Commodity Futures Trading Commission
CEA CASES

NAME: EDWARD A. COX JR. AND GEORGE F. FREY JR.

CITATION: Comm. Fut. L. Rep. (CCH) P21,767; [1982-1984 TRANSFER BINDER]

DOCKET NUMBER: 75-16; 192

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[P 21,767] In the Matter of Cox.

Commodity Futures Trading Commission. No. 75-16. January 3, 1983. Initial Decision in full text.

Manipulation -- Constitutionality -- Proper Application. -- The prohibition against "price manipulation" as used in Section 6(b) of the Commodity Exchange Act is not unconstitutionally vague. Words of general or wide scope are frequently used in statutory measures for administrative use in diversified circumstances in order to deal with complex economic and financial problems. The Commission added that the exact boundaries of manipulative conduct are not subject to being comprehensively listed or catalogued since there are many types and methods of manipulation. Therefore a case by case consideration is an appropriate enforcement method in cases involving manipulation.

See P 10,025, "Liabilities -- Prohibitions" division, Volume 1.

Administrative Proceedings -- Penalties -- Manipulation -- Sections 6(b) and 6(c) of the Commodity Exchange Act authorized the imposition of sanctions or corrective measures following an administrative proceeding if the facts have established that a person has committed a violation of the Act. The Commission was therefore clearly within its bounds in bringing an action seeking sanctions for alleged price manipulation.

See P 10,625 and 10,205, "Liabilities -- Prohibitions" division, Volume 1.

Wheat -- Delivery -- Supply -- Committed Wheat. -- Wheat supplies assigned by grain mills to satisfy milling needs must be excluded in determining the supply of available deliverable wheat to satisfy the holders of short futures positions.

See P 10,025, "Liabilities -- Prohibitions" division, Volume 1.

Wheat -- Supply -- Marketing Area. -- Although available wheat supplies may exist outside a "marketing area", they are not controlling on the issue of whether parties withheld long positions in order to creat price manipulation. The cost and time factors involved in obtaining these outside supplies is an important factor. According to the administrative law judge, the boundaries of a particular "marketing area" or trade area rests on the facts of each case.

See P 10,025, "Liabilities -- Prohibitions" division, Volume 1.

Wheat -- Delivery -- Supply. -- Wheat supplies allocated to a private company for shipment which could not be logistically shipped to a marketing area in a timely fashion could not be considered part of an available deliverable wheat supply for the holders of short contracts on futures markets.

See P 10,025, "Liabilities -- Prohibitions" division, Volume 1.

Manipulation -- Squeeze -- Artificial Prices. -- The manipulation of 1971 May wheat futures contracts by parties controlling a majority of outstanding long contracts violated Section 6(b) and 6(c) of the Commodity Exchange Act. Evidence showed that there was an insufficient supply of wheat deliverable and available for the short position holders for delivery on their futures contracts. The parties established a price level which was almost limit-up over the previous days settlement price. Long futures positions were withheld from futures markets until their high price goal was achieved for liquidation of their individual positions. According to the administrative law judge, the totality of these circumstances showed manipulative intent by these parties who were shown to be experienced futures traders.

See P 10,025 and 10,205, "Liabilities -- Prohibitions" division, Volume 1.

William O. Hoar, Esq., Lloyd E. Friesen, Esq., and *Alan L. Seifert, Esq.,* Commodity Futures Trading Commission, Washington, D. C. for the Division of Enforcement.

James M. Breen, Esq., and *Robert P. Howington, Jr., Esq.,* for respondent Cox. *Lee A. Freeman, Jr., Esq.,* for respondent Frey.

Statement of the Case

DUNCAN, Administrative Law Judge:

This is an enforcement case under the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 *et seq.* ("Act") instituted by a complaint issued under Sections 6(b) and 6(c) of the Act, 7 U.S.C. §§ 9 and 13b, on June 30, 1972, by the Assistant Secretary of the United States Department of Agriculture. The complaint alleges violations of the Act by Edward A. Cox, Jr. and George F. Frey, Jr., Respondents, in that they attempted to manipulate and manipulated the market price of May 1971 wheat futures contracts on the Chicago Board of Trade. On April 21, 1975, this proceeding was transferred to the jurisdiction of the Commodity Futures Trading Commission to "continue to completion" pursuant to Section 411 of the Commodity Futures Trading Commission Act of 1974, 88 Stat. 1389, 1414.

The complaint gives notice of a hearing on the alleged violations and sets forth proposed sanctions which may be applied if the statements in the complaint are determined to be true. The Respondents filed amended answers to the complaint admitting certain allegations and denying others. In the amended answer filed by Respondent Cox, it is averred, *inter alia,* that there was an ample available supply of wheat in Chicago for delivery during the time relevant here on the May 1971 wheat futures contract. It is further stated that Cook Grain Company or affiliates held a substantial short position on the May 1971 futures and also had a large inventory of wheat which could have been delivered. The amended answer states:

[The] Respondent Cox denies that prices he received for the sale of such wheat futures were "arbitrary and artificial" and states that the prices of such future on May 19, 1971, and for a considerable period of time prior thereto, did not accurately reflect economic supply and demand factors and that such price was depressed; further, that this depressed price was caused by, among other things, the concentration of a large short position in a commercial interest, Cook Grain Company, which carried such position late into the delivery month * * *

In the amended answer filed by Respondent Frey, it is stated, *inter alia,* "that there was more than ample wheat in deliverable position" to satisfy the short contracts in the May 1971 wheat futures. Cook Grain Company had warehouse receipts for a substantial amount of deliverable wheat in Chicago and "with a short position of 2,250,000 bushels, had approximately 2,000,000 bushels of wheat in barges on the Missouri River that it could have delivered to Chicago in satisfaction of the May 1971 wheat futures contract." It is stated in the amended answer that:

* * * Respondent further denies that the prices he received for the sale of 535,000 bushels in the 1971 wheat futures contract were "arbitrary and artificial;" on the contrary, the opening price on May 19, 1971, was a depressed price which did not accurately reflect the economic supply and demand factors. This low price was caused by the concentration of short positions and the market behavior of the persons having these concentrated short positions in the May 1971 wheat futures contract.

In addition, Respondent Frey avers that the allegations in the complaint "with respect to 'manipulation' and causing 'arbitrary' or 'artificial' prices are so vague as to be meaningless." Each Respondent denies "that there was any 'understanding or agreement' between him" and the other Respondent. The complaint and Respondents' amended answers are discussed at length under relevant sections *infra.*

A hearing involving several sessions was held which concluded on March 19, 1980. The transcript of the testimony adduced at the hearing consists of 1,507 pages; approximately 214 exhibits were received in evidence. The testimony and exhibits relate to the complexities of the economics and the pricing practices for cash wheat and wheat futures contracts and the transactions which are involved under the allegations of the complaint. The relevant testimony is extensive and the relevant exhibits are numerous. After the hearing, both Respondents filed motions to dismiss. The Division of Enforcement's responses will be regarded, in part, as oppositions to the motions. The parties were afforded full opportunity to be heard, adduce evidence, call, examine and cross-examine witnesses, submit oral argument and file proposed findings and conclusions and briefs.

Previous Decisions and Orders

In 1974, Respondents sought review in Federal Court of interlocutory pre-hearing orders concerning discovery issued by the Administrative Law Judge assigned to the case at that time. The District Court stayed the administrative case pending court review. The judgment of the District Court was reversed by the Court of Appeals for the Seventh Circuit on December 14, 1976, and motions for rehearing and rehearing *en banc* were denied on January, 11, 1977, *Frey v. Commodity Exchange Authority,* 547 F.2d 46, 50 (7th Cir. 1977).

On February 24, 1978, the Commission granted Respondents' request for a stay in this case pending consideration of Respondents' application for interlocutory review of the denial of their motions to the then-presiding Administrative Law Judge to disqualify himself and to issue a stay of the commencement of the hearing in this case. After that, the Administrative Law Judge determined to recuse himself. The Commission, on June 21, 1978, denied the application for interlocutory review. The Commission directed that the case be reassigned to a different Administrative Law Judge and indicated that prior orders pertaining to discovery, the issues in the case, admissibility of evidence and permissible defenses should be reexamined. *In the Matter of Edward A. Cox, Jr., and George F. Frey, Jr.,* CFTC Docket No. 75-16, COMM. FUT. L. REP. (CCH) [1977-1980 Transfer Binder] P 20,635 (June 21, 1978). The Commission stated, in part, in its decision (*Id.* at p. 22,594):

[If] an Administrative Law Judge has serious questions concerning whether or not certain evidence is admissible, he, in general, should allow it to be introduced at the hearing, affording to such evidence whatever weight is appropriate. This is consistent with the primary role of an Administrative Law Judge as one who compiles a complete, factual record from which findings of fact and credibility can be made and conclusions of law drawn. It is also consistent with the principle that one charged with violations of the Commodity Exchange Act before the Commission must receive a full and fair day in court, including an opportunity to place in the record the full evidentiary predicate for any arguably relevant defense a Respondent wishes to raise, even if the ultimate validity of that defense may be in dispute.

After reassignment and upon consideration of statements and arguments by the parties, certain prior orders were vacated (Tr. 17 (May 8, 1979)). n1

n1 The Respondents' admissions made pursuant to Section 10.42(c) of the Commission's Rules of Practice, 17 C.F.R. § 10.42(c), are hereby made a part of the record. The references to the record are the transcript -- "Tr."; Division of Enforcement exhibits -- "DE Ex."; Respondent Cox exhibits -- "Resp. Cox Ex."; Respondent Frey exhibits -- "Resp. Frey Ex."; Respondent Cox and Frey Joint Exhibit 1 -- "Resp. Joint Ex. 1"; complaint -- "Comp."; amended answer of Respondent Cox -- "Resp. Cox Am. Ans."; amended answer of Respondent Frey -- "Resp. Frey Am. Ans."; Respondent Cox's admissions -- "Resp. Cox Adm."; Respondent Frey's admissions -- "Resp. Frey Adm." Post-hearing documents submitted by the parties are identified by an abbreviated title. A reference is included to the relevant date of a document when necessary and generally to the page or pages or paragraph number or numbers of the document to facilitate finding the item in the record.

Issues

The basic issues presented for decision are the following (Tr. 17 (May 8, 1979); Comp.

pp. 2-5; Resp. Cox Am. Ans. pp. 2-7; Resp. Frey Am. Ans. pp. 2-6):

I. Whether the record establishes that Respondents intentionally attempted to manipulate and manipulated the price of the May 1971 wheat futures by means of (1) their dominant and controlling long position in the May 1971 wheat futures contract on the Chicago Board of Trade, (2) the insufficient supply of wheat deliverable and available to the shorts for delivery by them on their futures contracts during the time of manipulation and (3) the establishment and exaction of an abnormal or artificially high price for the liquidation of Respondents' futures contracts.

II. Whether there was full opportunity afforded the parties to present their evidence with respect to the issues and no unfairness resulted from the loss or destruction of various business records.

III. Whether, if it is determined that Respondents violated the Act with respect to the transactions involved herein, administrative sanctions should be applied in accordance with the terms of the Act.

Relevant Statutory Provisions

In relevant part, Sections 6(b), 6(c) and 9(b) of the Act as they existed in 1971 provided (82 Stat. 26, 30-31, 33 (1968) (See 7 U.S.C. §§ 9, 13b, 13)):

[Section 6(b)]. If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, * * * or otherwise is violating or has violated any of the provisions of this Act, or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, he may serve upon such person a complaint stating his charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Secretary of Agriculture, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked * * *. Upon evidence received, the Secretary of Agriculture may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person.

[Section 6(c)]. If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Secretary of Agriculture or the commissison thereunder, the Secretary may, upon notice and hearing, and subject to appeal as in other cases provided for in paragraph (b) of this section, make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $ 500 nor more than $ 10,000, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 9 of this Act, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph 9(a) or 9(b): *Provided,* That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under section 6(b) of this Act. Each day during which such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.

[Section 9(b)]. 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, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communications false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.

Based upon the entire record, including the exhibits and testimony adduced and from my observation of the witnesses and their demeanor, I make the following Findings of Fact, Conclusions of Law and Order:

Findings of Fact and Conclusions of Law

1. The Chicago Board of Trade, Chicago, Illinois, during 1971 was a designated contract market for wheat under the Commodity Exchange Act n2 (Comp. p. 2; Resp. Cox Am. Ans. p. 1; Resp. Frey Am. Ans. p. 1). The following are the principal classes of wheat: soft red winter, yellow hard winter, hard red winter, hard spring, durum and white (Resp. Joint Ex. 1, pp. 22-23). The rules of the Chicago Board of Trade permit delivery of the following classes: soft red winter, yellow hard winter, hard red winter and hard spring (DE Ex. 2, p. 5; Resp. Joint Ex. 1, pp. 9, 24). During 1971, yellow hard winter wheat was regarded as one of the subclasses for hard red winter wheat. Later the official U.S. grade standards were changed to eliminate the subclasses for hard red winter wheat (Tr. 667). Chicago, Illinois, is one of the major transportation centers for wheat. The usual or normal area tributary to Chicago for the source of wheat is "somewhat of an arc of approximately 125 miles around Chicago, starting * * * at South Bend, Indiana, and circling around to Kentland, Indiana, to Sheldon, Illinois * * *" (Tr. 473; See also Tr. 914 and *infra* pp. 25, 37, 39). It is "the area that will generally move their grain to the Chicago market" (Tr. 473). The predominant class of wheat grown in this area is soft red winter (Tr. 473-474). The Chicago Board of Trade during 1971 was a soft red

winter and yellow hard winter wheat market and primarily was "a soft red wheat market" (Tr. 474; *See* Tr. 938, 975-977, 1159; DE Exs. 40 (5/15/73) p 14; 39 (3/15/72) p. 5).

n2 The Chicago Board of Trade was designated as a contract market for wheat on May 3, 1923. Campbell, *Trading in Futures Under the Commodity Exchange Act,* Vol. 26, The George Washington Law Review, 215, 227 (1958).

2. Respondent Edward A. Cox, Jr. in May 1971 was registered under the Act as a floor broker. He was a member of the Chicago Board of Trade. Respondent Cox primarily traded for his own behalf, and he conducted very little trading for others. When trading on his behalf, he would trade himself or arrange to have other floor brokers trade for him. More than fifty percent of his trading was through Respondent George F. Frey, Jr. (Resp. Cox. Am. Ans., p. 1; DE Exs. 40 (5/24/71) pp. 3-4, 7; 40 (5/15/73) pp. 28-29; 39 (3/15/72), p. 46). Respondent Cox traded as a speculator and primarily as a position trader. He kept charts in his office, but did not base his trading decisions solely upon either charts or fundamental market analysis. He did some of his trading as a scalper (DE Ex. 40 (4/11/72), pp. 3-6). As an active floor broker, he was aware of supply and demand factors for wheat in Chicago (DE Ex. 40 (4/11/72) p. 10). Respondent Cox knew that in May 1971 wheat stocks in Chicago were low (DE Ex. 40 (5/15/73) pp. 18, 21, 36, 45).

3. Respondent George F. Frey, Jr., in May 1971 was registered under the Act as a floor broker. He was a member of the Chicago Board of Trade. Respondent Frey traded on his own behalf and traded for others. He traded as a speculator and operated both as a scalper and a position trader. Among other considerations, his trading decisions were made on the basis of charts, fundamental principles, point and figure reversals and ten-day averages (Resp. Frey Am. Ans. p. 1; DE Ex. 39 (3/15/72) pp. 3-4). Respondent Frey kept himself informed as to supply and demand factors in Chicago for wheat during May 1971 (DE Ex. 39 (3/15/72) pp. 5-7, 20-21).

4. Wheat futures contracts on the Chicago Board of Trade and under its rules are quoted in dollars and cents per bushel. The minimum fluctuation permitted by the rules in effect during May 1971 was one-eighth of a cent per bushel (Tr. 98). The daily trading price limits were 10 cents above or below the previous day's settlement price. The unit of trading covered by one contract was 5,000 bushels. Each fluctuation of one-eighth of a cent equalled $ 6.25 per contract. Speculators were confined by Agency regulations to position limits in wheat of 2,000,000 bushels net long or net short in any one future, Section 150.1(a), 17 C.F.R. § 150.1(a), 27 Fed. Reg. 12367 (December 13, 1962) (Tr. 205). Traders holding or controlling open positions in wheat futures which equaled or exceeded 200,000 bushels were required to report their positions to the Commodity Exchange Authority, Sections 15.01-15.03, 17 C.F.R. §§ 15.01, 15.03, 26 Fed. Reg. 2968 (April 7, 1961) 33 Fed. Reg. 8268 (June 4, 1968) (Tr. 92). The trading in wheat futures contracts on the Chicago Board of Trade was conducted in five separate delivery months: December, March, May, July and September (Resp. Cox Adm. (10/18/77) p. 2; Resp Frey Adm. (10/18/77) p. 2). During the period from approximately June 1, 1970, through and including May 19, 1971, the May 1971 wheat futures contract was traded on the Chicago Board of Trade. In May 1971, a wheat futures contract could be satisfied or liquidated by (1) an opposite and off-setting transaction in the same contract prior to the expiration of trading in that contract, or by (2) delivery of the specified quantity of wheat by the seller and its receipt and payment by the buyer during the delivery month in conformity with the rules and regulations of the Chicago Board of Trade (Tr. 362, 1288-1289). Trading in the May contract terminated on May 19, 1971, at approximately 12:01 p.m. Chicago time. Between December 24, 1970, and the end of trading May 19, 1971, the largest total open interest for

the May 1971 wheat futures contract was 28,950,000 bushels (DE Ex. 4). The total contracts settled by deliveries and redeliveries on the May 1971 wheat future were 945,000 (DE Ex. 19). The total long open interest at the end of trading on May 19, 1971, was 275,000 bushels (DE Ex. 4). The long contracts for this amount were satisfied by deliveries and redeliveries (Tr. 154-155; DE Ex. 38). The prices established by trading in wheat futures contracts on the Chicago Board of Trade were used to determine the price basis for cash transactions in wheat in interstate commerce (Tr. 166-168, 422).

5. On December 24, 1970, Respondent Cox began purchasing long May 1971 wheat futures contracts for his own account (Tr. 76-79; DE Ex. 4). He also began establishing a short position in the July 1971 wheat futures contract. Initially, 500 bushels long May against 500 bushels short July were established as the spread. By January 25, 1971, he had increased his spread position to 1,995,000 long May 1971 against 1,995,000 short July 1971 wheat futures (DE Exs. 4, 6). This position was one contract less than the allowable 2 million bushel limit. It was maintained until May 7, 1971, when deliveries against the May long position commenced. By the beginning of trading on May 19, 1971, delivery notices representing 555,000 bushels had been received and stopped n3 by Respondent Cox leaving him with a long position of 1,440,000 bushels (Tr. 76-94; DE Exs. 4, 6, 7). Prior to the commencement of trading on May 19, 1971, Respondent Cox was contacted on behalf of the Chicago Board of Trade's Business Conduct Committee through his clearing broker, and he was requested to make his wheat futures contracts available on the futures market (DE Ex. 40 (4/11/72) pp. 30-31; 40 (5/15/73) pp. 36-37, 63).

n3 When a purchaser of a futures contract receives a delivery "notice that he is willing to accept, he notifies his carrying clearing member firm that he is 'stopping' the notice, *i.e.,* that he will take delivery" COMM. FUT. L. REP. (CCH) P 317, p. 1068.

6. Respondent Frey's position at the beginning of trading on May 19, 1971, developed after a number of in-and-out trades. At times during early 1971, he was long May wheat and at other times, his position was short May wheat. He stated, "I, at least, reversed myself four or five times, depending on what I thought the stocks of wheat in Chicago were going to be" (DE Exs. 5; 39 (3/15/72) p. 5). Just before the delivery month, May 1971, Respondent began to build his long May 1971 position. By April 30, 1971, his long position was 550,000 bushels. During the first weeks in May, his short and long transactions were net long and he added to his long position so that at the beginning of the last day of trading, May 19, 1971, he was long 760,000 bushels of May 1971 wheat (DE Exs. 5; 6a; 39 (3/15/72) pp. 23-24). He was also long the July 1971 future in the amount of 250,000 bushels of wheat (DE Ex. 6a). In the morning of May 19, 1971, and prior to the opening of trading, Respondent Frey was approached on behalf of the Chicago Board of Trade's Business Conduct Committee and reminded of his open position in the expiring contract and of the necessity that an orderly market be maintained (DE. Ex. 39 (5/16/73) pp. 17-19).

