Commodity Futures Trading Commission
CEA CASES

NAME: HENRY S. SHATKIN

CITATION: 34 Agric. Dec. 261

DOCKET NUMBER: 211

DATE: FEBRUARY 14, 1975

DOCUMENT TYPE: DECISION AND ORDER

(No. 16,264

In re HENRY S. SHATKIN. CEA Docket No. 211. Decided February 14, 1975.

Herbert R. Bader, for complainant.

Philip M. Bloom, Chicago, Ill., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

[This initial decision by the Administrative Law Judge became final when the Judicial Officer filed an Order (which follows this decision) granting the complainant's motion to withdraw its appeal on the condition that this case is not to be regarded as a precedent in any future proceeding.]

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. 1 *et seq.),* instituted by a Complaint and Notice of Hearing issued on April 3, 1973. The Complaint, filed on April 3, 1973, alleges, *inter alia,* that Respondent,

"On August 26, 1971, Henry S. Shatkin violated the speculative daily trading limit of 3,000,000 bushels in soybean futures fixed by the Commodity Exchange Commission, by buying a total of 3,300,000 bushels on

or subject to the rules of the Chicago Board of Trade as follows:

Future	Purchases (In thousands of bushels)
September 1971	1,345
November 1971	1,910
January 1972	20
May 1972	25
Total	3,300"

On April 16, 1973 the Complainant moved to amend paragraph III of the Complaint by deleting therefrom the date of August 26, 1971, and adding in lieu thereof the date of August 27, 1971. Said Motion was granted on April 27, 1973.

The Complaint, as amended, alleges in substance that Henry S. Shatkin, both a member of the Board of Trade of the City of Chicago and a registered floor broker under the Commodity Exchange Act, did, on August 27, 1971, violate the speculative daily trading limit in soybean futures, as fixed by the Commodity Exchange Commission, by purchasing a total of 3,300,000 bushels of soybean futures, in all futures combined, on or subject to the rules of the Board of Trade of the City of Chicago. Such act is alleged to have been willful, and in

violation of Section 4a of the Commodity Exchange Act (7 U.S.C. 6a) and Section 150.4 of the orders of the Commodity Exchange Commission (17 CFR 50.4). n1

n1. Such regulation, as herein pertinent, and as set forth in 17 GFR 150.4, sets forth:

"150.4 Limits on position and daily trading in soybeans for future delivery.

The following limits on the amount of trading under contracts of sale of soybeans for future delivery on or subject to the rules of any contract market, which may be done by any person, are hereby proclaimed and fixed, to be in full force and effect on and after June 26, 1971:

(a) *Position limit.* The limit on the maximum net long or net short position which any person may hold or control in soybeans on or subject to the rules of any one contract market is 3 million bushels in any one future or in all futures combined.

(b) *Daily trading limit.* The limit on the maximum amount of soybeans which any person may buy, and on the maximum amount which any person may sell, on or subject to the rules of any one contract market during any one business day is 3 million bushels in any one future or in all futures combined."

In his Answer filed May 8, 1973, Respondent admits the jurisdictional allegations of the Complaintbut denies having violated the speculative daily trading limit, and asserts that he

did not "willfully, knowingly, nor intentionally purchase soybean futures on [August 27, 1971] in violation of the [daily speculative trading limit] ." The Respondent avers that "the filing of this Complaint is barred by lapse of time from the date of the alleged violation to the institution of this action, and further asserts laches as an additional defense to this Complaint."

Paragraph VI of the Answer sets forth, *inter alia,* "Respondent asserts that the violation alleged in the Complaint is not claimed to be wilful n2 nor one in which the public health, interest or safety was endangered, and despite the lack of such allegations, the Secretary of Agriculture instituted these proceedings without calling the alleged violation to the attention of the Respondent, in writing, and affording him the opportunity to demonstrate or achieve compliance with all lawful requirements pursuant to Section 0.3(c) of the rules of practice under the Commodity Exchange Act." n3

n2. The Complaint filed on April 3, 1973 did not allege willfulness. It was subsequently amended to do so, as set forth hereinabove.

n3. As herein pertinent, that provision provides:

"Provided, That in any case, except one of wilfulness or one in which the public health, interest or safety otherwise requres, prior to the institution of a proceeding for the suspension or revocation of a registration or license, facts or conditions which may warrant such action shall be called, in writing, to the attention of the person complained against, and such person shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. * * *"

A Motion for Discovery of Information and Production of Documents was filed May 15, 1973, to which Complainant filed objection on May 25, 1973. The Administrative Law Judge denied the Motion June 18, 1973 with the proviso:

"However, if at the oral hearing, after the Complainant has presented its case, the Respondent can show that it has been misled by the pleadings, has been

taken by surprise, has been inadequately informed as to the nature of the charges, or otherwise stands to suffer procedural prejudice, a Motion for Continuance not to exceed 20 days therefrom will be entertained in order to permit the Movant adequate time to prepare a defense to the Complainant's case. Such opportunity more than satisfies procedural due process and the requirements of a full and fair hearing."

No such showing nor Motion was made at the oral hearing.

On August 15, 1973 a prehearing conference was held in Chicago, Illinois. The parties exchanged the names and addresses of prospective witnesses, and it was agreed that there would be a mutual exchange of documentary evidence prior to the hearing,

with copies to the Administrative Law Judge and a mutually convenient date for the oral hearing was agreed upon. At the prehearing conference counsel for the Complainant indicated that he would file a Motion to Amend the Complaint with a view to alleging "willfulness." Said Motion was filed August 20, 1973. Respondent was given an opportunity to respond thereto. The Motion to Amend the Complaint was granted October 19, 1973.

Oral hearing was held in Chicago, Illinois, on October 30 and 31, 1973, and both sides offered oral and documentary evidence. At the hearing it was agreed that the Respondent could request from Complainant, within three (3) weeks after hearing, information, not then available, to be introduced in the record as an additional exhibit. There was reserved No. 12 for such exhibit. The Complainant received no such request and asked on brief that Exhibit No. 12 no longer be reserved (See Tr. 421). The Complainant's request is hereby granted. The record herein consists of eleven (11) exhibits submitted on behalf of Complainant and one (1) exhibit submitted on behalf of Respondent.

At the oral hearing, Judge Dorothea A. Baker, Administrative Law Judge, United States Department of Agriculture, presided. The Respondents were represented by Philip M. Bloom, Esquire and Michael Barton, Esquire, Bloom & Denberg, Ltd., Chicago, Illinois. Darrold A. Dandy, Esquire and Herbert R. Bader, Esquire, Office of the General Counsel, United States Department of Agriculture, appeared as counsel for the Complainant. In due course, the Complainant submitted its initial brief on January 21, 1974. The Respondent, pursuant to extension submitted its initial brief on April 8, 1974, and the Complainant filed its reply brief on May 10, 1974.

FINDINGS OF FACT

1. The Respondent, herein, Henry S. Shatkin, is an individual whose business address is 141 West Jackson Boulevard, Chicago, Illinois 60604. He is now and was at all times material herein, a registered floor broker under the Commodity Exchange Act and a member of the Board of Trade of the City of Chicago.

2. The Board of Trade of the City of Chicago ("The Chicago Board of Trade") is now, and was at all times material herein, a duly designated contract market under the Commodity Exchange Act.

3. On August 27, 1971 Respondent was a partner in the firm of

Shatkin Trading Company, a partnership registered as a futures commission merchant, and remained a partner until March 2, 1973, when the status of the partnership was changed to that of a corporation of the same name, registered as a futures commission merchant. Mr. Shatkin was, as herein pertinent, and still is presently the President, Chairman of the Board of Directors, and a twenty-percent shareholder of Shatkin Trading Company. The corporation has the same name and address, and is engaged in basically the same business as was the partnership.

4. On August 27, 1971 the speculative daily trading limit in soybean futures, as fixed by the Commodity Exchange Commission, was three million (3,000,000) bushels in any one future or in all futures combined. n4 Respondent, on August 27, 1971, and at all times pertinent hereto, knew, and was at all times aware of this limit as well as having knowledge of and concern for the pertinent rules and regulations of the Commodity Exchange Commission.

n4. This limit was increased from 2,000,000 bushels, effective June 26, 1971.

5. The Respondent maintains, and there is evidence to support such contention, that he "was not fully knowledgeable in reporting procedures required under the Act in certain instances." It was the Respondent's responsibility to be, or to become, fully knowledgeable of the reporting procedures required by the Act.

