

Commodity Futures Trading Commission
CEA CASES

NAME: GENERAL FOODS CORPORATION, CHARLES W. METCALF, DANIEL F. RICE AND COMPANY, DANIEL F. RICE, LAWRENCE J. RYAN, AND PHILIP R. O'BRIEN

CITATION: 6 Agric. Dec. 288

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(A.D. 1451)

In re GENERAL FOODS CORPORATION *et al.* CEA Doc. No. 34. Decided April 28, 1947.

Violations of Act -- Attempt to Manipulate Price of Rye Futures and Actual Rye and to Corner Them -- Manipulation of Price of Rye Futures and Actual Rye -- Exceeding Trading Limits -- Suspension of Registration -- Suspension of Trading Privileges

In this disciplinary proceeding under the Commodity Exchange Act (7 U. S.C. Chapter 1), involving charges by the Government that respondents had individually and collectively manipulated and cornered and attempted to manipulate and corner rye futures and actual rye in Chicago, and that one of the respondents exceeded the trading limits in rye futures in violation of the provisions of the act, it is determined (1) that respondents D. F. R., D. F. R. and Company, P. R. O. and L. J. R. collectively and individually attempted to manipulate the price of rye futures and actual rye; (2) that respondents G. F. Corporation, C. W. M., D. F. R., D. F. R. and Company, P. R. O., and L. J. R. collectively and individually attempted to and did manipulate the price of rye futures and actual rye by virtue of the 2,000,000 bushel transaction in May 1944; and (3) that respondent G. F. Corporation also exceeded the trading limits in one instance, and, therefore, it is concluded that the trading privileges of D. F. R. and D. F. R. and Company and the registration of D. F. R. and Company be suspended for 6 months, that the trading privileges of G. F. Corporation and C. W. M. should be suspended for 30 days, that the trading privileges and the registration of L. J. R. should be suspended for 10 days. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Violation of Act -- Evidence -- Failure to Prove Manipulation Without Proof of Artificially Enhanced Prices

In the absence of evidence that rye futures prices on the Chicago Board of Trade were artificially enhanced by manipulative means, the charges by the Government that respondents artificially enhanced prices of rye and rye futures cannot be sustained. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Official Notice -- Advertence to Expertise of Referee or Deciding Officer Not Adequate Substitute for Evidence

It is not for the referee or judicial officer to take official notice of matter subject to comprehensive economic study without the benefit of explanation by witnesses and without opportunity for each party to dispute the influences sought from the data by the other party, and advertence to the

expertise of the referee or the deciding officer is an inadequate substitute in this type of a proceeding for evidence introduced in the usual way. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Violation of Act -- Essentiality of Proving Commission of Act or Specific Intent Equivalent to Mens Rea

Since the holding of a large supply of rye by one of the respondents or its failure to liquidate its stock or part of it was not in itself prohibited, and since no other link with remaining respondents is established, this respondent cannot

be found to have collectively violated the act because even in an administrative proceeding such as this, some intent must be shown either by mere doing of a prohibited act or by the more exacting standard of a specific intent equivalent to the *mens rea* of criminal law.*

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Violation of Act -- Efforts To Corner Failing To Affect Prices Upward as Constituting Attempts To Manipulate or Attempt To Corner Under the Act

Although manipulative practices such as cornering efforts that fail to enhance the price or cause price fluctuation may be classified as "manipulation," it seems that such cornering efforts are covered by the act as attempts to manipulate or attempts to corner. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Violation of Act -- Establishment of Concerted Action in Absence of Express Agreement

The absence of a specific pleading of agreement among alleged collective violators is not fatal to a complaint. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Jurisdiction of Secretary -- Imposition of Administrative Sanctions for Past Attempts To Manipulate or Corner

Section 6 (b) of the act supported by the incorporation by reference of section 9 confers upon the Secretary jurisdiction in this proceeding to consider or impose administrative sanctions for past attempts to manipulate or to corner, and this is borne out by the legislative history of the section, particularly by the committee hearings. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Constitutional Law -- Constitutionality of Act -- Delegation of Legislative Power -- Due Process Clause of Fifth Amendment

Respondents' attack upon the constitutionality of the act on the ground of an improper delegation of legislative power and in violation of the due process clause of the Fifth Amendment is not well taken, for, even in the absence of power to decide these questions, they are well settled by now in favor of the constitutionality of the act. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Violation of Act -- Attack Upon Validity of Complaint as to Matter of Form

Respondents' contention that complaint is invalid on the ground that it reads "There is reason to believe" instead of "I have reason to believe" and because the complaint reads "In re General Foods" instead of "Secretary of Agriculture v. General Foods . . ." has no merit in substance and relates to mere matters of form. *

* Reference to other points involved in this case will be found in Index-Digest in this issue of Agriculture Decisions. -- Ed.

Messrs. Charles W. Bucy, John S. Griffin, and Ben Ivan Melnicoff, of Washington, D. C., for the Government. Messrs. Edward R. Adams and William Simon, of Miller, Gorham, Wescott & Adams, of Chicago, Illinois, for General Foods Corporation; Messrs. James A. Sprowl and Albert E. Jenner, of Poppenhusen, Johnston, Thompson & Raymond, of Chicago, Illinois, for Charles W. Met-calf; Mr. Lee A. Freeman, of Rooks & Freeman, of Chicago, Illinois, for Daniel F. Rice and Daniel F. Rice & Company; Mr. Frederick M. Bradley, of Washington, D. C., for Daniel F. Rice & Company ; Mr. Joseph B. Crowley, of Bowden, Taylor & Norville, of Chicago, Illinois, for Lawrence J. Ryan; and Messrs. Howard W. Vesey and William A. Clinsburg, of Vesey, Wheeler &

Prince, of Washington, D. C., for Philip R. O'Brien. Mr. Jack W. Bain, Referee.

Decision by Thomas J. Flavin, Judicial Officer

DECISION AND ORDER

This is a disciplinary proceeding under the Commodity Exchange Act (7 U. S. C. Chapter 1), involving charges by the complainant (usually called the Government herein) that the respondents, General Foods Corporation and Charles W. Metcalf of New York City, and Daniel F. Rice and Company, Daniel F. Rice, Lawrence J. Ryan, and Philip R. O'Brien of Chicago, had individually and collectively (1) attempted to corner and did corner actual rye in Chicago particularly rye deliverable on futures contracts under the rules of the Chicago Board of Trade, (2) attempted to corner and did corner the May 1944 rye futures on the Chicago Board of Trade, and (3) attempted to and did manipulate prices of rye futures contracts and actual rye on and subject to the rules of the Chicago Board of Trade. The complaint also alleged that respondent General Foods exceeded the trading limits in rye futures on May 8, 1943.

The complaint alleges the activities engaged in by respondents that gave rise to the charges of manipulation and corner and attempted manipulation and corner. In brief outline, the complaint states (1) that General Foods started buying rye futures on the Chicago Board of Trade in December 1942, took deliveries on its futures during 1943 maintaining generally the maximum long speculative position of two million bushels, and purchased large amounts of cash rye, so that its operations caused a tight situation in December 1943 rye with a resultant inflated and manipulated price for both rye futures and actual rye in Chicago; (2) that the Business Conduct Committee of the Chicago Board of Trade in December 1943 and in January 1944 prohibited General Foods and its Executive Vice President Metcalf from further purchases of rye and rye futures without approval of the committee; (3) that respondent Rice on his own account and through customers of Rice and Company listed in Schedule A of the complaint whose trading he controlled or influenced, respondent Ryan, and respondent O'Brien engaged in a heavy concerted purchasing program of May rye futures with the arrangement and understanding that none of the General Foods' stock of delivered rye in Chicago would be delivered on May 1944 futures contracts; (4) that respondents endeavored to prevent increases in the deliverable supply of rye in Chicago and purchased May 1944 Winnipeg rye futures for the purpose and

with the effect of preventing rye from moving to Chicago from Canada for delivery on the May 1944 Chicago futures and that the Rice respondents

for themselves and for Schedule A customers, Ryan, and O'Brien took delivery in Chicago on May 1944 futures contracts and withheld from the market 3,750,000 bushels of rye or 91.5 percent of the rye involved in May 1944 deliveries; and (5) that General Foods continuing its position of maintaining the actual rye part of the market operation acquired 2,000,000 bushels of deliverable rye in Chicago in May 1944 from Rice, Ryan and O'Brien and Schedule A customers of Rice and Company for the purpose of relieving these respondents from the burden of carrying the rye and at the same time maintaining the inflated price by insuring the withholding of this rye from the Chicago market.

The complaint was issued on May 26, 1945, by Ashley Sellers, Assistant War Food Administrator, and on June 15, 1945, he designated Jack W. Bain, Office of the Secretary, as referee. On July 31 and August 1, 1945, respondents Rice, Rice and Company, General Foods, and Metcalf filed motions questioning the authority of an Assistant War Food Administrator to issue the complaint. The powers exercised by the War Food Administrator were transferred back to the Secretary of Agriculture, effective June 30, 1945 (E. O. 9577, 3 CFR, 1945 Supp., Page 84), and on August 8, 1945, the Secretary ratified and adopted the complaint and designation of referee issued by the War Food Administration.