7. Just after the commencement of trading in May 1971 wheat futures on the last day, Respondent Cox and Respondent Frey met each other on the exchange floor. This meeting was at approximately 10:30 a.m. Chicago time. Respondent Cox placed a verbal order with Respondent Frey to sell 1,495,000 bushels of May wheat futures at a price of $ 1.70 per bushel or at a spread differential of 20 cents over July wheat n4 (DE Exs. 40 (5/24/71) p. 3; 40 (4/11/72) p. 16). Respondent Frey accepted the limit order. Respondent Frey determined that he would sell his

own contracts at the highest price he could obtain or at "limit up" (DE Ex. 39 (5/21/71) p. 7). When trading commenced at 9:30 a.m., the May future traded at approximately $ 1.61-1/2 and the price gradually increased. At 10:30 a.m., the price had moved to approximately $ 1.65 per bushel. The futures price continued to increase. Respondent Frey was able to sell 55,000 bushels at the twenty over

July spread. The May leg of this spread for the 55,000 bushels was sold for $ 1.69-3/4 at approximately 11:22 a.m. Chicago time (DE Ex. 8; Resp. Cox Adm. (9/19/77) p. 38). The futures price moved up and reached $ 1.70 at approximately 11:31 a.m. (DE Ex. 8). At that time, Respondent Frey sold a part of the order from Respondent Cox after which the futures market price retreated for a few minutes. Respondent Frey stated (DE Ex. 39 (3/15/72) pp. 31-32):

I know that the market got up to the price of his order before the close, and then backed off. And I sold some wheat at a dollar [seventy]. * * * I think the market got there and I sold some at that price, and the market broke off a couple of cents; the bulk of the order was filled on the close.

n4 Respondent Cox was short July 1,995,000 bushels at the opening of the market on May 19, 1971 (DE Ex. 6). If there had been an execution of all of the spread portion of the order, there would have been a simultaneous liquidation of most of both the long May and the short July contracts. Respondent Frey was only able to liquidate 55,000 bushels at $ 1.69-3/4 per bushel at the spread differential of twenty cents over the July wheat futures market. Respondent Frey stated (DE Ex. 39 (5/21/71) p. 8), see also Resp. Cox Adm. (9/19/77) p. 35):

I think the volume was 55. I offered the spread a number of times in the last three or four minutes at twenty over.

While the futures market showed some opposition to the $ 1.70 price for a few moments (DE Ex. 8) and trades were made at $ 1.69-1/2, the next trading at a price change was for $ 1.70 at 11:40 a.m. Two minutes later, the price dropped to $ 1.69-1/2 again. The next change in price was an increase to $ 1.70 at approximately 11:34 a.m. In a little over ten minutes later, the futures price dropped again to $ 1.69-3/4. At approximately five minutes from the closing bell, the futures price increased to $ 1.70 and remained there for the duration of the trading (DE Ex. 8). At the price of $ 1.70, Respondent Frey sold the remaining 1,440,000 bushels from Respondent Cox's order and also sold 535,000 bushels from his own long position of 760,000 bushels (DE Exs. 4; 5). Approximately a million and a half of the bushels of wheat were sold during the "last ten seconds" of trading (DE Ex. 39 (3/15/72) p. 33).

8. At the end of trading in the May contract, Respondent Cox was short 85,000 bushels on the May futures and had received and stopped delivery notices for 585,000 bushels of wheat (DE Ex. 4). From the 585,000 bushels of wheat, 85,000 bushels were used to redeliver against his short May futures position on May 28, 1971 (DE Ex. 4). Of the remaining 500,000 bushels, 405,000 bushels were sold on the cash market between June 3, 1971, and July 9, 1971, at prices ranging $ 1.54 to $ 1.63 per bushel and 95,000 bushels were delivered against a part of Respondent Cox's July short position at the trade price of $ 1.55-7/8 per bushel (DE Ex. 35).

9. At the end of trading in the May contract, Respondent Frey held a long position of 225,000 bushels (DE Ex. 5). He had intended to liquidate this position when the market traded at the price of $ 1.70 per bushel, but in the short time available, he as was unable to accomplish this (DE Ex. 39 (3/15/72) p. 34). Of the 225,000 bushels delivered to Respondent Frey, he sold 130,000 bushels on the cash market between May 26, 1971, and June 21, 1971, at prices ranging between $ 1.61-1/4 and $ 1.66 per bushel and the remaining 95,000 bushels were redelivered against a part of Respondent Frey's July short position at the trade price of $ 1.55-7/8 per bushel (DE Ex. 36).

10. Informed market observers regarded the price rise of the May future on the last day of trading as very unusual and novel *The Southwestern Miller,* n5 a weekly journal published in Kansas City, stated (Tr. 69; DE Ex 1d (5/25/71) "Cash Wheat Premiums" (5/25/71) "Wheat Futures Markets"):

Chicago May soared 9-1/4 in final day of trade, widening to 17-3/8 c above same KC delivery and 2 c above Minneapolis, a situation without precedent in recent years.

* * *

The sensational rise in May futures at Chicago provided an extraordinary development in market relationships in that Chicago May expired at a 2 c margin over Minneapolis for the first time in the memory of most traders.

Experienced grain traders testified at the hearing and explained that they believed that the price rise on the last day of trading in the May futures contract was unusual (Tr. 540); the futures market "price was too high" (Tr. 570). The price was "high" in that it was not justified by the "demand for cash wheat" (Tr. 841, 843).

n5 At a time after the basic facts relevent to this case transpired, the name of the publication *The Southwestern Miller* was changed to *Milling & Baking News* (Tr. 69).

11. Thomas A. Hieronymus testified on behalf of Respondents at the administrative hearing (Tr. 1388-1501) and submitted an 82-page affidavit with attached exhibits (Resp. Joint Exs. 1 and A-1 through A-23). By agreement, the affidavit and exhibits were received (Tr. 1388). Dr. Hieronymus is a Professor of agricultural economics at the University of Illinois and holds a doctorate in agricultural economics and economics from the University (Tr. 1389). He has been an observer and analyst of the operations of the agricultural futures markets and related areas since prior to 1949 (Tr. 1389; Resp. Joint Ex. 1, pp. 1-2). He has engaged in teaching, studying, writing and consulting with regard to agricultural marketing and futures trading. Among his published works is his well-known book *Economics of Futures Trading* (Resp. Joint Ex. 1, pp. 1-2). Dr. Hieronymus was qualified and testified as an expert witness for purposes of this case (Tr. 1414-1415). n6

n6 The "relevance of * * * economic effects" (*Wickard v. Filburn,* 317 U.S. 111, 123-124 (1942)) and "economic analysis" (*Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972)) in the application of statutory terms and as a generative source of law has been firmly established.

12. In his affidavit, Dr. Hieronymus states that the events and commercial transactions concerning May 19, 1971, indicate that "while the wheat futures market was somewhat lacking in the smoothness of price behavior that may be considered optimum * * *" (Resp. Joint Ex. 1, p. 70), he was able to conclude that the price of wheat was not manipulated in May 1971. (*Ibid.*) Dr. Hieronymus sets forth a broad overview of economic factors pertaining to the Nation's wheat market conditions during the 1970-1971 crop year and prior years (Resp. Joint Ex. 1, pp. 3-12, 22-30). He discusses the various futures market participants and their particular contributions (*Id.* at pp. 13-22). Prices at cash markets and their apparent relationships are covered (*Id.* at pp. 31-39). Under the heading *"Chicago Receipts, Shipments, Stocks and Disappearance,"* Dr. Hieronymus discusses existing supplies, receipts, shipments, local use of wheat in Chicago and a projected average rate of shipments and use for Chicago was stated. Based on these factors, conclusions are made regarding the demand for wheat in Chicago (*Id.* at pp. 40-43). Dr. Hieronymus in his affidavit then develops an analysis of the closing price of the May 1971 wheat future in the context of his conclusions regarding the demand for wheat in Chicago and the prevailing prices in other markets. He concludes that the closing price of $ 1.70 was reasonable (Resp. Joint Ex. 1, pp. 43-46). A discussion is also included as to the reasonableness of the actions by participants other than Respondents in the futures market in May 1971 (*Id.* at pp. 46-48). It is stated that Cook Industries, Inc., with a large short position on the last day of trading in the May 1971 wheat future, "overstayed its delivery capability" (*Id.* at 63). If the short position had been liquidated sooner, the rise in the futures price would have "occurred sooner, and been more gradual" (*Ibid*). Dr. Hieronymus concludes,

inter alia, that Respondents' conduct was "tolerable and reasonable behavior" (*Id.* at p. 68) and the "price of wheat was not manipulated in May 1971" (*Id.* at p. 70). Additional discussion of the salient facts and economic analysis contained in Dr. Hieronymus' affidavit and testimony are stated *infra* under relevant topics.

13. John R. Mielke testified on behalf of the Division of Enforcement at the administrative hearing (Tr. 872-1241) and submitted a 57-page affidavit and a 27-page rebuttal affidavit. These were identified as DE Exs. 51 and 52. There was no agreement between the parties as to the admissibility of the affidavits, and they were rejected as exhibits (Tr. 956, 962). Mr. Mielke is Director of the Commission's Office of Market Surveillance. Except for a period of military service, he has been with the Commission or its predecessor agency since 1968. He holds a Master's Degree in economics from Michigan State University and a Bachelor's Degree in economics from the University of Illinois at Chicago Circle (Tr. 872-874, 884-889, 903-904). Mr. Mielke was qualified and testified as an expert witness concerning surveillance and economic operations of the futures market (Tr. 883, 912, 1041-1042).

14. During 1971, Mr. Mielke participated in the Department of Agriculture, Commodity Exchange Authority's, investigation of the May 1971 futures contract on the Chicago Board of Trade. He collected information through interviews and examination of business records, and prepared exhibits for use in an administrative hearing (Tr. 874, 888, 890-891). Mr. Mielke conducted an economic analysis of the Chicago cash and futures market during May 1971, including an analysis of prices and deliverable supply (Tr. 874, 899-900, 963).

15. The term "manipulation" was considered and applied by Mr. Mielke (Tr. 993-999) and he reviewed the elements involved in manipulative conduct. These include, *inter alia,* supply and demand factors (Tr. 963-974, 1006, 1051-1069), price relationships between different markets (Tr. 923-934, 1026, 1190), the convergence of cash prices and futures prices (Tr. 931-932, 1169), artificial prices (Tr. 989, 1004-1006, 1069-1073, 1080, 1087, 1180-1181), available and deliverable supply (Tr. 912-923, 974, 1084, 1168) and dominance of positions held by traders (Tr. 964, 1168, 1170, 1186-1187). These concepts are directly interrelated (Tr. 1170-1171).

16. Generally defined, a prohibited manipulation in Mr. Mielke's view is "the intentional causing of a price that is not reflective of supply and demand conditions by a person who has the capacity to affect price" (Tr. 994). "[On] May 19, 1971, there was * * * a very substantial price movement, an upward movement of in excess of nine cents in the May futures price while there was no comparable price movement of that direction or magnitude in the cash price -- USDA price or the July Chicago wheat futures contract" (Tr. 929). A purchaser has several advantages when he buy the cash wheat directly compared to a purchase through the futures market. These advantages are specificity in terms as to the type of wheat (including possible protein content), date of delivery and terms of delivery (including possible transportation privileges). In contrast, in a purchase through the futures market, there is uncertainty as to exact time of delivery during the delivery month. There are different classes and grades which are deliverable, and there may be transportation costs to the buyer before he can utilize the wheat (Tr. 932-934). Because of these reasons, it is expected that normally "the cash [will] be a little bit higher than the futures" (Tr. 932). "Available supply [is] the quantity of wheat that would have been conformed to the delivery specification of the Chicago Board of Trade wheat futures contracts and which would have been available to shorts for delivery within the delivery period allowed by the contract at an economic price" (Tr. 882). Excluded from this available supply is wheat that has been committed, *i.e.*, wheat "assigned to a certain commercial use and from which it is not likely to be released * * * at an economic price" (Tr. 1128). "A dominant long futures position" stated Mr. Mielke, "is one which during the delivery period, and most particularly as the last day of trading in a futures contract approaches or arrives, the position is a majority of the total long open interest, and is also larger than the supply of wheat or commodity

available to deliver against that position" (Tr. 978-979). "[An] artificial price is a price which does not reflect the supply and demand conditions for the cash commodity in the commercial cash market" (Tr. 989).

17. The Respondents, Mr. Mielke concluded, by acquiring a dominant and controlling long position in excess of the available and deliverable supply, and by withholding their positions from the futures market until their predetermined price objective was reached, forced the holders of short contracts to buy out of their positions at an artificially high price -- a price which did not reflect supply and demand factors in the Chicago area (Tr. 987-992, 1180-1181, 1202-1203). Additional references to Mr. Mielke's testimony are made *infra* under relevant topics.

I. Respondents manipulated the market price of the May 1971 wheat futures by means of (1) their large holdings of long futures contracts in the May 1971 contract on the Chicago Board of Trade, (2) the insufficient supply of wheat deliverable and available to the shorts for delivery by them on their futures contracts during the time of manipulation and (3) the establishment and exaction of an abnormal or artificially high price for the liquidation of Respondents' futures contracts.

18. It is unlawful under the Commodity Exchange Act for a person to manipulate or attempt to manipulate the market price of any commodity, in interstate commerce, or for future delivery on a board of trade which has been designated as a "contract market" pursuant to the Act, 7 U.S.C. §§ 9 and 13, *supra* p. 5-7. *See also Cargill, Incorporated, v. Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972); *G H Miller & Company v. United States,* 260 F.2d 286, 288-290 (7th Cir. 1958), certiorari denied, 359 U.S. 907 (1959); *Great Western Food Distributors v. Brannan,* 201 F.2d 476, 478 (7th Cir. 1953), certiorari denied, 345 U.S. 997. The "transactions and prices" on futures markets "are susceptible to speculation, manipulation, and control * * *" 7 U.S.C. § 5. The futures markets are "extremely sensitive" 80 Cong. Rec. 6164 (1936).

19. Manipulations for speculative profit "exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to the actual supply and demand and discourage not only this justifiable hedging but disturb the normal flow of actual consignments. A futures market lends itself to such manipulation much more readily than a cash market." *Chicago Board of Trade v. Olsen,* 262 U.S. 1, 39 (1923). *See also Bartlett Frazier Co. v. Hyde,* 65 F.2d 350, 354 (7th Cir. 1933), certiorari denied, 290 U.S. 654.

20. The Congress did not define the word "manipulate" or itemize the various and divergent methods for manipulating the market prices on boards of trade. The statute broadly prohibits the manipulation of the market price or the attempted manipulation of the market price on the futures

market. The Commission is authorized by § 6(b) of the Commodity Exchange Act to issue an order upon the "evidence received" at the hearing which shows a violation of the Act. 7 U.S.C. § 9. The Commission ruled in the case of *In Re Hohenberg Bros. Company and Julien J. Hohenberg,* CFTC Docket No. 75-4, COMM. FUT. L. REP. (CCH) P 20,271 at 21,477 (February 18, 1977), that a manipulated price is created whenever the manipulator makes the market price of a futures contract "an artificial price," i.e., "a price that does not reflect the basic forces of supply and demand." The Commission also stated (*Ibid.*):

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.

The Commission in a recent case *In the Matter of Indiana Farm Bureau Cooperative Association, Inc., et al,* CFTC Docket No. 75-14 (Opinion and Order, December 17, 1982) stated with regard to the "intent requirement" that "we adhere to this general description [in the *Hohenberg* case], but recognize that some refinement is in order" (Slip Op. p. 6). The Commission held that where a respondent is alleged to have manipulated a futures market price, it must be proven that the respondent (Slip Op. p. 12): "acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand * * *."

21. In the case of *Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972), the Court held:

We think the test of manipulation must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished. The methods and techniques of manipulation are limited only by the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.

A "squeeze" is a well-known "manipulative technique" (*In re Fox Deluxe Foods, et al.,* 18 Agr. Dec. 582, 611 (1959)), and the term is in general usage in the industry, see 80 Cong. Rec. 8089 (1936). As the Court held in the *Cargill* case *supra,* 452 F.2d at 1162:

A squeeze is a less extreme situation than a corner. In this case, there may not be an actual monopoly of the cash commodity itself, but for one reason or another deliverable supplies of the commodity in the delivery month are low, while the open interest on the futures market is considerably in excess of the deliverable supplies. Hence, as a practical matter, most of the shorts cannot satisfy their contracts by delivery of the commodity, and therefore must bid against each other and force the price of the future up in order to offset their contracts. Many squeezes do not involve intentional manipulation of futures prices, but are caused by various natural market forces, such as unusual weather conditions which have caused abnormally low crop production or inadvertent destruction of a substantial volume of the commodity itself. However, given a shortage of deliverable supplies for whatever reason, the futures price can be manipulated by an intentional squeeze where a long acquires contracts substantially in excess of the deliverable supply and so dominates the futures market -- *i.e.*, has substantial control of the major portion of the contracts -- that he can force the shorts to pay his dictated and artificially high prices in order to settle their contracts.

22. It is contended by Respondent Cox (Resp. Cox brief (8/15/80) pp. 5-18) that the prohibition contained in the Act against price manipulation is inconstitutionally vague and its application here would be improper. Respondent Frey contended in his amended answer that the term manipulation as applied in the complaint was vague and meaningless (Resp. Frey Am. Ans., p. 6). A similar claim that the term was vague and indefinite was rejected in the case of *Bartlett Frazier Co. v. Hyde,* 65 F.2d 350, 354 (7th Cir. 1933), certiorari denied, 290 U.S. 654. Words of general or wide scope are frequently used in statutory measures with regard to business practices. Broad statutory standards for administrative use in diversified circumstances are the result of the need for modern legislation to deal with complex economic and financial problems. *See, e.g., FTC v. Anheuser-Busch, Inc.,* 363 U.S. 536, 542 (1960) (unlawful to discriminate in price); *FTC v. Motion Picture Adv. Co.,* 344 U.S. 392, 396-397 (1953) (unfair methods of competition); *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 185 (1941) (unfair labor practice); *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 398 (1940) (unreasonably high prices); *FTC v. Keppel & Bros.,* 291 U.S. 304, 311-312 (1934) (unfair methods of competition); *Crane Company v. Westinghouse Air Brake Company,* 419 F.2d 787, 794-796 (2d Cir. 1969), certiorari denied, 400 U.S. 822 (1970) (manipulative or deceptive device or contrivance); *Wilson & Company v. Benson,* 286 F.2d 891, 892, 895-896 (7th Cir. 1961) (discriminatory pricing activities).

The circumstance that the application of the term manipulation is involved does not preclude this proceeding under the Constitution.

23. Respondent Cox's further claim that the administrative agencies involved herein have not issued detailed instructions showing the exact boundaries of manipulative conduct (Resp. Cox brief (8/15/80) pp. 15-17) lacks merit. Clearly the Commission in exercising its sound discretion in enforcement of the sections of the Act involved here may proceed by way of adjudication rather than rulemaking. *Securities Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 201-203 (1947); *First National Monetary Corp. v. Commodity Futures Trading Commission,* 677 F.2d 522, 526-527 (6th Cir. 1982), certiorari denied, 51 L.W. 3378 (Nov. 15, 1982); *Precious Metals Assoc. v. Commodity Futures Trading Commission,* 620 F.2d 900, 911-912 (1st Cir. 1980); *Encyclopedia Britannica, Inc. v. FTC,* 605 F.2d 964, 973 (7th Cir. 1979), certiorari denied, 445 U.S. 934 (1980). The many possible "methods and techniques of manipulation" are not subject to being comprehensively listed or catalogued. *Cargill, Incorporated v. Hardin* 452 F.2d 1154, 1163 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972). A case-by-case consideration is an appropriate enforcement method in these circumstances.