6. The Respondent in November 1969, and September 1970, hired two general clerks, Victor Kastil and James O. Ryan, to perform independently certain duties and specifically to inform him of his net position and amount of volume throughout the trading day, or when it approached the daily speculative trading limit, and to serve as a double-check on Mr. Shatkin's own count. The Respondent had impressed upon his clerks the importance of relaying to Respondent a correct count of his position in the market and to keep track of Respondent's position so he would not exceed the speculative limits. Mr. Kastil obtained membership on the Chicago Board of Trade in April of 1970 and started to trade for his personal account. Mr. Ryan was hired in September of 1970 to assist the former in the discharge of his duties. Mr. Ryan was hired as an Assistant Clerk and in April of 1971 assumed the clerical duties of Mr. Kastil. During the week of August 23, 1971, Mr. Ryan was on vacation and Respondent requested Mr. Kastil to substitute for Mr. Ryan. On August 27, 1971, Mr. Kastil picked up the Respondent's trading cards at approximately 10:00 a.m. or 10:15 a.m.

7. During the week of August 23-30, 1971, which includes the date on which the alleged violation occurred, and while Mr. Ryan was on vacation, Mr. Kastil believes he performed his duties in substantially the same way that he had always performed them in addition to trading on the Chicago Board of Trade. Mr. Kastil had with him Mr. Shatkin's trading cards that he used to keep track of Respondent's position by putting down on the cards what he had counted. n5

n5. The witness Kastil's testimony was that:

"Q And did you at that hour communicate with him at all in any way regarding the volume of trades that he had made?

"A I don't believe I did.

"Q Did you then go up to the key punch operator, as you have described in the past?

"A I probably didn't on that day. I probably kept it in my pocket and gave it to one of our runners, who picks up cards, and they brought it up.

"Q Do you have a recollection, as you sit here now, how often you stopped to take Mr. Shatkin's card from him on that day, to total his net position and the amount of trades he had made?

"A I have no recollection, but I don't see why that day would have any -- would be any different than any other day that I did it. I would imagine three or four times.

"Q And during none of those times did you communicate to Mr. Shatkin what his volume of trades were for that trading day?

"A I guess I didn't see a problem. I don't think that I did."

8. On August 27, 1971, Victor Kastil counted Respondent's trading cards and had a card of his own which reflected the conclusion of his count. After trading closed Mr. Kastil further matched up the Clearing House run-back with his previously compiled Recapitulation Sheet (hereinafter referred to as Recap Sheet) prepared by Mr. Kastil for comparison, and found the Clearing House confirmation to be considerably higher than his own count. Thereafter Mr. Kastil re-added all of the Respondent's trading cards and found the Clearing House confirmation to be correct and his own count of Respondent's trades in error, and the appropriate corrections to the Recap Sheet were made. The following morning Mr. Kastil prepared a CEA Form 203 and forwarded the report to the Commodity Exchange Authority. It was regarded as "filed" on August 30, 1971, that being the date it was received.

9. Trading in soybean futures on the Chicago Board of Trade is conducted between the hours of 9:30 a.m. and 1:15 p.m. Trading is done on a competitive basis and all bids and offers are required to be by open outcry normally resulting in a noisy, and sometimes confusing, situation during trading hours. Traders on the floor of the Chicago Board of Trade are required to show all transactions made on trading cards or other records. Respondent used his trading cards to maintain records of his daily volume and open position.

10. On August 27, 1971 Respondent exceeded the speculative daily trading limit in soybean futures, as fixed by the Commodity Exchange Commission, by purchasing a total of three million three hundred thousand (3,300,000) bushels of soybean futures in all futures combined, on or subject to the rules of the Chicago Board of Trade. n6

n6. The testimony indicates that Respondent attributes his exceeding of the speculative limits to: "And this was due to a clerical error on the part of one of his clerks. He [Respondent] stated that he usually has two clerks independently total his trading during the trading hours. However, on this particular week, one of the clerks was on vacation." (Tr. 225)

"Q Mr. Shatkin stated to you that there was a clerical error concerning the trading of August 27th?

"A That's correct.

"Q He stated to you that he normally employed clerks to assist him in determining his trading limit, his trading volume and positions during the trading hours?

"A I don't know if he said anything about position. I think he said he had clerks tabulate or total the number of trades he made, as far as the trading, you know, in connection with the trading limits.

I don't know if anything was mentioned about position.

"Q You don't have a recollection at this time?"

"A No.

"Q Did you at any time seek to verify whether Mr. Shatkin did or did not employ clerks to assist him in totaling the volume of his trading during the day?

"A No, I had no reason to doubt Mr. Shatkin." (Tr. 236)

The witness Kastil testified:

"A I would give him counts during the day to give him his position, and to keep track of the volume count. And I'd later, I would check my count with the confirmations that we received after the trading cards had been handed in. Then the following morning I would hand in the Government book."

* * * *

"A I'd start about 10:00 o'clock in the morning or 10:10, 10:15. First of all, to go back, I'd start off by giving Mr. Shatkin his starting position for the day.

"Q What time of the day would you normally do that?

"A I'd probably stick it in his pocket about 9:00 o'clock in the morning."

* * * *

"Q Go ahead.

"A Okay. Then about 10:00 o'clock or 10:15, I'd go down and take the trading cards from Mr. Shatkin. I'd total them up, give him a new position, and also keep a record of my own to his volume.

"Q Now, you would go down at about 10:00 or 10:15 o'clock, where would you go?

"A I'd go down to the soybean pit and ask him for his cards, and he'd give them to me. He would also give his position card that I'd given him about 9:00 o'clock.

I'd change his position to the new positions, and give it back to Mr. Shatkin, take the cards, go back up to the office. I also had my card with his account, and go back up to the office to the key punch room.

"Q You said you'd have your card with his count?

"A Yes.

"Q Would you explain that.

"A I would also keep tract of what he was doing for my own record, to see if he was approaching the limit, so I could warn him.

"Q When you said 'approaching the limit,' what limit are you referring to?

"A Either position or trading volume limit.

"Q Did you keep a record then of both of those limits?

"A Right.

"Q On your card?"

* * * *

"Q When you say you would give him his position, what position are you referring to?"

* * * *

"A Like if he started out the day long, a hundred November soybeans, and short a hundred February soybeans, I would take his card back and now maybe it's only 50 November soybeans long and short January beans."

11. CEA Form 203 discloses that the Respondent exceeded the daily speculative trading limit fixed by the Commodity Exchange Commission. At the end of the trading day of August 27, 1971, Respondent held a position in excess of two hundred thousand (200,000) bushels in soybean futures, in the January future, on or subject to the rules of the Chicago Board of Trade. The Act requires any trader who holds an open position of more than two hundred thousand (200,000) bushels in soybean futures, in any one future, on any contract market, at the end of the trading day, to submit CEA Form 203 to the Commodity Exchange Authority.

12. On August 27, 1971 the Respondent did exceed the speculative daily trading in soybean futures, as established by the Commodity Exchange Commission by purchasing a total of three million three hundred thousand (3,300,000)

bushels of soybean futures in all futures combined, on or subject to the rules of the Chicago Board of Trade. The Respondent so admitted in his testimony:

"I would also like to add along this line that I know I have traded over the limit on August 27, 1971. And I feel extremely bad about it, because I violated a rule, but morally I don't feel I have done the wrong thing in that my methods and style of trading is what I consider to be an assist to the market, as opposed to something which would affect the market adversely." (Tr. 420)

13. Because of Mr. Kastil's error during the trading hours in calculating Respondent's trading cards and then giving Respondent an erroneous count, Mr. Shatkin inadvertently and accidentally exceeded the daily trading limit in soybean futures.

14. The persuasive testimony and evidence of record shows that Respondent did not consciously, deliberately, or intentionally exceed the speculative daily trading limit in soybean

futures. The record as a whole establishes that the speculative daily trading limit was exceeded by accident and inadvertence, most probably attributable to clerical error. Contrary to Complainant's arguments, the record does not establish disregard or negligence on the part of Respondent.

15. On January 4, 1961 n7 a letter was sent to Respondent by the Chicago office of the Commodity Exchange Authority, in response to CEA Form 203 filed by Respondent, covering his transactions in soybean futures on the Chicago Board of Trade for January 3, 1961, which stated that the Respondent exceeded the daily speculative trading limit established by the Commodity Exchange Commission. The letter advised Mr. Shatkin of this violation and quoted the orders of the Commodity Exchange Commission as they apply to the speculative trading limit in soybean futures. A guide to speculative trading and position limits under the Commodity Exchange Act was attached. On February 21, 1961 another letter was sent to the Respondent informing him that he had apparently violated the daily trading limits on January 31, 1961, February 1, 1961, and February 2, 1961. The date of January 31, 1961 was a clerical error committed by the Commodity Exchange Authority. The correct date was January 3, 1961. No evidence was adduced at the oral hearing to show that violations on any of the aforesaid dates did in fact exist. Mr. Clark, Director of the Central Region, Commodity Exchange Authority, does not believe that the CEA Form 203 report by itself is proof of an actual violation.

n7. The Respondent's attorney objected to the receipt into evidence of matters pertaining to alleged violations occurring over a ten-year period prior to the alleged violation of August 27, 1971, the date in question. The Administrative Law Judge overruled his objections but not without appreciation for the merits of his objections. Further attention will be given this contention hereinafter. However, it is believed the Judge's initial rulings are correct. The Complainant seeks to show by such documentary and testimonial evidence that the Respondent had been "warned," not that prior violations had occurred. Anyway, this is the only correct legal position. The Complaint filed herein does not allege violations prior to August 27, 1971 and it would be legally improper to allow Complainant to attempt to do so. Whether or not such prior "warnings" are sufficient to satisfy the statutory and regulatory provisions is crucial to a correct determination of the matters in this proceeding.

