

Commodity Futures Trading Commission
CEA CASES

NAME: WILLARD E. PLATT, GEORGE F. FREY, JR., OLIVER M. HIBBERD, PATRICK M. SHEA, HENRY C. GATLIN, F & G COMMODITIES, AND RALPH N. PETERS & CO.

CITATION: 25 Agric. Dec. 1431

DOCKET NUMBER: 112

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(No. 10,929)

In re WILLARD E. PLATT *et al.* CEA Docket No. 112. Decided December 14, 1966.

False entries -- Burden of proof re Oliver M. Hibberd -- Dismissal of complaint re F & G Commodities

In absence of proof as to respondent Hibberd's consent to false entries on trading cards of other floor brokers complaint against him dismissed. Complaint against F & G Commodities also dismissed as partnership out of existence and entry of order imposing sanctions would serve no useful purpose.

Mr. Earl L. Saunders for Commodity Exchange Authority.

Mr. Robert P. Howington, Jr., of Pope, Ballard, Uriell, Kennedy, Shepard & Fowle, of Chicago, Ill., for respondent Oliver M. Hibberd.

Mr. Jack W. Bain, Referee.

Decision by Thomas J. Flavin, Judicial Officer

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), instituted by a complaint issued by an Assistant Secretary of Agriculture. The complaint names seven respondents, five individuals and two partnerships. Prior to hearing, respondents Frey, Platt, Gatlin and Ralph N. Peters & Co. filed separate stipulations in which each of these respondents admitted substantially the facts alleged against the particular respondent, waived hearing, and consented to the entry of an order imposing sanctions, and such orders were entered (24 Agric. Dec. 93, 97, 102, 105 (24 A.D. 93, 97, 102, 105)) terminating the proceeding as against these four respondents. After hearing in this matter, respondent Shea similarly consented to the entry of an order imposing sanctions

against him. Such an order was issued April 11, 1966 (25 Agric. Dec. 463 (25 A.D. 463)) terminating the proceeding as to respondent Shea.

Respondent F & G Commodities withdrew an answer to the complaint previously filed and is considered to be in default herein. The referee accordingly filed his report pursuant to section 0.9 (c) of the rules of practice (17 CFR 0.9 (c)) recommending the entry of a default order imposing sanctions against F & G Commodities. No exceptions to such report were filed.

Respondent Hibberd, the only remaining respondent herein who is actively contesting the charges set forth in the complaint, is a registered floor broker under the act and a member of the Chicago Board of Trade. The proceeding insofar as it relates to this respondent is concerned with transactions in May 1963 soybean oil futures on the Chicago Board of Trade on December 18, 1962.

The complaint alleges, in part, that respondent Hibberd consented to false entries on the trading cards of two other floor brokers and that this respondent thereby reported false information to two futures commission merchants and clearing members of the Chicago Board of Trade, which false information became a part of the records of such firms, in willful violation of section 4b of the act (7 U.S.C. 6b) by respondent Hibberd. Respondent Hibberd filed an answer in which most of the principal allegations of the complaint are denied. Respondent Hibberd does admit that one of the transactions in question was executed in the manner described in the complaint.

An oral hearing was held in Chicago, Illinois, October 13 and 14, 1965, before Jack W. Bain, Office of Hearing Examiners, United States Department of Agriculture. At the hearing, respondent Hibberd was represented by Robert P. Howington, Jr., of Pope, Ballard, Uriell, Kennedy, Shepard and Fowle, Attorneys at Law, Chicago, Illinois, and complainant was represented by Earl L. Saunders, Office of the General Counsel, United States Department of Agriculture. After the hearing, the parties filed briefs. On September 16, 1966, the referee filed a report recommending that the complaint be dismissed as to respondent Hibberd. Complainant filed exceptions to the referee's report and counsel for respondent Hibberd filed a brief in opposition to complainant's exceptions.

FINDINGS OF FACT

1. The Board of Trade of the City of Chicago, also called herein the Chicago Board of Trade or the exchange, was at all times material herein a duly designated contract market under the act.