24. Respondent Cox also contends that the allegations of the complaint with respect to Section 9 must be dismissed because a felony charge can only be brought by a grand jury and must be tried by a jury or an Article III Judge (Resp. Cox brief (8/15/80) p. 5). The complaint in the instant proceeding states that this matter is brought to determine whether, if the allegations of the complaint are found to be true, an order should be entered pursuant to Sections 6(b) and 6(c) of the Act, 7 U.S.C. §§ 9 and 13b. These sections authorize the imposition of sanctions or corrective measures following an administrative proceeding where facts have been developed establishing that a person, *inter alia,* "is violating or has violated any of the provisions of this Act * * *" (Sections 6(b) and 6(c), 7 U.S.C. §§ 9 and 13b). In the case of *Great Western Food Distributors v. Brannan,* 201 F.2d 476, 478 (7th Cir. 1953), certiorari denied, 345 U.S. 997, the Court held:

The order is attacked on several grounds. The first, that the complaint did not charge an offense subject to administrative disciplinary action under Section 6(b) of the Act is, we think, without merit. Section 6(b) provides for disciplinary proceedings if a person 'is violating or has violated any of the provisions of this chapter * * *' Section 9 makes it unlawful to attempt to manipulate the price of a commodity in interstate commerce; to attempt to corner a commodity in interstate commerce, or to corner any such commodity. The complaint charged petitioners with the very conduct prohibited by this section. There can be no doubt that the averments constituted an offense under Section 6(b) of the act.

A consideration of the terms of the Act and the assertions in the complaint establishes that Respondent Cox's contention on this issue cannot be adopted.

A. Respondents held a dominant and controlling long position in the expiring May 1971 wheat futures on the Board of Trade in that (1) together they held the majority of the outstanding long contracts and (2) there was an insufficient supply of wheat deliverable and available to the holders of short positions for delivery by them on their futures contracts during the time of manipulation.

25. The "open interest" (*supra* p. 9) is the number of total contracts pertaining to one delivery month that have been entered into and not yet liquidated by an offsetting transaction or satisfied by delivery (Tr. 248-250, 325). It is alleged in the administrative complaint that Respondents on May 19, 1971, at the beginning of trading "owned or controlled" positions which totaled 2,200,000 bushels representing 46.1 percent of the total open long interest (Comp. p. 3). It is also stated that 1,440,000 of these bushels were held in Respondent Cox's name and on the same date notices of delivery had been made and stopped for 30,000 bushels. The amount of 760,000 bushels of the 2,200,000 were held in Respondent Frey's name. Of these, 10,000 bushels were sold by another floor broker on behalf of Respondent Frey. "Subsequently, at 11:31 a.m. [on May

19, 1971, Respondents'] holdings in the May 1971 wheat future represented 97 percent of

the total open interest" (Comp. p. 3). Respondents in their amended answers admit that the amounts alleged as their separate holdings are correct. They generally deny the other assertions in this part of the complaint (Resp. Cox Am. Ans., pp. 2-3; Resp. Frey. Am. Ans., pp. 2-3).

26. When Respondent Cox began to accumulate his long position in the May 1971 future on December 24, 1970, the total open long interest in the May futures was 26,450,000 bushels (DE Ex. 4). By establishing a long position with the purchase of 500,000 bushels on December 24, 1970, Respondent Cox acquired 1.89 percent of the open long interest. As Respondent Cox continued to obtain additional long contracts, the percent of long open interest held by him increased. On January 25, 1971, when he concluded his purchases, he had acquired 7.33 percent of the long open interest and held 1,995,000 bushels, and the total long open interest was 27,215,000 bushels (Tr. 77-80; DE Ex. 4). Thereafter, deliveries reduced Respondent Cox's position and at the beginning of the last day of trading, his long position was 1,440,000 bushels, and he held 30.91 percent of the total open long interest (DE Ex. 4, p. 5).

27. Respondent Frey began, in the latter part of April 1971, to establish the 760,000-bushel long position that he held at the beginning of trading on May 19, 1971. On April 28, 1971, at the close of trading, Respondent Frey held 475,000 bushels, and there was a total long open interest of 14,370,000 bushels. The percentage of the total long open interest held by Respondent Frey on April 28, 1971, was 3.31. As Respondent Frey added to his position, the total long interest declined, and his percentage of the total long interest increased. At the beginning of the last day of trading, his long position was 15.93 percent of the total open long interest (Tr. 80-81; DE Ex. 5, p. 1).

28. After Respondent Cox gave his liquidation order to Respondent Frey, in the morning of May 19, 1971, which was accepted by Respondent Frey, Respondent Cox left the immediate trading area of the wheat pit and returned "a couple of times" to talk to Respondent Frey (DE Ex. 39 (5/21/71) p. 3). Both Respondents had the same objective, *i.e.*, to liquidate their position at approximately $ 1.70 on May 19, 1971 (Tr. 987-988). The result of Respondents' decision to trade both positions by the same floor broker was to concentrate under the broker's, Respondent Frey's, control long futures positions representing 2,170,000 bushels of wheat (Tr 988).

29. By 10:41:53 a.m., none of these contracts had been sold, and the total long open interest was 3,545,000. Thus, Respondents' holdings were then 61.21 percent of the total long open interest (Tr. 982; DE Ex. 14). By 11:31 a.m., 10,000 bushels had been liquidated on behalf of Respondent Frey by another floor broker at Respondent Frey's order. Respondent Frey had not liquidated any of Respondent Cox's order or any of his own remaining contracts. At that time, their holdings were 2,160,000 bushels, and the total open long interest was 2,220,000 bushels. Respondents' holdings were then 97.29 percent of the total long positions. Respondent Cox's position alone was 63.51 percent (Tr. 983; DE Ex. 14a). During the final seconds prior to the close of trading, after Respondent Frey had liquidated Respondent Cox's order, he held as his own position approximately 81.82 percent of the total long interest (*Ibid.*). I find and conclude that Respondents during the final 30 minutes of trading held a majority of the total long open interest in the May 1971 wheat future.

30. In the administrative complaint, it is stated (Comp. p. 4):

At all times on May 19, 1971, there was an insufficient supply of deliverable wheat in deliverable position not owned or controlled by the respondents, and of long May wheat futures held by persons other than the respondents to permit holders of short contracts in the May 1971 wheat future to satisfy such short contracts without purchasing from the respondents May wheat futures or deliverable wheat. Such fact was known to the respondents.

Respondents in their amended answers deny the allegations of the complaint, just quoted *supra.* They contend that there was more than enough available and deliverable wheat for holders of short contracts in May 1971 wheat futures which could have been used to satisfy such short contracts without purchasing wheat from Respondents (Resp. Cox. Am. Ans., p. 4; Resp. Frey Am. Ans., pp. 3-4).

31. May 3, 1971, was the first day and May 28, 1971, was the last day on which delivery could be made in satisfaction of or to liquidate a short May contact. Any short May contracts remaining open after trading in the May contact ceased on May 19, 1971,

could only be satisfied or liquidated by delivery on or before May 28, 1971 (Tr. 1303). In May 1971, a Chicago Board of Trade clearing member with customers holding short May contracts who decided to satisfy their contracts by delivery would deliver delivery notices to the Board of Trade clearing organization. The Board of Trade clearing organization would then assign the deliveries to the clearing member having the oldest long futures position. The clearing member then generally assigned the deliveries to its account having the oldest long futures position. Respondent Cox appears to have had an arrangement with his clearing member to have delivery notices assigned to him out of regular order (DE Ex. 40 (5/15/73) p. 23).

32. Warehouse receipts tendered in satisfaction of a short futures position had to represent wheat of deliverable grade stored in a designated warehouse within the Chicago switching district approved by the Chicago Board of Trade as regular for delivery (see Tr. 812-813). During the last 3 days of the delivery month, delivery could also be made by tendering deliverable grade wheat loaded in railroad cars on track in the Chicago switching district (see Tr. 691-692). The railroad cars had to be consigned to a designated warehouse approved by the Board of Trade as regular for delivery. During May 1971, there were no delivery points outside of the switching district of Chicago for delivery in satisfaction of wheat futures contracts on the Board of Trade (DE Exs. 2 and 3).

33. With regard to May 1971, delivery on wheat futures contracts could be satisfied by delivery of the following classes of wheat: soft red winter, yellow hard winter, dark hard winter, dark northern spring, and northern spring. A trader holding a short position could deliver the above classes in the grades and at the price differentials listed below (Tr. 72-74; DE Ex. 2, p. 4): n7

No. 1 Soft Red

No. 1 Dark Hard Winter

No. 1 Hard Winter . . . a 1-cent premium

No. 1 Yellow Hard Winter

No. 1 Dark Northern Spring

(No. 1 Heavy grades at 1/2-cent additional premium)

No. 2 Soft Red

No. 2 Dark Hard Winter

No. 2 Hard Winter . . . . at contract price

No. 2 Yellow Hard Winter

No. 2 Dark Northern Spring

No. 1 Northern Spring

(No. 1 Heavy Northern Spring at 1/2-cent premium)

* No. 3 Soft Red

* No. 3 Dark Hard Winter

* No. 3 Hard Winter . at 1-cent discount

* No. 3 Yellow Hard Winter

* No. 3 Dark Northern Spring

No. 2 Northern Spring

(No. 2 Heavy Northern Spring at contract price)

(* No. 3 Heavy grades at contract price)

* All factors equal to No. 2 grade or better (including test weight, heat damage, total damage, shrunken and broken and contrasting classes) except foreign material (maximum 2%), total defects (maximum 8%) and total wheats of other classes (maximum 10%).

n7 Certain types or grades of wheat are not acceptable for delivery on a futures contract, such as, white (wheat used in cereal production) (Tr. 831), garlicky (wheat mixed with small wild onions) (Tr. 832), tuff (wheat containing more than 14 percent moisture) (Tr. 832), and mixed (wheat which is a "mixture of two or more different classes of wheat * * *")(Tr. 833).

* Division of Enforcement Exhibit 16c shows a total of 436.6 bushels committed or otherwise unavailable owned by The Pillsbury Company. This should be 436.3 (Tr. 915-916; DE Ex. 16a).

34. Mr. Mielke stated in his testimony, "[soft] red winter wheat and yellow hard winter wheat" were the classes which, during May 1971, were the most likely classes to be delivered on the 1971 May futures contract (Tr. 975). Dark northern spring wheat prior to 1973 had not been delivered on the Chicago futures contract (Tr. 976). "[In] most of the years the predominant class, 90 percent or more, was soft red wheat; but in 1970 and 71, [stated Mr. Mielke] I think the majority of the deliveries were hard wheat, but virtually all of the hard wheat deliveries were of the yellow hard subclass" (*Ibid.*). "[The] wheats produced in the Chicago region are principally the yellow hard -- in Illinois -- and the soft red" (Tr. 977). In May 1971, the stocks of wheat in Chicago were the smallest since 1964. Mainly, this was the result of the small wheat crops in the Indiana and Illinois states for the crop year 1970-1971 (Tr. 965; DE Exs. 1(b), 1(e)). The reasons dark northern spring wheat and hard red winter wheat are not delivered in the period 1963 through 1970 (DE Ex. 20) were economic considerations and the fact that these classes of wheat are grown geographically distant from Chicago (Tr. 976-977).

35. The wheat identified by the terms of the futures contract and the rules of the Chicago Board of Trade as eligible to satisfy a wheat futures contract is generally referred to as deliverable wheat. The available deliverable supply is the amount of deliverable wheat in store at a warehouse regular for delivery and available to a short

at an economic price and any wheat in a tributary location or distant location which can be shipped to Chicago and made deliverable at an economic price and within the time allowed (Tr. 881-882, 912). In this context, economic price is the price which "reflects the supply and demand conditions in the cash market for the commodity" (Tr 912). Generally it is the "character of the wheat" in the distant locations, *i.e.,* the circumstance that usually such wheat commands a premium based upon a specified protein content, which determines its delivery potential. Such wheat "was not ordinarily or likely to be delivered on the futures contract" (Tr. 991). Stocks of wheat located in Kansas City and Minneapolis were not included in the available deliverable supply because they are outside of the "normal supply area for Chicago" (Tr. 914). "Wheat moves on the Missouri River from Kansas City. The Missouri joins the Mississippi just south of Alton [Illinois] and the Illinois River is connected by water to Lake Michigan at Chicago. Barges moving from Kansas City can turn south or north at the Mississippi and which way they go depends on the relative pull of price from north to south" (Resp. Joint Ex. 1, p. 39). Wheat possibly being shipped on the Mississippi or Missouri Rivers was not considered available for delivery because the "price relationships which existed during the month of May did not make it economically advantageous for the owners of that wheat to ship it into Chicago" (Tr. 914-915). After the May 1971 futures market price reached $ 1.70 per bushel, it may have been economical to traders controlling wheat stocks in transit on the river system to ship some wheat to Chicago and deliver it on the futures market, but by then there was not enough time available (Tr. 1161). Respondents sharply contest this analysis of the available deliverable supply, *infra,* pp. 28-29, 32.

36. The following chart shows the approximate total supply of deliverable wheat of all classes and that portion of the supply of wheat which was committed or otherwise unavailable to the holders of short futures positions (Tr. 912-923, 1094-1095, 1126-1128, 1155-1156, 1226-1227; DE Exs. 16a, 16b, 16c, 16d):

Deliverable wheat, deliverable wheat committed or otherwise unavailable, and deliverable wheat available for holders of short positions in Chicago Warehouses regular for delivery for the Chicago Board of Trade for the delivery period after May 19, 1971

(In thousands of bushels)

Warehouses regular for delivery	Owner of deliverable wheat	Deliverable wheat	Deliverable Wheat committed or otherwise unavailable	Available deliverable wheat
Rialto Elevator (operated by General Mills)	General Mills (Chicago Flour Mill and Chicago Merchandising)	967.2	848.1	119.1
	Bay State Milling	69.4	69.4	
	Respondent Cox	220.7	220.7	
Cargill Elevator (operated by Cargill, Inc.)	Cargill, Inc. (includes Milwaukee wheat stocks, 48.4 bushels)	154.7	95.0	59.7
	Pillsbury Company *	357.8		
Continental Grain Company)	C.C.C.	1.7		1.7
Sante Fe Elevator Garvey Grain,	International Multifoods	198.2	198.2	
Inc.)	J.M. Rose	2.1	2.1	
	Dixie-Portland	77.4	47.4	30.0
Rock Island	Pillsbury Company *	105.5	105.5	
Elevator	Unknown	11.8		11.8
(operated by	Respondent Cox	130.0	130.0	
Garvey Grain,	Totals	2,538.3	2,316.0	222.3

37. A dominant long futures position in the marketplace, in Mr. Mielke's analysis, evolves from a combination of available deliverable supply and the size of the trader's futures position. Such a position (Tr. 978-979):

[Is] one which during the delivery period, and most particularly as the last day of trading in a futures contract approaches or arrives, the position is a majority of the total long open interest, and is also larger than the supply of wheat or commodity available to deliver against that position.

When the total approximate quantity of deliverable wheat committed or otherwise unavailable to holders of May short futures contracts (2,316,000 bushels) is subtracted from the total approximate amount of deliverable wheat in inventory for warehouses regular for delivery (2,538,300 bushels), the approximate remaining quantity (222,300 bushels) is far less than the outstanding short contracts (3,545,000 bushels) at 10:41:53 a.m. May 19, 1971.

Most of the available deliverable supply of wheat (190,000 bushels) was obtained and delivered on the futures market after May 19, 1971, from sources other than Respondent Cox (Tr. 921; DE Exs. 4, 5, 14). Holders of a substantial majority of the short positions were thus unable to obtain deliverable wheat and were required to meet the price established by Respondents in order to liquidate their short positions. I find and conclude that Respondents held a dominant and controlling long position after 10:41:53 a.m. in the expiring May 1971 wheat futures.

38. It is contended by Respondents that substantially all of the stocks of wheat in Chicago and wheat delivered prior to May 28, 1971, must be considered available deliverable wheat (Resp. Cox brief (8/15/80) pp. 90-106; Resp. Frey brief (8/14/80) pp. 20-24). It is asserted that the exclusion from the calculation of committed wheat, that is, wheat assigned by mills to satisfy their milling needs and by handlers to meet prior contracts was not warranted. Mr. Mielke, in order to determine the volume of wheat in the Chicago market which was committed, made a survey of the major firms and their inventories and commitments (Tr. 913; DE Ex. 16a). It may be that at a sufficiently high price level, it would become profitable for mills and other grain handlers to cease or interrupt their normal operations and sell their current wheat inventories to holders of short contracts. From the evidence adduced at the hearing from industry witnesses, the inference to be drawn and which is hereby applied is that mill managers and grain dealers are quite averse to disturbing uses previously assigned for the wheat they have because of the consequences such as closing mills and dissatisfied customers. For example, the stocks of wheat held in Chicago by International Multifoods were for "milling commitments at various locations that [the firm] had to honor" (Tr. 617). n8 Any assessment of the market supply must deal with the normal and usual market operations. It is clear that such committed wheat would only be available to the holders of short positions at a high or uneconomical price probably even above that reached on the futures market (see Tr. 426-427, 434, 596, 617). Current bids, offers or quotations in the market are for the spot commodity, *i.e.*, wheat that "will sell that is not committed. Something that comes in that has no contracts against it sells in the marketplace today * * *" (Tr. 478). I find and conclude that the committed wheat must be excluded in determining the supply of available deliverable wheat.

n8 Here, as in the case of *Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1160, fn. 6 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972) there were stocks of wheat in Chicago "owned by grain mills which needed them for their own grind requirements, and hence [such wheat stocks] were not available for delivery."

39. It is also Respondents' view that wheat located in markets other than Chicago must be considered available to the holders of short positions on May 19, 1971 (Resp. Cox brief (8/15/80) pp. 103-113; Resp. Frey brief (8/14/80) pp. 25-36). Reported stocks of wheat at these markets relied upon by Respondents are listed in the following table (Resp. Cox Exs. 52, 54):

Reported Wheat Stocks at Milwaukee, St Louis and Kansas City

May 18, 1971

Markets	Reported Wheat Stocks
Milwaukee, Wisconsin	246,000 bushels
St Louis, Missouri	659,000 bushels
Kansas City, Missouri	24,065,000 bushels

Wheat in transit from Milwaukee to Chicago was included as part of the deliverable supply (Tr. 913; DE Ex. 16c).

40. "Ten days was probably as quickly as [a shipper] could get enough [railroad] cars at that time" to ship as much as 55,000 bushels of wheat from Milwaukee to Chicago (Tr. 848). Transportation time between Chicago and St. Louis in May 1971 was estimated to be between 4 to 7 days (Tr. 535-536, 1400-

1401). The time between Chicago and Kansas City was estimated to be between 8 to 14 days (Tr. 536, 550, 648-649, 693). The record contains estimates of the transportation rates during May 1971 between Chicago and various cities (Resp.

Cox Ex. 52). The testimony of witnesses who were engaged in the handling of wheat during 1971 was that there was considerable risk to holders of short positions during the relevant time between May 19, 1971, and the last delivery day, May 28, 1971 n9 for the holders to have reasonable assurance that they could obtain deliverable wheat from a market outside of Chicago at an economic price and transport the wheat to Chicago and place it in deliverable position in the time available (Tr. 468, 625-628, 647-649, 690-691). In explaining the risk and uncertainty in acquiring wheat from Kansas City to deliver to Chicago, Mr. H. Dean Campbell, a Vice President of Dixie Portland, testified (Tr. 648-649):

Q. Where did you work prior to Dixie Portland?

A. I spent 15 years with General Mills and five years with Bartlett and Company, a private merchandising firm in the city of Kansas City.

Q. From your experience at Bartlett, was it possible or did Bartlett have the potential to load out and barge wheat to Chicago within seven business days in May of 1971?

A. They had the capability of loading wheat out, and they presumably had barge freight. Whether or not they could get to Chicago in seven days is highly doubtful.

