of the longs to take delivery.

n46 See note 27 *supra*.

Even though respondents' activities may have involved a "profit motive," absent a finding of manipulative intent, trading with the purpose of obtaining the best price for one's cotton does not constitute, in itself, a violation of the Commodity Exchange Act. It is clear that respondents intended to obtain the best price available for their stocks of certified cotton by tendering notices of delivery against their short position in the December future. But, it is not clear nor inferable from the record before us, considering the Company's trading activities, their large short position in the December future and Mr. Hohenberg's telephone call to Plains, that respondents intended their conduct to depress artificially the price of the December 1971 cotton future to a level not reflecting the basic forces of supply and demand. In sum, we find insufficient

evidence of manipulative intent in the record to conclude that respondents intentionally sought to depress the price of the December 1971 cotton future.

Standard of Proof:

The Division of Enforcement also has questioned the standard of proof applied by the ALJ in reaching his decision. It is asserted that the ALJ erroneously applied the standard of proof of "beyond a reasonable doubt," which is applicable to criminal proceedings, when he stated that he must consider whether or not respondents' "intent was so clearly exposed by the Company's actions as to leave *no reasonable doubt* of the existence of such intent as to the motives for its actions." n47 [emphasis supplied]. The Division of Enforcement maintains that the burden of proof on the complainant is that of proving its case by the weight of the evidence as provided in Section 6(b) of the Act, 7 U.S.C. § 9. We do not agree with the Division of Enforcement's contention that the ALJ actually imposed a standard of proof found in criminal cases, and in any event, we have independently reviewed the record and determined that the evidence does not support a finding of attempted manipulation as alleged in the complaint.

n47 CCH COMM. FUT. L. REP. P 20,146 (March 2, 1976) at p. 20,952.

Section 10.84 of the Commission's Rules of Practice n48 authorizes the ALJ to make an initial decision based on the record in the proceedings "in conformity with the requirements of the Administrative Procedure Act ["APA"], 5 U.S.C. § 557." Since the ALJ is in a position to observe the demeanor of the witnesses, the weight to be given to his findings reaches its maximum when these findings are based on credibility of witnesses. In weighing the evidence, the ALJ should reach his decision based upon "reliable, probative and substantial evidence" as required by § 7c of the Administrative Procedure Act. n49

n48 17 C.F.R. 10.84 (1976).

n49 While the Supreme Court in *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966), held the appropriate standard in deportation proceedings to be "clear, unequivocal and convincing evidence," the Court stressed the extreme deprivation of the sanction involved amounting to banishment and also the fact that Congress had not specified the degree of proof required in deportation proceedings. Although civil sanctions now imposed under Sections 6(b) and 8a(3) of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 9 and 12, may result in severe economic penalties including revocation of registration and a civil penalty of not more than \$ 100,000 for each violation of the Act, we do not feel this type of sanction reaches the level of severity found in a deportation proceeding nor that found in criminal proceedings where the standard of proof is "beyond a reasonable doubt."

It should be noted, however, that the standard of judicial review on appeal of a Commission Order, as set forth in Section 6(b) of the Act, 7 U.S.C. § 9, n50 differs from the burden of proof required for the Division of Enforcement to prove its case n51 before an ALJ or the Commission. Thus, at an administrative proceeding, the burden of proof to be met by the Division of Enforcement is that of proving its case by a preponderance or weight of the evidence.

n50 "[The] findings of the Commission as to the facts, if supported by the weight of the evidence, shall be . . . conclusive" as to a reviewing court.

n51 In *Woodby v. Immigration and Naturalization Service*, *supra*, the Court distinguished the scope of judicial review from the burden of proof with which it is sometimes confused. The Court indicated that "judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment." 385 U.S. at 282. Burden of proof, on the other hand, includes not only the burden of going forward with the evidence but also the burden of persuasion. As provided for in Section 7(c) of the APA, "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).

In summary, the Commission, in its review of the record, has concluded that the evidence does not support a finding of attempted manipulation. Consequently, the Commission has determined to affirm the order of the ALJ dismissing the complaint on the merits.

By the Commission (Chairman BAGLEY, Vice-Chairman RAINBOLT, and Commissioners SEEVERS and MARTIN). Commissioner DUNN not participating.

APPENDIX A

HOHENBERG: DECEMBER 1971 FUTURES POSITIONS, DECEMBER '71 AND MARCH '72 CLOSING FUTURES PRICES, NET FUTURES POSITION, NET COMMODITY POSITION, OVERALL POSITION AND PERCENT OF OPEN INTEREST IN DECEMBER FUTURES

May 4 - December 31, 1971

(all figures in 100's of bales)

L=Long S=Short

DATE (1971)	DEC. '71 FUTURES	PER- CENT OF OPEN INTEREST DEC. '71 FUTURES	CLOSING PRICE OF DEC. '71 FUTURES	CLOSING PRICE OF MARCH '72 FUTURES	NET FUTURES n1 POSITION FOR ALL CONTRACT MONTHS	NET COMMODITY POSITION n2	DIFFE- RENCE
5/4	S376	6.6	30.47	30.92-.97	S381	-	