All the respondents filed answers admitting some of the facts alleged but denying any manipulation or corner, but General Foods and Metcalf did not deny that the trading limits were exceeded in one instance. After some postponements, a prehearing conference was held in Washington on November 26, 1945, and the hearing was set for December 11, 1945, in Washington. It was set for Washington instead of Chicago, the place of the alleged manipulation and corner, at the request of respondent O'Brien, which request was concurred in by the other parties.

At the appointed time and place the hearing began before Referee Bain. Charles W. Bucy, John S. Griffin, and Ben Ivan Melnicoff of the Washington office, Office of the Solicitor, appeared for the Government. Edward R. Adams and William Simon of Miller, Gorham, Wescott & Adams of Chicago appeared for General Foods; James A. Sprowl and Albert E. Jenner of Poppenhusen, Johnston, Thompson & Raymond of Chicago appeared for Metcalf; Lee A. Freeman of Rooks and Freeman of Chicago appeared for Rice and Rice and Company; Joseph B. Crowley of Bowden, Taylor and Norville of Chicago appeared for Ryan; and Howard W. Vesey and William A. Clineburg of Vesey, Wheeler & Prince of Washington appeared for O'Brien. Sessions of the hearing were held on 14 different days,

ending on May 21, 1946, there having been various periods of adjournment between sessions.

Before and at the opening of the hearing, the referee denied motions by one or more respondents to dismiss on various grounds, including alleged unconstitutionality of the statute and of particular parts of it, and claims that the complaint was vague and not in proper form, that cornering and past attempts to manipulate were not covered by section 6 (b) of the act, and that the Secretary did not have reason to believe that the act had been violated when he issued the complaint. None of the alleged grounds for dismissal were well taken, and the referee's denial of the motions was correct. Motions for severance were properly denied by the referee because the respondents were charged with acting together and it would have been an unnecessary waste of time and expense to have a number of separate hearings to go over the same set of facts.

During the presentation of evidence by the Government, respondents were allowed, for the convenience of all concerned, to present some direct testimony and to introduce exhibits, without prejudice to their moving for dismissal when

the Government completed its case. On April 16, 1946, when the Government rested, the Rice respondents were allowed to recall three witnesses for further cross-examination. The respondents then filed motions to dismiss, and the hearing was recessed. Briefs were filed on these motions, and oral argument was held on them on May 14, 1946, in Washington, at the close of which the referee denied the motions, and the hearing was again recessed.

At the next session of the hearing, on May 21, respondents rested. The Government then requested that official notice be taken of a number of matters, to which respondents objected. Within the period of time allowed by the referee at their request, respondents filed objections and briefs against the taking of official notice, and on June 19, 1946, the referee denied the request on the ground that a clearer record would be made if so many figures were presented through witnesses or tabulated and offered in evidence as exhibits. Respondent General Foods then requested that official notice be taken of a number of matters. The referee refused to take notice for General Foods for the same reason that he denied the Government's request, and detached "exhibits" which General Foods had attached to its request on the ground that it would be unfair to admit into the record in this manner documents which were numbered as, and appeared to be, exhibits duly admitted in evidence. General Foods objected, claiming that due process requires that the record contain these "exhibits" as presented. It is the referee's duty to obtain a fair and orderly record, and to do this he must exclude matters which would make the record

unfair or disorderly. We do not think the filing of the written request to take official notice gave General Foods a constitutional right to place in the record the documents in question as if they were exhibits admitted in evidence nor does it appear that the referee abused his discretion in excluding them from the record. And in view of the conclusions reached herein, no harm was done to the General Foods' case.

The parties were allowed until July 12, 1946, to file suggested findings and briefs, and all did so, respondents recommending dismissal and the Government recommending an order against all respondents.

The referee issued his report proposing findings of fact and conclusions substantially similar to those suggested by the Government and proposing that respondents be found to have violated the act as alleged in the complaint and that sanctions be imposed. All respondents filed exceptions to the report supported by briefs. Thereafter, on December 17, 1946, extensive oral argument was held upon the exceptions before me in Washington, D. C.

At this stage, a general description of the nature of the evidence and the principal issues might clarify what is set out later. Much of the evidence at the hearing was introduced in the form of exhibits. There is little or no dispute about the accuracy of the data contained in such exhibits. These deal with the rye market operations of respondents during the period covered by the complaint, rye futures prices on the Chicago Board of Trade and stocks of rye in Chicago during this period, shipments of rye to Chicago, etc. From these data it is plain (1) that General Foods by the operations alleged in the complaint had built up a stock of over 7,000,000 bushels of deliverable rye in Chicago by the end of December 1943, (2) that in December 1943 and January 1944 General Foods and respondent Metcalf, General Foods' Executive Vice President, were prohibited from acquiring any more rye futures or rye on the Chicago Board of Trade without the consent of the Business Conduct Committee, (3) that respondent Daniel F. Rice was retained about this time as agent to merchandise the General Foods' rye, (4) that respondent Rice and the Schedule A customers of respondent Rice and Company, whose trading is alleged to have been under the control or direction of respondent Rice, respondent O'Brien and respondent Ryan followed the trading pattern of holding large long lines in May 1944 futures, standing for and taking delivery of large amounts of May 1944 rye, (5) that respondent Rice on behalf of himself and Schedule A customers and respondent Ryan were long

May 1944 futures on the Winnipeg Board of Trade and took delivery and kept in Canada about 2,000,000 bushels, (6) that none or practically

none of the large stock of General Foods' rye in Chicago was disposed of between December 31, 1943, and June 1, 1944, (7) that when the long May 1944 futures positions and deliverable cash rye holdings of all respondents are combined, the total for several months preceding May 1944 and into May 1944 was greater than the deliverable supply of rye in Chicago, and (8) that about 2,000,000 bushels of rye of respondents Rice for himself and Schedule A customers, Ryan and O'Brien were sold to General Foods about May 13, 1944. The data also shows that rye futures prices climbed steadily during 1943 to a price of about \$ 1.27 on December 31, 1943, and remained about on this level during January, February, March, and April, 1944, that the opening price for May 1944 futures on May 1, 1944, was \$ 1.30, that the price reached \$ 1.32 5/8 on May 5, that it started to decline on May 6 and, except for two or three days of minor recoveries, the price steadily declined to reach a low of \$ 1.11 on May 22.

Most of the exhibit evidence was introduced through Mr. William T. Buster of the Commodity Exchange Division, Compliance and Investigation Branch of the Production and Marketing Administration, United States Department of Agriculture, now the Commodity Exchange Authority, who made the investigation. Mr. Buster also testified concerning conversations had with Messrs. Rice, O'Brien, and Metcalf in June 1944 during the course of his investigation. These conversations are of considerable significance since they throw some light on the circumstances surrounding the trading activities of respondents. For the benefit of those who may read or review this decision and order, a summary of the important aspects of the conversations is given.

In relating the conversation with Mr. Rice, Mr. Buster testified that Mr. Rice said that it was sometime in the winter of 1943-1944 that the Rice firm was retained as selling agent for General Foods cash rye, that the sale of approximately 2,000,000 bushels of rye to General Foods in May 1944 followed pursuant to Mr. Rice calling upon Mr. Metcalf for help in carrying the rye and telling Mr. Metcalf if some help was not given that some of the rye was going to be sold on the open market and would undoubtedly result in the breaking of prices. According to Mr. Buster, Mr. Rice said that he made the proposition to Mr. Metcalf on behalf of himself, O'Brien and Ryan, that on May 13, 1944, Mr. Rice did not have on hand enough rye to fill his share of the sale and asked his customers for orders sufficient to do this. Mr. Buster also testified (1) that Mr. Rice expressed resentment at the Board of Directors of the Chicago Board of Trade for failing or refusing to adopt some measures that would prevent the delivery of some rye imported from Canada on which the duty was

not supposed to have been paid and (2) that Mr. Rice said that in order to protect the Chicago market from Canadian rye being brought there, he was carrying 2,000,000 bushels of rye Winnipeg which he had bought for the account of himself and his customers in order to keep that rye from Chicago. Mr. Buster testified that Mr. Rice was discussing May 1944 futures in connection with the 2,000,000 bushels of rye Winnipeg and that Mr. Rice said that he kept this amount in Canada to keep it from being delivered on Chicago futures. Later, on cross-examination, Mr. Buster said Mr. Rice did not make the statement with the meaning that his Canadian holdings were being withheld from shorts who would want the rye for delivery on Chicago May futures.