2. Respondent, Oliver M. Hibberd, is an individual whose business address is 141 West Jackson Boulevard, Chicago, Illinois. Respondent is now and was at all times material herein a registered floor broker under the act and a member of the Chicago Board of Trade.

3. Transactions in futures on the Chicago Board of Trade are executed on the trading floor between floor brokers or traders who are members of the exchange. In each such transaction, each floor broker or trader acts for the clearing member of the exchange who is to clear such transaction as a principal with the clearing house of the exchange. When a transaction in futures on the exchange is cleared with the clearing house of the exchange, the clearing house is substituted as the buyer from the seller and the seller to the buyer. A transaction in futures on the Chicago Board of Trade is initially recorded on the respective trading cards of the floor brokers or traders who execute the transaction. Each floor broker or trader lists all of his transactions on his trading cards. Each trading card bears the name of the executing floor broker or trader, or some indication thereof. Purchases are entered on one side of the card and sales on the reverse side. With respect to each transaction recorded thereon, the trading card shows the date, commodity, the quantity bought or sold, the future, the price, and the name of the clearing member which is the other principal to the trade. The name of the opposite clearing member is obtained from the opposite executing floor broker or trader at the time the transaction is executed. On the date of the transactions involved herein, the trading card may or may not have indicated the name of the opposite floor broker or trader.

4. From time to time throughout each trading session on the exchange trading cards are turned over by each floor broker or trader to the clearing member whom he represented in the trades listed on such cards and by whom these trades are to be cleared through the clearing house of the exchange. The trading cards are kept by the clearing member as a part of its records and as a record of the floor broker or trader. The trading cards constitute the original record of the trades listed thereon and the information

on the trading cards is transcribed into the street book, which is a permanent record of the clearing member. At the time of the transactions involved herein,

the trading cards were used by the clearing member as the basis for preparing check slips used to confirm its trades with the opposite clearing member with whom such trades were made and were to be cleared. These check slips showed the date, commodity, quantity, future, price and name of the opposite clearing member, and were sent to the clearing house of the exchange which in turn forwarded them to the respective clearing members with whom the transactions were shown on such slips as having been made. In the event the clearing member shown on a particular check slip as the opposite clearing member had no record of the trade shown on the check slip, it so notified the clearing member which had prepared the check slip and the latter clearing member would attempt to locate the opposite clearing member with whom the trade had actually been made and with whom it was to be cleared. Upon locating the clearing member who acknowledged having made the trade, the clearing member who prepared the check slip was in a position to clear the trade and would correct its records so as to show the name of the opposite clearing member who acknowledged having had the trade made on its behalf.

5. The transactions involved herein relate to contracts for the purchase or sale of May 1963 soybean oil futures on the Chicago Board of Trade. Such contracts could have been used for (a) hedging transactions in interstate commerce in soybean oil or the products or byproducts thereof, or (b) determining the price basis of transactions in interstate commerce in soybean oil, or (c) delivering soybean oil sold, shipped, or received in interstate commerce for the fulfillment of such futures contracts. A soybean oil futures contract on the Chicago Board of Trade calls for the delivery of one tank car of 60,000 pounds of soybean oil.

6. Hayden, Stone & Co. Incorporated, A. E. Staley Manufacturing Co., John E. Brennan & Co. and F & G Commodities were at all times mentioned herein registered futures commission merchants under the act and clearing members of the Chicago Board of Trade.

7. On December 18, 1962, respondent Hibberd, acting in part as floor broker for A. E. Staley Manufacturing Co. and in part for his own account carried with John E. Brennan & Co., purchased on the floor of the exchange 17 cars of May 1963 soybean oil

futures at a price of 8.94 cents per pound from Patrick M. Shea, who was acting in the capacity of floor broker for Hayden, Stone & Co. Incorporated. With respect to the above-described transaction, Hibberd recorded on a trading card which he turned in to A. E. Staley Manufacturing Co. the purchase of 12 cars from Hayden, Stone as opposite clearing member, and recorded on a trading card which he turned in to John E. Brennan & Co. the purchase of 5 cars from Hayden, Stone as opposite clearing member. With respect to the above-described transaction, respondent Shea recorded on his trading card the name "Staley" as the name of the opposite clearing member and the initials "OH" as the initials of the opposite executing floor broker.