Q. Ten days?

A. Ten plus. The normal trip to St. Louis is about four days from Kansas City. And the good Lord only knows how long it will take you to get through a fleeting area in St. Louis and thence down and into the Illinois, and from there to Chicago, plus the fact that once you get to Chicago, you do not necessarily have a place to put it, if your don't own a elevator here.

n9 A holder of a short position would have to have had a warehouse receipt in hand on May 27, 1971, in order to deliver against the May future (Tr. 449-450).

41. On the last day of trading, the failure to have such "delivery capacity," *i.e.*, lack of sufficient quantity and adequate quality of wheat and the physical facilities available to place the wheat in deliverable position would place a holder of a short position (because of such time and cost factors) at extreme financial risk (Tr. 495-496, 594-595, 626, 647-648, 812-813). In the case of *G. H. Miller & Company v. United States,* 260 F.2d 286 (7th Cir. 1958), certiorari denied, 359 U.S. 907 (1959), the circumstance that the shorts could have availed themselves of a higher grade of commodity or out-of-town supplies of the commodity for delivery on their futures contracts did not preclude a determination that there was "insufficient supply of deliverable" commodity for the manipulated market (*Id.* at 288-289). The cost and time factors involved in obtaining such alternative supplies afforded a proper basis for exluding them from the deliverable supply available to the shorts (*Id.* at 289). See also *Great Western Food Distributors v. Brannan,* 201 F.2d 476, 481 (7th Cir. 1953), certiorari denied, 345 U.S. 997; *Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1165 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972).

42. In any event, the dispositive answer to this contention by Respondents is that it is the amount of available deliverable wheat shown to be in the Chicago market and the area tributary to Chicago that is controlling. The Court in *Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1166 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972), noted the "closely related area of antitrust regulations under the Sherman Act" and market manipulations under the Commodity Exchange Act. In cases arising under § 1 of the Sherman Act, "it is the nature of the restraint and its effect on interstate commerce and not the amount of the

commerce which are the tests of violation." *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 485 (1940). In the case at hand, it is the evidence of the Respondents' manipulation of the price on the Chicago futures market which is of concern and this is irrespective of the number of other markets their actions may or may not disrupt. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Assn.,* 336 U.S. 460, 464 (1949). The *Report of the Federal Trade Commission on the Grain Trade* (1926), Vol. VII, p. 243, refers to owning grain "in the market where the corner is run." Similarly, in the *Report of the Federal Trade Commission on the Grain Trade* (1920), Vol. V, pp. 322-323, it is explained that in "the process of running a corner the corners acquire all or nearly all the wheat (or corn or oats) that is in store in regular warehouses in Chicago (or at whatever terminal market may be the scene of their operations), either by purchase and storage of the cash grain or through the earlier deliveries made by sellers of the futures, and thus occupy approximately the position of being the only holders of the actual wheat from whom grain can be bought to meet obligations on the future contracts by delivery". Clearly the boundaries of a particular "marketing

area" or "trade area" rest on the facts in each case. A relevant geographical market need not be proved "in the same way the corpus delicti must be proven to establish a crime," or "by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.* 384 U.S. 546, 549 (1966). Nor, held the Court is there a burden of proving "by an army of expert witnesses what constituted a relevant 'economic' or 'geographic' market." *Ibid.* The Chicago cash wheat market is a well-defined market established by its direct participants on the basis of normal supply sources, price, transportation costs and competing markets (Tr. 1094).

43. There were rumors or gossip among the member floor brokers of the Chicago Board of Trade during the existence of the May 1971 wheat futures contract that Cook Industries, Inc., had a large quantity of wheat loaded on barges located on the Mississippi or Illinois Rivers which it could bring to Chicago for delivery against its short futures contracts (Tr. 591-594, 611-612, 646-648). It is contended by Respondents (Resp. Cox brief (8/15/80) pp. 108-111; Resp. Frey brief (8/14/80) pp. 31-34) that this wheat must be included in the determination of the available deliverable supply for the holders of short positions.

44. None of the witnesses at the hearing testified that they believed the rumors or gossip. Various rumors occur frequently in the grain industry (Tr. 738). H. Dean Campbell, Vice President of Dixie Portland Flour Mills, Division of the Federal Company, testified that he did not believe such rumors or gossip and in his opinion, it was not reasonable to expect that Cook Industries, Inc., was going to bring substantial quantities of wheat up the Illinois River in time to deliver on the May 1971 futures contract because it was not physically possible (Tr. 654-657). Mr. Jordan Hollander, a partner in Hollander and Feuerhaken, a Chicago grain dealer, testified as follows (Tr. 507): "[Up] until the last trading day there was never an indication made that I can recall whether those barges were going to come to Chicago." If any barges with wheat had been started on the Illinois River for delivery at Chicago, the information would have been sent to Chicago, and it would have received marked attention in the Chicago marketplace (see Tr. 508).

45. Phillip H. McCaull was employed by Cook Industries, Inc., from March 1964 until March 1972, as an Executive Vice President with responsibility for commercial merchandising of grain and the firm's futures trading (Tr. 676). During the hearing, facts were adduced tending to reflect adversely upon Mr. McCaull's evidence (Tr. 677, 695-696, 727-729, 800-801). I find and conclude that Mr. McCaull was truthful and I credit and accept his testimony in this case. At the beginning of trading on May 19, 1971, Cook Industries, Inc., and its associates had a short position of approximately 2,250,000 bushels of wheat (Tr. 740-741). Mr. McCaull testified that commencing approximately May 5, 1971, his firm started to lose its ability to deliver cash wheat against its short

position in Chicago (Tr. 819-820). This was because, in part, the wheat the firm could have brought to Chicago was being shipped south to the Gulf and, in part, because of the passage of time and the logistics of moving grain to Chicago (*Ibid.*). By May 15, 1971, the firm no longer had the ability to ship a substantial quantity of wheat to Chicago for delivery on the futures market (*Ibid.*). Mr. McCaull testified (Tr. 812-813):

Q. During the course of your cross-examination, you said that on May 19 -- I believe your exact words were, "Strictly speaking you had the ability to make delivery on your 2 million short position." Do you recall that?

A. Yes, sir. I do.

Q. What do you mean by "Strictly speaking you had the ability to" -- do so?

A. When we -- at that point in time, we had the choice of going off short, not buying in our short position, and going out and acquiring the wheat in the market, the warehouse receipt, and delivering them -- whatever warehouse receipts were there, delivering them. And then if there were not enough, buying them back again and redelivering them again until the expiration of the contract.

In doing that, one does take the risk of either the warehouse receipts not being available, period. Or that the warehouse receipts would cost you much more than it would cost you to buy in your short futures. And that is the decision that you have to make at the time. Physically, I did not mean that more wheat could be brought in to Chicago, because physically we could not -- and I can't speak for others, but we could not bring in more wheat. What I meant was that we did have -- and as I recall, had the choice of going off short the wheat and trying to buy warehouse

receipts and redeliver them against our shortage

Q. So, in sum by ability, you had the money to go out and acquire it?

A. Yes, sir.

Q. If you had to?

A. Yes, sir.

Q. But you did not have the stocks in Chicago?

A. No, sir.

Q. And it was your feeling that you couldn't logistically bring them in?

A. That was our opinion, yes, sir.

I find and conclude that the cash wheat owned and controlled by Cook Industries, Inc., on May 19, 1971, was not available to the holders of short contracts on the Chicago futures market and such wheat was properly excluded from the available deliverable supply.

46. Respondents, contrary to their contentions in their papers filed herein (Resp. Cox brief (8/15/80) pp. 27-32, 114-115; Resp. Frey brief (8/14/80) pp. 36-37), clearly knew that there was an insufficient supply of available deliverable wheat for holders of short positions during the period of manipulation. Both Respondents admitted that they were aware of the weekly reports of wheat stocks in Chicago (Resp. Cox. Adm. (9/19/77) p. 46; Resp. Frey Adm. (9/15/77) p. 39). Respondent Frey based his trading decisions, in part, on "[just] exactly what [he] through the availability of the supplies were going to be" (DE Ex. 39 (3/15/72) p. 5). With respect to the "delivery of wheat in May" he was aware of the supply and demand factors and "thought that every pound of wheat in Chicago would be needed" (DE Ex. 39 (3/15/72) p. 20). Respondent Frey "anticipated 15 days before it happened that it [*i.e.*, the price rise in the May futures contract] was going to happen" (DE Ex. 39 (5/16/73) p. 21). Respondent Cox knew there was "a small available stock of wheat" for the holders of short

positions (DE Ex. 40 (5/15/73) p. 36). "[There] are very few secrets in cash grain trading * * *" (Tr. 1333). Mr. Duane N. Ware, a futures trading specialist employed by the Commission, is a trained and experienced observer of the futures markets (Tr. 58-61, 327-330). He testified at the hearing and explained that floor traders, based upon reports of the actions of mills and others engaged in the cash and futures markets, have an approximate knowledge of the open interest, know which traders have a position in the futures market and the relative strength of the position that the trader himself has (Tr. 325-329). It is acknowledged that prior to the commencement of trading on the last day, the Business Conduct Committee of the Chicago Board of Trade sent a communication to each Respondent that their respective concentrated positions were potentially disruptive and that they should act accordingly (De Ex. 39 (5/16/73) pp. 17-18; DE Ex. 40 (4/11/72) pp. 30-31). See also the determination arising from Respondents' failure to testify, *infra,* pp. 73-74). As Dr. Hieronymus observed both Respondents are "knowledgeable" "professional speculators" (Tr. 1408-1409). While Respondents could not be certain of the precise deliverable supply available to the shorts from the estimates of the total visible supply and from other information available to them, it may be inferred, and the inference is hereby adopted and applied, that the Respondents had knowledge of a reasonably accurate estimate of the deliverable supply available to the holders of short contracts. Moreover, quite appropriate here is the maxim that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States,* 342 U.S. 337, 340 (1952). I find and conclude that Respondents, as experienced traders with over 20 years (*infra,* p. 72) combined experience in the market, were well aware of the relevant market conditions and of the importance of such conditions.

47. In the case *Volkart Brothers, Inc. v. Freeman,* 311 F.2d 52 (5th Cir. 1962), which involved an alleged manipulation of cotton futures prices, the Court stated, 311 F.2d at 60:

Unless the shorts are to be excused from the performance of their contracts and from the exercise of due diligence to that end, the ample supply of uncertificated cotton must be considered as available to them.

Both Respondents (Resp. Cox brief (8/15/80) pp. 81-100; Resp. Frey Brief (8/14/80) pp. 43-44) rely upon this holding as establishing that the constraints of time and price must be deemed irrelevant and the holders of short positions have an obligation to prepare for and make delivery or else pay whatever price is exacted to liquidate their position. Dr. Hieronymus stated as part of his interpretation of deliverable supply that (Resp. Joint Ex. 1, p. 8):

Shorts should be expected to and do, in fact, see to it that the available stocks are certificated if they cannot otherwise fulfill their contracts. If they elect to bid up the futures price rather than see that available stocks are certificated, the consequences are and should be considered their own fault.

48. The answer to Respondents' contentions is that in the particularized facts in the case at bar. Respondents elected to trade with the holders of short positions to off-set their positions by liquidating trades on the exchange. When traders have resort to this alternative to satisfy their futures contracts and there co-exists a dominant or controlling long interest and a shortage of available deliverable commodity, the Act mandates that the futures market price shall not be an intentionally manipulated price.

49. The Court in *Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1172-1173 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972) in determining not to follow the *Volkart* decision recognized that "the obligation to make or take delivery is a bona fide feature of the futures contract * * *." Nevertheless, "the [main economic] functions [of a futures market] can be fulfilled only if both longs and shorts can be assured that they can offset their contracts at nonmanipulated prices." The prohibitions in the Act are paramount. Respondents cannot escape the provisions of the Act and the holding of the Court in the

Cargill case, by their reliance on the *Volkart* case and the basic contractual obligation of delivery.

B. There was no substantial demand for wheat in Chicago and Respondents established and exacted an abnormal or artificially high price for the liquidation of their contracts.

1. There was no substantial demand for soft red winter wheat or yellow hard winter wheat in Chicago during the time of Respondents' manipulation.

50. During the last half of May 1971, there was no substantial market demand for soft red winter wheat or yellow hard winter wheat delivered in Chicago (Tr. 421-422, 437, 460-461, 475, 533, 546-547, 562-564, 578-579, 581, 583, 622, 634-636, 641, 661-662, 664, 681, 687, 836, 841, 966-971).

51. The lack of substantial demand for wheat during the second half of May 1971 is in accord with the production and marketing practices for wheat in and near Chicago. The time from approximately the middle of May to the first of June is a transitional period in the Chicago area. Supplies of old crop wheat are near depletion, and the harvest of new crop supply is commencing (Tr 583-584, 643, 869-870). Generally, new crop wheat is cheaper than old crop wheat. The inventory needs of flour millers are usually consistent from year-to-year (Tr. 436). Millers want to have an adequate supply of wheat during this time for their milling needs and in order to make a gradual incorporation or blending of new crop wheat as it is acquired with old crop wheat so that a smooth transition is possible (Tr. 643-644, 853). During the middle and latter part of May and with the harvest of new crop wheat approaching, millers seek to keep their old crop inventory as small as they can in anticipation of the incoming new crop. "[Most] millers or processors try to cut it as close as possible * * *" (Tr. 600-601). The principal users of wheat or flour millers in Chicago are General Mills, Inc., and Dixie-Portland Flour Milling Company (Tr. 376-377, 661, 966-969). "They are the people in Chicago within the confines who take the wheat and grind it into their flour" (Tr. 377).

52. William J. Walton testified at the hearing (Tr. 830). During May 1971, he was employed by General Mills, Inc., in its Chicago grain office, and he was in charge of Chicago and southeastern grain operations (Tr. 830-831). General Mills, Inc.'s, Rialto Elevator in the Chicago area had a storage capacity of 2,500,000 bushels of wheat (Tr. 831, 850). The firm's Chicago Flour Mill used primarily soft red winter wheat from Northwestern Indiana, Southern Illinois and the St. Louis area. The cereal plant used white wheat from Michigan (Tr. 831-832). Mr. Walton stated that based upon his observation there was very little demand for wheat in Chicago during May 1971. He testified (Tr. 835-836):

Q. In May of 1971 you were generally aware of the demand conditions for wheat in the Chicago area?

A. Yes.

Q. And what were your observations of the demand conditions in Chicago at that time?

A. We had some yellow hard wheat that we wanted to sell. And for a while, I couldn't get very far selling it. We finally sold, I think it was 70,000 bushels to

another mill at four over May, which is approximately delivery value.

I know Cargill had some soft red wheat that they had been trying to sell. And they ended up delivering it, so that didn't indicate too much demand.

And we were buying a little truck wheat and old wheat of one kind or another at around eight or nine over July, which didn't indicate much demand either.

General Mills, Inc., during May 1971, had sufficient wheat or close to that quantity in Chicago for its milling operations to carry it through until new crop wheat became available (Tr. 835, 840).

The firm would still purchase wheat, if the price was favorable (Tr. 840, 851). Daily it issued nominal bids for wheat (Tr. 851) which were at prices below what other firms, if they needed wheat, would be likely to offer (Tr. 852).

53. On May 19, 1971, General Mills, Inc., purchased 55,000 bushels of No. 2 soft red winter wheat from Cargill, Incorporated, at $ 1.58 per bushel F.O.B. Milwaukee, for ten days' shipment to Chicago (Tr. 836-837; DE Exs. 45,48). General Mills, Inc., did not have a critical need for this shipment of wheat; the firm had ample storage space and the ten-day limitation was to insure that the firm received old crop wheat (Tr. 848-849, 853).

54. On May 1, 1971, General Mills, Inc., held a short position on the May futures of 1,170,000 bushels (Tr. 834). During the month of May, the firm delivered 125,000 bushels against this position (Tr. 834). Mr. Walton explained: "The first 25,000 bushels was -- I think yellow hard wheat, which [General Mills, Inc.] didn't have a need for; and I wasn't able to sell it, so we delivered it" (Tr. 834). The remaining 100,000 bushels was soft red wheat which was delivered because Mr. Walton believed he might be able to buy it back later at a cheaper price (Tr. 834-835). Also, the "hundred [thousand] represented wheat that [Mr. Walton] thought we might get along without if we had to" (Tr. 835). On May 25, 1971, General Mills, Inc., purchased 50,000 bushels of No. 2 soft red winter wheat from St. Louis Grain Corporation of St. Louis, Missouri, at $ 1.66-1/2 per bushel delivered Chicago by barge with shipment as soon as possible or within 10 days (Tr. 838; DE Ex. 49). This wheat was purchased, in part, "to replace what had been delivered on the futures contract" (Tr. 838). On May 26, 1971, General Mills, Inc., purchased 85,000 bushels of No. 2 soft red winter wheat from Respondent Frey through J. T. McKerr & Co., at $ 1.66 per bushel in store at General Mills, Inc.'s, Rialto Elevator in Chicago (Tr. 838-839; DE Ex. 50). "This again was part of replacing the hundred [thousand] that [General Mills, Inc.] had delivered" on the May futures contract (Tr. 839).

55. H. Dean Campbell, the Vice President in charge of cash grain purchasing and hedging for wheat on the futures markets for Dixie Portland Flour Mills, a division of the Federal Company, testified at the hearing (Tr. 632-633). His firm mills wheat for family flour and commercial flour. Family flour is prepared for retail sale in two-pound, five-pound and ten-pound bags in grocery stores. Commercial flour is used by bakers for crackers, cookies and bread (Tr. 633). The Chicago mill "manufacturers entirely commercial flour for the use of the commercial baker" (Tr. 633). The Chicago mill "ground hard red winter, yellow hard red winter, soft red winter and dark northern spring" wheat (Tr. 637). Normally the tributary area to Chicago for soft red wheat would be the two northern tiers of counties in the states of Illinois and Indiana. Dixie Portland Flour Mills normally obtained its soft red winter wheat from northwestern Indiana; yellow hard red winter wheat from the two northern tiers of counties in Illinois and Western Kansas and Nebraska; hard red winter wheat was obtained from eastern Colorado, Nebraska and western Kansas (Tr. 637-638).

56. On May 19, 1971, Dixie Portland Flour Mills had a surplus of soft red winter wheat, in that when its soft red wheat inventory was measured against its bakery flour contracts, there was a surplus of wheat (Tr. 634, 636, 641). And, at that time, Mr. Campbell did not foresee any bakery flour sales contracts "in the immediate future" (Tr. 635). As a means of dealing with its surplus wheat, the firm established a short futures position in May wheat on the Chicago Board of Trade on May 19, 1971, at approximately 11:00 o'clock (Tr. 634). At that time, the market price was approximately $ 1.67-1/2 per bushel (DE Ex. 8). Subsequently, the firm delivered 30,000 bushels of wheat against its short position (Tr. 635; DE Exs. 16a, 16c). Other surplus wheat held by Dixie Portland Flour Mills was not delivered because the firm did not have transportation billing for the wheat as required by the Chicago Board of Trade rules (Tr. 635-636).

57. Grain merchants handling wheat for domestic and export use during the middle

and latter part of May were not seeking wheat in the Chicago area. Cargill, Incorporated, stated Lawrence R. Miller, who was in charge of export and domestic merchandising made no export sale in May 1971 (Tr. 443). It sought cash purchasers (Tr. 453) and cash sales were made during May 1971 at $ 1.58, $ 1.64-1/2, $ 1.66-1/2 and $ 1.67 (Tr. 445-451; DE Exs. 43-46) and made deliveries against its short position in the May 1971 wheat futures (Tr. 451). The delivery of the last quantity on the futures market was because the firm "couldn't sell it" (Tr. 461). The firm was not "making very many purchases of wheat during that period" (Tr. 452).

58. Jordan Hollander as a partner in the firm Hollander and Feuerhaken made transactions in May 1971 as a cash grain broker. "We buy the grain from country elevators and sell * * * to the exporters, processors [and] users of grain" (Tr. 472-473). The supply and demand for wheat in Chicago in May 1971 was such that there "was no immediate need for wheat" (Tr. 475) by mills in Chicago.