16. On August 6, 1962, Respondent filed with the Commodity Exchange Authority a report on CEA Form 203, covering his transactions in soybean futures on the Chicago Board of Trade, which stated that the Respondent exceeded the daily speculative trading limit established by the Commodity Exchange Commission. On

August 16, 1961, Mr. John Carpenter and Mr. Robert M. Ollquist, of the Commodity Exchange Authority, met with Mr. Shatkin and discussed his prior apparent violations, the rules concerning the speculative daily trading limit, and left with Mr. Shatkin a copy of the Commodity Exchange Act and a

guidesheet to the speculative limits. Mr. Shatkin explained that a "clerk goofed" and there were no actual violations.

17. On or about October 3, 1966 the Respondent filed with the Commodity Exchange Authority a report on CEA Form 203 covering the transactions in soybean futures on the Chicago Board of Trade for September 30, 1966, which indicated that the Respondent had exceeded the daily speculative trading limit in soybean futures. On October 4, 1966, a letter was sent to Respondent advising him that he had exceeded the speculative daily trading limit fixed by the Commodity Exchange Commission on September 30, 1966. The letter further advised the Respondent of the speculative trading limit in soybean futures and had attached to it a guide sheet which showed the limit for regulated commodities as established by the Commodity Exchange Commission. On October 5, 1966 the Respondent wrote a letter in reply to the aforementioned letter in which he advised that he had not violated the speculative daily trading limits on September 30, 1966 but that his clerk had made an error in filling out the report and a corrected Commodity Exchange Authority Form 203 was enclosed. On October 20, 1966 a representative of the Commodity Exchange Authority requested, by telephone, Respondent's appearance in his office for a discussion with respect to an apparent limit violation which allegedly occurred on October 18, 1966 as reflected in CEA Form 203 for that day. The problem reflected therein was an outtrade of October 17, 1966 which did not clear until October 28, 1966 and was included in the sales reported in the CEA Form 203 for October 3, 1966. The Commodity Exchange Authority accepted the explanation of Respondent and concluded that no violation occurred on either September 30, 1966 or October 18, 1966.

18. On or about February 13, 1967, in response to a CEA Form 203 report submitted by Mr. Shatkin on or about January 31, 1967, which reflected a reportable position and a long position in soybean futures apparently in excess of the daily speculative trading limit, the Respondent attended a meeting at the Commodity Exchange Authority in the presence of Mr. Clark and Mr. Shiner, a Commodity Exchange Authority employee. The meeting was held to verify whether or not the CEA Form 203 report was correct and advise Mr. Shatkin of the limit and reporting procedure. Mr. Shatkin's explanation was that possibly sales made on January 31, 1967 to reduce the long position were not reported on the January 31, 1967 report and therefore did not show a reduction in the long procedure that a holdout trade, a

trade made on one day that for some reason does not clear on that day but on a later day, would be reported on the day it is cleared. The Respondent also stated that the CEA Form 203 report was probably filled out incorrectly because the regular clerk was away at key punch school. Shortly after the aforesaid meeting Mr. Clark sent Mr. Shiner to Respondent's office where he found that, according to trading card records of Mr. Shatkin, the trades and positions had been incorrectly reported on CEA Form 203 report for January 31, 1967 or February 1, 1967, the date on which the trade in question cleared.

19. On or about July 21, 1971, Respondent filed with the Commodity Exchange Authority, a report on CEA Form 203, covering his transactions in soybean futures on the Chicago Board of Trade for July 20, 1971, which stated that the Respondent exceeded the daily speculative trading limit fixed by the Commodity Exchange Commission. On July 22, 1971, a letter was sent to Mr. Shatkin, by certified mail return receipt requested, advising him that he had exceeded the speculative daily trading limit on July 20, 1971. The Respondent was further advised of the speculative daily trading limit in soybean futures, and attached

to this letter was a guidesheet showing the limit for all regulated commodities as established by the Commodity Exchange Commission. Although CEA Form 203 indicated Respondent had exceeded the daily speculative trading limit on July 20, 1971, an examination of Respondent's records by one of Complainant's employees indicated that the report itself was in error.

20. The evidence of record clearly establishes that the Respondent knew the speculative daily trading limits in soybean futures.

21. The persuasive evidence of record shows that Respondent, or the employees under his direction and control were less than accurate in their reporting procedures to the Commodity Exchange Authority.

22. The documentary evidence of record which could be considered written "warnings" permitting the Respondent the opportunity to demonstrate or achieve compliance with all lawful requirements were issued in instances where there had been clerical, bookkeeping and tabulation deficiencies in reporting:

(1) Complainant's Exhibit 2 n8 is a letter dated July 22, 1971. It was

subsequently determined that Respondent's CEA Form 203 was in error.

(2) Complainant's Exhibit 3 n9 is a letter dated October 4, 1966, and was likewise premised on faulty reporting by Respondent on his Form 203.

(3) Complainant's Exhibit 5 n10 is a letter dated February 21, 1961, and refers to alleged violations on January 31, February 1, and February 2, 1961 and contains the warning: "* * * if there are continued instances on

your part of exceeding such limits we would have to consider taking formal action, as provided under the Commodity Exchange Act, looking toward the denial to you of trading privileges on all contract markets."

n8. Exhibit 2 is a letter addressed to Respondent from the Commodity Exchange Commission, dated July 22, 1971, which sets forth *inter alia:*

"We call your attention to Section 150.4(b) of the orders of the Commodity Exchange Commission which establishes for soybeans a speculative trading limit of 3,000,000 bushels. That is the maximum amount of contracts which any trader may buy or sell speculatively in any one soybean future or in all soybean futures combined, during a single business day.

"Attached is a copy of the guide sheet, 'Speculative Limits on Position and Daily Trading Under the Commodity Exchange Act.' The maximum amounts shown on the guide sheet should be kept clearly in mind, so that you may avoid any further instance of exceeding a speculative limit established by the Commodity Exchange Commission."

n9. Exhibit 3 is a letter dated October 4, 1966 which sets forth, *inter alia:*

"* * * You reported that you purchased 2,545,000 bushels and sold 2,730,000 bushels in all soybean futures combined on that day.

"We call to your attention Section 150.4(b) of the Order of the Commodity Exchange Commission which establishes for soybeans a speculative daily trading limit of 2,000,000 bushels. That is the maximum amount of contracts any trader may buy or sell speculatively in any one contract market during a single business day. Attached is a copy of the guide sheet; Speculative Limits on Trading and Positions Under the Commodity Exchange Act.

"The maximum amounts shown on the guide sheet should be kept clearly in mind, so you may avoid any further instance of exceeding the speculative limits established by the Commodity Exchange Commission."

n10. By letter dated February 12, 1961 the Respondent was advised by the Commodity Exchange Authority that:

"* * *

"The purpose of this letter is to emphasize to you that it is a violation of the Commodity Exchange Act to exceed the speculative limit applicable to daily trading, and that it is important for you to take steps to avoid any repetition.

"It is the responsibility of this agency to enforce speculative limits established by the Commodity Exchange Commission, and if there are continued instances on your part of exceeding such limits we would have to consider taking formal action, as provided under the Commodity Exchange Act, looking toward the denial to you of trading privileges on all contract markets."

The terminology of such warning did not appear in Exhibits 2 and 3.

(4) Complainant's Exhibit 6 is a letter dated January 4, 1961, and is more in the nature of advice as to the applicability of the terms "net" and "gross."

23. Evidence other than that enumerated in Finding of Fact 22, *supra,* and relied upon by Complainant, would not suffice to show that there had been *written* warning since such evidence consists of inter or intra office memoranda, "for files," or alleged oral conversations. n11

n11. For instance, Exhibit 7, is an inter-office memorandum dated February 14, 1967 and, *inter alia,* sets forth:

"Mr. Shatlin was questioned by Messrs. Robert W. Clark and Robert P. Shiner in our office on February 13, 1967 concerning his Form 203 soybean report which showed a long March position of 2,060,000 bushels as of January 31, 1967. No further action on this matter is planned, because the information furnished by Mr. Shatkin indicates that he did not violate the speculative position limits in soybeans on January 31, 1967."

