

Commodity Futures Trading Commission  
CEA CASES

**NAME:** DAVID LAIKEN

**CITATION:** 23 Agric. Dec. 1193

**DOCKET NUMBER:** 113

**DATE:** OCTOBER 9, 1964

**DOCUMENT TYPE:** DECISION AND ORDER

(No. 9373)

*In re* DAVID LAIKEN. CEA Docket No. 113. Decided October 9, 1964.

**Noncompetitive Trades -- Time of Execution -- Hearsay Evidence -- Violation of Regulations -- Suspension of Registration**

Respondent's registration as a floor broker is suspended and his trading privileges on contract markets refused, both for a period of 10 days, for making a trade in the May 1963 potato future in a manner that was not open and competitive in violation of section 1.38 of the regulations under the act, but charges of 2 additional violations of such section of the regulations in connection with trading in such future dismissed for lack of proof thereof.

*Mr. Earl L. Saunders* for Commodity Exchange Authority. *Mr. Leonard Hemley*, of New York, New York, for respondent. *Mr. John J. Curry*, Referee.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is an administrative proceeding of an adversary nature under the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) instituted by a complaint and notice of hearing issued under section 6(b) of the act (7 U.S.C. § 9), on October 25, 1963, by the Assistant Secretary of Agriculture. The respondent, a registered floor broker under the act and a member of the New York Mercantile Exchange, is charged with making trades in the May 1963 potato future on the New York Mercantile Exchange in a manner which was not open and competitive, in violation of section 1.38 of the regulations under the act (17 CFR 1.38). The respondent filed an answer denying the allegations of the complaint.

A hearing was held in New York, New York, on December 12, 13 and 14, 1963. John J. Curry, Office of Hearing Examiners, United States Department of Agriculture, was assigned as referee in the proceeding and presided at the hearing. Leonard Hemley of the law firm of House, Grossman, Vorhaus and Hemley, New York, appeared as counsel for the respondent. Earl L. Saunders, Office of the General Counsel of the Department, appeared as counsel for the complainant. Five witnesses testified for the complainant and 21 exhibits were received on behalf of the complainant. The respondent testified in his own behalf and introduced six exhibits. The respondent's motion to dismiss, made

after the complainant had concluded the presentation of its evidence, was denied by the referee. Both parties filed briefs after the close of the hearing.

The case involves three alleged infractions of section 1.38 of the regulations. As to two of these the complaint alleges that respondent assigned or gave to his customer, Clayton Brokerage Company, Clayton, Missouri, futures purchases which respondent had previously made for himself on the same day. As to these two charges the referee recommended dismissal for lack of adequate

evidence. With respect to the third charge, involving an arrangement between respondent and another floor broker whereby respondent purchased for Clayton 26 contracts from the other floor broker selling for respondent's account the referee recommended that respondent be found to have violated section 1.38 of the regulations.

Both parties filed exceptions to the referee's report and oral argument was held before the Judicial Officer on August 21, 1964.

#### **FINDINGS OF FACT**

1. The New York Mercantile Exchange, hereinafter called the exchange was, at all times material herein, a duly designated contract market under the Commodity Exchange Act. Contracts for the sale and purchase of potato futures thereon can be used for hedging transactions in interstate commerce in potatoes or the products or by-products thereof, or for determining the price basis of transactions in interstate commerce in such commodities, or for delivering such commodities sold, shipped, or received in interstate commerce.

2. The respondent, David Laiken, an individual whose address is 6 Harrison Street, New York, New York, is now, and was, at all times material herein, a registered floor broker under the act and a member of the exchange.

3. When trading on the exchange is conducted by means of board trading, the bids and offers 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. In the course of board trading, a floor broker wishing to buy from another floor broker whose offer has priority for acceptance, or to sell to another floor broker whose bid has priority for acceptance,

calls out his acceptance and the trade is consummated. Thus, a floor broker wishing to accept a particular offer already made by another floor broker may do so by calling out his acceptance of such offer and all prior offers at the same or lower prices. However, in the event a floor broker is following the procedure prescribed by the exchange for taking the other side of his customer's order, such floor broker is required to post both the bid and offer at the same price and to give every other broker an opportunity to accept either at the posted price.