59. Phillip M. McCaull during 1971 as an Executive Vice President of Cook Industries had the responsibility for the supervision of commercial merchandising of grain and futures trading by the firm (Tr. 675-676, 694-695). He and others with the firm believed that the commercial demand in May 1971 for wheat in Chicago "[seemed] very, very modest to us, very slight * * * [and there was a] lack of demand in Chicago * * *" (Tr. 681). In addition, it was believed that because of the lack of demand the May-July spread should narrow and trading in the May future end with the "May even money with the July" (*Ibid.*). The firm and a related group maintained a short position of approximately 2,250,000 bushels at the start of the last day of trading of the May 1971 wheat future (Tr. 679-681, 704, 733). Cook Industries had a small inventory of wheat in store in Chicago in May which it delivered on the May 1971 wheat future (Tr. 687, 738) The firm had attempted to sell this wheat in the cash market but had been unsuccessful (Tr. 687). In Mr. McCaull's opinion, the closing price of $ 1.70 per bushel for the wheat futures market did not "represent supply and demand conditions in Chicago for cash wheat on May 19, 1971" (Tr. 690).

60. In 1971, Raleigh B. Wilson was employed by Continental Grain Company in its Chicago office and he was in charge of wheat and small grain merchandising for the firm (Tr. 659-660). At that time, the firm owned and operated two delivery elevators in the Chicago area (Tr. 660). As a part of his duties, Mr. Wilson kept himself generally aware of the demand for wheat by Chicago area mills in 1971 (Tr. 661). During May 1971, the demand "was for hard wheat rather than the soft wheat, or the Illinois hard wheat." "[Most] mills thought they had a sufficient stock of red wheat or soft wheat to run them into new crop harvest which would be in approximately seven or eight weeks. And since the protein hard wheat has to come from the West, any of that variety of wheat that was in Chicago carried some demand" (Tr. 662). There also was no export demand for wheat from Chicago (Tr. 662-663). Continental Grain Company attempted to merchandise 130,000 bushels of wheat prior to May 14, 1971, but it was not successful, and the firm delivered this wheat on the Chicago Board of Trade 1971 wheat futures (Tr. 664-665).

61. Continental Grain Company was short the May 1971 wheat future toward the final day of trading 15,000 bushels (Tr. 665). The firm attempted to locate wheat to deliver against this position, but found that no wheat was available to it (Tr. 669-670). The firm did not wish to risk having to pay a higher price for deliverable wheat and thus it liquidated its short position at $ 1.70 per bushel (Tr. 668-669).

62. International Multifoods Corporation is an agri-business engaged in flour milling and other endeavors (Tr. 576-577). In 1971, the firm operated 12 flour mills in the United States, including its mills in Buffalo, Detroit and Cleveland (Tr. 577-578). The Detroit mill was a multi-purpose mill, and it ground, among other types, soft red winter wheat (Tr. 578). In May 1971,

Michael James Mullin was the Director of Grain Procurement for the firm (Tr. 577). He testified that during the month of May 1971, the firm did not need and did not purchase any soft red winter wheat in the Chicago area (Tr. 579, 583, 607). There was an interest by Multifoods in acquiring hard red winter wheat or yellow hard winter wheat of known specific protein content (Tr. 579-580, 598-600, 612-613, 625). The firm did not believe that it was feasible to attempt to obtain this wheat by delivery through the Chicago Board of Trade because, among other factors, there were some stocks of soft red winter wheat which were deliverable in Chicago, and the firm had no need for this type of wheat if it had been delivered to it as a result of a futures position (Tr. 581-582, 600, 613). The firm's need for hard winter wheat and yellow hard winter wheat with specific protein content was satisfied by cash purchases mostly from Kansas City, Kansas (Tr. 598-599, 603-604, 1085; DE Exs. 32, 34).

63. Dale C. Porter in 1971 was Vice President and General Manager of the Alton Terminal Operations of the Peavey Company at Alton, Illinois (Tr. 525-526). The firm maintained a flour mill in Alton using soft red winter wheat and yellow hard winter wheat. Its supply source was a 50-mile area around Alton, Illinois (Tr. 525, 530). The Peavey Company had no need to acquire additional wheat in May 1971. The firm had a surplus supply in Minneapolis (Tr. 528, 530-531). Mr. Porter testified (Tr. 528):

[We] had a supply of soft wheat in Minneapolis which we wanted to get rid of before the new crop came in, so we sold two barges of soft wheat and we also sold some rail soft wheat to go to the Gulf.

Generally, Mr. Porter, for the middle and latter part of May 1971, perceived no substantial demand for wheat in Chicago. "* * * [Stocks] in Chicago were low but stocks at the mills were adequate to carry new crop" (Tr. 533).

64. The wheat sales of the Peavey Company were sales of No. 2 soft red wheat on May 11, 1971, and May 12, 1971, to Cargill, Incorporated, of 84,000 bushels at $ 1.70-1/2 per bushel and 15,000 bushels at $ 1.70 per bushel for shipment to New Orleans and Baton Rouge by barge and rail (Tr. 556-558; Resp. Frey Exs. 10, 11 and 12).

65. During 1971, Pillsbury Company had mills in Buffalo, Minneapolis, Atchison, Springfield, Enid, Ogden, and South of Los Angeles (Tr. 428). Mr. George D. Gobel was the Manager of the Buffalo Grain Operations for Pillsbury Company. The firm maintained an office in the Minneapolis Grain Exchange. He was in charge of purchasing grain for the firm's mills in Buffalo, Minneapolis and Springfield (Tr. 414-415). The firm's Buffalo mill used primarily spring wheat. From 70 to 80 percent of its operation was southwestern wheat and 5 to 10 percent was Illinois hard or soft wheat (Tr. 416). Mr. Gobel explained that on May 10, 1971, Pillsbury had purchased "Southwestern wheat via barge to Chicago for transfer into a lake vessel, destination Buffalo" (Tr. 416). Vessels larger than those expected were furnished by the transit company and in order to fully load the vessels -- as opposed to a demand for milling operations -- 25,000 bushels of No. 2 yellow hard winter wheat were purchased from J. G. McKerr Grain Company and 80,000 bushels from Continental Grain Company at $ 1.60 per bushel (Tr. 418-420; DE Exs. 41, 42). After the May 10, 1971, purchases, practically no soft red or yellow hard winter wheat was purchased by the Pillsbury Company, because the firm did not need and was not in the market for such wheat and new crop wheat would soon be available (Tr. 421-422, 425, 437).

66. Based upon his review of the requirements of the mills in Chicago, the elevator operation firms using Chicago as a transshipment location and other merchandisers of cash wheat, Mr. Mielke concluded that there was no substantial demand for cash supplies of soft red winter wheat or yellow hard winter wheat during the middle and latter part of May 1971 in Chicago (Tr. 966-971). "There was nothing in that [cash] market that was of significant impact that it could have caused that sudden a price rise [in the futures market] * * *" (Tr 971, See also Tr. 974, 978).

67. In late April and early May 1971, *The Southwestern Miller* reported that demand for Chicago wheat was not large relative to past weeks. The trade publication attributed this condition to the inventories earlier acquired by mills. On the indicated dates, the following observations were stated by *The Southwestern Miller* (DE Ex. Id, pp. 1, 3, 5, 7):

[April 27, 1971]

["Cash Wheat Premiums"]

CENTRAL STATES MILL DEMAND OFF

* * * Chicago receipts mainly comprised protein hard for mills, only few trucklots of soft against contracts, in Central States, mill demand was absent, evidence of buildup during lengthy period of tightness.

[May 4, 1971]

["Cash Wheat Premiums"]

LIMITED CENTRAL STATES BUYING

* * * Chicago receipts were largely against to-arrive contracts in Central states, mill demand was less intense, buying hand-to-mouth among few users not already well covered * * *

[May 11, 1971]

["Cash Wheat Premiums"]

GENEROUS INVENTORIES FOR MILLS

* * * Margin of Chicago May over same KC delivery narrowed from 11c to 8c and 180,000 bus were delivered in Chicago against May contracts. Demand for elevator stocks was lacking. In Central states, mill interest was far from keen in line with generous inventories * * *

[May 18, 1971]

["Cash Wheat Premiums"]

WEAKNESS PREVAILS ON MOST MARKETS

Chicago, May 17-Weaker trend developed in premiums on soft wheat in most markets this week. * * * Most central states markets were steady to 1c lower, white unchanged. Flow from country elevator and farm bins was no more than a trickle, strong indications being that old crop stocks have been exhausted. Expansion occurred in feeding of wheat, influenced by high coarse grain and milo prices. Mills have generous balances that were acquired during long periods of tightness and concern over availability.

* * *

DELIVERIES AGAINST CHICAGO MAY

* * * [Deliveries] mounting to 180,000 bus soft red and 130,000 yellow hard * * * Mill demand was slack, most needs already accommodated.

On May 25, 1971, after the last day of the futures trading in the May 1971 wheat future. *The Southwestern Miller* again reported that there was little or no substantive demand for wheat in Chicago. It was stated (DE Ex. 1d, p. 9):

CHICAGO MAY UP 9-1/4c ON LAST DAY

* * * Chicago May soared 9-1/4c in final day of trade, widening to 17-3/8c above same K.C. delivery and 2c above Minneapolis, a situation without precedent in recent years. Some expectation is that Chicago mills would even deliver against May * * * mill demand slack.

68. The statements by the market commentator in *The Southwestern Miller* indicated, according to Mr. Mielke, "no strong demand in the cash market during

the week ending the 24th of May" (Tr. 973). As of May 19, 1971, neither Respondent Cox or Respondent Frey had an agreement or sales contract providing for the sale by these Respondents of any wheat they received on delivery from their long positions held in the May 1971 wheat futures contract (Tr. 150-156; DE Exs. 35, 36, 38). I find and conclude that there was no substantial demand for soft red winter wheat or yellow hard winter wheat in Chicago, Illinois, from the first of May 1971 through the last week in May 1971.

69. A further indication that there was no demand for Chicago cash wheat is the circumstance that Respondent Cox in the final minutes of trading on May 19, 1971, established a short position of 85,000 bushels and later delivered this amount against his position (DE Exs. 4, p. 5; 35). Similarly, Respondent Frey did not want to receive any deliveries of cash wheat, and he was displeased that he was not able to liquidate all of his long position and that 225,000 bushels were delivered to him (DE Exs. 5; 39 (3/15/72) p. 34). Thus, by their actions Respondents demonstrated that they did not believe that there was a significant demand for soft red winter or yellow hard winter wheat in Chicago or that such wheat had a value of $ 1.70 per bushel in the Chicago market.

70. Both Respondents (Resp. Cox brief (8/15/80) pp. 42-43; Resp. Frey brief (8/14/80) pp. 61-62, 68) rely on the analysis by Dr. Hieronymus and his conclusions that there was a strong commercial demand for cash wheat in Chicago during the latter part of May 1971. Dr. Hieronymus in determining that there was strong demand for wheat asserts that Chicago disappearance (*i.e.*, wheat used locally for flour milling) and shipments averaged 469 thousand bushels per week. Using this average amount divided into existing stocks gives the number of weeks' supply on hand (Resp. Joint Ex. 1, p. 41). He states, (*Id.* at pp. 41-42):

The Chicago disappearance and shipments averaged 469 bushels per week. The stocks of wheat in summer 1968 were about a 20-week supply. In 1969 stocks were reduced to an 8.7 week supply. In 1970, they were a 3 week supply and on June 24, 1971 only 2.3 weeks. Stocks were at critically low levels in the summer of 1971.

* * *

By the end of the second quarter the impending Chicago shortage was even more apparent. Receipts and shipments were just about equal and Chicago use was large enough to exhaust the stocks. Second quarter Chicago use was 223 thousand bushels per week and ending stocks were 5071. At that rate, they would run out in 22.7 weeks and 26 weeks remained before harvest.

71. Dr. Hieronymus relied upon information gathered from reports in the Chicago Board of Trade Statistical Annual and arranged and tabulated on Exhibit A-11. The figures for Chicago pertaining to the crop year 1970-1971 are set forth below (Reported in 1,000 bushels):

Date	Receipts	Shipments	Stocks	Disapp
1970				
July 3	213	58	1434	125
July 10	1159	107	2725	-239
July 17	2827	20	4831	701
July 24	2250	134	6265	682
July 31	1253	98	6942	478
Aug 7	905	102	7602	143
Aug 14	939	560	7526	455
Aug 21	492	54	7791	173
Aug 28	752	198	7752	593
Sep 4	517	456	7896	- 83
Sep 11	437	106	7644	583
Sep 18	538	168	7922	92
Sep 25	472	118	8009	267
Oct 2	564	130	7984	459

Date	Receipts	Shipments	Stocks	Disapp
Oct 9	243	538	6992	697
Oct 16	202	889	6518	-213
Oct 23	569	590	6415	82
Oct 30	573	492	6069	427
Nov 6	482	161	6071	319
Nov 13	353	146	5974	304
Nov 20	307	200	5782	299
Nov 27	250	202	5583	247
Dec 4	382	308	5318	339
Dec 11	345	288	5048	327
Dec 18	259	288	5066	13
Dec 24	417	262	5102	119
1971				
Jan 2	44	139	5071	- 64
Jan 7	181	193	4676	383
Jan 14	161	106	4413	318
Jan 21	97	143	4061	306
Jan 28	238	49	3805	445
Feb 4	212	41	3643	333
Feb 11	137	48	3505	227
Feb 18	211	110	3330	276
Feb 25	168	158	3132	208
Mar 4	508	92	3119	429
Mar 11	259	76	3128	174
Mar 18	265	92	2941	360
Mar 25	329	80	2838	352
Apr 1	266	242	2697	165
Apr 8	146	98	2564	181
Apr 15	366	46	2424	460
Apr 22	480	80	2636	188
Apr 29	401	537	2732	-232
May 6	386	14	2314	790
May 13	275	62	2478	49
May 20	96	563	2403	-392
May 27	71	56	1761	657
Jun 3	280	114	1782	145
Jun 10	79	74	1583	204
Jun 17	68	102	1320	229
Jun 24	200	16	1098	406
July 1	358	34	1126	296

As one of his conclusions, Dr. Hieronymus states (*Id.* at p. 43):

The receipts, shipments, use and stocks of wheat at Chicago were strongly suggestive of an impending shortage as early as the close of harvest in 1970.

72. It is apparent that receipts, Chicago use, shipments and total stocks varied widely from week-to-week and as the marketing of old crop wheat tapered off before the new harvest, all of these factors gradually decreased (Ex. A-11). It does not appear reasonable or appropriate to apply to the ending weeks of the old crop year an average use and shipment rate derived by considering weeks which were more active. A consideration of the level of stocks and such a use and shipment rate does not translate into a statement of developing shortage or of a description of the supply and demand for wheat in Chicago.

73. Reference is made by Respondents (Resp. Cox brief (8/15/80) pp. 35, 40; Resp. Frey brief (8/14/80) pp. 45, 49, 61-62) to a demand in Chicago attributed to or derived from requirements of eastern mills for wheat. As shown, *supra,* pp. 30-32, it is the local economic conditions in Chicago which are controlling. In any event, Respondents' reliance upon an eastern demand is misplaced. Eastern mills (International Multifoods Corp. and Pillsbury, Inc., were the main buyers for wheat to be shipped east (Tr. 1053, 1059)) generally obtain their requirment for hard red winter wheat and northern spring wheat from the northwest and the Kansas City market. Soft red winter wheat for the eastern

mills is obtained from Michigan, Ohio, Pennsylvania and New York (Tr. 335-336). Soft red winter wheat during May 1971 was available and was selling in the east at a basis below the Chicago market (Tr. 336-337). "Ordinarily soft wheat in Ohio and east is cheaper than wheat at Chicago" (Tr. 845). Eastern millers could obtain soft red wheat in the east at prices lower than those which prevailed in Chicago (Tr. 970-971). "Some eastern milling companies

at least needed hard wheat, and that demand, [stated Mr. Mielke], was expressed at least, in part, through Chicago" (Tr. 1064). Mr. Mielke made it clear, nontheless, that this demand was not particularly significant because the eastern mills were obtaining their basic requirements for hard wheat from Kansas City, a hard wheat market (Tr. 1051-1055, 1113-1114). If hard wheat had been available in Chicago and it conformed to a buyer's requirements, then possibly a demand would be present in Chicago within a special meaning of that term (Tr. 1054-1055). The operative demand for hard wheat was in the east where the commodity was to be used (Tr. 1051-1052, 1222-1223). I find and conclude that the demand for soft red winter wheat and yellow hard winter wheat in Chicago derived from demand by eastern mills was not a significant demand and had no effect on the local demand during May 1971. This derivative demand does not support Respondents' claims that the futures market price on May 19, 1971, was not artificial.

2. The abnormal or artificially high price is shown by a comparison of the futures prices and other reported prices.

a. There was an abnormal increase in the prices of the futures contracts on the last day of trading.

74. There was a sharp and significant increase in the May wheat futures price on May 19, 1971, in the final minutes of trading. Trading in the May contract closed at approximately 12:01 p.m. on May 19, 1971 (DE Ex. 8). At 11:00 a.m. on May 19, 1971, Respondent Cox's long position was 1,410,000 bushels. At that time, futures contracts were being traded within the approximate range of $ 1.67-5/8 to $ 1.67-1/2 per bushel. Respondent Cox therafter, through Respondent Frey, liquidated his long position in the May wheat futures contracts between 11:22 a.m. and the close of trading on May 19, 1971, for 55,000 bushels of wheat spread at 20 cents over July wheat at $ 1.69-3/4 per bushel and his remaining May long position, 1,355,000 bushels of wheat at $ 1.70 per bushel (DE Ex. 8; Resp. Cox Ad. (9/19/77) pp. 34-38). At about 11:00 a.m. on May 19, 1971, Respondent Frey's long position was 760,000 bushels. Respondent Frey thereafter liquidated a portion of his long position in May wheat futures contracts, 10,000 bushels, on May 19, 1971, at $ 1.69 per bushel through another broker. He directly liquidated 535,000 bushels between 11:39 a.m. and the close of trading at $ 1.70 per bushel (DE Ex. 8; Resp. Frey Ad (9/15/77) pp. 29-31).

75. The opening prices in the May wheat future on May 19, 1971, were $ 1.61-1/2 to $ 1.62 (DE Ex. 8). The previous day's closing prices were $ 1.60-7/8 to $ 1.60-5/8 (DE Ex. 9, p.2). n10 The price reached at the close of trading on May 19, 1971, $ 1.70 per bushel, "was within 3/4 of a cent of the highest price permitted under the rules of the Board of Trade for the May 1971 wheat future on May 19, 1971" (Comp. 4; Cox Am. Ans. 5; Frey Am. Ans. 4).

n10 It is admitted that "the maximum daily price fluctuation for the May contract permitted under [Chicago Board of Trade] rules and regulations on May 19, 1971, was 10 cents per bushel above or below the settlement price for that future on May 18, 1971" (Resp. Cox Ad. (9/19/77) pp.4-5; Resp. Frey Ad. (9/15/77) p. 5). The settlement price for May 18, 1971, was $ 1.60-3/4 (Ex. A-3).

76. Trading commenced in the May 1971 wheat future on approximately June 1, 1970. The highest price the May wheat future reached was $ 1.78-3/4 on November 5, 1970. During the month of May 1971, except for the last day, the May wheat

future traded within the narrow range of approximately $ 1.57 to $ 1.66-3/8 (DE Ex. 9). On May 19, 1971, the prices sharply advanced to close at $ 1.70. No news or other market information existed that would account for such a sharp rise in price (Tr. 971, 978).

77. For the period January 1, 1970, through June 30, 1971, on the days when the closing price on a particular day for one of the five contract months for wheat, *i.e.*, September, December, March, May and July, fluctuated greater than 4-1/2 cents from the previous day's close, other months on the same day had a similar fluctuation. The only time the prices departed from this price relationship was the May 1971 contract on May 19, 1971, the day Respondents are alleged to have manipulated the market price of the May 1971 future (Tr. 150; DE Ex. 27).