DATE (1971)	DEC. '71 FUTURES	PER- CENT OF OPEN INTEREST DEC. '71 FUTURES	CLOSING PRICE OF DEC. '71 FUTURES	CLOSING PRICE OF MARCH '72 FUTURES	NET FUTURES n1 POSITION FOR ALL CONTRACT MONTHS	NET COMMODITY POSITION n2	DIFFE- RENCE
5/14	S508	7.4 a	31.45-.46	31.85	S564	L1881	L1317
5/28	S766	6.5 b	31.30-.48	31.85-32.10	S928	L2941	L2013
6/8	S914	9.8	29.63-.67	30.18	S1097	-	-
6/11	S880	9.1 c	30.47-.52	31.12-.15	S1107	L2126	L1019
6/25	S800	9.6 d	30.10-.12	30.63	S1063	L2072	L1009
7/9	S762	-	31.95-32.05	32.60	S1020	L1980	L960
7/16	S769	9.4 e	32.36-.41	33.04	S1055	L2051 *	L996
7/30	S805	10.3 f	31.34-.35	32.08-.12	S1044	L1882	L838
8/13	S791	11.5 g	32.52-.56	33.35-.38	S1024	L1733 *	L709
8/27	S773	12.6 h	31.62-.65	32.50-.51	S970	L1571 *	L601
9/3	S764	-	31.32-.40	32.18	S957	L1566 *	L609
9/17	S780	12.5 i	31.23-.24	32.04-.05	S870	L1235 *	L365
10/1	S815	13.3 j	32.21-.23	33.14-.17	S833	L1276 *	L443

n1 At varying times from May 4, 1971, the Company also had positions in July and October '71 futures; March, May, July, October, and December '72 futures; and March '73 futures.

* Includes net unfixed-price cotton "on call."

a As of May 15.

b As of May 31.

c As of June 15.

d As of June 30.

e As of July 15.

f As of July 31.

g As of August 15.

h As of August 31.

i As of September 15.

j As of September 30.

n2 Net Commodity Position includes current inventory plus commitments to purchase cotton at fixed prices less contracts to sell cotton at fixed prices.

See original document-page 9

DATE (1971)	DEC. '71 FUTURES	PER- CENT OF OPEN INTEREST DEC. '71 FUTURES	CLOSING PRICE OF DEC. '71 FUTURES	CLOSING PRICE OF MARCH '72 FUTURES	NET FUTURES n1 POSITION FOR ALL CONTRACT MONTHS	NET COMMODITY POSITION n2	DIF- FERENCE
10/15	S795	14.4	31.97-.99	32.88-.90	S784	L1290 *	L506
10/21	S738	13.9	31.75-.77	32.60	S678	-	-
10/22	S780	15.5	-	-	S722	L1253 *	L531
10/29	S936	19.4	31.97-32.01	32.88	S869	L1341 *	L472
11/5	S987	23.0	31.85-.88	32.82-.83	S916	L1437 *	L521
11/12	S973	29.2	31.12	32.16-.18	S936	L1533 *	L597
11/19	S915	40.3	31.15-.16	32.10	S893	L1466 *	L573
11/22	S936	46.3	31.14-.16	32.15-.16	S936	-	-
11/23	S655 k	-	31.95-32.00	32.70-.72	S863	-	-
11/26	S190 l	-	-	-	S509	L919 *	L919
12/3	S14 m	-	33.40	33.67-.70	S210	L834 *	L624

DATE (1971)	DEC. '71 FUTURES	PER- CENT OF OPEN INTEREST DEC. '71 FUTURES	CLOSING PRICE OF DEC. '71 FUTURES	CLOSING PRICE OF MARCH '72 FUTURES	NET FUTURES n1 POSITION FOR ALL CONTRACT MONTHS	NET COMMODITY POSITION n2	DIF- ERENCE
12/9	L26	-	33.25	34.44-.45	S103	-	
12/10	L26	-	-	-	S83	L1133 *	L1050
12/17	L19	-	-	36.15	S24	L1162 *	L1138
12/23	-	-	-	36.60-.65	S49		
12/31 n	-	-	-	37.20-.22	L39	L1054 *	L1093

k Includes 35,700 bales of which notice of tender was given that day.

l Excludes such 35,700 bales to make futures position comparable with net spot position in which the 35,700 bales are not included.

m Excludes 13,000 bales of which notice of tender was given on November 30, 1971 to make futures position comparable with net spot position in which the 13,000 bales are not included.

n Price quote is as of December 30, 1971.

FINAL ORDER

The Division of Enforcement has appealed from the decision and order of an Administrative Law Judge dismissing a complaint against respondents Hohenberg Bros. Company and Julien J. Hohenberg, which charged them with attempted manipulation of the price of the December 1971 cotton futures contract on the New York Cotton Exchange in violation of Sections 6(b), 6(c) and 9(b) of the Commodity Exchange Act, 7 U.S.C. §§ 9, 13 and 13(b), as in effect in 1971.

The Commission, having reviewed the record and briefs, and for the reasons stated in its Opinion dated February 18, 1977, hereby affirms the order of the Administrative Law Judge dismissing the complaint on the merits.

Accordingly, IT IS ORDERED that the charges in the complaint not having been proven, the complaint is dismissed on the merits.

By the Commission (Chairman BAGLEY, Vice-Chairman RAINBOLT and Commissioners SEEVERS and MARTIN). Commissioner DUNN not participating.

LOAD-DATE: June 16, 2008