4. Trades made in the course of board trading on the exchange are recorded in chronological order on "execution" boards by employees of the exchange as soon as such trades are made. Each of these boards is designated by a different letter of the alphabet and contains numbered lines on which the trades are so recorded. Normally, as each price change occurs in the course of board trading, the time of the transaction in which the price change occurs is recorded on the execution board on the same line on which such transaction is recorded. The exchange photographs the boards on which trades are recorded and these photographs are thereafter maintained by the exchange as permanent records. As trades are made on the exchange, they are recorded in chronological order on ticker tape by an employee on the Western Union Telegraph Co., and the time at various intervals is recorded on this tape. After each trading session, such tape is turned over to the exchange and thereafter maintained by the exchange as a permanent record. At all times material herein, trading in May 1963 potato futures on the exchange was conducted by means of board trading.

5. In the usual course of business, when a brokerage firm or futures commission merchant receives an order to buy or sell futures on the exchange, an employee of the firm prepares an office order on a printed form, and enters the date, the order number, the identification of the account, the commodity and the future, the quantity to be bought or sold, and the terms or conditions under which the purchase or sale is to be made. This information is then telephoned by an employee of the firm directly to the firm's floor broker on the trading floor of the exchange. As soon as such order is executed by the floor broker,

he reports the execution to the office of the firm by telephone, and an employee of the firm enters on the office order the quantity bought or sold and the price. In addition, the floor broker reports to the employee of the firm the board and line on which the trade

is recorded, and the employee enters this information on the office order.

6. In the usual course of business, a brokerage firm or futures commission merchant time stamps the face of the office order immediately after the order is telephoned to the floor broker for execution, and time stamps the office order again immediately after a report of execution of the order is received by the office from the floor broker. The purpose of so stamping the office order is to give the brokerage firm a record of when the order is telephoned to the floor broker and when it is reported by him as executed.

7. On January 11, 1963, the respondent, in his capacity as floor broker, received over the telephone from Clayton Brokerage Co., Clayton, Missouri, a registered futures commission merchant, an order to buy on the exchange for Clayton's account, 5 May 1963 potato futures contracts at a price of \$ 2.52 per hundredweight. According to the board described in Finding of Fact 4 the trade was made between 9:36 a.m. and 9:52 a.m. According to the Western Union ticker tape the trade was made between 9:45 a.m. and 9:50 a.m. On the other hand, the Clayton office copy of the order to buy bears a time stamp of 8:53 a.m., which would be 9:53 New York time, as the time the order was sent to respondent and as the time the order was reported filled by respondent.

8. On January 11, 1963, the respondent, in his capacity as floor broker, received over the telephone from the said Clayton Brokerage Co. an order to buy on the exchange for Clayton's account, 13 May 1963 potato futures contracts at the going market price. According to the board described in Finding of Fact 4 a trade covering 4 of the 13 contracts was made at 10:06 and trades of 2 contracts and 10 contracts, of which 7 were part of the 13 contracts in issue, were made at 10:06 or thereafter prior to 10:13 a.m. According to the Western Union ticker tape the trades were made between 10:00 a.m. and 10:05 a.m.

9. On January 11, 1963, the respondent, in his capacity as floor broker, received from the said Clayton Brokerage Co. 6 orders to buy on the exchange for Clayton's account, a total of 26 May 1963 potato futures contracts. Shortly after the respondent received such orders, he instructed Charles Lepore, another floor broker, to offer 26 May 1963 potato futures contracts at a price of \$ 2.54 per hundredweight, and Lepore thereupon called

out this offer. As soon as such offer was called out, the respondent called out his acceptance, thus purchasing the 26 contracts which he had offered through Lepore. The respondent applied the purchase of the said 26 contracts against the buying orders mentioned above, and took the sale side of the transaction into the house account of Laiken and Laiken, a partnership composed of the respondent and his wife.