With respect to his conversation with Mr. Metcalf, Mr. Buster testified that Mr. Metcalf explained that General Foods entered the rye market because they had lost the benefit of the domestic wheat and corn markets due to Government restrictions and other conditions which tended to make it impossible to trade in those markets, that consideration was given to the fact that rye was relatively cheap and unrestricted as to trading, that it seemed a good opportunity to do some buying to offset possible losses in the obtaining of materials used by

General Foods, that as General Foods took deliveries of rye they knew they were not going to be able to use it, that it was going to be necessary to dispose of the rye after it had served the company's purpose and that because General Foods and he were not experienced in the merchandising of rye they sought the services of one of the leading grain merchandising firms of the United States, Daniel F. Rice and Company. Mr. Metcalf told Mr. Buster that he had nothing in the files of the company to show the date when the services of the Rice firm were employed but he thought it was about sometime in January or February 1944 and he said that he notified the Rice firm that they might offer the rye for sale to Government agencies or other processors who might have use for it but not to offer it to speculators or elevator operators. He admitted to Mr. Buster that ". . . by taking delivery of this rye and holding it, that the company had caused the prices of the nearest maturing future to be at a premium from the deferred futures and he said that this was unwittingly done but he recognized that it was done." Later, on cross-examination, Mr. Buster admitted that Mr. Metcalf did not tell him that Mr. Rice was "advised" to refrain from offering the rye to speculators or elevator operators but Mr. Buster said that Mr. Metcalf told him that "many offers of the rye had been made to the Government and other users of rye, but no sales were made, but no offers had been made to speculators" (Tr. pp. 911, 912).

Mr. Buster testified that Mr. O'Brien told him that the break in prices in May rye was due to quite a bit of short selling and liquidation,

particularly as to deliveries, that he could not take on any more rye when the weight of the selling hit the market and that Dan Rice Larry Ryan and he were about the only bulls left operating in the market when the selling and break came along. He told Mr. Buster that in connection with the sale of rye to General Foods in May 1944 the Stratton Grain Company had called him for margin, that he was unable to respond and needed help, that he knew General Foods was carrying a large line of rye and would be interested in supporting the price, that he told Dan Rice that he was unable to respond to his margin call, and Dan Rice put the proposition up to General Foods. He stated to Mr. Buster that ". . . he had been bearish in the market until about the first of the year, but after taking a couple of healthy wallops on the short side, and after being convinced by talking with Dan and giving thought to the economic situation in rye, that he was on the wrong side of the market, and at that time he thought rye was a relatively strong position, and that the long side of rye was the correct side to be on."

Other witnesses were Mr. Douglas B. Bagnell and Mr. Fred Chauvin also of the Department's administrative organization for the administration of the act, who, for the most part, introduced exhibit evidence, Mr. Fred H. Clutton, secretary of the Chicago Board of Trade, Mr. Roland McHenry, chairman of the Business Conduct Committee of the Chicago Board of Trade in 1941, 1942, and 1943, Mr. Erling Mostue, assistant comptroller of Cargill, Inc., and Mr. Clarence Francis, Chairman of the Board of General Foods.

Mr. Clutton introduced excerpts from minutes of meetings of the Board of Directors of the Chicago Board of Trade and of the Business Conduct Committee. His testimony also covered a move on April 28, 1944, initiated by respondent Rice, which would make un-deliverable on Chicago futures contracts grain imported from Canada unless duty had been paid on the grain. According to Mr. Clutton, Mr. O'Brien also favored this move as well as other persons including the local office of the Commodity Exchange Division, Compliance and Investigation Branch, Production and Marketing Administration. United States Department of Agriculture.

Mr. McHenry testified generally as to the action taken by the Business Conduct Committee in restricting General Foods and Metcalf from further purchases of Chicago rye and rye futures.

Mr. Francis testified that he met respondent Rice once at a meeting in Mr. Metcalf's office in New York, that respondent O'Brien was present, that Mr. Rice

"definitely carried the ball", that Mr. Francis was advised that there were 2,000,000 bushels of distress rye about to be dumped on the market which would have the very definite effect of

depreciating the value of General Foods' rye holdings, that the recommendation was made that General Foods acquire the 2,000,000 bushels of cash rye, that Mr. Francis insisted that General Foods should not increase its net position, and that the decision was arrived at to acquire the 2,000,000 bushels and to sell an equivalent amount of futures. Mr. Francis said that Mr. Rice recommended the purchase but that he did not tell Mr. Francis who held the 2,000,000 bushels. Following Mr. Francis' initial testimony, Mr. Bagnell testified as to a conversation which he had with Mr. Francis in the latter part of October or the first of November, 1945. Mr. Bagnell said that he gathered from Mr. Francis' discussion during this conversation that the meeting with Mr. Rice and Mr. O'Brien took place in the latter part of April 1944. He testified that Mr. Francis told him that at this meeting Mr. Rice was asked if he had a position in rye and he replied, "Yes, about a million bushels", and that the other gentleman whose name Mr. Francis did not recall was asked if he had a position and he replied "About half as much as Mr. Rice."

There was no testimony from an expert witness or any witness as to whether rye futures prices or actual rye prices on the Chicago Board of Trade were manipulated prices, and no witness testified as to whether there was a corner or "squeeze" in May 1944 rye on the Chicago Board of Trade.

The main charge of the Government is that respondents acted together to bring about a corner in May rye with General Foods handling the actual rye part of the program and the remaining respondents operating the futures part. The Government also charges that respondents individually and collectively manipulated the price of rye futures and actual rye on the Chicago Board of Trade. In essence, the principal Government contention is that the rye prices which broke in May 1944 was a manipulated price established by the operations of General Foods and Metcalf during 1943 and sustained by collective operations of all respondents during the months of 1944 preceding the market decline in May 1944. Some hints are also made that Rice and Ryan may have contributed to the manipulated price level reached by December 31, 1943. In addition to the main charges of corner and manipulation of price, the Government charges respondents individually and collectively with attempting to corner rye futures and rye and attempting to manipulate actual rye and rye futures prices on the Chicago Board of Trade.

Respondents generally insist that there is no showing of any collusion, combination or plan among them, that there was no corner in May rye, that their activities are not shown to be in violation of the act, etc. Respondents raised so many objections that it is impracticable

to relate them all especially since many are essentially upheld by the conclusions reached herein. The more important of respondents' objections bearing on the violations found are discussed under the heading "Conclusions."

Findings of Fact

1. Respondent General Foods Corporation, herein called General Foods, is a Delaware corporation having its principal place of business and office in New York, New York. At all times material herein it had membership trading privileges on the Board of Trade of the City of Chicago, herein called the Chicago Board of Trade, a contract market.

2. Respondent Charles W. Metcalf, New York, New York, was Executive Vice President of General Foods and a member of the Chicago Board of Trade at the time of the transactions involved herein, but he is not now an officer of General Foods. He had charge of and handled the rye and rye futures trading of

General Foods involved herein. He resigned from General Foods because there were objections within the corporation to his having traded in rye for himself while directing the corporation's rye trading.

3. During the period December 1942 through May 1944 respondent Daniel F. Rice and Company, herein called Rice and Company, was a partnership composed of respondent Daniel F. Rice, of Chicago, Illinois, Joseph J. Rice, Walter T. Rice, and William F. Rowley, having its principal place of business in Chicago, Illinois. In January 1945 Joseph A. Fagan became a partner. At all times material herein the partnership was registered under the Commodity Exchange Act as a futures commission merchant, and all partners except Fagan and Walter T. Rice were members of the Chicago Board of Trade.

4. Respondent Lawrence J. Ryan, Chicago, Illinois, was at all times material herein a member of the Chicago Board of Trade and was registered under the act as a futures commission merchant.

5. Respondent Philip R. O'Brien, Chicago, Illinois, was at all times material herein a member of the Chicago Board of Trade and was registered under the act as a floor broker. During 1944 he was President of the Chicago Board of Trade.

6. During the period here involved, General Foods was not a user of rye and had no need for it. Its holdings of rye and rye futures were speculative, not being offset by sales of or needs for rye. The same is true for the rye and rye futures held and controlled by each of the other respondents.

7. In December 1942 and January 1943 General Foods bought 1,055,000 bushels of May 1943 rye futures and 945,000 bushels of July 1943 rye futures on the Chicago Board of Trade, getting a net long

position of 2,000,000 bushels, the maximum speculative position which it could legally attain (17 CFR, 1938 Supp., 150.1). It held this position until May 1943, when it began taking delivery on its May futures. As it received delivery, it purchased more futures, generally maintaining its 2,000,000 long futures position, except that on May 8, 1943, it held 20,000 bushels of speculative rye futures in excess of the limit. During May 1943 General Foods took delivery of 2,420,000 bushels of rye on its futures contracts, and in addition purchased from Rice and Company 540,000 bushels of deliverable rye, deliverable rye meaning rye of such grade and in such position as to be deliverable in satisfaction of rye futures contracts under the rules of the Chicago Board of Trade. On May 29, 1943, it held 2,960,000 bushels of deliverable rye in Chicago.