Exhibit 11 is a memorandum for "files" and is dated August 20, 1962, and reflects, among other things,

"* * * I advised him that he should impress upon his clerk the importance of keeping him accurately informed in this regard so as to make sure that additional violations do not occur, stating that he is responsible in such matters, not his clerk. He appeared to be impressed and said he would be sure to cut off his trading at sublimit levels in the future.

"We left with him another copy of the Commodity Exchange Act and the Guide to Speculative Limits, in addition to the impression, I think, that any future violation would not be handled so informally and would necessarily be referred to Washington. Mr. Shatkin appeared to understand fully the speculative limits on trading and positions."

24. The documentary evidence of the entire record, including that set forth in Finding of Fact 22, does not show that the Complainant provided the Respondent with written notification of the facts and conduct which would warrant the institution of these Agency proceedings as contemplated by the regulations and the Administrative Procedure Act.

25. The record evidence does not establish that the excess of the daily speculative trading limit in soybean futures by Respondent on August 27, 1971, caused or influenced any sudden

or unreasonable fluctuations or unwarranted changes in the price of soybean futures.

26. The Respondent has not shown that the lapse of time or laches preclude these proceedings.

CONCLUSIONS

The basic question involved herein is whether or not the Complainant has established that the Respondent exceeded the daily speculative trading limits in soybean futures in *willful* violation of Section 4a n12 of the Commodity Exchange Act and Section 150.4 of the Orders of the Commodity Exchange Commission establishing limits on positions and trading in soybean futures.

n12. As herein pertinent, Section 4a of the Commodity Exchange Act provides:

(1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodities, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to diminish, eliminate, or prevent such burden * * *

(2) The Commission shall in such order fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person --

(a) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the Commission in such order for or with respect to such commodity; * * *

The regulation of the Commodity Exchange Commission which fixes daily speculative trading limits in soybean futures has been set forth, *supra.*

Careful study and consideration of the entire record herein shows that there is no dispute that on August 27, 1971 the Respondent purchased three million three hundred thousand (3,300,000) bushels of soybean futures in all futures combined on or subject to the rules of the Chicago Board of Trade. The

Respondent admits this, but maintains that he exceeded the daily speculative trade limits because of inadvertence and accident. In support thereof, and the record shows, that the Respondent had engaged clerical help, and admonished such clerical help to keep him informed of his market position. Considerable evidence was adduced relating to the circumstances surrounding the working conditions and activities of Respondent's employee Mr. Kastil on the day in question, namely, August 27, 1971. This evidence is persuasive in that it shows that what transpired was not the result of deliberate or intentional direction of Respondent, but rather of inadvertence or inattention on the part of Mr. Kastil. Of course, the Respondent must bear the burden of the acts and omissions of his employees.

The Respondent is considered a "spreader" n13 who trades in the "pit" the conditions of which he described as "extremely hectic and difficult with "fast"

markets. He has a "particular style of trading" that required him to have a high volume. He was aware and acknowledged that he traded dangerously close to the speculative limits. Respondent utilizes three-by-five "trading cards." At about 10 a.m. he gives his clerk all the cards which have trades written on them. His instructions to his clerical help were:

"A His instructions are mutual to all things. All three things that he's doing are of equal importance. In that the volume count he knows is something that can't be ignored. I mean, I have explained to him the problem that I have about volume. He knows the rule, and he knows that it's obviously my responsibility as far as to the Exchange and to the Commodity Exchange Authority, but it is his responsibility to me to give me an accurate volume count and generally speaking that volume count is extremely accurate.

"The clerks that I have used are mainly because of their mathematical ability. And so that I, very seldom have I had a problem along this line. The method of trading that I employ has, more often than not, caused me not to be able to trade a full day." (Tr. 414)

n13. Respondent described his activities as:

"Initially there are different kinds of spreads that have varying amounts of volatility. The spreads that I trade in, basically, are not of that nature, in that I trade in spreads within a crop year as opposed to trading in spreads that encompass two different years, in which case the volatility and the risk factor becomes much higher.

"And my method of trading is that when a market move is affected in one particular area of the pit, and by that I mean in one section where a certain commodity future is traded, such as January soybeans, or March, or May or whatever it may be, when something happens in that section that I feel would affect the market, I'll try to use a reaction factor, try to go the same way that that move is taking place in a different option.

"For instance, if a large selling order were to come in to January soybeans, I might go, and while the broker is trying to sell the January soybeans, I might be trying to sell March or May or November. And if I'm successful, then try and get back and buy what I think the quantity would have been that this man is trying to sell, the broker in the initial option that I referred to.

"In the time to explain what -- earlier we spoke about having a position overnight. During the day I very seldom have a position. That is, I really don't feel that I have enough knowledge of soybeans, or whatever I happen to be trading in at the time, usually soybeans, I really don't feel I know enough about soybeans where I can take a position one way or the other.

"But I do feel I have a feeling of how the market is going to react for 15 seconds, 30 seconds, or a minute.

"So during a given day, I never have a position for longer than -- have a net position, my guess is, for longer than a minute or two, depending on the market situation. For the most part, I'll say 90 percent of the time, I'd be completely even, during any given period, during any given day.

"If my system of trading, going back to the example I used before, if there was a large quantity of January beans being sold, and I went and sold what I thought would be a corresponding amount of March and May, corresponding to what I think would be left, other people bought what they wanted in January, and I went back to the January and somebody had also bought all that were for sale, leaving me with a short position, from the March and May that I had sold, I would immediately either pay up, pay a higher price to buy the January, and would likely get it from the person or persons who had bought the January, from their broker, at a lower price.

"Or if I couldn't, or if they didn't want to sell it at a higher price, I would immediately go back to what I'd sold and try and establish either scratch the trade and at the same price that I bought it, or take a loss and get the trade over again and start all over again.

"I'm not a speculator. And I don't presume to know that much about the market that I can sit there and risk losing a lot of money, because I may -- I'd made a mistake in judgment. And where I thought I was to be over from the January, from the broker who had a large selling order, when I made a mistake like that, I just assume that that trade is over with, and I take my loss and start over again." (Tr. 392-394)

Further description of trading procedures was supplied by the witness Robert W. Clark, Director, Central Region, Commodity Exchange Authority, where he testified:

"Q Okay. You mention the trading card. Could you tell us briefly what is a trading card and what it contains?

"A Well, a trading card is a card, I guess, about 3 x 5 inches, which normally a trader would hold a supply of these cards on his person and carry them in his hand, usually, and then, as he made a trade, he would fill out the card.

"The card would have to show his own name, the name of the clearing member that he's clearing his trades through, would have to show, the commodity and the price at which the trade was made, the future and the quantity and the opposite clearing member; that is, the clearing member that the opposite side of the trade is using and then, also, the identity of the Floor broker on the other side of the trade.

"Q And all of this information is written down when? Is this the supplement that's filled out at the end of the day, or exactly when is a trading card prepared?

"A The trading card would be prepared usually at the time of the trade, although, when you have a fast Market and a trader is making many trades, let's say, in a very short period of time, why, he may not fill out all the information on the card right at that moment. Maybe a few minutes later.

"I would think normally certainly before the end of the day.

"Q Once these trading cards have been prepared, what then happens as far as the transaction is concerned? In other words, what happens to the trading cards after they are prepared on the Floor?

"A Normally the trader then would send the trading card or take it himself. It probably would normally go by runner back to his firm's office where the information from the trading card then is keypunched into a trade confirmation card, which in turn is sent before the end of the day to the clearinghouse of the Chicago Board of Trade and then the clearinghouse takes that card, let's say the card is a buy card, they would make sure before the end of the day is over that they can match that buy card; that is, to make sure that for every buyer there is a seller."

The record evidence, as a whole, does not show that Respondent traded with a "reckless abandon" or "a careless disregard" of the limit, as alternatively asserted by Complainant on brief (p. 16).

On brief, Complainant further suggests that elaborate precautions by Respondent against a violation of this limit should not be sufficient to show a lack of willfulness on his part; that the elaborate precautions taken by Respondent did not include supervision of his agent, whose negligence could have reasonably been foreseen; that Respondent is aware of his propensity to approach the speculative daily trading limit; and, that he should not be able to place

his responsibility on a clerk who "goofed" or a clerk in "keypunch school" or a clerk "on vacation."