## **CONCLUSIONS**

### **I**

The complainant's case is that respondent violated section 1.38 of the regulations under the act in connection with the 5 contract transaction described in Finding of Fact 7, the 13 contract transaction referred to in Finding of Fact 8, and the 26 contract transaction related in Finding of Fact 9. Respondent raises no issue as to the validity of section 1.38 but defends by claiming that the complainant has not established a violation in any of the three transactions involved. The referee recommended that the charges with respect to the 5 contract and the 13 contract transactions be dismissed for lack

of adequate proof but that respondent be found to have violated section 1.38 in connection with the 26 contract transaction.

Section 1.38 of the regulations reads as follows:

*Execution of transactions -- (a) Competitive execution required; exceptions.* All purchases and sales of any commodity for future delivery on or subject to the rules of a contract market shall be executed *openly and competitively* (emphasis supplied) as to price by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity: *Provided, however,* That this requirement shall not apply to such transactions as are executed in accordance with written rules of the contract market which have been submitted to and not disapproved by the Secretary of Agriculture, specifically providing for the noncompetitive execution of such transactions.

(b) *Noncompetitive trades; exchange of futures, etc., requirements.* Every person handling, executing, clearing, or carrying trades or contracts which are not competitively executed, including transfer trades or office trades, or trades involving the exchange of futures for cash commodities or the exchange of futures in connection

with cash commodity transactions, shall identify and mark by appropriate symbol or designation all such transactions or contracts and all orders, records, and memoranda pertaining thereto.

## II

Complainant's contention with respect to the 5 contract issue and the 13 contract issue is that respondent noncompetitively assigned or gave to his customer, Clayton, purchases previously made on the exchange by respondent for his partnership account with his wife.

Complainant then has the burden of proving that respondent had not received from Clayton the orders to buy at the times the trades involved were executed. So that the precise times at which the trades were executed on the exchange and at which the orders to buy were sent by Clayton to respondent are crucial to the complainant's case.

As to the times of execution of the trades, complainant shows that the 5 contract trade was made according to the execution board between 9:36 a.m. and 9:52 a.m. and according to the Western Union ticker tape between 9:45 a.m. and 9:50 a.m. Respondent has estimated the time as 9:49 a.m. We see, however, that in comparing the execution board and the Western Union ticker tape with respect to the 13 contract transaction, the tape records the three trades covering the 13 contract transaction as having taken place between 10:00 a.m. and 10:05 a.m. whereas the execution board shows that a 4 contract trade, the first of three trades covering the 13 contract transaction, took place at 10:06 a.m., thus revealing a variance of at least one minute between the times of execution shown in the board and by the tape.

On the issues as to exactly when the buy orders were sent by Clayton to respondent there is a problem of exactitude. The times of sending were time stamped on Clayton's office copies of the orders and the times stamped appear to be later than the times the trades were apparently executed on the exchange. But, without more, these time stamps are not conclusive proof that the orders were sent at the precise moments stamped. Aside from questions of the accuracy of the time clock and the lack of synchronization of Clayton's clock in St. Louis and the clock on the floor of the exchange, it is seen from the record that it was the practice of Clayton to time stamp the office copy of the order

as sent immediately *after* the order was telephoned by an order clerk to respondent. There were no witnesses from the Clayton firm at the hearing and the information as to Clayton's office procedures came into evidence through testimony of an investigator for complainant. How little or how much time in the way of minutes or fractions of minutes might elapse between the sending of an order and the time stamping of the copy of the order as sent is not revealed by the evidence except by the testimony of the investigator that the head customer's man at Clayton gave it as his opinion that this time span should not be more than two minutes and probably should be about a minute. Of course this was hearsay evidence with no opportunity to respondent for testing by cross-examination and could not serve alone as constituting substantial evidence in support of a finding of fact to this effect. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938).