8. On December 18, 1962, after the 17-car transaction referred to in Finding of Fact 7 was executed between respondents Hibberd and Shea, another floor broker, Willard E. Platt, made a fictitious purchase and a fictitious sale of 17 cars of May 1963 soybean oil futures. Such fictitious purchase and sale were accomplished in the following manner: (1) Platt made entries on a trading card which purported to show a sale of 12 cars of May 1963 soybean oil futures at a price of 8.94 cents per pound to A. E. Staley Manufacturing Co. as opposite clearing member, and a sale of 5 cars of the same future at the same price to John E. Brennan & Co. as opposite clearing member, and delivered such trading card to F & G Commodities, the clearing member which Platt represented; (2) Platt made entries on another trading card which purported to show a purchase of 17 cars of May 1963 soybean oil futures at a price of 8.94 cents per pound from Hayden, Stone & Co. Incorporated as opposite clearing member, and delivered such trading card to F & G Commodities; and (3) Shea altered the entries on his trading card pertaining to the 17-car transaction between him and Hibberd,

referred to in Finding of Fact 7, to purport to show that F & G Commodities was the name of the opposite clearing member with whom the 17-car transaction was made and that "BP" were the initials of the opposite executing floor broker in such transaction, and delivered such card to Hayden, Stone & Co. Incorporated, the clearing member which Shea represented. Based on the information which Shea so reported, Hayden, Stone recorded the 17-car transaction in its street book as having been made with F & G Commodities as opposite clearing member, and cleared such transaction through the clearing house of the exchange with F & G Commodities as opposite clearing member.

9. Based on the information which respondent Hibberd reported on his trading card referred to in Finding of Fact 7 which he turned in to A. E. Staley Manufacturing Co., this firm showed in its street book that its 12-car purchase was made from Hayden, Stone as opposite clearing member, and sent a check slip through the exchange clearing house to Hayden, Stone to confirm such purchase. Based on the information which respondent Hibberd reported on his trading card referred to in Finding of Fact 7 which he turned in to John E. Brennan & Co., this firm showed in its street book that its 5-car purchase was made from Hayden, Stone as opposite clearing member, and sent a check slip through the exchange clearing house to Hayden, Stone to confirm such purchase. Hayden, Stone had no record of the 12-car trade with A. E. Staley Manufacturing Co. or the 5-car trade with John E. Brennan & Co., and Hayden, Stone, therefore, refused to acknowledge having made these trades. Thereafter, A. E. Staley Manufacturing Co. received a check slip from F & G Commodities purporting to show that F & G Commodities was the opposite clearing member with whom A. E. Staley Manufacturing Co. made the 12-car trade, and John E. Brennan & Co. received a check slip from F & G Commodities purporting to show that F & G Commodities was the opposite clearing member with whom John E. Brennan & Co. made the 5-car trade. In these circumstances, A. E. Staley Manufacturing Co. and John E. Brennan & Co. believed that respondent Hibberd had incorrectly reported Hayden, Stone as the name of the opposite clearing member, and that F & G Commodities was the opposite clearing member with whom their trades had been made. Accordingly, A. E. Staley Manufacturing Co. changed its street book to show its 12-car purchase as having been made from F & G Commodities, and cleared such purchase through the clearing house of the exchange with F & G Commodities as opposite clearing member; and John E. Brennan & Co. changed its street book to show its 5-car purchase as having been made with F & G Commodities, and cleared such purchase through the clearing house of the exchange with F & G Commodities as opposite clearing member. John E. Brennan & Co. changed the entry on Hibberd's trading card from Hayden, Stone & Co. Incorporated to F & G Commodities, and A. E. Staley Manufacturing Co. changed the entry on Hibberd's trading card on the instructions of an employee of complainant from Hayden, Stone & Co. Incorporated to F & G Commodities. Respondent Hibberd was not informed of these changes on his trading cards

until after an April 1, 1963 interview with employees of complainant.