However, in its Reply Brief (p. 5), Complainant asserts that it

was not by accident but "carelessness" that Respondent continued to trade on August 27, 1971. A careful analysis and study of the entire record shows that on August 27, 1971, the Respondent inadvertently and accidentally exceeded the limit in soybean futures. In substance, the Respondent admits that he so did.

On the other hand, the Complainant maintains that the Respondent willfully violated the speculative daily trade limits in soybean futures in that the record discloses that the Respondent voluntarily traded in soybean futures on August 27, 1971 and that as a result of such trade Respondent's soybean futures purchases were in excess of the speculative trade limits for that date. [Until amendment thereof, the Complaint did not allege *willful* violation.] It is Complainant's position that this is sufficient to establish a willful violation within the meaning of Section 558(c) of the Administrative Procedure Act (5 U.S.C. 558(c)) and Section 0.3 of the regulations under the Commodity Exchange Act (17 CFR Section 0.3)). The. Complainant maintains this position irrespective of whether the Respondent relied on erroneous advice or the lack thereof, with respect to his trading position on August 27, 1971. According to the Complainant's argument, "willfulness," as applied to both the Administrative Procedure Act and the Commodity Exchange Act should be defined as: (1) intentionally doing an act which is prohibited, irrespective of evil motive or reliance on erroneous advice; or (2) acting with careless disregard of the statutory requirements. Essentially, such a position, when translated into the realities of the present proceeding, means that once the daily speculative trading limits have been exceeded, such action is per se willful and the Department is relieved of the necessity of any further proof, including why it declined to send out a warning letter. Likewise, the alleged violator would never be accorded the opportunity to demonstrate or achieve compliance. If such a contention is correct then no written "warning" letter was required. See *KWK Radio, Inc.* v. *F.C.C.*, 337 F.2d 540 (D.C. Cir., 1964), *cert. den.*, 380 U.S. 910.

Furthermore, it is evident from Complainant's brief that it no longer seeks to rely upon letters addressed to the Complainant during the years 1961, 1966 and July 22, 1971 as being sufficient to satisfy the requirements of the Administrative Procedure Act. The Respondent objected to the receipt into evidence of documents relating to past transactions. Counsel for Complainant admitted that such documentary evidence was "directed to the question of willfulness." Since Complainant has abandoned such

argument, it is suffice to say that such evidence relating to past transactions did not meet the directives of the statutory and regulatory mandate as to written notice. The letters, inter- or intra-office memoranda, and testimony relevant to past transactions are remote in time (except as to the July 1971 letter) and no prior violations were shown.

Section 558 of the Administrative Procedure Act, provides, *inter alia,*

"§ 558. *Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses*

"(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

"* * *

"(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of

this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given --

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(a) opportunity to demonstrate or achieve compliance with all lawful requirements."

In applying and interpreting such provisions, there are precedent cases which essentially adopt the view that "willfulness" means the intentional doing of the act charged. n14

n14. It is interesting to note that the original version of Section 9(b) of the Administrative Procedure Act relating to sanctions and powers initially contained the language "Except in cases of clearly demonstrated willfulness." At the time of its enactment the legislation had been changed to omit the term "clearly demonstrated." The reason for this is not crystal clear. Senate Report No. 752, 79th Cong., 1st Sess. 25 would indicate that "willfulness must be manifest," the same being true of "public health, interest, or safety," such standard meaning a situation requiring immediate action irrespective of the equities or injuries to the licensees. House Report No. 1980, 79th Cong. 2nd Sess. 20 reflects the same reasoning. It is further interesting to note that the text of the Secretary of Agriculture's report of May 15, 1945 reflects:

"The provision in section 9(b) prohibiting, with certain exceptions, the revocation of licenses until persons shall be accorded a reasonable opportunity to demonstrate or achieve compliance with all lawful requirements would present many administrative problems and might be considered as placing a premium on non-compliance. Even though a broad discretion appears to be placed in the agencies in regard to its application, extreme difficulty would be encountered in determining the existence of clearly demonstrated willfulness or that public health, morals, or safety manifestly require summary action. Furthermore, under the judicial review provided by a subsequent section, the courts would prevent any arbitrary or capricious action with respect to an instance of noncompliance of an unintentional or technical nature. Therefore, the deletion of the matter beginning with the word 'except' on page 14, line 20, and ending with the word 'requirements' on page 15, line 4, is recommended."

The hearings before the Committee on the Judiciary, House of Representatives, 79th Cong., 1st Sess., on the subject of "Federal Administrative Procedure" (June 21, 25 and 26, 1945, Serial No. 19) also reflects that it was the opinion of some authorities submitting statements that willfulness was to be "clearly demonstrated."

The Complainant argues that the meaning of the term "willfulness" in the Administrative Procedure Act was focused upon and decided in *Eastern Products Co.* v. *Benson,* 278 F.2d 606 (3rd Cir., 1960). The Complainant maintains that the court therein refused to subscribe to the proposition that the test of willfulness is evil purpose or criminal intent, and supported its decision by citing the following language in *United States* v. *Illinois Central R. Co.,* 303 U.S. 239:

"* * * In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States* v. *Murdock,* 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or

voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.' [Emphasis supplied]

Both parties on brief have cited cases which they believe support their respective contentions as to whether the facts in this case establish "willfulness."

Among those relied upon by Complainant are: *David G. Henner,* 30 Agric. Dec. 1151 (30 A.D. 1151) (1971); *Arthur N. Economou,* 32 Agric. Dec. 14 (32 A.D. 14) (1973); *Glover Livestock Comm'n Co.,* 30 A.S. 179 (1972); modified and aff'd 454 F.2d 109 (8th Cir., 1972), rev'd *Butz* v. *Glover Livestock Comm'n Co.,* 411 U.S. 182 (1973).

Without reviewing in detail each case relied upon by the Complainant, its position is that "willful" conduct can refer to either intentional conduct or conduct that was merely careless or

negligent. On brief, Complainant states, among other things, "On August 27, 1971, Mr. Shatkin was voluntarily trading futures, and it was not by accident *but by carelessness* that he continued to voluntarily trade * * *." [Emphasis supplied] Thus, Complainant contends that Respondent's carelessness was equatable with legal willfulness.

The Respondent believes that the court's view in *Great Western Food Distributors* v. *Brannan,* 201 F.2d 476 (7th Cir., 1953) was that a determinative element was the intent of the parties during trading. Respondent also relies upon *Schwebel* v. *Orrick,* 153 F.Supp. 701 (D.C. Cir., 1957) for the proposition that knowledge and intent must be implicit in the facts and that willfulness connotes intent to do the act charged. As noted by Complainant on reply brief the United States District Court for the District of Columbia stated in that decision:

"Whether the intentional acts described in various charges constitute such unethical or improper professional conduct as would warrant suspension or revocation of an attorney's permission to practice before the [Securities Exchange] Commission, is not a question which the Court may determine in this action."

Although it found on the facts that compliance with the notice requirements had been achieved, the court, in the *Schwebel* case adopted the interpretation of "willfulness" as being the intentional doing of the act charged.

The Administrative Law Judge has also studied and analyzed the case of *Great Western Food Distributors* v. *Brannan, supra, cert. den.,* 345 U.S. 997, where the evidence sustained the Department's findings that the petitioners therein had cornered the egg market on the Chicago Mercantile Exchange and that such program was intentionally undertaken. The contention was raised that the order (sanction) was violative of the Administrative Procedure Act because the petitioners were not notified in writing of the charges being contemplated against them. In disposing of this argument, the court stated, *inter alia,* "* * * Assuming, arguendo, that this section is applicable to proceedings such as this, in view of the evidence that petitioners wilfully violated the act, i.e., that *they intentionally* set out to widen the spread between December and January futures, its relevance, is by its own terms, excluded in this instance." [Emphasis supplied]

The *Eastern Products* case related to a suspension of a license under a Perishable Agricultural Commodities Act (7 U.S.C.

499a). In that case, there was a specific finding that the licensees failed or refused truly and correctly to account and make full payment promptly for numerous shipments of perishable agricultural commodities over a five-month

period. The court, in its opinion, did not seek to equate neglect and willfulness, but rather, "* * * that notorious neglect of explicit provisions of law may be evidence of willfulness," and that *repeated violations* justified the finding of willfulness therein. In *Cargill, Inc.* v. *Hardin,* 452 F.2d 1154 (8th Cir., 1971) *cert den.,* 392 U.S. 906, the court found, among many other things, that the facts presented in that case showed *intentional* action on the part of Cargill and that certain manipulative actions caused severe fluctuations and "such severe fluctuations constitute a threat to a free and orderly market."