8. When the May 1943 rye future expired, General Foods bought enough of the July and September 1943 rye futures to continue its 2,000,000 bushels long futures position. It held the rye acquired in May and it took delivery on 2,040,000 bushels of July futures, so that at the end of July 1943 it held 5,000,000 bushels of deliverable rye in Chicago. On September 4, 1943, General Foods had received delivery of its 350,000 bushels of September rye futures, giving it 5,350,000 bushels, or 66 percent of the 8,095,464 bushels of deliverable rye in Chicago. In October and November, it bought 1,880,000 bushels of December 1943 rye futures, and in December took delivery, giving it 7,230,000 bushels on December 31, 1943, or 76 percent of the 9,487,525 bushels of deliverable rye in Chicago. The majority of General Foods' transactions were handled through brokers other than Daniel F. Rice or Rice and Company.

9. General Foods' stock of cash rye in Chicago on December 31, 1943, was an extraordinarily large supply of rye in Chicago. On very few occasions in past years did the total supply in Chicago reach or exceed this figure.

10. In November 1943 the Business Conduct Committee of the Chicago Board of Trade considered the "commanding position" of General Foods in rye and called respondent Metcalf before the committee, as it was Metcalf's membership on the Board of Trade which was so registered as to give General Foods its membership trading privileges. At a meeting of the committee on November 29, 1943, the

committee told Metcalf that the "combined position" of General Foods and himself in rye and December rye futures "might tend to create a corner and be in a position to dominate price movements." Metcalf then agreed with the committee; (1) that neither he nor General Foods would purchase any more December 1943 rye futures without prior consent of the committee; (2) "That neither he nor the corporation would purchase warehouse

receipts for Chicago Rye without prior consultation with and consent of the Committee"; and (3) that he would be available for further consultation. The quotations in this paragraph are from the minutes of the Business Conduct Committee.

11. On December 6, 1943, the Business Conduct Committee wrote Metcalf denying his request that he and General Foods be released from the agreement not to purchase rye and rye futures. On January 4, 1944, Metcalf wrote the committee that the agreement not to purchase rye futures and rye had been fulfilled and that he felt free to buy and sell rye futures, but the committee answered on January 6 that "this Committee is of the opinion that any further purchases of Rye in cash or futures would constitute an attempt to corner Rye stocks in Chicago for the purpose of manipulating or controlling the price of that commodity."

12. On June 23, 1944, Charles W. Metcalf told an investigator for the Government that the taking delivery of rye and holding it by General Foods had caused the nearest maturing future to be higher than the deferred future. He promised that there would be no corner in the July 1944 future, stating that he would see to it that General Foods offered enough rye in the market to keep it liquid, and that the price would not go higher in July than the price that prevailed in May.

13. In December 1943 or in January or February, 1944, General Foods employed Rice and Company to merchandise its rye, but neither party to the contract of employment kept any record of it. By May 27, 1944, Rice and Company had not merchandised or delivered any of the rye held by General Foods in Chicago.

14. On March 21, 1944, Rice and Company wrote to the War Food Administration that it was authorized to offer the rye of General Foods "to any processors who had use for it or to agencies of the Government who had the authority to make such purchases." Enclosed in the letter was an article from a newspaper, dated New York, March 19, stating that a spokesman for General Foods said that it was not a user of rye and would sell its rye "to the government or any other user who has need for it" and that the rye was "available to any user in need of it."

15. On June 23, 1944, Charles W. Metcalf told an investigator for the Government that many offers had been made to sell the rye of General Foods to the Government and other users of rye, but that no offers had been made to speculators. By restricting offers to the Government and to "users" of rye, the General Foods' rye was not made available to others who could use it for delivery on Chicago rye futures.

16. On November 27, 1943, Daniel F. Rice was short 170,000 bushels of Chicago May 1944 rye futures. On November 29 he changed to a long position of 180,000 bushels, which he increased to 1,200,000

bushels on December 21. He remained long on through the first four months of 1944, being long 590,000 bushels on April 29, 1944. In December 1943 he accumulated 305,000 bushels of cash rye, by taking delivery on futures and by purchase. This was increased to 358,400 bushels of deliverable rye in Chicago on April 29, 1944.

17. On September 30, 1943, Daniel F. Rice held a long position of 560,000 bushels of May 1944 rye futures on the Winnipeg Grain Exchange, Winnipeg, Canada.

He increased this position until he held 1,010,000 bushels on April 29, 1944, and took delivery of and held all of it in Winnipeg in May 1944.

18. During the period October 1943 through May 1944 Daniel F. Rice controlled or directly influenced the trading of 23 customers of Rice and Company in rye on the Chicago and Winnipeg markets. These are called Schedule A customers, as they were listed in Schedule A attached to the complaint.

19. During late 1943 and early 1944 Schedule A customers bought May 1944 rye futures on the Chicago Board of Trade and Winnipeg Grain Exchange, through Rice and Company, and took delivery in May 1944. On May 27 they held 2,305,000 bushels in Chicago out of 2,705,000 bushels they received on delivery there, and at Winnipeg they held 700,000 out of 805,000 bushels received on delivery.

20. On December 15, 1943, the Rice and Ryan account, owned equally by Daniel F. Rice and Lawrence J. Ryan, changed from a short position in the Chicago May 1944 rye future to a long position, and maintained the long position into May 1944. On April 29 it was 165,000 bushels long. It increased its holdings of deliverable rye in Chicago, by receiving delivery on futures contracts, from 44,984 bushels on September 30, 1943, to 289,336 bushels on April 29 and 342,282 bushels on May 11, 1944.

21. On April 12, 1944, the Rice and Ryan account bought 200,000 bushels of Winnipeg May 1944 rye futures, took delivery in May 1944, and was holding the 200,000 bushels of rye in Winnipeg on May 27.

22. Lawrence J. Ryan had been long Chicago May 1944 futures from October 1, 1943, but on November 29 he increased this long position from 260,000 to 575,000 bushels, and continued to increase it until he was long 1,215,000 bushels on January 4, 1944. He remained long through the first four months of 1944, being long 945,000 bushels on April 29. In December 1943 he took delivery of 140,000 bushels of rye, and on April 29, 1944, he held 105,000 bushels of this deliverable rye in Chicago.

23. In May 1944 Lawrence J. Ryan took delivery of 120,000 of rye on Winnipeg Grain Exchange May 1944 rye futures contracts, and on May 27 was holding 100,000 bushels of this rye in Winnipeg.

24. On December 31, 1943, Philip R. O'Brien was long 120,000 bushels in the Chicago May 1944 rye future. After talking to Daniel F. Rice and after giving consideration to the economic position of rye, O'Brien, on January 4, 1944, purchased 405,000 bushels more, and continued to purchase such future until on February 14, 1944, he held 2,025,000 bushels, being 25,000 bushels in excess of the limit for speculative holdings in any one future (17 'CFR, 1938 Supp., 150.1). He maintained a large long position in that future for the first four months of 1944, and on April 29, 1944, was long 1,480,000 bushels in it. During May 1944 he took delivery of 735,000 bushels of rye on his Chicago May 1944 rye futures contracts.

25. On December 24, 1943, Rice, Schedule A customers, Ryan, and O'Brien were long 5,645,000 bushels in the Chicago May 1944 rye future, their holdings constituting about 26 percent of the 21,715,000 bushel open interest in that future. On February 11, 1944, they were long 7,950,000 bushels, or about 38 percent of the 21,077,000 bushel open interest. On April 29, 1944, the first day on which notice could be issued to deliver rye in satisfaction of Chicago May 1944 rye futures contracts, they were long 5,695,000 bushels, about 46 percent of the 12,404,000 bushel open interest. General Foods had no long position in May 1944 futures but took a comparatively modest short position toward the end of April 1944.

26. During the first five months of 1944 Charles W. Metcalf traded in rye and rye futures for himself, Mrs. Metcalf, Barbara Metcalf, and G. E. Platt. The positions of these accounts differed and the combined position in the Chicago May 1944 rye future was short and long at various times during this period until April 19, when it went from 175,000 bushels net short to 5,000 bushels net long.

On April 26 this net long position was increased to 125,000 bushels. One of these accounts held 50,000 bushels of deliverable rye in Chicago from December 29 to May 13, 1944. Metcalf failed to file some of the reports required under the Commodity Exchange Act in connection with these holdings.

27. On April 28, 1944, Daniel F. Rice initiated a proposal that the Chicago Board of Trade pass a regulation which would thereafter prevent delivery on Chicago futures contracts of grain, including rye, imported into the United States unless the import duty for grain to be used as food had been paid, there being an act of Congress then in effect exempting from the import duty grain to be used for livestock feed. Philip R. O'Brien favored the proposal. When counsel for the Board of Trade advised that adoption of the proposed regulation would not be proper, no action was taken to adopt it. The proposal was an attempt to reduce the amount of deliverable rye in Chicago.