CONCLUSIONS

The complaint herein alleges, in effect, in paragraph XII thereof with respect to respondent Oliver M. Hibberd that he consented to false entries on the trading cards of other floor brokers, Platt and Shea, and that Hibberd, by reason of such consent, reported or caused to be reported false information to 2 futures commission merchants and clearing members of the Chicago Board of Trade, which false information became a part of the records of such firms. It is further alleged in the complaint that respondent Hibberd "caused false records to be entered and made false reports in connection with the execution of commodity futures transactions and deceived the persons from whom the orders for such transactions had been received, in willful violation of section 4b of the act (7 U.S.C. § 6b)" by reason of the matters set forth in paragraph XII thereof. It is clear that the charges against Hibberd rest upon his alleged consent to the action of Platt and Shea and that complainant has the burden of

establishing such consent in this proceeding. The hearing examiner, who was in a position to observe the demeanor of respondent Hibberd, failed to find the necessary consent on the part of this respondent. Cf., e.g., *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 479 (7th Cir. 1953), cert. denied 345 U.S. 997 (1953); *Ohio Associated Tel. Co. v. National Labor Relations Board*, 192 F.2d 664, 668 (6th Cir. 1951); *In re Daniel J. Shelley, John M. Rowley, and Sam H. La Mantia*, 22 Agric. Dec. 8 (22 A.D. 8) (1963). Nor do we find such consent.

The record contains no direct evidence of consent by Hibberd to the questioned entries made on the trading cards of Platt and Shea, but, rather, to the contrary, contains a denial by Hibberd of any such consent. Moreover, Hibberd further testified that he did not even have a conversation with anyone in connection with a change of the opposite clearing member in his trade with Shea. Further, it is highly significant, it seems to us, that Hibberd's trading cards correctly reflected his transaction with Shea when they were submitted to the 2 futures commission merchants on whose behalf or through whom Hibberd made the trades. If, as complainant contends in another connection, Hibberd, Shea and Platt wanted to be certain that the trades in question would be cleared, it is thought that Hibberd would have changed the

name of the opposite clearing members listed on his own trading cards, as was done by Shea.

Complainant basically relies upon two matters which tend to support the contention that Hibberd consented to the entries in question. First, during an interview between this respondent and employees of complainant on April 1, 1963, respondent stated that he had to assume that Shea would not have made the change on Shea's trading card with respect to the opposite clearing firm unless Hibberd had instructed him to do so or had approved of such change. Of course, such statement was made by Hibberd with no recollection of the particular transaction and before he learned that the alterations on his own trading cards were not made by him. These factors considerably lessen the probative value of Hibberd's statement made April 1, 1963. He appears, however, to have repeated this statement at the hearing in this proceeding. It is difficult, however, to understand why Hibberd's consent would be necessary to effectuate the clearing of the trades in issue. The futures commission merchants involved apparently do not customarily check, and did not do so here, with the broker who made the trade when there is merely a discrepancy in the name of the opposite clearing member on the trading card submitted to them and when another clearing member is then available to clear the trade.

Also, complainant contends that Platt would not have known the names of the clearing members for whom Hibberd was acting in the transaction involved herein unless such information was furnished by Hibberd to Platt. This is, of course, speculation and surmise and counsel for Hibberd has pointed out other ways Platt might have gotten such information. While we believe that complainant's contention has some merit, it is not of sufficient probative value, standing alone, to establish consent by Hibberd to the entries on Platt's trading cards.

We conclude not that respondent Hibberd did not consent to the action of Platt and Shea but that complainant has failed to establish that Hibberd did so. Accordingly, the complaint should be dismissed as to this respondent. n1

n1. The complaint should also be dismissed as to respondent F & G Commodities which at the time of the transactions involved herein was a partnership whose address was 141 West Jackson Boulevard, Chicago, Illinois. This partnership apparently ceased doing business as a clearing member of the Chicago Board of Trade upon the death of one of its two members quite some time ago and has not been in existence for a considerable period. Under the circumstances, no useful purpose can be served by the entry of the order recommended by the referee.

ORDER

The complaint as to Oliver M. Hibberd is hereby dismissed.

The complaint as to F & G Commodities is hereby dismissed.

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

LOAD-DATE: June 8, 2008

