

Commodity Futures Trading Commission
CEA CASES

NAME: BENEDICT K. GOODMAN

CITATION: 18 Agric. Dec. 1121

DOCKET NUMBER: 81

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(No. 6161)

In re BENEDICT K. GOODMAN. CEA Docket No. 81. Decided October 12, 1959.

Trading Limits -- Reporting Requirements -- Denial of Trading Privileges

Respondent exceeded the maximum speculative limit in rye futures and failed to file with the Commodity Exchange Authority the required reports as to respondent's positions and trading in rye futures. All contract markets are ordered to refuse all trading privileges to respondent for a period of 20 days.

Mr. Benj. M. Holstein, for Commodity Exchange Authority. *Mr. Homer E. Rosenberg*, of Chicago, Illinois, for respondent. *Mr. Jack W. Bain*, Hearing Examiner.

Decision by Thomas J. Flavin, Judicial Officer

PRELIMINARY STATEMENT

This is a proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1), instituted by a complaint filed April 14, 1958, by an Assistant Secretary of Agriculture. Respondent is charged with holding positions in rye futures in excess of the maximum permissible quantity in violation of the act and with violating the reporting requirements of the act and the regulations issued thereunder. Respondent is also alleged to have attempted to conceal his violations of the act by keeping his trading in rye futures with any one futures commission merchant below the level required to be reported to the Commodity Exchange Authority by the futures commission merchant.

The complaint alleges that between December 31, 1957, and February 21, 1958, respondent held speculative net long positions in the March 1958 rye future on the Chicago Board of Trade ranging from 580,000 to 700,000 bushels, and speculative net long positions in all rye futures ranging from 730,000 to 1,085,000 bushels, which positions were in excess of the speculative limit of 500,000 bushels; that since these positions exceeded 200,000 bushels in a single future, respondent was in reporting status under the regulations and required to submit reports with respect to all his trades and positions in rye futures during such status, but that he failed to do so; and that respondent was aware of his obligations with respect to these matters and attempted to conceal such violations by distributing the positions among various futures commission merchants in quantities just below the level at which the futures commission merchant would have been required to report the respondent's position.

Respondent filed an answer July 7, 1958, in which he denied the substantive allegations of the complaint, challenged the Secretary's jurisdiction over the respondent and the subject matter, and asserted that the act, the regulations thereunder, and the order of the Commodity Exchange Commission establishing trading limits are unconstitutional, void, and of no effect. By way of affirmative defense, respondent alleged that he engaged in the trading in question in reliance upon erroneous information as to speculative limits

furnished to him by a representative of the Commodity Exchange Authority, and contended that the Secretary should, therefore, be estopped from proceeding against him.

An oral hearing was held in Chicago, Illinois, August 8, 1958, before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture. The respondent was represented by Homer E. Rosenberg, Attorney at Law, Chicago, Illinois, and complainant was represented by Benjamin M. Holstein, Office of the General Counsel, United States Department of Agriculture. After the hearing, both parties filed briefs. On March 24, 1959, the hearing examiner filed a report containing proposed findings of fact and conclusions and recommending that respondent be found to have violated the act substantially as charged and that all contract markets be ordered to refuse trading privileges to respondent for a period of 20 days. Both parties filed exceptions to the hearing examiner's

report and oral argument was held before the Judicial Officer on August 26, 1959.

FINDINGS OF FACT

1. Respondent, Benedict K. Goodman, is an individual whose address is 636 Church Street, Evanston, Illinois. The respondent is now, and has been since 1927, a member of the Board of Trade of the City of Chicago, a duly designated contract market under the act.

2. From December 31, 1957, through February 21, 1958, the respondent held speculative net long positions in the March 1958 rye future on the Chicago Board of Trade which ranged between 580,000 and 700,000 bushels, and speculative net long positions in the March and May 1958 rye futures combined which ranged between 730,000 and 1,085,000 bushels. Such positions were held through seven different brokerage houses or futures commission merchants, and the maximum quantity in any one future held through any one futures commission merchant was 195,000 bushels.

3. On ten days during the period December 31, 1957, through February 21, 1958, that is, on January 22, 23, 24, 28, February 4, 5, 10, 12, 17 and 19, 1958, respondent bought or sold March or May 1958 rye futures on the Chicago Board of Trade through one or more of the seven futures commission merchants referred to above, but respondent did not report these transactions or the resulting positions to the Commodity Exchange Authority.