78. The prices on the futures exchange on the last day of trading were almost limit up. Mr. Mielke noted in his testimony that there were "very few instances in which the market moved limit up * * *" (Tr. 989). The price was "unusually high in terms of the magnitude of the price changes that normally occurred in the wheat futures market during that time period" (Tr. 988-989). In Mr. Mielke's opinion, "Mr. Cox and Mr. Frey arbitrarily selected certain prices at which to liquidate [their] positions. * * * [They] exercised their dominance and that effectively caused the May futures price to go to $ 1.70 on its last trading date" (Tr. 988-989). I find and conclude that there was an abnormal price increase in the last day of trading in the May 1971 wheat futures price.

79. The contention is presented by Respondents that the future market price prior to the closing price on May 19, 1971, was depressed and the rise in price on the last day cannot be regarded as abnormal (Resp. Cox brief (8/15/80), pp. 29, 43, 71-72, 116-120; Resp. Frey brief (8/14/80), pp. 62, 71-72). The record herein does not support Respondents' claim. As stated *supra,* p. 16, the futures prices are generally found to be slightly lower than cash prices for the commodity expected to be delivered (Tr. 366-369, 932) with the two prices tending to converge on the last day of trading (Tr. 926, 931-932, 1289). (*See Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1168 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972)). ("In theory, at least, the price of the future should be * * * less than the price of the cash wheat * * *.") During the early part of May 1971, futures prices and the prices of cash wheat likely to be delivered on the futures market, soft red winter and yellow hard winter, followed this pattern until approximately seven days before the end of trading when the price of the cash commodity dropped slightly below the futures price (Tr. 926-927; DE Exs. 21, p. 5; 26, 30, 31). The prices continued that relationship until the last day of trading when the futures prices increased sharply over the cash price (*Ibid*).

80. Cook Industries and associates on May 3, 1971, had a net short position of approximately 4,565,000 (Resp. Frey Ex. 13). Between May 3, 1971, and May 18, 1971, the firm and its associates delivered some wheat and liquidated contracts representing approximately 2 million bushels (Tr. 317-318, 738; Resp. Frey Ex. 4). Cook Industries attempted to market cash wheat in Chicago but could find no price better than the futures market and the firm made some deliveries. (Tr. 687). Mr. Campbell, a Vice President for Dixie Portland Flour Mills, stated that in his opinion such action could not be said to have a depressing or other material effect upon the market (Tr. 653). Mr. Mielke, in describing his analysis of the market conditions stated (Tr. 1026; See also Tr. 1148):

I did not specifically investigate those rumors [that Cook Industries and associates intended to deliver substantial wheat against their short positions on the May 1971 future]. I did look at the price relationships which occurred during the month of May, and looking at the relationship between cash and futures prices and the relationship between the price of Kansas City and Chicago

May futures and looking at the information that was reported in such trade publications as the *Southwestern Miller,* which discusses supply and demand condition of the two markets, I did not see any evidence that the May futures price was depressed prior to the last day of trading.

I find and conclude that Respondents' claims that the futures market prices were depressed in April and May 1971 are not supported by the record and must be rejected.

b. There was an abnormal spread or differential between the price of the May 1971 wheat futures and the price of the July 1971 wheat futures.

81. The "effect of the squeeze or corner upon prices" should be looked for "in spreads between current-delivery and later-maturing options," and the existence of an abnormal price spread affords a test of the evidence of a manipulated price. *Report of the Federal Trade Commission on the Grain Trade,* Vol. VII, pp. 245, 248 (1926). The increase or advance in price for the May 1971 wheat futures on May 19 was 8-1/2 cents above the lowest price in the opening range (DE Ex. 9, p. 2). In sharp contrast, the July 1971 wheat futures on the same day increased only 7/8 to 1 cent (DE Ex. 8a). An exhibit in the record (DE Ex. 8b) which lists the prices of the May wheat future and the July wheat futures on the Chicago Board of Trade on May 19, 1971, shows the dissimilarity in price movement between the two futures. The May contract generally concerns the prices of old crop wheat. The July contract generally prices both old crop and new crop wheat (Tr. 229, 169).

82. It is expected that the May future will close with a slight premium over July (Tr. 502, 840-841, 925). During the years 1963-72, the May and July futures have maintained during the last several days of trading in each contract month a pattern of a consistent relationship and usually a premium for the May future over the July (Tr. 923-927; DE Ex. 21).

83. A departure for this pattern is shown for the years 1963 and 1971. The 1963 May futures prices in the last two days of trading were found to be abnormal prices by the Court in *Cargill, Incorporated v. Hardin,* 452 F.2d 1154, 1167 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972). (See also Tr. 926).

84. In 1971, the May futures' advance on the last day of trading of 8-1/2 cents while the July future remained stable resulted in an increase of over 9 cents in the May-July price spread to a 20 cent difference. Disregarding 1963 as an abnormal year, there was no comparable movement on the Chicago Board of Trade in the May-July future price spread during the last day of trading in the 10 years prior to 1971. Mr. Walton, who was in charge of Chicago and southeastern grain operations for General Mills, Inc., remembers that (Tr. 840-841) "[at] the close, the night before the last day of trading, [May futures] was around 11 over [the July futures]. And at the close on the 21st [the 19th] I think it was about 20 over * * *. I didn't think the demand for cash wheat would justify a price of 20 over." I find and conclude that -- in view of the relationships between the May and July futures in recent prior years -- the recordsetting advance in price to $ 1.70 per bushel on the last day of trading in the May 1971 future resulted in an abnormal or artificially high price compared to the July 1971 future.

c. There was an abnormal spread or differential between the prices of the Chicago Board of Trade May 1971 wheat futures and those of the Kansas City Board of Trade and the Minneapolis Grain Exchange for May wheat futures and the advance in the May 1971 futures prices on the Chicago market was not reflected in the prices for the July 1971 futures contract on either the Chicago or Kansas City markets.

85. During the years 1964-1970, the Chicago Board of Trade and the Kansas City Board of Trade, Missouri, had a May futures contract. During some of those years, the Minneapolis Grain Exchange did not have a May futures contract (Tr.

935; DE Ex. 23, pp. 4-6). Kansas City and Minneapolis markets are related to the Chicago market for the shipment of wheat by rail, barge and truck transportation (Tr. 336, 376, 417, 470, 536, 580, 692-693, 765, 1051). Witnesses at the administrative hearing explained that generally, prior to 1971, the spread relationships between the Chicago Board of Trade, the Kansas City Board of Trade and the Minneapolis Grain Exchange were basically stable and their wheat prices tended to move together and in the same direction (Tr. 537-540, 937).

86. The Kansas City Board of Trade as a futures market primarily relates to hard red winter wheat. The Minneapolis Grain Exchange primarily relates to northern spring wheat with specified protein (Tr. 336-341, 422, 935). Generally, soft red winter wheat and hard yellow winter wheat, the two types of wheat that primarily relate to the Chicago Board of Trade, are sold at a discount to hard red winter wheat and northern spring wheat (Tr. 935).

87. During 1963-1970, the price of the Chicago Board of Trade May futures contract at the close of trading on the last day of the expiring contract was never more than 10 cents per bushel over the closing price of May futures on the Kansas City Board of Trade (Tr. 936; DE Ex. 23, pp. 1-6). In substantial contrast to prior years, the May futures price on the Chicago Board of Trade on May 19, 1971, closed at 17 3/8 above the Kansas City Board of Trade price for the May future for the same day (DE Ex. 23, p. 7).

88. For the years 1966-1970, the Minneapolis Grain Exchange did not have a May wheat futures contract (Tr. 935; DE Ex. 23, pp. 4-6). In 1963, 1964 and 1965, the Minneapolis Grain Exchange May wheat futures contract closed at a premium in price to the closing price of the May wheat futures contract on the last day of the Chicago Board of Trade expiring May futures contract (Tr. 935-936; DE Exs. 23, pp. 1-3; 25, pp. 2-3, 5). On May 19, 1971, the May wheat futures contract on the Chicago Board of Trade closed 2 cents per bushel over the closing price of the May wheat futures contract on the Minneapolis Grain Exchange (Tr 425, 936; DE Exs. 23, p. 7; 25, p. 8). This was an unusual departure from the relationship between the two markets prevailing in prior years (Tr. 423-424). Division of Enforcement Exhibit No. 24 contains graphs of the July wheat futures prices, mid-point of the closing range on the Chicago Board of Trade and the Kansas City Board of Trade for the years 1963-1971 (Tr. 936-937). This exhibit shows that the relationship between the July futures prices on these two markets for these years "tended to be relatively stable," including the period May 1971 (Tr. 937). "So whatever factor was present in the Chicago [1971] May [futures] market was not present in the July futures on the two exchanges" (*Ibid.*).

89. I find and conclude that there was an abnormal spread or differential between the closing prices of the Chicago Board of Trade May 1971 wheat futures and those of the Kansas City Board of Trade and the Minneapolis Grain Exchange for May wheat futures. It is further found and concluded that the abnormality of the price advance in the Chicago Board of Trade May 1971

wheat future is also shown by lack of a similar sharp price advance in the July 1971 wheat futures on the Chicago Board of Trade and the Kansas City Board of Trade.

d. There was an abnormal spread or differential between the prices of the May 1971 wheat futures on the last day of trading on the Chicago Board of Trade and the cash prices, price estimates, and bids for soft red winter wheat and yellow hard winter wheat in the Chicago market.

90. As shown *supra* pp. 36-48, there was no demand in Chicago for soft red winter wheat or yellow hard winter wheat. The mills in Chicago had obtained a sufficient supply to last until the new crop came to market. There was no export demand. Together with the lack of demand for the cash commodity the supply of such cash wheat was also low (Tr. 479, 533-534). This generally is a normal condition for the Chicago market during May (Tr. 498, 661-664, 869-870).

It is to be expected that such cash transactions which did occur would be scattered and varied and with negotiated premiums and discounts (Tr. 381, 498, 545, 1100).

91. An attempt was made to locate and record the major cash transactions which occurred in the Chicago wheat market during the month of May 1971 (Tr. 163-166). The firms actively involved in the Chicago wheat market were requested to provide information concerning any wheat transactions (Tr. 171, 334-335, 337, 1070). Information and statistics from *The Southwestern Miller,* publications by the Chicago Board of Trade and reports by the U.S. Department of Agriculture were collected (Tr. 69, 73, 336-339).

92. The cash wheat market "is, of course, tied to the futures" market (Tr. 764; see also Tr. 1337). The term "convergence" in this context "refers to the fact that theoretically the price of cash grain as indicated by the warehouse receipt for the market terminal area would become identical with or close to the futures contract" price (Tr. 1289). As stated *supra* p. 16, because of the cost and other factors concerning delivery and uncertainty as to type, quality and exact time of the delivery of the commodity, futures prices are expected to be slightly lower than the least expensive or contract grades of the cash commodity specified in the futures contract (Tr. 932-934). In the case of *Chicago Board of Trade v. Olsen,* 262 U.S. 1, 38 (1923), the Court in describing the relation between the futures market and cash sales stated:

[It] is very reasonable to suppose that the one influences the other as the time of actual delivery of the future approaches, when the prospect of heavy actual transactions at a certain fixed price must have a direct effect upon the cash prices in unfettered sales.

93. In making his analysis of cash prices for comparison with the closing futures price on May 19, 1971, Mr. Mielke found that there were no cash transactions involving hard red winter wheat of ordinary protein during May 1971 in Chicago which were above $ 1.67 (Tr. 1080-1081). The following tables show cash transactions involving soft red winter and yellow hard winter wheat and corresponding futures prices on the dates indicated (Tr. 990-991, 1081; DE Exs. 29, 32, 46; Ex. A-3):

CASH WHEAT TRANSACTIONS FOB CHICAGO OR DELIVERED CHICAGO FOR NO 2 SOFT RED WINTER WHEAT (EXCEPT WHERE NOTED)

-- Figures after a hyphen are in eighths of a cent --

Date 1971	Quantity (bu. or conv.)	Delivery Terms	Price ($ per bu.)	Futures Price
May 3	5,000	truck del Chicago	1.60-4	1.57-6
May 4	804	truck spot	1.55	1.58-1
	(3 srw Tuff)	truck spot		
	426	truck spot	1.59-4	
	(3 srw Tuff)			
	766	truck spot	1.59	
May 5	5,000	truck (20 days)	1.61-2	1.60-4
	700	truck (20 days)	1.62	
May 6	1,548	fob Chicago	1.63-4	1.58-4
	2,600	fob Chicago truck (20 days)	1.58-4	
	1,000	fob Chicago	1.47-6	
May 7	842	fob Chicago	1.57-4	1.58-5

Date 1971	Quantity (bu. or conv.)	Delivery Terms	Price ($ per bu.)	Futures Price
May 10	1,700	fob Chicago	1.57-4	1.58-6
	850	fob Chicago	1.58-4	
May 11	818	truck	1.56	1.58-2

Date 1971	Quantity (bu. or conv.)	Delivery Terms	Price ($ per bu.)	Futures Price
May 13	891 (1 srw)	truck	1.56-6	1.59-7
	30,000	fob Chicago	1.66-4	
	450	fob Chicago	1.59-4	
May 14	2 trucks	truck (20 days)	1.58	1.59-4
May 17	914	fob Chicago	1.58-4	1.60-6
	1,200	fob Chicago	1.58-4	
May 18	2,100	fob Chicago	1.59-6	1.60-6
	850	fob Chicago	1.58-6	
May 19	55,000	fob Milwaukee del Chicago in 10 days	1.58	1.70 (last day of trading)
May 20	867	fob Chicago	1.55-4	
May 21	749	fob Chicago	1.55-4	
May 24	2 trucks	truck (10 days) del Chicago	1.56-4	
May 25	5,000	in store Chicago	1.67	
	50,000	del Chicago, sap barge (10 days)	1.66-4	
May 26	85,000	in store Rialto	166	
May 27	824	truck	1.61-6	

CASH WHEAT TRANSACTIONS FOB CHICAGO OR DELIVERED CHICAGO FOR NO 2 YELLOW HARD WINTER WHEAT

-- Figures after a hyphen are in eighths of a cent --

Date 1971	Quantity (bu. or conv.)	Delivery Terms	Price ($ per bu.)	Futures Prices
May 3	1 car	fob Chicago	1.57-6	1.57-6
May 7	1 car	spot Chicago	1.59-3	1.58-5
May 10	700 (1 yhw)	truck 20 days fob Chicago	1.50-4	1.58-6
	6,000	spot Chicago	1.53-4	
	80,000	in store	1.60-4	
	1 car	spot Chicago	1.58-6	
	80,000	in store Chicago Chicago	1.60	
	25,000	in store Chicago	1.60	
May 12	70,000	fob rail Chicago	1.64-6	1.60-5
May 14	807	fob Chicago	1.58-6	1.59-4
May 17	574	truck	1.49-6	1.60-6
	10,000	fob Chicago	1.64-4	
May 19	1 car	spot Chicago	1 58	1.70 (last day of trading)
May 24				
	1,300	truck (10 days del Chicago)	1.50-6	

As shown by the two tables, the closing price of the May wheat futures contract was substantially in excess of the cash prices for soft red winter wheat and yellow hard winter wheat during May.

94. In May 1971, the highest priced transaction involving soft red winter wheat was a May 25, 1971, sale by Cargill, Inc., to Mitchel Hutching & Company of 5,000 bushels at $ 1.67 per bushel to be delivered and which was delivered (Tr. 449-450; DE Ex. 46). In May 1971, the highest priced transaction involving

yellow hard winter wheat was a May 12, 1971, sale by Cargill, Inc., to International Multifoods of 70,000 bushels at $ 1.64-3/4 per bushel (DE Exs. 32 and 34). Division of Enforcement Exhibit No. 33 is a graphic representation of the price movement of the May future and the cash price of Chicago soft red and yellow hard winter wheat and other grades of premium wheat (Tr. 950-951). The exhibit illustrates the contrast in the sudden rise in the futures price as compared to the steady prices in the cash transactions during May 1971.

95. The cash prices for hard red winter, and dark northern spring wheat which are generally sold with reference to protein content and at a premium to soft red winter wheat and yellow hard winter wheat varied greatly during the month of May 1971 (DE Ex. 32). In May 1971, all cash wheat transactions above $ 1.67 per bushel involved hard red winter wheat of 11.50 protein content or better or dark northern spring wheat (DE Exs. 32 and 34). The following tables show cash transactions in hard red winter wheat and dark northern spring wheat (Tr. 944-952; DE Ex. 32).

CASH WHEAT TRANSACTIONS FOB CHICAGO OR DELIVERED CHICAGO FOR HARD RED WINTER WHEAT AND PROTEIN CONTENT WHERE NOTED

-- figures after a hyphen are in eighths of a cent --

Date 1971	Quantity (bu. or conv.)	Grade (protein content)	Terms of Delivery	Cash Price (er bu.)
May 3	70,000	1HRW(12.00)	truck del Chicago	1.65
	1 car	1HyHW	spot Chicago	1.61-2
May 10	842	1HW	truck spot	1.49-4
	781	1HRW (12.00)	truck del Chicago	1.67-4
	25,000	2HW/YW	in store Chicago	1.60
May 11	70,000	1HW (12.00)	del Chicago	1.76
	3,000	1HRW (12.00)	del Chicago	1.67
May 13	714	2HRW	truck	1.49-6
	727	2HRW	truck	1.49-6
May 14	19,000	1HW (11.50)	del Chicago	1.74-1
	13,000	1HW (12.00)	del Chicago	1.75-1
	70,000	1HW (11.50)	del Chicago	1.67-4
	70,000	1HW (11.50)	del Chicago	1.65-4
May 18	10,561	2HyHW	in store Rialto	1.60-2
	1 car	3HW	fob Chicago	1.56-2
May 21	3,750	1HRW (12.25)	truck del Chicago	1.71
May 24	1,442	1HRW	truck	1.49-6
	1,442	1HRW	truck	1.49-6
May 25	140,000	1HW (12.00)	del Chicago	1.69-2
	1,500	1HRW (12.00)	truck del Chicago	1.67
	70,000	1HW (12.00)	del Chicago	1.70-2

CASH WHEAT TRANSACTIONS FOB CHICAGO OR DELIVERED CHICAGO FOR DARK NORTHERN SPRING AND PROTEIN CONTENT WHEN NOTED

Date 1971	**Quantity (bu. or conv.)**	**Grade (protein content)**	**Terms of Delivery**	**Cash Price (er bu.)**
May 4	**3,750**	**2DNS (14.75)**	**del Chicago**	**1.92**
May 6	**3,500**	**2DNS (14.75)**	**del Chicago**	**1.92**
May 10	**2,000**	**2DNS**	**on track Chicago**	**1.89**

96. In his analysis of cash prices for comparison with the futures price, Mr Mielke did not include hard red winter wheat, ordinary protein content, because

he was not able to find sales of this type of wheat at prices above $ 1.67 (Tr. 1081; DE Exs. 32, 33, 34). Hard red winter wheat with specified protein content and dark northern spring wheat were excluded because these wheat classes are "not ordinarily or likely to be delivered on the [Chicago Board of Trade wheat] futures contract" (Tr. 991; See also Tr. 975-977, 1080; DE Ex. 20). These classes of wheat are not grown in the Chicago marketing area (Tr. 474, 976-977). Generally they are regarded as having higher milling value and in Chicago have an added transportation expense (Tr. 121, 367, 423, 454-455, 588, 638-639, 1083, 1088). In May 1971, hard red winter wheat and dark northern spring wheat were not as closely linked to the wheat futures market in Chicago as soft red winter wheat and yellow hard winter wheat grades (TR. 1159). It is found and concluded that the prices for hard red winter wheat with ordinary protein content, hard red winter wheat with specified protein content and dark northern spring wheat have no direct relevance as to whether the May 19, 1971, futures prices were abnormal or artificially high.

97. On May 19, 1971, in none of the Nation's six major cash markets -- Kansas City (hard winter ordinary); Omaha (No. 1 hard winter ordinary); Chicago (No. 2 soft red winter, No. 2 yellow hard winter); St. Louis (No. 2 soft red winter); Minneapolis (No. 1 dark northern spring ordinary, No. 1 dark spring 15% protein, and No. 1 hard amber durum); and Portland (No. 1 soft white) -- did the cash price for the type of wheat identified with that market increase on May 19, 1971, more than one-cent per bushel in contrast to the 9-1/4-cent move above the previous day's settlement price on the Chicago Board of Trade (Tr. 938-940; DE Ex. 26).

