

Commodity Futures Trading Commission  
CEA CASES

**NAME:** JULIAN M. MARKS, STUART A. NEWMAN, MARSHALL K. SMITH, IRWIN M. EISEN, AND  
JAMES S. SCHONBERG

**DOCKET NUMBER:** 98

**DOCUMENT TYPE:** COMPLAINANT'S EXCEPTIONS TO REFEREE'S REPORT

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: Julian M. Marks, Stuart A. Newman, Marshall K. Smith, Irwin M. Eisen, and  
James S. Schonberg, Respondents

CEA Docket No. 98

Complainant's Exceptions to Referee's Report

Complainant takes exception to the referee's failure to incorporate in his report a conclusion to the effect that respondent Marshall K. Smith, by reason of his transaction of May 19, 1960, with respondent Irwin M. Eisen, cheated and defrauded Smith's buying customers in violation of section 4b of the Commodity Exchange Act.

It is provided in section 4b of the Act that it "shall be unlawful for any member of a contract market \* \* \* in or in connection with \* \* \* the making of \* \* \* any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market for or on behalf of any person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, on (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof - (A) to cheat or defraud or attempt to cheat or defraud such person" (7 U.S.C. § 6b).

To "cheat" is defined in Webster's New International Dictionary, Unabridged (2d ed. 1959), p. 456, as to "deprive of something valuable by use of deceit; to practice fraud upon; to defraud \* \* \*." To "defraud" is defined as to "deprive of some right, interest, or property, by deceit; to cheat \* \* \*" (id. at p. 689). "'Cheat and defraud' include every kind of trick, device, artifice, or deception from false representation and intimidation to suppression and concealment of fact or information, used for the purpose of depriving another of his property or other known right contrary to the plain rules of common honesty." State v. Gerich, 138 Conn. 292, 83 A. 2d 488, 490; State v. Parker, 114 Conn. 354, 158 A. 797, 800.

"It is established law that acts in violation of the fiduciary duties of an agent are regarded as fraudulent." Ramey v. Myers, 159 Cal. App. 2d 82, 323 P. 2d 805, 808. Acts which tend to violate the "fiduciary obligation" of an agent to a principal "are considered, in law, as 'frauds upon confidence bestowed.'" Myers v. Ellison, 249 Ala. 367, 31 So. 2d 353, 355. The "vital principle [relating to agency] is good faith; without it the relation of principal and agent cannot exist; and so sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed." Nagel v. Todd, 185 Md. 512, 45 A. 2d 326, 328. A person may "defraud"

someone irrespective of whether there is an "attempt to secure any monetary advantage" (United States v. Tommasello, 160 F. 2d 348, 350 (C.A. 2)).

The referee's proposed findings of fact with respect to the transaction in question read as follows:

On May 19, 1960, Respondent Marshall K. Smith received from Lamson Brothers & Company, a registered futures commission merchant, various orders to sell and to buy as a floor broker, for Lamson's account, Chicago May wheat futures on the close. After executing some of these orders, Smith still had orders to sell 40 and orders to buy 25 for Lamson. He filled 25 of the sell orders and the 25 buy orders by a transaction with Respondent Irwin M. Eisen, after direct and noncompetitive negotiation, in which Smith, for Lamson, simultaneously sold 25 at \$ 1.98 to, and bought 25 at \$ 1.98 1/2 from, Eisen, who made the purchase and sale for his own account. At the time of the transaction, the price of the future was not in excess of \$ 1.98. (Referee's report, proposed finding of fact 13, pp. 7-8).

The referee's proposed conclusions with respect to the transaction in question read as follows:

As to Finding 13, the testimony and exhibits show that shortly after Respondent Eisen had purchased 115 May wheat at \$ 1.98, Respondent Smith offered 25 at \$ 1.98, but Eisen refused it. Smith had 40 to sell, but offered only 25. Smith could not sell at \$ 1.98. Eisen had just bought at \$ 1.98. The market was declining steadily and fast. But then Eisen did buy from Smith at \$ 1.98 and Smith bought from Eisen at \$ 1.98 1/2. Both Eisen and Smith stated that the purchase and sale were simultaneous. Smith recorded the sale after a sale at \$ 1.95, which price was not reached until after the price of \$ 1.98. After Eisen refused to buy at \$ 1.98, Smith said "I'll give you

a half", whereupon the sales of 25 at \$ 1.98 and \$ 1.98 1/2 occurred. Although he had difficulty selling at \$ 1.98, Smith bought at 1/2 cent more.

Respondents present arguments as to various elements of the situation. Smith says he offered 25 instead of 40 because he likes to execute orders in units of 25. Eisen testified that "simultaneously" does not mean at the same time. It is argued that the price may have gone back to \$ 1.98 1/2 after getting down to \$ 1.98, or might have been different in different parts of the pit. They say that "I'll give you a half" is an open offer which anyone could take.

After all arguments are considered, the conclusion is inescapable that Smith, having difficulty getting off selling orders, having his offer refused by Eisen, got Eisen to accept by agreeing to buy a like amount from Eisen at 1/2 cent more; and that the sale and the purchase back constituted one transaction, agreed upon by Smith and Eisen, neither part of which was made so that any other trader could have taken either part of it. By it, Smith was able to offset his customer's buy and sell orders at 1/2 cent more than the going market for his buying customers, and Eisen made 1/2 cent by accommodating Smith. Both respondents engaged in an accommodation trade in violation of section 4c(A) of the Act and a noncompetitive transaction in violation of section 1.38 of the regulations. (Referee's report, pp. 13-14).

In view of the foregoing, it must be concluded that Smith did not purchase for his buying customers at the best possible price but, rather, caused his buying customers to pay a higher price than necessary in order to fill 25,000 bushels of his sell orders at a price of \$ 1.98. Smith's buying customers were not concerned with any orders but their own, and they had a right to execution of these orders independently and without any tie-in with other orders. Smith's actions deprived them of this right and made them pay for the

execution of other orders held by Smith in which they had no interest. Such conduct on the part of Smith certainly constitutes cheating and defrauding within the meaning of the authorities cited above. In view of the fact that this conduct constitutes a violation of section 4b of the Commodity Exchange Act, and in view of the nature of this violation, complainant believes that the final decision and order issued in this proceeding should include a specific conclusion with respect thereto.

[SEE SIGNATURE IN ORIGINAL]

Earl L. Saunders

Attorney for Complainant

**LOAD-DATE:** June 12, 2008