4. Effective December 3, 1945, the Commodity Exchange Commission reduced the limit on the maximum speculative position in rye for future delivery which any person could hold or control on any one contract market from 2,000,000 to 500,000 bushels (17 CFR 150.3; 10 F.R. 14363), and at or about the same time the Chicago Board of Trade addressed a letter to its members setting forth in full the order of the Commission with respect to the reduction. The respondent was a member of the Board of Trade at that time. The 500,000 bushel limit has remained in effect continuously since December 3, 1945.

5. During the period February 23 through March 2, 1956, respondent held a speculative position in rye futures on the Chicago Board of Trade in excess of 500,000 bushels. The matter was called to his attention by the Commodity Exchange Authority, and in a conference with representatives of that agency the respondent explained that he did not know that the limit had

been reduced to 500,000 bushels, and stated that he would bring himself into compliance by reducing his position, which he did within a short time. On or about March 1, 1956, as a result of this occurrence, respondent received from the Chicago office of the Commodity Exchange Authority a document specifying the speculative limits on trading and positions under the act, which stated that the

maximum allowable position in rye was 500,000 bushels. Shortly thereafter, the respondent received a letter from the Administrator of the Commodity Exchange Authority containing similar information and requesting the respondent's cooperation in observing limits in the future.

6. In August or September 1957, respondent inquired of Paul Murin, senior partner in David A. Noyes and Company, one of the brokerage firms through which respondent traded, as to the speculative limit on rye futures, and was informed by Paul Murin that the limit was two million bushels. Respondent questioned the accuracy of this information, and Murin said he would verify or check the speculative limit. Murin then informed respondent that he had "checked with the Commodity Exchange and it is two million." Respondent told his secretary at his office in Evanston, Illinois, the same day, that "I'm going into rye and we don't have to concern ourselves about rye. We can go up to two million. That is all we have to worry about. Let me know as I approach two million."

7. Respondent made no further inquiry with respect to the rye speculative limit until after he learned, on February 21, 1958, that his trading and positions were being examined by the Commodity Exchange Authority, whereupon he again inquired of his brokers and was told by John Murin and Sigmund Mika, partner and office manager, respectively, in David A. Noyes and Company, that the limit was 2,000,000 bushels. Respondent again questioned the accuracy of this figure and replied that he believed the limit to be 500,000 bushels. Mika then telephoned the Chicago office of the Commodity Exchange Authority and asked for Albert W. Kibby, chief accountant. When informed that Kibby was not in, Mika asked for Mr. Stone, an accountant who had previously examined the brokerage firm's books and was, therefore, known to Mika. In answer to Mika's inquiry, Stone erroneously informed him that the rye limit was 2,000,000 bushels. Later the same day, respondent made inquiry of his attorney who ascertained and informed respondent that the limit in question was 500,000 bushels.

8. Under the regulations issued pursuant to the act, a trader is obligated to report to the Commodity Exchange Authority whenever he holds a position in any one grain future (including rye) on any one contract market in the amount of 200,000 bushels or more, regardless of whether such position is held through one or more than one broker or futures commission merchant. Each futures commission merchant is required to report to the Commodity Exchange authority with respect to any customer's position which reaches or exceeds that quantity. Respondent was aware of the regulations. Over a period of approximately 20 years prior to 1958, he had, as required from time to time by his market position, filed reports with the Commodity Exchange authority with respect to his trading in wheat, corn, rye, and soybeans.

9. Between December 31, 1957, and January 23, 1958, respondent had a reportable position in corn futures, which included 200,000 bushels or more in a single future through each of three futures commission merchants. During this period, the Commodity Exchange Authority received reports as required with respect to such positions from each of the futures commission merchants and also from respondent. On February 21, 1958, respondent's position in wheat futures reached 200,000 bushels or more in one future. This position was on the books of one futures commission merchant, and the Commodity Exchange Authority received a report as required with respect thereto from the futures commission merchant and also from respondent. Between January 14 and February 14, 1958, respondent had a reportable position in soybean futures, consisting of positions of less than 200,000 bushels with each of several futures commission merchants, which positions, in the aggregate, totaled more than 200,000 bushels in a single future. On January 14, 20, 22, 28, and February 12 and 14, 1958, reportable transactions in soybean futures were executed for respondent's account, but respondent did not report these transactions to the Commodity Exchange Authority until February 24, 1958.