As we have seen there are only two or three minutes at the most between complainant's evidence as to when the 5 contract order was sent and the execution of the trade. There seems to be a longer time interval with respect to the 13 contract transaction. But Clayton's order to buy the 13 contracts was Clayton's Order No. 7 to respondent. Orders No. 8 through 14 were also buy orders to respondent from Clayton and the Clayton office copies of all these orders are time stamped as having been sent at 9:11 a.m. and reported as filled at 9:23 a.m. which would be 10:11 a.m. and 10:23 a.m., respectively, New York time. We have no way of knowing from the evidence how long it would take in minutes or fractions of minutes for the order clerk to telephone these orders at one time and then to time stamp the office copies of all the orders.

In view of the narrow time spans involved and the scarcity of reliable evidence as to the exact minutes at which the trades were made and the orders sent, we reach the same conclusions as the referee with respect to the 5 contract and the 13 contract transactions, namely, that these charges should be dismissed.

It is true, of course, that complainant introduced testimony indicating that respondent had admitted the charge as to the 5 contract transaction.

Hugh A. Collins, an investigator in the New York office of the Commodity Exchange Authority, testified for the complainant that he and Sheldon Coopersmith, chief investigator in the New

York office of the Commodity Exchange Authority, interviewed the respondent on April 3 and May 20, 1963, during the investigation which preceded the issuance of the complaint in this proceeding. Mr. Collins testified that during the interview of May 20, 1963, he showed the respondent a copy of the office order of Clayton Brokerage Co. covering the order involved in Finding 7, and informed the respondent that according to the records of the exchange the transaction in which the contracts were purchased to fill this order occurred before the respondent received such order from Clayton Brokerage Co. Mr. Collins testified that he then asked the respondent "how he could execute an order before he received it", and that the respondent explained that on "a number of occasions" he advised Clayton Brokerage Co., when it had a considerable number of orders to execute, that "'I just purchased a number of contracts for my own account. If you wish so many, I will give them to you' ", and that "it could have been the case on these five; that he may have given these five contracts which he previously had purchased for his own account." Mr. Collins testified that during the same interview he asked the respondent if he filled the order for 13 contracts with contracts which he previously had purchased for his own account and that the respondent replied, "that he could not remember; that he did not give them these contracts which he purchased for his own account."

Charles E. Robinson, Director of the Compliance Division in the Commodity Exchange Authority, testified for the complainant that on October 28, 1963, subsequent to the issuance of the complaint, the respondent called him on the telephone and requested additional information concerning the charges alleged. Mr. Robinson testified that during such telephone conversation the respondent

voluntarily stated that he remembered filling the order for 5 contracts with contracts which he previously had purchased for his own account but that he had no recollection of the order for 13 contracts.

Nevertheless, respondent denied under oath at the hearing that he had made any such admissions and the referee in his report did not think it necessary to adjudicate the issue of admission as to the 5 contract charge because he concluded that the charge failed otherwise for want of sufficient evidence. With this the posture of the case on this point we do not think that we can resolve the matter at this stage nor do we think it appropriate or necessary to remand the matter to the referee.

### III

The referee concluded that the respondent had violated section 1.38 of the regulations by virtue of the manner in which respondent handled the 26 contract transaction described in Finding of Fact 9. Respondent had in hand orders from Clayton to purchase 26 contracts and he arranged with another floor broker, Lepore, to offer to sell 26 contracts at \$ 2.54 for respondent's account and respondent immediately accepted the offer and thereby filled the Clayton purchase orders. This was not open and competitive trading because respondent's bid and offer were not exposed and no one else trading on the floor was afforded an opportunity to sell to respondent at \$ 2.54 to fill Clayton's purchase orders.