28. Through the month of May 1944 Daniel F. Rice, Schedule A customers, and Lawrence J. Ryan held 2,010,000 bushels of rye in Winnipeg. This is the rye Rice referred to when he told an investigator for the Government that he was holding 2,000,000 bushels of rye in Winnipeg to keep it from coming to Chicago. This rye was withheld to prevent its being used for delivery on Chicago May 1944 rye futures contracts.

29. In May 1944 Rice and Company, Rice (for himself and Schedule A customers), Ryan, and O'Brien received 3,980,000 bushels of rye in satisfaction of Chicago May 1944 rye futures contracts, redelivered 230,000 bushels, and held in Chicago 3,750,000 bushels, or over 91 percent of the 4,100,000 bushels of rye delivered on Chicago May 1944 rye futures contracts.

30. About May 5 and 6, 1944, there were rumors around the Chicago Board of Trade that General Foods had "sold out to Cargill" or was disposing of large quantities of its rye. On May 8 Charles W. Metcalf telephoned Philip R. O'Brien, wanting to know if something could be done to stop the rumors. The conversation was followed by a telegram from Metcalf to O'Brien denying that General Foods was disposing of its rye. At Metcalf's request O'Brien showed the telegram to some of the men on the trading floor and the news quickly got around that the telegram had been received.

31. During April 1944 and on until trading closed in the Chicago May 1944 rye future on May 22, 1944, the price of such May future was more than that of the Chicago July and September 1944 rye futures. On April 29, 1944, such May future was 2 cents per bushel more than the July and 5 3/4 cents more than the September future. A premium relationship for May futures over the deferred futures also existed on the Winnipeg Grain Exchange.

32. Some time before May 13, 1944, Philip R. O'Brien received a call for margin in connection with his rye transactions, but he could not respond to the call. He told Daniel F. Rice of the situation and Rice put the proposition up to General Foods. As a result, O'Brien sold General Foods, through Rice, 665,000 bushels of rye on May 13 and 15, 1944. On May 13 he owned only 530,000 bushels of rye, but he bought 60,000 bushels on May 15 and took delivery on Chicago futures contracts of 25,000 bushels on May 16, 10,000 bushels on May 17, and 75,000 bushels on May 18.

33. Shortly before May 13, 1944, there was a meeting in Charles W. Metcalf's office in the office of General Foods in New York, of which meeting General Foods kept no written record. It was attended by Chairman of the Board Clarence Francis, President Austin S. Igleheart, and Executive Vice President Metcalf, all of General Foods, and

Daniel F. Rice and Philip R. O'Brien. At the meeting General Foods ascertained the positions of Rice and O'Brien in the Chicago rye market and authorized the purchase of 2,000,000 bushels of "distress rye" about to be dumped on the

market, which, in the words of the Chairman of the Board of General Foods, would "have the very definite effect of depreciating the value of our holdings" Rice recommended that General Foods acquire such rye. General Foods authorized the purchase of the rye, and the taking of a short position of an equal quantity in the Chicago July rye future.

34. As a result of the authorization mentioned in Finding of Fact 33, on May 13, 15, 16, 17, 18, and 23, 1944, General Foods purchased, through Daniel F. Rice, 1,999,466.14 bushels of deliverable rye in Chicago. This consisted of 140,000 bushels from Schedule A customers, 355,000 bushels from Rice, 495,000 bushels from Ryan, 344,466.14 bushels from the Rice and Ryan account, and 665,000 bushels from O'Brien. When the Rice and Ryan account rye is divided between its two owners, the amount of Ryan's rye involved is 667,233.07 bushels, the exact amount of Rice's when the Schedule A customers are included.

35. The purpose of the transactions mentioned in Finding 34 was to support the price of rye by preventing a drop in price that would have been caused if the rye purchased and held by General Foods had got into the open market.

36. Commencing at some time around the beginning of 1944 and continuing into May 1944, Daniel F. Rice, Rice and Company, O'Brien and Ryan collaborated to manipulate the price of rye futures and actual rye on the Chicago Board of Trade and to corner the rye market on the Chicago Board of Trade.

37. General Foods Corporation, its Executive Vice President Metcalf, Daniel F. Rice, Rice and Company, O'Brien, and Ryan, by virtue of the 2,000,000-bushel transaction mentioned in Findings of Fact 34 and 35, collaborated to manipulate and did manipulate the price of rye futures and actual rye upon the Chicago Board of Trade.

CONCLUSIONS

This proceeding is not one of investigation with a view to the formulation and promulgation of legislation or rules of a legislative nature designed to restrict or suppress undesirable speculative excesses in futures markets. This is an adjudicative proceeding of a type some people call "accusatory" and it culminates in the imposition of administrative sanctions for violations of the act. Section 6 (b) of the act provides that the findings of fact in proceedings of this kind shall be final on appeal to the appropriate United States circuit court of appeals ". . . if supported by the weight of the evidence" Whether

a reviewing circuit court of appeals will determine for itself the weight of the evidence, or will not upset our appraisal of the weight of the evidence unless clearly wrong, we nevertheless must decide the problems presented on the basis of what we consider the weight of the evidence.

I

With these preliminary but imperative considerations in mind, the first general question to be examined is whether the evidence establishes that respondents individually and collectively *manipulated* prices of rye futures contracts and actual rye on the Chicago Board of Trade. To manipulate prices means, giving the term its broadest scope, to cause prices to go up or down by means directed to either such end or to prevent prices from going up or down by means directed to either such end. Leaving for subsequent consideration the 2,000,000-bushel transaction in May 1944, the Government charges respondents mainly with artificially enhancing prices of rye and rye futures. I take it that such a charge cannot be considered as established unless the evidence shows that rye and rye futures prices on the Chicago Board of Trade were artificially enhanced by manipulative means.

The Government and the referee base their conclusions of a manipulated price, that is a price artificially enhanced by manipulative means, largely on (1) the rise in the price of rye futures on the Chicago Board of Trade from \$ 0.64 1/4

on December 1, 1942, to \$ 1.32 5/8 per bushel on May 5, 1944; (2) the fact that May rye futures, starting in August 1943, were at a premium over July 1944 rye futures, and (3) the fact that the price of May rye futures declined during May 1944 from \$ 1.32 5/8 on May 5 to a low of \$ 1.11 for the month on May 22, the last day of trading in the future.

We do not have the benefit of the testimony of an expert price analyst or economist as to whether the facts relied upon by the Government are proof of, or evidence of, a manipulated price. And there is not in the evidence any data as to rye futures prices at markets other than Chicago or cash rye prices with which to compare Chicago rye futures prices. Of course it is possible, although it does not appear from the record, that the Chicago market is the price-determining rye market, both cash and futures, for the United States and Canada, and that such data would not indicate much by comparison with Chicago prices. But, at any rate, I am afraid that there is something missing in the process by which the Government gets over from the existence of these facts to the conclusion of a manipulated price, at least as far as the evidential requirements of this proceeding are concerned.

Taking up first the price rise from \$ 0.64 1/4 on December 1, 1942, for the December 1942 future to the price of \$ 1.32 5/8 for the May 1944 future on May 5, 1944, it is apparent that there was a trend upward in rye futures prices before General Foods had done anything that would indicate any significant effect upon price. The December 1942 future closed on December 23 at \$ 0.72-\$ 0.72 3/4. On December 1, 1942, the opening price of the May 1943 future was \$ 0.70 5/8 - 3/4, and the opening price of the July 1943 future was \$ 0.73. By the end of April 1943, before General Foods had acquired any cash rye by delivery or otherwise, the May 1943 future was at \$ 0.85-\$ 0.85 1/8 and the July 1943 future \$ 0.87 7/8-\$ 0.88. The September 1943 future went as high as \$ 0.94 1/8 in March 1943. The record itself, then, indicates an upward movement in rye prices and I cannot help but know that during the period covered by the complaint there was an upward trend in grain prices and prices generally. The data in the record as to increases in the visible supply of rye and increases in the deliverable supply of rye in Chicago are indications that, in the light of objective supply and demand conditions, rye prices should not have risen so much. But another thing that I cannot help but know is that factors less fundamental than objective supply and demand conditions enter into trading opinion in a speculative market and the record shows a volume of trading in rye futures far above normal during the period covered by the complaint. Another difficulty with the invocation of the price rise as proof of manipulation is that the price level reached at the end of December 1943 and the first few days of January 1944 did not go up during the months of 1944 preceding the price decline during May 1944. The decline was from approximately \$ 1.30 to \$ 1.11 which the Government charges was the natural level dictated by supply and demand conditions. So that if the price was a manipulated price, the manipulation would seem to represent only about 19 cents of the sharp price rise during 1943. General Foods' large purchases and taking of delivery may very likely have accelerated an already existing upward movement. This might be a safe assumption in some other kind of a proceeding. Here we are faced with the necessity of finding facts and not probabilities. n1

n1 In 1934, Dr. J. W. T. Duvel, Chief, Grain Futures Administration, testified in connection with H. R. 8829, 73d Congress, 2d session, one of the bills from which later emerged the Commodity Exchange Act. In support of the provisions of the bill for establishing trading limits, Dr. Duvel said that Grain Futures Administration studies had disclosed that concentrated large-scale operations, that is transactions of 2,000,000 bushels or more, result in abnormal price-movements *in more than 80 percent of instances*. Hearings before House Committee on Agriculture, pp. 13-17. So that even the studies referred to show lack of abnormal price movements in some concentrated large-scale operations.