The Department of Agriculture, through its Judicial Officer, has consistently n15 taken the position which is argued by the Complainant herein. In the case of *David G. Henner,* 30 Agric. Dec. 1151 (30 A.D. 1151) (1971), the Judicial Officer found that the Respondent's violation was willful. This was concluded because:

"The respondent is an experienced trader, and the inference is inescapable that he intentionally paid more than he had to for November shell egg futures."

n15. The one exception is *American Fruit Purveyor's Inc.,* 30 Agric. Dec. 1542 (30 A.D. 1542) (1971) where the Judicial Officer of the Department, in overruling this Judge stated in part:

"In determining whether the respondent violated the Act, we start with the proposition that the respondent is not required to conduct its business activities in a manner that will make it easiest for the complainant to determine whether it has complied with the Act. The respondent must do only what the Act and lawful regulations require it to do -- no more, no less."

* * * *

"Under the complainant's construction of section 9(b), if a person violates the Perishable Agricultural Commodities Act by failing to pay promptly on one or more occasions, the complainant's only obligation is to notify the person in writing of the violation, and if he cannot demonstrate that he did not violate the Act, the complainant may institute an action to suspend or revoke his license without any further violation after the "notice" letter. The complainant contends that there is no obligation in this type of case to permit the person to "achieve compliance" with the Act because, in the complainant's view, the violation has already occurred and it is impossible to achieve compliance with respect to that violation.

"The complainant would give meaning to the provision for achieving compliance only in the case of a continuing violation, such as a packing plant which had unsanitary conditions, in violation of Federal law, in which case the plant could achieve compliance with the sanitation requirements by correcting the unsanitary conditions. As to all violations of a non-continuous nature, the complainant contends that section 9(b) merely requires a letter to be sent to the alleged violator to give him an informal chance to demonstrate that he did not violate the Act before a formal action is instituted against him (Oral Arg. pp. 81-90).

"That construction misses the point of the change that section 9(b) made as to licensing programs subject to the Administrative Procedure Act. *There is no basis in the language of the Administrative Procedure Act or its legislative history for limiting the major benefit of section 9(b) to continuing violations.* Except in cases of willfulness or those meeting the other specified exceptions, all licensees must be given a warning, *i.e.,* a second chance, before an action is instituted to suspend or revoke a license because of a violation of law."

* * * *

"In *H. P. Lambert Co.* v. *Secretary of Treasury,* 354 F.2d 819, 821, fn. 2 (C.A. 1), the Court stated that "Rule 9(b) may well allow the dog one bite

* * *." This is consistent with the legislative history and the foregoing views as to the construction of section 9(b). <26>

"There is no basis in the language of the Administrative Procedure Act, its legislative history, or in logic for the complainant's argument limiting the "second chance" benefits of section 9(b) to those licensees who are engaged in a continuing violation. Whether the violation is a continuing violation (such as an unsanitary packing plant) or a single violation (such as failure to pay promptly or misbranding), in either instance, the past violation has occurred and nothing that is done in the future can alter the fact that the Act has been violated in the past. But whether the violation is of a continuing nature or of a single instance nature, the licensee can "achieve compliance with all lawful requirements" by complying with the Act in the future. In the case of a continuing violation, such as an unsanitary plant, he can "achieve compliance with all lawful requirements" by eliminating the unsanitary condition. In the case of a prompt payment violation or a misbranding violation, he can "achieve compliance with all lawful requirements" by paying promptly or branding properly in the future. <27> (Footnotes omitted)

"With respect to a non-continuing violation, such as failure to pay promptly, the complainant's construction of section 9(b) reduces the benefits of the Administrative Procedure Act merely to an opportunity for an informal hearing before the agency brings a formal action to suspend a person's license. But where Congress intends to enact such an informal settlement type of procedure, it uses clear language to provide for it, and it does not also give the violator an opportunity to "achieve compliance with all lawful requirements."

* * * *

"The construction of section 9(b) of the Administrative Procedure Act in this decision is contrary to that set forth in *In re Harrisburg Daily Market, Inc.,* 20 Agriculture Decisions 955, 974-977, affirmed without any specific discussion as to section 9(b), 309 F.2d 646 (C.A.D.C.), certiorari denied, 372 U.S. 976. I am reluctantly forced to disagree with the construction of the Act in the *Harrisburg* case. The *Harrisburg* case relied on the case of *Schwebel* v. *Orrick,* 153 F. Supp. 701, 706 (D.C.D.C.), affirmed on other grounds, 251 F.2d 919 (C.A.D.C.), certiorari denied, 356 U.S. 927, in which the Court said that section 9(b) of the Administrative Procedure Act "requires only that before suspension or revocation of any license the licensee shall be given written notice of the charges against him and an opportunity to meet such charges, unless willfulness of the licensee or the public interest requires summary action." But for the reasons stated above, I do not agree that section 9(b) requires only written notice with an opportunity to meet the charges. It requires, in addition, a second chance, that is, an opportunity to achieve compliance with the Act in the future.

"It is clear that only one notice is required by section 9(b) of the Administrative Procedure Act, that is, once a licensee has been adequately warned, if he subsequently violates the Act, the agency may proceed to suspend his license without any further warning, notice, or opportunity to demonstrate informally that he did not violate the Act." (Emphasis supplied)

It was concluded therein by the Judicial Officer that since the Respondent intentionally traded in a manner to cause the closing price to be artifically high such intention connoted willfulness. The authorities relied upon by the Department in support of that contention are set forth therein.

In *Economou and Economou & Co.,* 32 Agric. Dec. 14 (32 A.D. 14) (Janauary 15, 1973), reversed F.2d (2nd Cir., March 28, 1974), the Respondents were denied trade privileges on all contract markets for a period of 90 days where

the evidence, as found by the Judicial Officer, showed that the Respondents had violated the Act and the Regulations. In that case, the Judicial Officer (the individual to whom the Secretary has delegated final authority in these matters) acknowledged that the Respondents therein had received no written notice prior to the original complaint issued in that case and, relying upon the legal authorities cited therein [essentially the same as are relied upon by the Complainant in this proceeding], it was concluded that a violation is willful if a violator does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice or if such individual acts with careless disregard of statutory requirements. The Department's position was that 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.

In reversing the Department of Agriculture in the *Economou* case, the Court of Appeals for the Second Circuit stated in a *per curiam* decision, *inter alia:*

"* * * the essential finding of willfulness, now passionately protested, was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under those circumstances, the finding of willfulness appears erroneous on the record taken as a whole, and the sanctions imposed unwarranted."

In *Capitol Packing Company* v. *United States,* 350 F.2d 67 (10th Cir., 1965) an adjudicatory proceeding under the Packers and Stockyards Act was subject to review. Among the many issues involved therein was that of "willfulness" since the written notice provisions of the Administrative Procedure Act had not been satisfied. The Judicial Officer had made no specific finding of willfulness. Upon review the Tenth Circuit noted that the Department of Agriculture sought to rely upon past admitted violations of which the registrants were not charged in the proceeding under review. Arguments and contentions as are made in the present proceeding were argued in *Capitol Packing,* e.i., "* * * willfulness is shown because the petitioners *intentionally* committed a prohibited act, * * *." [Emphasis supplied] In commenting upon *Goodman* v. *Benson,* 286 F.2d 896 the Tenth Circuit noted that the Seventh Circuit in the *Goodman* case found that the "* * * violations constituted clear violations of the Act and *that he was not acting in good faith.* The remainder of the cases cited by the Government in support of its interpretation *also show a gross disregard of the law.* * * *" [Emphasis supplied] The court in *Capitol Packing* n16 found that the facts therein justified the finding of willfulness, i.e., an *intentional* misdeed or such gross neglect of a known duty *as to be the equivalent thereof.* Thus, although finding willfulness, the element of intent was not vanished from the court's mind.

> n16. The Judicial Officer in discussing *Capitol* states that the definition of willfully adopted by the Court in *Capitol* "would seem to be rendered nugatory by the [Supreme] Court's decision in *Butz* v. *Glover Livestock Comm'n Co.,* 441 U.S. 182, 185,187 (1973), citing *inter alia* at 411 U.S. 187, fn. 5"
>
> "'Wilfully' could refer to either intentional conduct or *conduct that was merely careless* or negligent." [Emphasis supplied]

In the subject proceeding no warning letter was sent out, nor has Complainant advanced any reason as to why it was not. A

reading of Complainant's briefs might lead one to reasonably conclude that it is Complainant's position that none was required inasmuch as, in Complainant's view, the mere occurrence of the acts giving rise to the violation are *per se* evidence of wilfulness. If Complainant does not intend to send out warning

notices n17 and seeks to rely upon establishing "willfulness" as an alternative thereto, then, in such event, it must be held to strict rules of proof and the application of legal principles must be carefully and meticulously employed.

n17. The record does not disclose the Complainant's policy in this regard. However, note is made of the Department's statement, "* * * Even though a broad discretion appears to be placed in the agencies * * * extreme difficulty would be encountered in determining the existence of clearly demonstrated willfulness * * *." See Secretary Claude R. Wickard's letter of June 21, 1945 to Senator Pat McCarran, Chairman, Committee on the Judiciary.