98. During 1971 the U.S. Department of Agriculture, Consumer and Marketing Service, Grain Division, Market News Branch, prepared and distributed daily cash prices on a weekly basis to the public (Tr. 116; DE Ex. 13). As a part of the Division of Enforcement's investigations of the events involved here, Mr. John Miller was interviewed. Mr. Miller was employed as a market news reporter for the Chicago area. The source for the information contained in Division of Enforcement Exhibit 13 was Mr. Miller's inquires or the inquiries of a market news reporter under his supervision (Tr. 230-235). Information was sought from cash grain merchants, cash dealers and milling firms in the Chicago area to determine what prices are involved in cash transactions and bidding for the cash commodity (Tr. 116-122, 477-479; DE Ex. 13). The figures and quotations "[reflect] the value of cash grain on the floor of the Chicago Board of Trade on the basis of closing futures prices with cash basis added to that" (Tr. 231-232; See also 291, 294). "[The] prices Mr. Miller would obtain would be those prices reflecting cash wheat, which may be on the basis of bids as well as actual trades that may have been made during the day for wheat that would be in the Chicago switching district" (Tr. 232). In May 1971, *The Southwestern Miller* published price quotations for No. 2 soft red winter wheat (Tr. 941). This publication is highly regarded by members of the industry for its accuracy and reliability (Tr. 545, 561-562, 636-637). Indications of prices of "bids" are placed by wheat buyers on their desks on the Chicago Board of Trade cash wheat market. These bids are the current prices that wheat buyers are willing to pay for designated types of wheat. The offers are not binding commitments. While such offers are subject to withdrawal, they are usually observed and relied upon as important indications of prices for cash transactions (Tr. 231, 234, 338-340, 476-477). Grain merchants record the highest prices from the bids and use such prices as a reference for the prices in their offers to wheat elevator operators for wheat sales (Tr. 338, 476-477, 514). The price indications or bids supply a direct and competitive statement of current market prices for cash wheat (Tr. 231-232, 851-852).

99. Indiana Farm Bureau, General Mills, Inc., *The Southwestern Miller* and the U.S. Department of Agriculture placed or reported the following bids or quotations for old crop No. 2 soft red winter wheat during May 1971 (Tr. 116-122, 230-235, 338-340, 476-477, 514, 851, 941; DE Exs. 13, 28; Ex. A-3).

CASH WHEAT BIDS AND QUOTATIONS FOR NO 2 SOFT RED WINTER WHEAT BASIS CHICAGO AND THE MAY 1971 FUTURES CONTRACT PRICES

(Old Crop)

-- figures after a hyphen are in eighths of a cent --

Date 1971	Indiana Farm Bureau Truck Bids	General Mills, Inc. Truck Bids	The Southwestern Miller to Arrive Bids Rail Bids	Rail Basis	Rail Prices	USDA Quotations Basis	USDA Quotations Prices (futures contract)	May prices
May 3	1.59-2	1.59-6	1.62-6	+5 May	1.62-6	+5 May	1.62-6	1.57-6
May 4	1.59-6	1.60-2	1.63-2	+5 "	1.63-2	+5 "	1.63	1.58-1
May 5	1.60	1.60-4	1.63-4	+5 "	1.65-4	+5 "	1.65-4	1.60-4
May 6	1.58	1.58-4	1.61-4	+5 "	1.63-3	+5 "	1.63-2	1.58-4
May 7	1.57	1.57-4	1.60-4	+5 "	1.63-4	+5 "	1.63-4	1.58-5
May 10	1.55-4	1.56	1.59	+5 "	1.63-6	+9 Jul	1.59	1.58-6
May 11	1.55-4	1.56	1.59	+5 "	1.63-2	+9 "	1.59	1.58-2
May 12	1.57	1.57-4	1.60-4	+5 "	1.65-5	+9 "	1.60-2	1.60-5
May 13	1.56-2	1.56-6	1.59-6	+9 Jul	1.59-7	+9 "	1.59-6	1.59-7
May 14	1.55-2	1.55-6	1.58-6	+9 "	1.58-6	+9 "	1.58-4	1.59-4
May 17	1.53-2	1.53-6	1.58-6	+9 "	1.58-6	+9 "	1.58-4	1.60-6
May 18	1.54-4	1.55	1.58	+9 "	1.58	+9 "	1.58	1.60-6
May 19	1.54-6	1.55-2	1.58-2	+9 "	1.58-4	+9 "	1.58-2	1.70 *
May 20	1.55	1.55-4	1.58-4	+9 "	1.58-4	+9 "	1.58-2	
May 21	1.55-4	1.56	1.59	+9 "	1.59	+9 "	1.59	
May 24	1.55-2	1.55-6	1.58-6	+9 "	1.58-6	+9 "	1.58-4	
May 25	1.56-2	1.56-6	1.58-6	+9 "	1.61-6	+6 "	1.58-6	
May 26	1.57-6	1.58-2	1.60-2	+9 "	1.63-2	+6 "	1.60	
May 27	1.61-2	1.61-6	1.63-6	+6 "	1.63-6	+6 "	1.63-4	
May 28	1.61-2	1.61-6	1.63-6	+6 "	1.63-4	+6 "	1.63-4	

* Last day of trading

100. Division of Enforcement Exhibit No. 30, a copy of which is reproduced below, graphically depicts *first* the general parallel during the beginning of the month of May 1971 between the futures price and prices in bids and quotations for soft red winter wheat and *second,* on May 19, 1971, the sudden rise of the futures price compared to other prices (DE Ex. 30).

[SEE GRAPH IN ORIGINAL]

101. General Mills, Inc., and the U.S. Department of Agricultural placed or reported the following bids or quotations for old crop yellow hard winter wheat (DE Ex. 29; Ex. A-3):

CASH WHEAT BIDS AND QUOTATIONS FOR NO. 2 YELLOW HARD WINTER WHEAT AND THE MAY 1971 WHEAT FUTURES CONTRACT PRICES

-- figures after a hyphen are in eighths of a cent --

Date 1971	General Mills, Inc. Truck Bids	General Mills, Inc. Rail Bids	USDA Quotations Basis	USDA Quotations Prices	May futures contract prices
May 3	1.52-6	1.57-6	+3-4 May	1.61-2	1.57-6
May 4	1.53-2	1.58-2	+3-4 May	1.61-4	1.56-1
May 5	1.53-4	1.58-4	+3-4 May	1.64	1.60-4
May 6	-1.51-4	1.56-4	+3-4 May	1.61-6	1.58-4
May 7	1.50-4	1.55-4	+3-4 May	1.62	1.58-5
May 10	1.49	1.54	+7 Jul	1.57	1.58-6
May 11	1.49	1.54	+7 Jul	1.57	1.58-2

May 12	1.51-4	1.55-4	+7 Jul	1.58-2	1.60-5
May 13	1.49-6	1.54-6	+9 Jul	1.59-6	1.59-7
May 14	-	-	+9 Jul	1.58-4	1.59-4
May 17	1.49-6	1.53-6	+9 Jul	1.58-4	1.60-6
May 18	1.49	1.53	+9 Jul	1.58	1.60-6
May 19	1.49-2	1.53-2	+9 Jul	1.58-2	1.70 *
May 20	1.49-4	1.53-4	+9 Jul	1.58-2	
May 21	1.50	1.54	+9 Jul	1.59	
May 24	1.49-6	1.53-6	+8 Jul	1.57-4	
May 25	1.50-6	1.52-6	+5 Jul	1.57-6	
May 26	1.54-2	1.54-2	+5 Jul	1.59	
May 27	1.53-6	1.57-6	+5 Jul	1.62-4	
May 28	1.53-6	1.57-6	+5 Jul	1.62-4	

* Last day of trading

102. Division of Enforcement Exhibit No. 31 is reproduced below. It illustrates the sharp rise in the May 1971 wheat future on May 19, 1971, and the contrast between that price and the prices in bids and quotations for yellow hard winter wheat (DE Ex. 31).

[SEE GRAPH IN ORIGINAL]

103. The following table shows the disposition and the prices received from sales of wheat received by delivery on the May 1971 futures contracts after May 19, 1971 (Tr. 991-992, 1182-1184; DE Exs. 35, 36, 37, 38).

DISPOSITION AND PRICES OF WHEAT RECEIVED BY DELIVERY ON THE MAY 1971 FUTURES CONTRACT AFTER MAY 19, 1971

-- figures after a hyphen are in eighths of a cent --

Owner	Date	Price ($ per bu.)	Quantity (Bushels)	Grade and class	Disposition
Respondent Cox	May 28	1.70	85,000	2SRW	Delivery on May future
	June 3	1 63	50,000	2YHW	Sale
	9	1.62-4	50,000	2YHW	Sale
	23	1.63	20,000	2YHW	Sale
	28	1.62	25,000	2YHW	Sale
	July 7	1.56	120,000	2HyHW 2YHW	Sale
	9	1.54-4	55,000	2YHW	Sale
	9	1.54	85,000	2HyHW	Sale
	21	1.55-7	65,000	2SRW	Delivery on July future
	21	1.55-7	15,000	2SRW	Delivery on July future
	21	1.55-7	15,000	2SRW	Delivery on July future
TOTAL			585,000		

Owner	Date	Price ($ per bu.)	Quantity (Bushels)	Grade and class	Disposition
Respondent Frey	May 26	1.66	85,000	2SRW	Sale *
	June 15	164	15,000	2YHW	Sale
	21	1.61-2	30,000	2SRW	Sale
	July 21	1.55-7	20,000	2SRW	Delivery on July future

Owner	Date	Price ($ per bu.)	Quantity (Bushels)	Grade and class	Disposition
	21	1.55-7	75,000	2SRW	Delivery on July future
TOTAL			225,000		
Richard W	June 8	1.60-2	10,000	2SRW	Sale
Rose	July 1	1.57-1	40,000	2SRW	Delivery on July future
TOTAL			50,000		

* This wheat was purchased from Respondent Frey by General Mills after this firm had taken a short position in the May future on May 19, 1971, and delivered 85,000 bushels against the position at the basis price of $ 1.70 per bushel to Respondent Frey (Tr. 968-969, 992).

As the foregoing table shows, the three holders of long positions who took delivery were not able to sell on the cash market the wheat received on delivery at a price as high as $ 1.70 per bushel (Tr. 991-992), and the futures price of $ 1.70 is in stark contrast to the prices received for the cash commodity.

104. "Of particular interest," stated Mr. Mielke in his testimony, "is the transaction on [May 26, 1971] * * * when General Mills delivered the wheat [to fulfill its short position on the futures market] at a basis of 20 over [the July futures price], in effect, and repurchased it at a basis of 12 over on the same day from Mr. Frey" (Tr. 992).

105. As noted supra p. 56, the highest cash price in transactions involving soft red winter wheat in the Chicago area during May 1971 was $ 1.67 per bushel. The highest price for yellow hard winter wheat was $ 1.64-3/4 per bushel. Cash transactions are the most direct measure of the market value of wheat (Tr. 1070). Based upon his review of such transactions and applying "a conservative test" (Tr. 952) with "some leeway" to traders making such decisions (Tr. 1086-1087), it was Mr. Mielke's analysis that "the highest price that would represent the economic value of [the most likely] deliverable wheat in Chicago [soft red winter and yellow hard winter wheat] during the month of May 1971 would be approximately $ 1.66 or $ 1.67 per bushel * * * [Prices] above that for the May future were, in my opinion, artificially high" (Tr. 1070-1071). I have reviewed in detail the evidence of record concerning prices for wheat in the Chicago area during May 1971 including cash prices, price estimates, bids and the prices at other markets. The arguments and analyses submitted by the parties have been considered and weighed. I credit and accept the economic interpretations and reasoning in support of Mr. Mielke's analysis and hereby find and conclude that futures prices on May 19, 1971, at $ 1.67 or above were abnormal or artificially high.

106. Respondents contest the Division of Enforcement's allegations (DE brief (8/15/80) pp. 29-49) pertaining to the misalignment of cash prices and bid prices with the futures prices in May 1971. Respondents argue (Resp. Cox brief (8/15/80) pp. 33, 36, 39-49, 53-63; Resp. Frey brief (8/14/80) pp. 45-52, 57-62, 67) that (1) cash transactions concerning hard red winter wheat during May, (2) transactions concerning wheat occurring during June 1971, (3) the reservation price for wheat held by millers and grain merchants, and (4) specific transactions involving soft red winter wheat and yellow hard winter wheat show that futures price on May 19, 1971, cannot be regarded as artificial.

107. Respondents' claim that the cash prices for hard red winter wheat should be used in comparing cash prices with futures prices is not in accord with the record. The Chicago Board of Trade wheat futures market discovers prices for the cheapest or least expensive wheat expected to be delivered (Tr. 367, 977, 1065-1066; Resp. Joint Ex. 1, pp. 28, 36). The types of wheat satisfying this condition in May 1971 were primarily the deliverable soft red winter and deliverable yellow hard winter wheats grown tributary to Chicago (Tr. 950-951). Other classes

of wheat such as cash hard red winter wheat with specified protein content and cash northern spring wheat had a transportation expense added to their cost and also had milling characteristics and specified protein content making them more expensive than cash soft red winter and cash yellow hard winter wheat during May 1971 (Tr. 121, 367, 423, 454-455, 638-639, 668, 1083-1088, 1159; DE Exs. 19, 33).

108. If a trader established a long position and held it until a delivery was made in May 1971, he would have no assurance that he would receive wheat other than the basic contract grade (Tr. 1065). Mr. Mullin, a Vice President of International Multifoods in charge of grain procurement (Tr. 576), explained that his firm needed hard wheat and that yellow hard wheat would have met this demand (Tr. 599-600). No consideration was given to taking delivery on the futures market because of the possibility the firm would receive soft red wheat. Mr. Mullin testified (Tr. 581-582; See also Tr. 600, 607):

Q. As you may recall, the last day of trading in that contract was May 19, 1971. Did your firm have a position going into the last day?

A. To the best of my knowledge, the answer is no.

Q. Were the stocks which you had in Chicago as of May 19, 1971, available for delivery on the Chicago contract?

A. No.

Q. Sir, does your firm ever use a futures contract for purposes of taking delivery?

A. Yes, we do.

Q. Did you ever consider taking delivery on the May 19, 1971, wheat futures contract, if you recall?

A. To the best of my knowledge we did not consider taking delivery of the May -- Chicago May wheat contract.

Q. And why would that have been, or why was that?

A. Primarily because we did not want soft wheat, we wanted hard wheat.

Q. Now, correct me if I'm wrong, hard wheat is deliverable on that contract, isn't it?

A. That's correct.

*** * * ***

Q. Why would you have thought the possibility existed that you would get soft wheat as opposed to hard wheat?

A. To the best of my knowledge there were some small stocks of soft wheat in deliverable positions.

International Multifoods elected to take its demand for hard winter wheat during May 1971 to Kansas City and purchased such cash wheat in that market (Tr. 600, 603-604, 1085-1086, 1114-1115; DE Exs. 32, 34). I find and conclude that the Chicago May futures contract prices pertained to soft red winter wheat and yellow hard winter wheat and it is the prices of these classes of wheat which are to be compared to the futures market prices to consider whether the latter prices are abnormal or artificially high.

109. Respondents' position, *supra* p. 66, that wheat prices for cash transactions occurring after May 28, 1971, the last delivery day for the May 1971 contract, and up until the new crop is harvested and arrives at the market must also be considered in the comparison of futures prices with cash prices cannot be sustained. As the record here shows, *supra* p. 55, normally the prices for the futures contracts and the corresponding cash commodity are at their closest during the delivery months (Tr. 931-934, 1169-1170). In explaining the

appropriate time period for this comparison, Mr. Mielke said that in his view the futures "contract prices what is delivered or is likely to be delivered on the contract" (Tr. 1075) and "delivery must be consumated by the 28th" (*Ibid.*). Cash prices are normally a reflection of current day-to-day supply and demand factors. Futures prices have a degree of forecast or prediction attached. As time is extended and prices for days and weeks ahead are projected, necessarily such assessments are weakened and become progressively uncertain (Tr. 1075-1079, 1224-1225, 1238). To be sure the cash prices of wheat rose during June 1971 (Tr. 587-588), but this price rise was attributed to subsequent reports of possible corn blight (Tr. 515-516, 588, 1219-1222, 1234). These reports and a possible shortage in the supply of corn resulted in a price rise for cash wheat in June 1971. This later circumstance was too remote to be relevant to the futures prices on May 19, 1971. I find and conclude on the evidence of record that it is reasonable and allowable to use the period May 3, 1971, to and including May 28, 1971, as the relevant time. Any cash wheat transactions involving

the classes of wheat likely to be delivered on the May 1971 Chicago futures market during that time may be reasonably compared to the futures market prices on May 19, 1971, to indicate whether an artifical price occurred.

110. Certain industry witnesses stated that the wheat held in inventory by their firms was worth more to the firms than the futures market closing price of $ 1.70 (Tr. 432-434, 617; See also *supra* pp. 28-29). Respondents designate this as a reservation price and assert that this price is more representative of the accurate value of wheat *supra* p. 66. As shown *supra* pp. 28-29, this reservation price is a particularized matter for each firm. It is a unilateral value which a firm in its internal operations places on its assets. While the holdings of a firm may influence its actions, it is the actual bids, offers and sale transactions which are established in the context of competition which are the most directly related to market price and value of the commodity (Tr. 1070, 1086-1087, 1185). "Price and competition are so intimately entwined that any discussion of theory must treat them as one" *United States v. du Pont & Co.,* 351 U.S. 377, 392 (1956). I find and conclude that the noncompetitive prices assigned by firms to wheat held by the firms in inventory are not relevant in considering whether the futures market reached an artificial price on May 19, 1971.

111. The following specific transactions in cash wheat are relied upon by Respondents, *supra* p. 66, to support their claim that there were no artificial futures price on May 19, 1971. On June 4, 1971, General Mills sold 215,000 bushels of soft red winter wheat to a subsidiary, Chicago Flour Mill, for $ 1.71 per bushel (Tr. 844-845, 855; Resp. Frey Ex. 19). This was "an interoffice trade that [General Mills] made selling wheat from our merchandising account to our flour account" (Tr. 844). It is apparent that this transaction was not within the appropriate time period, *supra* pp. 68-69 and the price was not competitively established. It was "not an arm's-length transaction" (Tr. 1097-1098; See also Tr. 1193-1195). The term "competition" denotes a "conflict for advantage" by "contending forces." *United States v. American OIl Co.,* 262 U.S. 371, 388 (1923). "Furnishing services to oneself does not constitute competition, as that term is generally accepted * * *." *Porto Rico Ry., Light & Power Co. v. Colom,* 106 F.2d 345, 353 (1st Cir. 1939), certiorari denied, 308 U.S. 617. This General Mills interoffice transaction does not support Respondents' position.

112. On May 13, 1971, Cargill, Inc., sold 30,000 bushels of soft red wheat to ConAgra, Inc., for $ 1.66-1/2 and received an additional 9 cents for freight costs (DE Ex. 43). At the hearing it became apparent that there was "uniqueness" involved in this transaction which was puzzling (Tr. 446, 466) but in any event, it would not be proper to conclude that the price of the wheat was $ 1.66-1/2 + .09 or $ 1.75-1/2 per bushel. The 9 cents was due to transportation difficulties, and ConAgra, Inc., recovered this cost from the railroad by receiving a benefit on transit billing (Tr. 446-447, 465-466, 471).

This transaction did not result in a price which supports Respondents' assertions.

113. Upon consideration of Respondents' large holdings in the expiring May 1971 wheat futures contract and their actions in the context of the prevailing market conditions, the determination, and I so find and conclude, that Respondents caused the abnormal and artificially high May 19, 1971, futures prices is abundantly and amply supported by the record herein.

C. The evidence establishes Respondents' purpose and intent to manipulate the May 1971 wheat futures contract.

1. Respondents acted in accordance with an understanding or arrangement between them with the purpose and intent of causing prices in May 1971 wheat futures which were arbitrary and artificial.