10. In accordance with the practice followed by respondent during 1958 and for several years prior thereto, reports concerning his trading and positions were prepared by his secretary from information contained in brokers'

confirmations, and forwarded by her to the Commodity Exchange Authority without any prior examination by respondent. The secretary who prepared reports for respondent in 1958 had been employed by respondent

and had prepared and submitted such reports for many years.

CONCLUSIONS

The record establishes and respondent concedes that respondent exceeded the maximum speculative limit in rye futures and failed to file with the Commodity Exchange Authority required reports as to respondent's positions and trading in rye futures as charged in the complaint.

Respondent, however, argues that the violations were only technical in nature, that he was misled by erroneous information supplied by representatives of complainant to the effect that the rye trading limit was 2,000,000 bushels, that he suffered a loss in reducing his rye futures holdings to the 500,000 bushel limit and that his failure to file reports was due to a misunderstanding of instructions given by him to his secretary and to "clerical error." He contends that the complaint should not have been filed and should be dismissed. Complainant contends that the violations were intentional and excepts to the hearing examiner's recommended suspension of trading privileges for 20 days and urges that respondent be denied trading privileges for 90 days.

Examining first respondent's argument that respondent relied upon information from complainant's representatives in exceeding the 500,000 bushel trading limit, that respondent was "trapped" and that therefore complainant is subject to some kind of estoppel in bringing the complaint, we observe that the developments outlined in Finding of Fact 7 occurred *after respondent had gone beyond the limit* and respondent cannot have relied upon anything he was told then in trading previously beyond the limit. Assuming that prior to doing the trading Murin told respondent as described in Finding of Fact 6 that he, Murin, had checked with the Commodity Exchange Authority's office in Chicago and that he, Murin, had been told that the trading limit was 2,000,000 bushels, we do not believe that respondent escapes blameworthiness or that there is any possible application of any such principle as estoppel.

After respondent's violation of the rye limit in 1956, he was supplied by complainant with a document entitled "Speculative Limits On Trading And Positions" which listed 500,000 bushels as such limit for rye and 2,000,000 bushels for the other regulated grains. In addition, respondent was informed orally and by letter at that time of the rye limit. When respondent decided

to speculate again in rye futures in 1958, however, he did not refer to the documentary materials supplied him and he did not communicate with the employees of the regulatory agency whom he dealt with in 1956. Instead, he inquired of a brokerage firm as to the speculative limit in rye. That firm dealt primarily in securities and not in commodity futures. Also, relatively little trading is done in rye futures in comparison with other grain futures and the record does not indicate that the broker had much experience with rye futures. Apparently the fact that the trading limit for rye is 500,000 bushels when the limit for all other grains is 2,000,000 bushels is not widely known because of the relatively small trading in rye. But respondent knew what it was 18 months before because he was officially and personally notified. Moreover, respondent does not seem to have asked specifically about the limit for rye alone but asked for the limits on grains. At any rate while respondent expressed doubt when told that the limit was 2,000,000 bushels he did not make reference in his conversation with his broker to the 500,000 bushel limit in 1956 or to the document he had received listing speculative limits on regulated commodities. Respondent's behavior does not impress us as that of a reasonable man attempting to comply with the requirements of law, especially in view of his prior

experience and the information he had previously acquired with respect to the trading limit in rye futures.

A similar lack of care is present in respondent's failure to comply with the reporting requirements of the act and the regulations issued thereunder. Respondent contends that his secretary misunderstood his instructions (see Finding of Fact 6) and, in effect, thought that it was unnecessary to file reports with respect to rye futures transactions. Respondent knew that he was required to file the reports and "assumed" his secretary was doing so. Respondent's employee was experienced in filing reports required under the act including reports on respondent's positions in rye futures and had done so for many years. Furthermore, it happened that respondent reported only those positions which he knew his brokers would also report and not those positions which he knew his brokers would not report (see Findings of Fact 8 and 9). In any event, the responsibility for filing reports rested upon respondent and the record indicates at least a failure on his part to exercise reasonable care or any supervision in the performance of such duty. In view of the foregoing, it is concluded that, at the least, respondent

negligently violated section 4a of the act (7 U.S.C. 6a) by exceeding the rye speculative limit established by the order of the Commodity Exchange Commission and violated section 4i of the act (7 U.S.C. 6i) and the regulations issued thereunder (17 CFR 2.10, 2.11, 2.12, and 2.21) by failing to file reports of his rye positions (see Finding of Fact 3). Accordingly, such violations are wilful. n1 See e.g., *Mercado v. Brannan*, 173 F.2d 554, 555 (1st Cir. 1949), cert. denied, 338 U.S. 820 (1949). See also *United States v. Illinois Central Railroad Company*, 303 U.S. 239, 243-244 (1938).