The same general conclusions are applicable to the deductions desired by the Government from the existence of a premium for the May

1944 future over the July and September futures. Analysis of the relationships between futures is undoubtedly one of the standard tests for the detection of artificiality or manipulation. Government counsel say that the premium relationship between the May 1944 and the deferred futures was abnormal. Respondents' counsel say that the relationship was normal. The only way to find out is to conduct a close study of data not introduced in evidence covering a period of years to ascertain the reasons for the existence of the premium relationship for rye futures in other years when it occurred. If such a study revealed the relationship to be unusual, the problem would still remain as to whether manipulation or some other ingredient in the 1943-May 1944 rye market situation was the cause. I do not believe that because Mr. Metcalf admitted to a Government investigator that General Foods had unwittingly caused the relationship to come about and promised to cooperate by making the July market liquid is powerful evidence that General Foods *manipulated* the price. Potentially the premium relationship is perhaps a more reliable test for artificiality or manipulation, or a stronger indication of such a condition, than the rise in price during 1943, but its potentialities are not realized in this record.

Then we come to the decline in price in May 1944. It may be that the price was at an unrealistically high level on May 1, 1944, when the price of May rye futures opened at \$ 1.30. Again, it may be, although not established here by the proof requirements applicable to this proceeding, that respondents' operations contributed to the building up and maintenance of this price level. But because the price came down is not to prove that the only answer is a *manipulated* price in violation of the act. There is no testimony that this is the answer. Support of the Government contention is sought in the fact that heavy deliveries by shorts in the first few days of May 1943 did not cause the price to go down during the delivery month of May 1943. Similar heavy deliveries in December 1943, although not so much in amount as in May 1943 or May 1944, did not bring about any price decline during December 1943 in December 1943 futures prices. In fact the prices went up at the time when the alleged manipulated price level was reaching its peak. Seizing upon the May 1943 situation of heavy deliveries by the shorts having no depressing effect upon the May 1943 futures prices during May 1943 as proof that the May 1944 heavy deliveries by shorts broke a manipulated price naturally causes one to wonder why heavy deliveries in December 1943, although admittedly not quite as large as in May 1943 or May 1944, did not break the allegedly artificial and manipulated price level for rye futures in December 1943. Some logical explanation may exist but it does not emerge clearly from the record.

The price rise during 1943, the premium relationship for the May 1944 future over the deferred futures, and the price decline in May 1944 are matters which might be strong indications of an artificial or a manipulated price. An expert analyst might start with these facts and by appraising and isolating the various influences upon prices during this period come out with a reasoned conclusion that the price level for rye and rye futures was artificially enhanced to some extent during 1943 by the weight of General Foods' operations and maintained with the help of the other respondents to sometime in May 1944 when it declined due to the apparent ability of the shorts to meet their commitments. Yet, I do not see how I can do this in this kind of a proceeding.

The Government sought to have official notice taken of a great many data in support of its *arguments* that these facts establish a manipulated price. General Foods likewise tried to get in a great deal of data and information by official notice to disprove a manipulated price. The referee ruled that such data should be put in evidence in the usual way but neither party saw fit to do this. The comprehensive economic study sought to be made on this subject by the

requests of the Government and General Foods for official notice is something that should not have to be made by a referee or deciding officer without the benefit of explanation by witnesses and without an adequate opportunity for each party to dispute the inferences sought from the data by the other party. The data sought to be officially noticed do not consist of general background material. They go to the heart of perhaps the main issue in the entire proceeding. I do not believe that advertence to the expertise of the referee or the deciding officer is an adequate substitute in this kind of proceeding for evidence introduced in the usual way.

Before leaving the discussion of the charges that respondents collectively and individually manipulated prices of rye futures and actual rye, attention should be paid to the charge of *collective* manipulation. There is no evidence, or at least practically no evidence, that the Rice respondents, Ryan, or O'Brien had any connection or association with General Foods' operations during 1943 which ended with the May 1944 futures price at \$ 1.27. During the first few days of January 1944, the price got as high as \$ 1.34. It was about this time that respondent Rice and Company was retained as selling agent for the General Foods' rye and it was after this time that the heavy purchasing program of May rye futures by the respondents other than General Foods took place. But the price did not get any higher and on May 1, 1944, was \$ 1.30. So that any responsibility for a manipulated price on the part of respondents, other than General Foods and perhaps Metcalf, can only

be vicarious and on the tenuous theory of contribution to maintenance of any existing manipulated price level. While this might possibly be a supportable theory if it had been established by the evidence that the price level was a manipulated one and that the activities of respondents held this price level up, it is difficult to believe that the respondents who bought heavily in May rye futures at an alleged artificially enhanced price did so with knowledge that the price level was a manipulated one and for the purpose of maintaining a manipulated price. The main charge in the Government case is that respondents ran a collective corner in May rye. Rice, Ryan and O'Brien, to be candid, were looking for profits and if everything the Government charges would be conceded, these respondents were trying to enhance the prices existing when they purchased. Another weakness in the joining of all respondents on a charge of *collectively* manipulating the price is that according to the Government evidence it was not until shortly before May 13, 1944, that General Foods and Metcalf knew the positions in May rye of the other respondents. Mr. Bagnell testified that Mr. Francis told him that General Foods ascertained the positions of Rice and O'Brien in May rye at the meeting in New York some short time before May 13, 1944, which culminated in the purchase of 2,000,000 bushels of rye which came from Rice, Schedule A customers, O'Brien, and Ryan. The Government even suggested this in a finding of fact. I do not see then how General Foods and Metcalf can be joined collectively with the others as manipulators who *together* sustained during 1944 a manipulated price otherwise achieved prior to that time by General Foods, even if such was proved, when there is no link shown between General Foods or Metcalf and the remaining respondents during the months of 1944 preceding May.

We finally come at this stage of our decision to the sale of the 2,000,000 bushels of rye to General Foods from Rice, Ryan, and O'Brien on May 13, 1944, and subsequent dates. There is no doubt that the purchase by General Foods and the sale by Rice, Ryan, and O'Brien were transacted for the purpose, at least, of supporting or pegging the market price by taking off the market rye which otherwise would have been sold on the market with consequent adverse effects upon price. The sale came during a delivery period when this record shows that prices were acutely sensitive. It is a proper inference from the record evidence that the 2,000,000-bushel deal kept the price from declining to some extent which would have happened if the rye had been dumped on the market at the time. General Foods and Metcalf as its officer in charge of its rye purchasing program, O'Brien and Rice without question

participated in the transaction. Some of the rye sold was Ryan's individually and some from the Rice-Ryan joint account. While Ryan is less directly involved than the others, the evidence is sufficient to justify the conclusion that Ryan also participated in the sale for the purpose of maintaining rye prices.

II

Concerning the charges in the complaint and the referee's proposed findings and conclusions that the respondents collectively cornered the May market in rye, the same problem raises its head as was discussed above in connection with collective manipulation. This problem must be faced. As was pointed out, there is no link shown between General Foods and Metcalf on the one hand, and the remaining respondents on the other during the months of 1944 preceding May 1944. The Government even suggested a finding of fact that it was at the meeting shortly before May 13, 1944, which led to the 2,000,000-bushel transaction that General Foods ascertained the positions of Rice and O'Brien in the rye market. On what basis, then, can General Foods and Metcalf be found collectively with the others to have cornered the market? Even in an administrative proceeding, such as this, for violations of an act, I suppose that to hold a person responsible for a violation some intent must be shown either by the mere doing of a prohibited act or by the more exacting standard of a specific intent equivalent to the *mens rea* of criminal law. However questionable or undesirable, the holding of a large supply of rye by General Foods was not in itself prohibited, nor was its failure to liquidate the stock or part of it in such a way as to make rye available to elevators or other speculative interests.

Omitting General Foods and Metcalf from the picture for a moment, it might still be possible for the remaining respondents to have violated the act by cornering the market because they took advantage of the technical situation of General Foods' apparent policy of not making their rye available to speculators or elevator interests. I am afraid, however, that other applicable considerations do not make it possible to find that the respondents other than General Foods did corner the market in May rye *as distinguished from an attempt to corner*.