Attentive reading of the decisions in the *Henner* and *Cargill* cases, *supra,* reveals an apparent "intent" or "purpose" surrounding the actions complained of. The evidence herein does not establish that the Respondent Shatkin had any "intent" or "purpose" attached to his exceeding the trading limits. Rather, the excessive trading was caused by accident or inadvertence. Respondent admits that he was knowledgeable of the rules and regulations, including the trading limits, but to infer intent, purpose, or design from such knowledge would be to engage in unwarranted conjecture and speculation. The Complainant has described Respondent's action as "carelessness," but the evidence of record does not establish that Respondent was careless in his trading procedures, even though his particular *modus operandi* was to trade close to the limit. Nor may we impute ill-doing because of Respondent's propensity to approach the trading limit. The Respondent describes himself as a successful trader and attributes this to his unique style of trading. The evidence does show that on more than one occasion Respondent or his employees improperly filled out the CEA Form 203 report. The Complaint filed herein does not allege this to be a matter in issue or a violation, and indeed, it is not a matter in issue.

Basically, what must be determined herein is whether actions of inadvertence or accident are sufficient evidence of "willfulness" as that term is used in the Administrative Procedure Act and the Complainant's regulations, both cited above.

Despite the guidelines set forth in the above-mentioned cases

the term "willful" is commonly employed in averring or describing an act, or in denoting the quality or intensity of the act. As with all terminology it is susceptible of different shades of meaning and may be used in different contexts depending on the nature of the subject. It has been said that the term "willful" means nothing more than that the person, about whom the expression is used, knows what he is doing, intends what he is doing, and is a free agent. Another view is that the term implies a conscious act of the mind and denotes an attitude of the mind and will but that something more than a mere exercise of the will is imparted in that there is included, when used in connection with an act forbidden by law, the idea of consciousness or knowledge of all the circumstances. Thus, one view of the meaning of "willfulness" would carry the idea that, with knowledge, the will consented to, designed and directed the act.

The determination of whether the Respondent's actions in exceeding the trading limits violated the Act is not an easy one for the Administrative Law Judge to make. Departmental policy as discerned from the published Agricultural Decisions and the court cases which have sustained the Department would tend to support the contentions of Complainant in the absence of a close scrutiny of the cases which reveals the presence of the element of intent or of purpose or design. In none of those cases was the violation in question the result of accident or inadvertence. This difference in the factual circumstances is deemed to be of material importance. In *Economou, supra,* the Second Circuit did not elaborate on the specific reasons for reversal.

After having given careful thought and consideration to the entire record herein, it is believed that the interests of justice and the statutory mandate

of the Administrative Procedure Act required the issuance of a warning letter in this case, and that in the absence of such letter, the Complainant has not established a "willful" violation. To conclude otherwise would be tantamount to avoidance of the statutory provisions providing for a warning letter in instances of minor or unavoidable infractions devoid of intent, design or purpose. This was not intended by the Congress in enacting the Administrative Procedure Act and the Administrative Law Judge perceives it an improper function to attempt to enlarge upon or modify Congressional intent.

In all probability, the conclusions reached herein will be reversed by the Judicial Officer. In the event this case is reviewed by a Federal Court, and since this initial decision will become part

of the record, it is suggested that it would be of great value were the Court to be so lenient as to comment, among other things, on the necessity or non-necessity of warning letters in non-continuing violations such as the factual circumstances present in this case. Such indulgence would provide a valuable guideline for Administrative Law Judges, including this one, when they are presented with factual situations similar to the subject case.

Other matters raised in this proceeding are summarized hereinafter. However, in view of the Administrative Law Judge's determination that "willfulness" has not been shown in this case and that no "warning letter" was issued with respect to the violation in question, the following contentions are concisely set forth.

Anticipating a finding of fact that the Respondent's action of exceeding the daily trading limit was the result of a "clerical error," Complainant submits that such fact should not mitigate the requested sanction. In support thereof, it premises its position on certain intimations:

(1) A spreading broker, such as the Respondent, has a beneficial balancing effect on the commodity market,

(2) The volume traded on the Chicago Board of Trade on August 27, 1971, was heavy, causing great confusion, and

(3) The violation was due, "only," to a clerical error and was not done through any fault of Respondent.

Arguing from such hypothesis the Complainant argues that it should be permitted to impose its sought for sanction, in any event, so as to dissuade violations of the daily speculative trading limit and in order to comply with the intent of Section 4a of the Act.

Basically, Complainant's argument in this connection is that, notwithstanding the statutory requirements for "willfulness" or the issuance of warning letter, a sanction must still be imposed in this case. In support of this contention Complainant argues that Respondent has been characterized, by several of his witnesses, as a spreading broker. Mr. Kirshbaum, a member of the Chicago Board of Trade for 41 years, testified that a spreading broker is what the Commodity Exchange Authority desires. In fact Mr. Kirshbaum says that this type of broker adds a balancing factor to the market, could have no adverse effect on any market conditions and would never cause undue price fluctuations. Mr.

Kirshbaum testifies further that with regard to spreading brokers, "Congress doesn't really understand."

Section 4a of the Commodity Exchange Act reads in part:

"Sec. 4a(1)

* * * *

"Nothing in this section shall be construed to prohibit the commission from * * * exempting transactions normally known to the trade as 'spreads' * * * or from fixing limits applying to such transactions * * * different from limits for other transactions * * *."

Complainant suggests that the Commodity Exchange Commission has drawn on the expertise of the Commodity Exchange Authority and has found that spreaders can and will have an adverse effect on the market, should they cumulatively violate the speculative daily trading limit. The Commodity Exchange Commission has not granted preferential treatment to spreaders and a violation should be treated with sufficient sanctions.

In support of this line of reasoning, the Complainant maintained that the volume traded on the Chicago Board of Trade on August 27, 1971 was no more than a normal trading day for that period in time; the average daily volume of soybean futures in all futures combined traded on the Chicago Board of Trade, for the month of July 1971, was seventy-three million seven hundred and twenty-seven thousand (73,727,000) bushels; on eleven of the twenty-one trading days in that month the volume exceeded that of August 27, 1971; during this period there were only two apparent violations of the speculative daily trading limit; and that although there may be an increase in possible error where the volume is very high, August 27, 1971 was an average trading day, and volume was not a factor herein.

Assuming clerical error the Complainant states that to allow a trader's violation of the speculative daily trading provisions of the Commodity Exchange Act to be excused because of clerical error would render impotent this provision of the Act. Thus, according to Complainant's argument, in order to avoid undue price fluctuations, the Commodity Exchange Act provides for limits on both the daily speculative volume and the open position a trader may have in any regulated commodity. When a violation of these limits occur, sufficient sanctions must be imposed in order to dissuade subsequent violation.

In response to this argument of Complainant, the Respondent

maintains that "spreaders," unlike speculators, create balance, operate for the benefit of the public, and their operations "stabilize" the market by not disturbing price. Respondent interprets the language of Section 4a of the Commodity Exchange Act as unequivocally illustrating Congressional intent in enacting this provision, the force of which is "to diminish, eliminate, or prevent an undue and unnecessary burden on interstate commerce." In subsection (1) of Section 4a, such burden is defined as "excessive speculation in any commodity * * * causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodities * * *." Section 150.4 simply defines excessive speculation as in excess of 3,000,000 bushels. The pertinent inquiry, according to Respondent, is whether one who exceeds the aforesaid limit does cause such fluctuations or changes in price, and whether he does it willfully.

Respondent's assertion of the legal issues herein are the more correct. The record evidence fails to establish that Respondent's actions on August 27, 1971 caused or influenced any sudden or unreasonable fluctuations or unwarranted changes in the price of soybean futures, the act Congress intended to prevent. The record evidence in this proceeding does not establish that Respondent's action in exceeding the daily trading limit produced any adverse price fluctuation. The witness, Clark testified that the only study made was a 1930 study on price manipulation; n18 that no general study ever was made on the single factor of the effect on market

price by trading in excess; and that the Commodity Exchange Authority made no analysis or study of what effect, if any, the alleged excess trading by Respondent on August 27, 1971 had on the price of soybean futures on that day nor did it try to determine whether Respondent's trading affected prices or the

effect severe sanctions might have upon potential violators of the daily volume limit rule. He indicated that a trader may unintentionally exceed the limit without affecting price. n19

n18. The witness Clark's testimony relative thereto is as follows:

"A There have been studies made in the past. Of course, the problem in making studies now is you do have speculative limits, so therefore you hope there is not much trading in excess of the speculative limits. So therefore how do you really measure something that doesn't happen very often?