n1 Section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b)) states that there shall be no withdrawal, suspension, etc., of any "license" except in cases of "willfulness . . ." unless prior to the institution of the administrative proceeding an opportunity is accorded to demonstrate or achieve compliance. "License" is defined in section 2(e) of that act (5 U.S.C. 1001(e)) in terms of a permit, certificate, approval, etc., "or other form of permission." Unlike required registration of brokers and futures commission merchants, a trader does not have to receive permission from the Department to trade. But at any rate, the violations here constituted a case of "willfulness" within the meaning of this part of the Administrative Procedure Act.

Our findings herein have been based upon respondent's negligence in complying with the requirements of the act. However, the manner in which respondent's position in rye futures was distributed among the seven brokers through whom he traded indicates a possible intent to conceal his position in such future from complainant and to violate the act knowingly. His position in the March 1958 future with two of the seven brokers in question was kept at 195,000 bushels with each broker. A position of 200,000 bushels with a futures commission merchant would have required the broker to report such position to the regulatory agency. Respondent testified that this was done to prevent any discovery or "leak" of his futures holdings and that he tries to keep his holdings in grain with any one brokerage house below this reporting limit. Yet, during the period of the violations involved, respondent had reportable positions in corn and wheat futures with several futures commission merchants, that is, positions of 200,000 bushels or more in corn and wheat futures with or through one or more brokers and he filed reports with respect to these positions. We do not, however, rely upon the distribution of respondent's rye position in concluding that he wilfully violated the act.

Respondent claims that the act, the regulations issued thereunder and the order of the Commodity Exchange Commission setting trading limits in rye futures at 500,000 bushels are unconstitutional, invalid and void. While of course respondent is

free to raise the issue of the constitutional validity of the act in this proceeding and perhaps should do so if he expects to argue the point upon judicial review, he cannot expect an agency charged with administering a statute to hold the statute unconstitutional. *Panitz et al. v. District of Columbia*, 112 F.2d 39 (D.C. Cir. 1940); *In re Corn Products Refining Co.*, 13 Agric. Dec. 1117 (13 A.D. 1117), 1139 (1954), *aff'd*, 232 F.2d 554 (2d Cir. 1956); *In re Edward R. Byer et al.*, 13 Agric. Dec. 873 (13 A.D. 873), 874 (1954). See also *Engineers Public Service Co. v. Securities and Exchange Commission*, 138 F.2d 936, 952-953 (D.C. Cir. 1943), ordered dismissed as moot on motion of parties, 332 U.S. 788 (1947). Respondent's contention that the contested order of the Commodity Exchange Commission is invalid because of the absence of findings of basic or evidentiary facts raises an interesting question as to whether the Secretary of Agriculture in this proceeding or his delegatee can hold an action of the Commodity Exchange Commission invalid. We conclude, however, that the contention is without merit as the facts stated in the order are sufficient to support the order.

We now address ourselves to the difficult question of determining the sanction to be ordered for the violations of the act found above. The hearing examiner recommended that all contract markets be ordered to refuse trading privileges to respondent for a period of 20 days. Complainant filed exceptions to this recommendation of the hearing examiner and proposed that trading privileges be refused to respondent for a period of 90 days. Respondent's trading is speculative, that is, he does not merchandise commodities for which he needs to hedge in the futures markets and he trades for himself and not for others such as a futures commission merchant or floor broker. In view of our conclusions and the recommendation of the hearing examiner who had an opportunity to observe the witnesses at the hearing and to get "the feel of the case," we adopt the recommendation of the hearing examiner.

ORDER

Effective on the 30th day after the date of this order, all contract markets shall refuse all trading privileges to respondent for a period of 20 days, such refusal to apply to all trading done and positions held by respondent directly or indirectly.

LOAD-DATE: June 8, 2008