Respondents claim in general that a corner in violation of the act cannot exist unless the shorts are actually cornered during the delivery month, that is that the shorts are unable to make delivery of the commodity due to the efforts of the cornering interest in cornering the

available supplies and standing for delivery on its long contracts. n2 The position of the Government does not seem precise. While there is no doubt that the Government holds out as a corner in violation of the act control or possession of deliverable supplies on one market the Chicago Board of Trade, it sometimes appears that the Government claims that such a situation constitutes a corner in violation of the act regardless of whether the attempts to corner the market succeed or any resulting enhancement or fluctuation of price results. At other times, the Government seems to concede that an essential element of the violation "corner" is an artificial stimulation of price.

n2 This is the classical corner on a grain futures market. Numerous authorities were cited by respondents in support of their position. They might also have referred to "A Primer of Trading in Commodity Futures," July 1937, United States Department of Agriculture, Commodity Exchange Administration, which has the following definition: *Corner*. A condition in which one operator or pool controls so much of a commodity, usually both with respect to the physical commodity deliverable upon contracts and with respect to contracts to buy, that contracts to sell can be fulfilled or offset only upon the terms of such operator or pool."

Section 6 (b) of the act does not mention corner but does impose administrative sanctions for manipulating the price or attempting to manipulate

price. Section 9 of the act authorizes criminal penalties for persons "who shall corner or attempt to corner" any commodity in interstate commerce or for future delivery on or subject to the rules of any board of trade. Assuming that the first part of the first sentence in section 6 (b), "If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating, or has violated any of the provisions of this act * * *" incorporates by reference the prohibition in section 9 against corners and attempts to corner, I have been unable to find any satisfactory authority that a corner in violation of the act exists, *as distinguished from an attempt to corner*, unless a manipulated or artificial price of some sort or degree is caused by the cornering efforts. Careful examination of the several authoritative treatises referred to in the proceeding, n3 the legislative history of the act, and the leading cases reveal that a corner is the most spectacular illustration of manipulating prices upward. Manipulative practices such as cornering efforts that fail to enhance the price or to cause price fluctuations may still come under the general heading of "manipulation" but it seems to me that these are covered by the act as *attempts* to manipulate or *attempts* to corner.

n3 Technical Bulletin No. 747, Grain Prices and Futures Market, G. Wright Hoffman, United States Department of Agriculture, 1941; Future Trading Upon Organized Commodity Markets, G. Wright Hoffman, University of Pennsylvania Press, 1932; Report of the Federal Trade Commission on the Grain Trade, Vols. V, VI, and VII, 1920-1926.

We have already come to the conclusion that the evidence in the record does not warrant a conclusion in this type of proceeding that rye futures or rye prices were manipulated prices at the end of 1943 or in

the first few days of January 1944. No enhancement of the price level occurred during 1944 and we cannot find that respondents maintained a manipulated price level during 1944 up to the market decline in May. So even if it be conceded that the respondents or some of them were attempting to run a corner on May rye, no price effects are disclosed and we are consequently unable to find or conclude that a corner in violation of the act was achieved.

III

The part of the Government case dealing with attempts to manipulate and attempts to corner is on more solid ground. It is common knowledge and it is apparent throughout this record that the adequacy of deliverable supplies on a futures market to meet maturing futures contracts is a potent price-influencing factor. The inadequacy or threat of inadequacy is disturbing to stability and has a tendency to enhance prices. On the other hand, excessively large or surplus supplies on any market, particularly a large or terminal market results in, or has a tendency to result in, lowered prices.

Rice, O'Brien and Ryan were experienced traders. They were speculators with no use for actual rye. The "tight" situation in December 1943 rye due largely to General Foods' operations was not a secret. O'Brien was the President of the Board of Trade and Rice as General Foods' agent for the merchandising of its rye must have known of the action of the Business Conduct Committee in prohibiting further purchases of rye or rye futures by General Foods or Met-calf. Ryan had a joint account with Rice. Yet in the face of a practically unprecedented supply of rye in Chicago, with over 7,000,000 bushels in the hands of General Foods alone, Rice, the Schedule A customers, O'Brien, and Ryan embarked on large long lines in May 1944 futures. This in itself does not seem logical for an experienced trader unless he has some reason to believe that the large supplies would not be available to shorts or at least would not be liquidated in such a way as to depress prices on the Board of Trade. n4 The source for such a reason to believe on the part of O'Brien and Ryan immediately suggests itself as Mr. Rice. This is supported by later developments in May 1944 when Mr. O'Brien found himself unable to carry

the rye delivered on his contracts and Rice, Schedule A customers, Ryan, and O'Brien took their trouble to General Foods through Mr. Rice.

n4 The possible impact upon the market of the liquidation upon the Board of Trade of General Foods' long supply is seen from Finding of Fact 30. In defending O'Brien's participation because of his position as President of the Board of Trade, O'Brien's counsel argues, "If 7,000,000 bushels of rye should suddenly be dumped on the Chicago market, the impact upon the rye market would obviously be terrific" (p. 16, O'Brien's Exceptions to the Referee's Report). This bears out our conclusion that an experienced trader would be wary about going on a large long line with 7,000,000 bushels of cash rye in the market. How would such traders know when they went long whether or not the rye would be dumped or sold to the shorts?

Although these respondents made heavy purchases of May futures in January and February, 1944, prices did not go up, and after some liquidation on their part, Rice, Schedule A customers, Ryan, and O'Brien, as shown by Finding of Fact 25, were long 5,695,000 bushels May on April 29, 1944, and took delivery of large amounts of rye in May. For some time previously a profit could have been made by selling May and buying July or September 1944 futures. When to the purchase and maintenance of large long lines in May futures, the taking of delivery and the holding of very large amounts are added the taking of delivery and the holding of rye in Winnipeg mentioned in Finding of Fact 28, the last-minute attempt on April 28, 1944, to make Canadian rye undeliverable unless the duty was paid, the failure of these speculators to take a profit by selling May and buying later futures, and the sale of the 2,000,000 bushels to General Foods in May 1944 by Rice, Schedule A customers, O'Brien, and Ryan, it is a reasonable inference that Rice personally and through Schedule A customers, O'Brien, and Ryan, were individually and together using the weight of their trading in an attempt to influence the price, in other words, to manipulate the price. The attempts even reach the ambitious level of attempts to corner the market in May rye, a more newsworthy description of the kind of manipulation attempted.

I am unable to conclude from the record evidence that General Foods or Metcalf participated in these efforts by Rice, O'Brien, and Ryan. As has been previously observed, the evidence indicates that General Foods and Metcalf did not know of the positions of Rice and O'Brien in May rye until the meeting shortly before May 13, 1944 (Complainant's Suggested Findings of Fact, Conclusions and Order, Suggested Finding of Fact 18). The evidence reveals also that General Foods did not know whose rye they were buying, and I am not asked to disbelieve the witness who gave the testimony. The mere fact that the meeting had to be held and the fact that, according to the Government evidence and argument, Mr. Rice had to exercise his persuasive powers to talk General Foods into the 2,000,000-bushel purchase are inconsistent with the notion that General Foods and Metcalf were parties to a full-fledged plot to corner the rye market that had been hatched with the assent and cooperation of all sometime in 1943. General Foods was not long May 1944 but short to some extent. As far as Metcalf personally is concerned, his trading in May rye on his individual account and for the accounts he controlled

does not reveal trading consonant with any knowledge, participation or understanding of a plan to run a corner.

Naturally, counsel for the respondents dispute vigorously the drawing of any inferences of illegitimacy from any of the facts. The inferences drawn are certainly reasonable in the light of the evidence and in the absence of any explanation in evidence by the respondents. A few words might be said, however, about Finding of Fact 18 to the effect that Rice controlled or directly influenced the Schedule A customers. Counsel for the Rice respondents dispute

any finding that Rice controlled or directly influenced the Schedule A customers although they do admit that "These customers, in the same manner as customers of any brokerage house, very probably were influenced in their trading by Rice" (Suggested Findings of Fact and Conclusions of Law Submitted by Rice Respondents). Buster testified that Rice told him that he was in touch with the Schedule A customers almost daily and that he often had discretionary authority for a day. There is evidence also of numerous block executions of orders both on the Chicago Board of Trade and on the Winnipeg Grain Exchange with distribution of the orders among Rice customers, most of whom are listed in Schedule A, without any indication that individual orders had been received. There is the further strong circumstantial evidence in the pattern of trading, that is practically all Schedule A customers being long May 1944 Chicago, 19 of the 23 customers being long May 1944 on the Winnipeg Grain Exchange, with 14 of the customers taking delivery in Chicago and 18 of the 19 in Winnipeg taking delivery. These deliveries were taken when it would have been profitable both in Chicago and Winnipeg to sell May and buy July or later futures. Further, the rye delivered to Schedule A customers in Winnipeg was part of the 2,000,000 bushels which Rice held in Winnipeg according to his statement to Buster.