Respondent claims that the transaction was open and competitive because Lepore called out the offer to sell and respondent called out his acceptance. The alleged open offer and acceptance amounted, however, to form without substance. The offer to sell was made by Lepore for respondent at respondent's request and immediately accepted by respondent while they were both still on the telephone. Respondent argues that there was outstanding on the board at the time an offer to or offers to sell a contract or two at \$ 2.54, \$ 2.53 bid, which had not been accepted by any trader, so that in accepting the offer to sell at \$ 2.54 respondent was accepting an offer turned down by all other traders and that, therefore, there was nothing wrong with the arrangement. But as we pointed out above, all other traders were kept from the opportunity to sell at \$ 2.54.

Respondent insists that the 26 contract transaction was open and competitive and that therefore, there is no occasion to go into the question as to whether under section 1.38 of the regulations it was a noncompetitive trade authorized by written rules of the exchange not disapproved by the Secretary of Agriculture. We do not agree of course with respondent. But, at any rate, examination of the rules of the exchange does not reveal that respondent complied with any applicable rule for the handling of noncompetitive trades.

Section 43.16 of the exchange rules provides:

#### TRADING AGAINST CUSTOMER'S ORDER

No member, having an order from a customer, may take the opposite side of the transaction for himself, directly or indirectly, or for an account of any firm or corporation of

which he is a partner, officer, or employee, or for account of any partner, officer, or employee of such firm or corporation, unless the clearing member has the prior consent of the customer, in which event the transaction shall be handled in accordance with the procedure outlined in section 43.12 of this Chapter, except that the bidding and offering must be at the same price. The carrying member, in placing orders on the floor, shall use due diligence to assure compliance with this section of the Bylaws.

Section 43.12 of the exchange rules provides:

## SIMULTANEOUS BUYING AND SELLING ORDERS

A member who shall have in hand at the same time both buying and selling orders of different principals for the same commodity for future delivery in the same delivery month may execute such orders for and directly between such principals at the market price, provided:

(a) When pit trading prevails, such orders are first offered by said member openly and competitively by open outcry in the trading pit on the Exchange floor by bidding and offering at the same price, and neither such bid nor offer is accepted; or,

(b) When in non-pit trading, bids and offers are posted on a board, such member (i) pursuant to such buying order posts a bid on the board and, incident to the execution of such selling order, accepts such bid and all other bids posted at prices equal to or higher than the bid posted by him, or (ii) pursuant to such selling order posts an offer on the board and, incident to the execution of such buying order, accepts such offer and all other offers posted at prices equal to or lower than the offer posted by him;

(c) Such member executes such orders in the presence of the President or his official representative designated to observe such transactions and, by appropriate descriptive words or symbol, clearly identifies all such transactions on his trading card or other similar record, made at the time of execution, and notes thereon the exact time of execution and promptly presents said record to the President or his official representative for verification and initialing;

(d) The Exchange shall keep for at least five years a record of each such transaction showing the date, price,

quantity, kind of commodity, delivery month, by whom executed, and the exact time of execution; and

(e) Neither the futures commission merchant receiving nor the member executing such orders has any interest therein, directly or indirectly, except as a fiduciary.

(f) The carrying member, in placing orders on the floor, shall use due diligence to assure compliance with this section of the Bylaws.

As the referee concluded in his recommended decision, the evidence does not show that respondent complied with rule 43.16 which makes the procedure of rule 43.12 applicable to members taking the opposite side of a customer's order.

All contentions and arguments, etc., made by the parties have been carefully considered, and whether or not specifically mentioned herein, any objections, exceptions, etc. inconsistent with this decision are denied or overruled.

Respondent's violation of section 1.38 of the regulations under the act was wilful and was serious in nature because competitive execution of trades is essential to the maintenance of a free and effective market. We accept the recommendation of the referee that respondent's registration be suspended for 10 days and trading privileges on the contract markets be refused to respondent for that period of time.

**ORDER**

Effective November 9, 1964, the registration of David Laiken as a floor broker under the act is suspended for a period of 10 days and all contract markets shall refuse all trading privileges to David Laiken during this period, such refusal to apply to all trading done and all positions held by respondent directly or indirectly.

**LOAD-DATE:** June 8, 2008