"So most of the studies that have been done by the CEA in the past were done back in the days before speculative limits. They were done back in the 19 -- in the 20's and 30's. And I have read a lot of that material, and the conclusions that were reached and the data collected at that time was summarized. And from that information it was clear to the CEA and the Commodity Exchange Commission at that time, that when you did have large trades frequently occurring in excess of the limits, that certainly there was an over-all price effect, and adverse price effect.

"Q That was back in the 30's?

"A Yes."

"Q But you have made no studies of the effect on prices by trading in excess of the daily limits, is that correct?

"A No general study, no, and not considering only that factor.

"Q And you have no individual study on any individual cases involving trading in excess of the daily limit, not involved with price manipulation?

"A No, I don't recall making such a study.

"Q Do you have any current information, other than the 1930 reports that you mentioned, that you could support your opinion, or base your opinion on, that daily trading in excess of the limit causes an unwarranted price fluctuation?

"A Well, the most current investigation, or information, I think would be these cases we have investigated over the years involving price manipulation.

"Q But not limited to daily trading in excess of the limits without manipulation involvement?

"A No. I don't recall any current studies on that, that I have been involved in.

"Q Now, notwithstanding all of that, you still have the opinion that excessive speculation on a given day would result in an unwarranted price fluctuation?

"A Yes.

"Q Does it matter the type of trading that the individual might employ?"

n19. The witness Clark, Director, Central Region, CEA, gave testimony which set forth, *inter alia:*

"A Speculative limits are very, very important for protecting the functions of the futures markets. The primary functions of the futures markets are two. The first function is the pricing function of the markets. Also you have the hedging function of the Market. These functions are and were recognized in the Commodity Exchange Act and it's because of these economic functions that are served by the futures markets that we have the regulation of the futures markets, because, going back before the Commodity Exchange Act was passed, the first law was passed in 1922 under the name of the Grand Futures Act.

"The question then before Congress was whether the futures markets should be allowed to continue to exist."

Further testimony was to the effect:

"The people that we are concerned with, the groups that are mentioned in the law and in the legislative history are the producers, first of all; that is, the people who actually produce the commodities have certainly a lot of interest in the prices registered by the futures markets, because these futures prices are so important in establishing the price of soybeans, for example, as it moves from the consumer to the hands of the customers themselves, and this is in interstate commerce. That is, these prices are important all over the country; so, in order to protect this pricing function and prevent unwarranted price changes, that might result from the actions of an individual trader; that is, buying or selling too much on one day, so this is trades that would have possibly some price affect or by establishing a position that's too large where perhaps he dominates the Market or establishes a corner on the Market or some other manipulative technique, in order to protect the Market against the activities of large traders and in order to insure that the Market is competitive; that is, it does consist of many, many traders trying to buy and sell rather than having a few traders dominate the trading and, therefore, exerting excessive effect on price or unwarranted affect on price. The law then provides for the establishment of speculative limits."

* * * *

"A I think the speculative limits have been effective in reducing the activities of market plungers and people who would be making rapid reductions of large positions, and it's limited their activities to reduce the adverse price affects that would result if the limits were not in effect.

"Also I think the speculative limits have been effective in helping to reduce the occurrence of Market corners, for example, and other types of price manipulation that might result from large positions."

On the other hand, Mr. Kirshbaum did review the prices for soybean futures on August 27, 1971 and found the entire range in price from high to low to be approximately four cents a bushel. He further reflected the fact that the volume of trading on October 30, 1973, the day prior to his testimony was slightly over one-half of the volume on August 27, 1971 and that the fluctuation between high and low was approximately thirty to forty cents a bushel, illustrative of the fact that the price range on August 27, 1971 was normal.

In the absence of persuasive proof that Respondent's trading in

excess of the daily limit on August 27, 1971 did cause an undue price fluctuation or other adverse effect upon the market, or reasonably might have been expected to cause one, as opposed to conjecture and influence, it cannot be found that such undue price fluctuation occurred. The evidence of record indicates the contrary.

We next consider Respondent's argument that the filing of the Complaint is barred by laches in that it took the Department of Agriculture seventeen (17) months after it received Respondent's CEA Form 203 to bring the Complaint. Both parties have set forth argument relative to whether or not the case was immersed in public interest and whether the Complainant pursued the matter in its sovereign capacity. The theory of estoppel is likewise argued. Respondent's contention that he "detrimentally suffered" because of the Complainant's alleged delay is not persuasive.

Without deciding whether or not the Complainant proceeded in its sovereign capacity to protect the national public interest under the Commodity Exchange Act, the record as a whole does not establish laches to the extent that it would constitute an affirmative defense to bar the Government from proceeding herein. Admittedly, there may have been less than quick, expeditious action. Among explanations given by the Complainant for the apparent delay were those attributable to a large workload, accommodating to a "large backlog of investigations" and because as the "* * * Regional Director I had to make sure that sufficient personnel were assigned to these price manipulation investigations, and this means then that lower priority cases or cases of a type that are considered lower priority than price manipulation have to be deferred, and this type of case was one that's considered lower priority than price manipulation, so I didn't pull people off the price manipulation investigations to work on this case." Such testimony, however, is not evidence of lack or diligence nor unreasonable or arbitrary inaction.

To be a bar to the institution of this proceeding, the delay on the part of the Government would have had to been shown to have been materially detrimental to Respondent and unreasonable in length. This has not been done.

The final matter in this proceeding which deserves extended discussion relates to Complainant's request for sanctions. In its proposed Order the Complainant seeks an Order to the effect that Respondent shall cease and desist from exceeding the trading and position limits fixed by the Orders of the Commodity Exchange

Commission and that the registration of Respondent as a floor broker under the Commodity Exchange Act be suspended for a period of six (6) months. Respondent would be prohibited from trading on or subject to the rules of any contract market for a period of six (6) months, and all contract markets would refuse trading privileges to the Respondent during this period. Such prohibition and refusal would apply to all trading done and positions held directly by the Respondent, either for his own account or as agent or representative of any other person or firm, and also to all such trading done and positions held indirectly through persons or firms owned wholly or in a substantial amount by the Respondent or in any way subject to his direction or control, wholly or substantially, including but not limited to Shatkin Trading Company.

Both the Complainant's regulations and the Administrative Procedure Act cited hereinabove contemplate that except in cases of willfulness *the withdrawal, suspension, revocation, or annulment of a license is lawful only if a written warning has been given the registrant.*

On the basis of the facts of this case we have found neither willfulness nor a written warning. Accordingly, it is believed that any suspension of Respondent's registration would be illegal and erroneous.

However, we find no such prohibition with respect to a cease and desist order. In view of Respondent's admission that he did exceed the daily trading limit in soybean futures and after consideration of the entire record, the interests of fairness and justice will best be served by the issuance of the Order below.

All contentions and arguments of the parties were weighed, analyzed, and considered. Those not specifically discussed were deemed not to require extended discussion.

The briefs, proposed findings, and conclusions filed by the parties and the evidence of the entire record were considered in making the findings and conclusions set forth above. To the extent that some are inconsistent with the findings and conclusions set forth in this decision, they are denied.

ORDER

1. The Respondent, Henry S. Shatkin, shall cease and desist from exceeding the trading and position limits fixed by the orders.

rules, and regulations of the Commodity Exchange Commission.

2. Such Order shall become effective on the date this Decision and Order become final.

3. Pursuant to the amended Rules of Practice governing proceedings under the Commodity Exchange Act, this Decision and Order become final without further procedure 35 days after service hereof, unless appealed by the Secretary or by a party to the proceedings within 30 days after service, as provided in § 0.16 and §0.18 of the amended Rules of Practice published in the Federal Register of August 20, 1973 (38 F.R. 22381).

4. A copy of this Decision and Order shall be served on each of the parties.

(No. 16,265)

In re HENRY S. SHATKIN. CEA Docket No. 211. Decided February 14, 1975.

Order granting motion to withdraw appeal

Herbert R. Bader, for complainant.

Philip M. Bloom, Chicago, Ill., for respondent.

Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

On January 7, 1975, the complainant filed an appeal to the Judicial Officer from the initial decision filed herein on November 21, 1974, by the Administrative Law Judge, Dorothea A. Baker. Final administrative authority to decide cases under the Commodity Exchange Act has been delegated to the Judicial Officer (37 F.R. 28475; 38 F.R. 10795). n1

n1. The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550). The Department's first Judicial Officer held the office from 1942 to 1972. The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

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