114. In the administrative complaint, it is contended that Respondents' challenged actions were conducted by way of an understanding or arrangement between them "for the purpose and with the intent of causing prices in the May 1971 wheat future which were arbitrary and artificial and demanded and received such prices" (Comp. pp. 4-5). Both Respondents deny this claim in the complaint. They also assert that they both lacked knowledge of each other's plans (Resp. Cox. Am. Ans., p. 5; Resp. Frey Am. Ans., p. 5). The objective circumstances developed in the record establish Respondents' understanding or arrangement and their manipulative intent. An understanding or arrangement need not be demonstrated by evidence of an express agreement. *Comfort Trane Air Conditioning Co. v. Trane Co.,* 592 F.2d 1373 (5th Cir. 1979); *FTC v. Lukens Steel Co.,* 454 F. Supp. 1182 (D.D.C. 1978). Direct evidence is not required because of the general recognition

that seldom are the participants (*Rutledge v. Electric Hose and Rubber Co.,* 327 F. Supp. 1267, 1274 (C.D. Ca. 1971), aff'd, 511 F.2d 668 (9th Cir. 1975)):

So devoid of cleverness as to broadcast their oral agreements or publicly circulate the written memos which describe their plan.

Here, as in cases under the Sherman Act, see *supra* p. 31, "judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements." *United States v. Parke, Davis & Co.,* 362 U.S. 29, 44 (1960). While the essence of an understanding or arrangement is a "meeting of the minds," tacit understanding or arrangement can be found by mere acquiescence or acceptance of an invitation to participate in a plan, if each individual knows that cooperation is essential to the success of the plan. *Interstate Circuit Inc. v. United States,* 306 U.S. 208 (1939); *Wall Products Co. v. National Gypsum Co.,* 326 F. Supp. 295, 316 (N.D. Ca. 1971). If people with knowledge give adherence to a plan, acquiescence is sufficient to establish a tacit understanding or agreement. The understanding or arrangement can be inferred from circumstantial evidence or conduct or a course of dealing even though there is no evidence of the manner by which the plan was formulated. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939); *Overseas Motors, Inc. v. Import Motors Limited, Inc.,* 375 F. Supp. 499 (E.D. Mich. 1974), aff'd., 519 F.2d 119 (6th Cir. 1975), certiorari denied, 423 U.S. 987 (1975).

115. It is undisputed that on the last day of trading Respondents had some arrangement or understanding between themselves as to how their long positions should be handled. They talked to each other during that trading session (DE Ex. 39 (5/21/71) p. 3). Both Respondents had been placed on notice by the Business Conduct Committee of the Chicago Board of Trade that because of their large open long positions their actions were potentially disruptive to the market, *supra* pp. 3-4. n11

n11 The Chicago Board of Trade contacts "clearing members when there is concern for a disorderly liquidation or some problem in the liquidation in the futures contract" (Tr. 1227; See also Tr. 1239-1240).

116. Respondent Cox and Respondent Frey frequently dealt with each other with respect to their activities in the futures market. Both were experienced and capable futures traders. Each had more than 10 years trading experience (DE Exs. 39 (3/15/72) pp. 6-7; 40 (5/15/73) pp. 12-13). On some occasions prior to May 19, 1971, Respondent Cox acted as a floor broker for Respondent Frey and during the same period, Respondent Frey acted as floor broker for Respondent Cox in a substantial number of Respondent Cox's futures trades (Resp. Cox Adm. (9/19/77) p. 39; Resp. Frey Adm. (9/15/77) p. 33). The two had spoken to each other prior to May 19, 1971, concerning various commodity markets (Resp. Cox. Adm. (9/19/77) pp. 39-40; Resp. Frey Adm. (9/15/77) pp. 33-34). Each knew that the other held a long position in the May 1971 wheat future. Each knew that Respondent Cox had been accumulating a large holding of cash wheat by stopping delivery notices in May 1971 (Tr. 1139-1140, 1165-1166). Both Respondents had the same price objective, *i.e.,* a price level which was almost limit up over the previous day's settlement price (Tr. 987-988). I find and conclude that Respondents had an understanding or arrangement between themselves to exercise their market power to force the price for the May 1971 wheat futures market to a level set by them and to withhold their long futures positions from the futures market until they achieved their price goals.

117. The totality of all the circumstances when considered together compels the determination that Respondents acted with manipulative intent. As determined, *supra,* pp. 8, 35, Respondents were experienced futures traders. It may be inferred that they kept themselves informed as to cash market price conditions and available deliverable supply (See Tr. 1126, 1408-1409, 1156, 1226-1227). It may also be inferred that they kept themselves advised generally as to the open interest during the trading days toward the end of trading and on the last day of trading (Tr. 1093, 1155-1156, 1226). In this context, Respondents acquired and held a dominant and controlling long position in the May 1971 wheat futures, *supra* pp. 21-23. There was an insufficient supply of available deliverable wheat, *supra* pp.23-24, and Respondents established and exacted an abnormal or artificially high price for the liquidation of their futures contacts (Tr. 1181, 1202-1203) *supra* pp. 48-70. The Respondents "must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary." *United States v. Patten,* 226 U.S. 525, 543 (1913); *United States v. Masonite Corp.,* 316 U.S. 265, 275 (1942). As Mr. Ware testified: individuals participating in a market trading situation, in the main, consider their actions in the context of what is a gain or profit for them and "in terms of values, markets, [and] what [the traders] can get done on a futures transaction" (Tr. 314;

See also Tr. 330). Here Respondents' actions go beyond this stage and they acquired and maintained dominant market power then used it to exact prices which were not the result of normal supply and demand conditions in the cash commodity. It is sufficient, for the purpose of the requisite "specific intent" in a manipulation case that a permissible inference may be drawn -- and such an inference is hereby adopted and applied -- from Respondents' actions and use of their accumulated market power that they intended the creation of futures market prices which were the result of their own conduct rather than normal supply and demand factors. *In the Matter of Indiana Farm Bureau Cooperative Association, Inc., et al.,* CFTC Docket No. 75-14 (Opinion and Order, December 17, 1982) pp. 9, 12-13.

118. I find and conclude that the averments of the complaint *supra* concerning Respondents' understanding or arrangement and their manipulative intent are sustained by the evidence of record. Additional considerations, if any are needed, further support this determination. Respondents themselves did not testify at the administrative hearing. No opportunity was afforded to observe Respondents "as they expound the reasons behind the operation." There was no way to fully "ascertain their grasp and knowledge, their perspective and understanding * * *." In a case involving manipulation and intent of the parties, these matters pertaining to witnesses are "of substantial

significance," *Great Western Food Distributors v. Brannan,* 201 F.2d 476, 479 (7th Cir. 1953), certiorari denied, 345 U.S. 997. When a party supporting the allegations of an administrative complaint has shown -- as in the case at bar -- a *prima facie* case of the existence of the requisite arrangement or understanding and manipulative intent, the Respondents' failure to testify "most assuredly creates a presumption that the testimony would have been unfavorable to them," *G.H. Miller & Company v. United States,* 260 F.2d 286, 290 (7th Cir. 1958), certiorari denied, 359 U.S. 907 (1959). *See also Interstate Circuit v. United States* 306 U.S. 208, 225-227 (1939). "[The] failure to produce evidence, which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it." *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.,* 182 F.2d 269, 271 (7th Cir. 1950). *See also, International Union (UAW) v. NLRB,* 459 F.2d 1329, 1336-1337 (D.C. Cir. 1971); *Wigmore Evidence* (3d ed. 1940), P 285; *Jones on Evidence* (5th ed. 1958), P 27. The circumstance that Respondents gave testimony or made statements before the Business Conduct Committee of the Chicago Board of Trade, which were received at the hearing (DE Exs. 39, 40), does not prevent the application of the presumption. See, *United States ex. rel. Bilokumsky v. Tod,* 263 U.S. 149, 153-155 (1923); *United Broadcasting Co., Inc. v. Armes,* 506 F.2d 766, 770 (5th Cir. 1975) certiorari denied, 421 U.S. 965. n12 Applicable here is the holding by the Court in *G.H. Miller v. United States,* 260 F.2d 286, 290 (7th cir. 1958), certiorari denied, 359 U.S. 907 (1959):

We are in complete accord with the thought expressed by Mr. Justice Frankfurter in his concurring opinion in the case of *Adamson v. People of State of California,* 1947, 332 U.S. 46, 67 S.Ct. 1672, 1680, 91 L.Ed. 1903, on page 60, when he says:

"Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict."

2. The establishment and exaction of artificial futures prices by means of a squeeze, a manipulative method, is a violation of the Act.

n12 Respondents' reliance on the proceedings before the Chicago Board of Trade is misplaced. A determination by an industry unit that no improper conduct has been proven (Tr. 1421-1423; Resp. Cox. Ex. 67) does not preclude the agency assigned the responsibility of enforcing that statute from going forward with an enforcement action. *In re G.H. Miller and Company, et al,* 15 Agr. Dec. 1015, 1047 (1956), aff'd, *sub nom; G.H. Miller & Company v. United States,* 260 F.2d 286 (7th Cir. 1958), certiorari denied 359 U.S. 1907 (1959); *see also Silver v. New York Stock Exchange,* 373 U.S. 341, 350-352 (1963).

119. The complaint alleges that "[by] reason" of the Respondents' conduct, they "attempted to manipulate and did, in fact, manipulate the price of a commodity for future delivery on or subject to the rules of the Board of Trade in wilfull violation of Sections 6(b) and (c) and 9 of the Commodity Exchange Act (7 U.S.C. 9, 13b and 13)" (Comp. p. 5). Both Respondents in their amended answers deny the quoted assertion in the complaint (Resp. Cox Am. Ans. p. 5; Resp. Frey Am. Ans. p. 5). Sections 6(b), 6(c) and 9 of the Act as they existed in May 1971 are set forth *supra* p. 5-7. Respondents' conduct reads upon the terms of the Act.

120. All the elements indentified with a manipulative squeeze coexist in this case. A dominant and controlling interest forced the futures price to a level which was abnormal or artificial with manipulative intent. *Cargill, Incorporated v. Hardin,* 452 F.2d 1154 (8th Cir. 1971), certiorari denied, 406 U.S. 932 (1972); See also Tr. 997-999).

121. The possible economic damage from such market behavior is apparent. As the Court explained in the *Cargill,* case, *supra,* 452 F.2d at 1173:

The main economics performed by the futures market are the stabilization of commodity prices, the provision of reliable pricing information and the insurance against loss from price fluctuation. The functions can be fulfilled only if both longs and shorts can be assured that they can offset their contract at nonmanipulated prices. If in a squeeze situation, the shorts must be forced either to pay manipulated prices to offset their contracts or in the alternative to bring in higher priced outside supplies which are neither wanted nor needed in the local market, then both the cash and the futures market will be dislocated.

The legislative history of the Commodity Exchange Act shows that Congress intended that the transactions relating to a futures contract market be responsive to the economic forces exerted on the market by supply and demand rather than the dictates of one or a few traders. During the Congressional debates in 1936 on the bill which amended the Grain Futures Act and renamed the Act the Commodity Exchange Act, it was stated (80 Cong. Rec. 6164 (1936)):

The very nature of the business is such as to make it fraught with temptation for those who are disposed to take unfair advantage. In no other business is there found the same combination of circumstances and profit possibilities to tempt the unscrupulous.

It is the purpose of this bill to reduce to a minimum the possibility of unscrupulous trading and to permit the benefits of such trading to be obtained by those entitled to them.

At best, with all the safeguards possible to be thrown around transactions in futures, these market exchanges possess possibilities of manipulation to the advantage of the shrewd and unscrupulous trader with corresponding loss to the thousands of producers who are innocent victims.

"The purpose and object of the whole bill is to give a free, *open market* * * *" [emphasis supplied] (80 Cong. Rec. 7932 (1936)). Manipulative squeezes causing "severe fluctuations constitute a threat to a free and orderly market" *Cargill supra,* 452 F.2d at 1171. The "long interest, no matter how built up, that allows itself to be tempted into exploiting the situation in a way to involve acute disturbance of the market becomes a cornering [or squeezing] interest." *Report of the Federal Trade Commission on the Grain Trade,* Vol. VII, (1926), p. 244. Here, as in the *Cargill* case *supra,* 452 F.2d at 1172, the traders exploited their position. They intentionally manipulated the May 1971 futures contract prices in violation of the provisions of the Act.

122. The Administrative Procedure Act, Section 9b as reenacted and recodified (5 U.S.C. § 558), provides that a revocation or suspension order may be issued without prior notice only if the violation was willful. A violation is willful if the violator "1) intentionally does an act which is prohibited -- irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements," *Goodman v. Benson,* 286 F.2d 896, 900 (7th Cir. 1961). Willfulness means "no more than that the person charged with the duty knows what he is doing," and "it does not mean that, in addition, he must suppose that he is breaking the law." *Townsend v. United States,* 95 F.2d 352, 358 (D.C. Cir. 1938), certiorari denied, 303 U.S. 664; *Fields v. United States,* 164 F.2d 97, 100 (D.C. Cir. 1947), certiorari denied, 332 U.S. 851. I find and conclude that Respondents intentionally and purposefully traded in a manner to manipulate the futures prices and their actions were willful. See also *supra* p. 71-74.

123. When a statute provides for administrative proceedings to enforce prohibitory provisions and does not specify the degree of proof at the initial decision and order level, certain sections of the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, apply. *Steadman v. SEC,* 450 U.S. 91, 96-97 (1981). Section 7(c) (5 U.S.C. § 556) "was intended to establish a standard of proof and * * * the standard adopted is the traditional preponderance-of-the-evidence standard," *Steadman supra* 450 U.S. at 102. *See also Seaton v. SEC,* 670 F.2d 309, 311 (D.C. Cir. 1982). I have considered the evidence of record pro and con and I

find and conclude that the Division of Enforcement has met its burden of proof. It has been established that Respondents attempted to manipulate and did, in fact, manipulate the price of the 1971 May wheat futures market on the Chicago Board of Trade in willful violation of Sections 6(b) and 6(c) and 9 of the Commodity Exchange Act (See 7 U.S.C. §§ 9, 13b and 13).

II. Full opportunity was afforded the parties to present their evidence with respect to the issues and no unfairness resulted from the loss of various business records.

124. Between May 1971 and the commencement of the evidentary hearing in this case in November 1979, documents in the possession of grain handling firms and documents collected by the Division of Enforcement which may have had information pertinent to this proceeding were lost or destroyed (Tr. 604-605, 1039). The Division of Enforcement conceded at the hearing "that certain records were inadvertently thrown out which, likely, were within the literal term of [District Court Judge Perry's Order] or prior subpoenas of Respondents Cox and Frey" (Tr. 322; Resp. Frey Ex. 5). Generally, the information sought from these documents concerned inventory records, including futures positions and cash wheat holdings and transactions in the futures and the cash commodity by specific firms. Prior to the hearing, Respondents obtained large quantities of information and data from the Division of Enforcement, the Chicago Board of Trade and various firms (Tr. 323, 340, 603, 777, 780-781). It is apparent that much of the information in summary form is readily available from indirect sources, *i.e., The Southwestern Miller* (Tr. 545, 561-562, 1189, 1310, 1223-1224), the U.S. Department of Agriculture (Tr. 598), the Chicago Board of Trade (Tr. 780-781, 878, 1193-1194), summaries prepared by witnesses tendered by the Division of Enforcement (Tr. 875-881, 912-914) and stipulations (Tr. 211, 322, 583, 740, 777).

125. Dr. Hieronymus who testified on behalf of Respondents was able to obtain sufficient information and data to formulate his opinions and observations (Tr. 1394-1395; Resp. Joint Ex. 1, pp. 4, 48). I find and conclude that Respondents have not been prejudiced by any inability to obtain inventory and price information for specific firms. In the absence of any suggestion that the destruction of the documents which the Division of Enforcement was unable to produce was willful and where the substance of the information in the documents appears available no unfairness or lack of due process is present. *Cella v. United States,* 208 F.2d 783, 788 (7th Cir. 1953), certiorari denied, 347 U.S. 1016 (1954). The information from the indirect sources and the other evidence of record "constitute the best evidence that is available now," *Schiavone-Chase Corp. v. United States* 553 F.2d 658, 666 (Ct. Cl. 1977); see also, *Federal Rules of Evidence,* Rule 1004, 28 U.S.C. I find and conclude that the substantive rights of the Respondents were preserved and the parties were afforded a full opportunity to present evidence on the issues in this case and no unfairness resulted because of the loss or destruction of documents.

III. Administrative sanctions should be applied against Respondents in accordance with the relevant terms of the Act.

126. The complaint states that an appropriate order, if determined to be warranted after the conclusion of the hearing, would provide that (1) Respondents be prohibited from trading on or subject to the rules of any contract market, and all contract markets refuse all trading privileges to Respondents for such period of time as may be determined, (2) directing that the Respondents shall cease and desist from violations of the Commodity Exchange Act as established in the record, and (3) suspending or revoking the registrations of the Respondents as floor brokers (Comp. p. 6). As shown *supra* p. 77, Respondents acting together intentionally, deliberately and willfully engaged in price manipulation in violation of the Act. Price manipulation is one of the most serious violations intended to be barred by the Commodity Exchange Act.

127. A search of the record has been conducted for convincing evidence of rehabilitation or mitigating circumstances with regard to Respondents'

violation. No persuasive evidence is present. The general statements (Tr. 602-603, 670-671) concerning Respondents' reputations fall far short of affording a basis for any findings that Respondents or either of them has established such matters. I find and conclude that the record supports the imposition of sanctions provided in the Act.

128. I find and conclude that each of the Respondents' registrations as a floor broker should be revoked. Administrative sanctions are not designed as direct punishment or retribution but are a means of obtaining compliance in the future with applicable requirements.

129. The Order shall further provide that Respondents shall cease and desist any violation which is of the nature involved in this case. Respondents shall also be prohibited from trading on or subject to the rules of any contract market for a period of twenty-four (24) months from the date on which the Order becomes final.

130. All motions, proposed findings and conclusions and other documents presented by the parties have been considered. Not all of the motions, proposed findings and conclusions and contentions have been specifically mentioned. Any such matters inconsistent with this Initial Decision and Order are found and concluded to be without merit.

Based upon the foregoing Findings of Fact and Conclusions of Law, I issue the following:

Order

1. The registration of Respondent Edward A. Cox, Jr., as a floor broker is hereby revoked.

2. The registration of Respondent George F. Frey, Jr., as a floor broker is hereby revoked.

3. Respondent Edward A. Cox, Jr., is directed to cease and desist any manipulation or any attempt to manipulate the price of any commodity futures contract traded on or subject to the rules of any contract market.

4. Respondent George F. Frey, Jr., is directed to cease and desist any manipulation or any attempt to manipulate the price of any commodity futures contract traded on or subject to the rules of any contract market.

5. Respondent Edward A. Cox, Jr., is prohibited from trading on or subject to the rules of any contract market for a period of twenty-four (24) months from the date on which this Order becomes final. All contract markets shall refuse all trading privileges to the Respondent until the expiration of the twenty-four (24) month period. Such prohibition and refusal shall apply to all trading done and positions held directly by the Respondent, either for his own account or as the agent or representative of any other person or firm, and to all trading done and positions held indirectly through persons or firms owned or controlled by this Respondent, or otherwise.

6. Respondent George F. Frey, Jr., is prohibited from trading on or subject to the rules of any contract market for a period of twenty-four (24) months from the date on which this Order becomes final. All contract markets shall refuse all trading privileges to the Respondent until the expiration of the twenty-four (24) month period. Such prohibition and refusal shall apply to all trading done and positions held directly by the Respondent, either for his own account or as the agent or representative of any other person or firm, and to all trading done and positions held indirectly through persons or firms owned or controlled by this Respondent, or otherwise.

7. Motions by Respondents to dismiss this proceeding are denied. A copy of this Initial Decision and Order shall be served upon each of the parties and

when the Initial Decision and Order shall become final, it shall be served upon each of the parties and upon each contract market.

LOAD-DATE: August 6, 2008