As to the move on April 28, 1944, initiated by Rice and proposed by O'Brien, to have the Board of Trade declare ineligible for delivery Canadian grain unless the duty was paid, the Rice counsel defend by saying that officials of the Board of Trade and the Commodity Exchange Division officer in Chicago favored the move. Mr. O'Brien had a large long line in May rye, he had attended a meeting on the night of April 27, 1944, at Rice's apartment and must have known of Rice's position. The record shows that most of the rye in Chicago outside of that held by General Foods and some of the respondents was rye imported from Canada by Cargill, Inc., in November and December, 1943. Yet on the morning of April 28, 1944, after the meeting in Rice's apartment on the night of April 27, and on the last day before the first notice day for delivery on May rye contracts, Mr. O'Brien took action to have a resolution prepared for the Board of Directors

which would make undeliverable at least some if not a large part of the deliverable rye in Chicago. The circumstances justify an inference of less than an altruistic desire on the part of Mr. O'Brien to protect the market. As far as Mr. Rice is concerned, his conversation with Mr. Buster in which he complained of the "raw deal" he and the other May rye longs got from the Board of Trade on this matter, pretty well indicates the motivation for his action in initiating the proposal.

The activity of O'Brien in making known to the traders Metcalf's telegram on May 8, 1944, denying the rumors that General Foods had sold out to Cargill, Inc., the principal short, may be explainable on the ground that Mr. O'Brien was President of the Board of Trade. Perhaps this activity does not mean very much in itself in this case. It did happen, however, that O'Brien was long May and that, consequently, his personal interests were also served. The incident does fill in another detail of the general picture.

In addition to what are considered the collective attempts of Rice, O'Brien, and Ryan during 1944 to manipulate the price, each one individually made his contribution and, therefore, individually attempted to manipulate the price. There is the further question of the 2,000,000-bushel transaction with General Foods in May 1944 which has been held to be a manipulation of the price and, of course, this also constituted an *attempt* to manipulate the price. Here also the attempt was participated in by General Foods, Metcalf, Rice, O'Brien, and Ryan and constituted a collective attempt and an individual attempt on the part of each participant. Rice, Metcalf, Francis, and O'Brien admitted that the purpose of the deal was to maintain the market price or to prevent any break in the price.

IV

Respondents voiced many grievances throughout the proceedings. Out of a sense of fairness but at the expense of having a long, drawn-out decision, we have attempted to answer those of significance, but there are so many that we have been unable to discuss them all. Of course then, this decision shall be considered as overruling all objections and exceptions inconsistent with it. A few procedural matters raised by respondents are left for consideration. Respondents attack the complaint. They urge its invalidity because the document reads "There is reason to believe" instead of "I have reason to believe" and because the caption reads "*In re General Foods . . .*" instead of "*Secretary of Agriculture v. General Foods . . .*" These protestations have no substance and relate to mere matters of form.

Respondents were particularly upset because the complaint does not charge a conspiracy or agreement. They say that the word "collectively"

has no legal meaning. The complaint is clear that respondents are accused of acting together, in concert, as a group. Respondents' protestations that the complaint leaves them in the dark as to whether collusive action is alleged because of the omission of specific charges of conspiracy or agreement are far-fetched. Conspiracy to violate is a separate crime in the field of criminal law and this is not a criminal proceeding. Because complaints in former proceedings under the act may have alleged an agreement is not to strike down as fatal any changes in the form or style of subsequent complaints. Absence of either the pleading or proof of an express agreement entered into at a particular time and particular place is not fatal in a conspiracy case in criminal law and certainly is not an administrative proceeding involving substantive charges of violations of an act by a group working together.

Respondents also attack the constitutionality of the act. They find it an improper delegation of legislative power and a violation of the due process clause of the Fifth Amendment. Even if we had the power to decide these questions, they are well-settled by now in favor of the constitutionality of the act.

Another contention pressed vigorously by respondents is that there is no jurisdiction in this proceeding to consider or impose administrative sanctions for *past* attempts to manipulate or to corner. This contention is based on the wording of section 6 (b) with respect to attempts. Section 6 (b) says:

"If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this act, or any of the rules and regulations made pursuant to its requirements, *or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade*" [Italics supplied]

Respondents rely upon the decision in *Wallace v. Cutten*, 298 U. S. 229 (1936), upholding a Circuit Court of Appeals decision that the former section 6 (b), phrased in the present tense, precluded the Secretary from proceeding against Cutten after the violation was completed. After a reading of the legislative history of the section, particularly the committee hearings (Hearings Before House Committee on Agriculture on H. R. 8829, 73rd Congress, 2nd Session; Hearing Before the Senate Committee on Agriculture and Forestry on H. R. 6772, 74th Congress, 2nd Session), one finds it hard to believe that Congress in legislating to remedy the defect in the statute revealed by the *Cutten* decision did not intend to cover attempts as well as established manipulation of price. Any doubts are resolved by the language in the first part of the sentence incorporating in section 6 (b) any existing or

past violations of other provisions of the act. Section 9 of the act provides in part as follows:

"Any person who . . . shall 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 board of trade, or who shall corner or attempt to corner any such commodity . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not more than \$ 10,000 or imprisoned for not more than one year; or both, together with the costs of prosecution."

Section 6 (b) authorizes jurisdiction where any person *has* violated any of the provisions of the act, one of which is the prohibition and the penalty for any person who shall ". . . attempt to manipulate . . . or who shall . . . attempt to corner"

One more comment is in order. Respondents continually argued about the malefactions of Cargill, Inc., in the carrying on of its business. As long as the Government charged the market decline in May 1944 to be due to the "breaking" of a corner, there was relevancy to respondents' answering contentions that the decline was due to a "bear raid" by Cargill. But respondents or some of them did not stop there and went on to delineate all the historical tactics of the short or elevator interests that they consider unfair or irregular. Those matters were not in issue here.

V

In recapitulation, it is concluded that respondents Daniel F. Rice, Daniel F. Rice and Company, Philip R. O'Brien, and Lawrence J. Ryan in violation of the act collectively and individually attempted to manipulate the price of rye futures on the Chicago Board of Trade and actual rye on and subject to the rules of the Chicago Board of Trade and to corner such futures and actual rye. It is concluded further that respondents General Foods Corporation, Charles W. Metcalf, in charge of General Foods' rye operations, Daniel F. Rice, Daniel F. Rice and Company, Philip R. O'Brien, and Lawrence J. Ryan in violation of the act collectively and individually attempted to and did manipulate the price of rye futures on the Chicago Board of Trade and actual rye on and subject to the rules of the Chicago Board of Trade by virtue of the 2,000,000-bushel transaction in May 1944. General Foods as alleged in the complaint also exceeded the trading limits in one instance.

There remains, finally, the soul-searching task of imposing sanctions. Some of the charges in the complaint have not been established and the sanctions accordingly should not be as heavy as those requested by the Government and proposed by the referee. The violations found are nevertheless serious and warrant remedial measures. However,

no sanction is invoked because of O'Brien's trading in excess of the limits nor for Metcalf's failure to file some reports since these matters were not mentioned in the complaint. The protagonist in the drama is Daniel F. Rice, and this should be considered in the evaluation of the sanctions invoked. General Foods, through Metcalf, provided the setting for the attempt to corner but we are unable to find that it was done with manipulative intent or that General Foods and Metcalf were parties in the attempt to corner. However, General Foods through arrangements made by Metcalf did purchase the 2,000,000 bushels in May 1944 to keep it from being dumped upon the market, in itself a manipulation, and the trading limits were exceeded on one occasion in 1943. O'Brien played a minor role compared to Rice and Ryan's participation is considerably less than that of Rice and O'Brien. Weighing all the pertinent factors as best we can, the conclusion is that the trading privileges of Daniel F. Rice and Daniel F. Rice and Company and the registration of Daniel F. Rice and Company be suspended for six months, that the trading privileges of General Foods Corporation and Metcalf should be suspended for 30 days, that the trading privileges and the registration of Philip R. O'Brien should be suspended for 30 days, and that the trading privileges and the registration of Lawrence J. Ryan should be suspended for 10 days.

ORDER

1. All contract markets shall refuse respondents Daniel F. Rice and Daniel F. Rice and Company all trading privileges thereon for a period of six months and shall refuse respondents General Foods Corporation, Charles W. Metcalf and Philip R. O'Brien all trading privileges thereon for a period of 30 days and shall refuse respondent Lawrence J. Ryan all trading privileges thereon for a period of 10 days.

2. The registration of Daniel F. Rice and Company as a futures commission merchant is suspended for a period of six months, the registration of Philip R. O'Brien as a floor broker is suspended for 30 days, and the registration of Lawrence J. Ryan as a futures commission merchant is suspended for 10 days.

3. The refusals of trading privileges and the suspensions provided shall begin on the 40th day after this date.

4. All charges contained in the complaint not found to be established are dismissed as far as this proceeding is concerned.

5. Copies hereof shall be served on the parties or their counsel of record and on each contract market.

LOAD-DATE: March 12, 2008

