Commodity Futures Trading Commission
CEA CASES

NAME: CONTINENTAL GRAIN COMPANY

CITATION: 16 Agric. Dec. 194

DOCKET NUMBER: 72

DATE: MARCH 20, 1957

DOCUMENT TYPE: ORDER REOPENING HEARING

(No. 4964)

In re CONTINENTAL GRAIN COMPANY. CEA Docket No. 72. Decided March 20, 1957.

Rebuttal Evidence -- Reopening of Hearing

Petition to reopen hearing for the submission of rebuttal by complainant granted where complainant did not have reasonable opportunity to submit the evidence at the hearing since (1) section 7(c) of the Administrative Procedure Act probably requires the reopening and (2) the proper administration of the act and the public interest would be better served by having the rebuttal materials in the record.

Mr. Benj. Mr. Holstein, for Commodity Exchange Authority, *Messrs. Albert E. Jenner, Jr., Frederick Mayer and Edward H. Hatton,* of Thompson, Raymond, Mayer, Jenner & Bloomstein, of Chicago, Illinois, for respondent.

Decision by Thomas J. Flavin, Judicial Officer

ORDER REOPENING HEARING

In this proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1) the respondent is charged with manipulating wheat prices downward on the Kansas City Board of Trade on November 30, 1955, and on January 26, 1955, for the purpose of making effective wheat purchase contracts it had with Commodity Credit Corporation. The manipulative tactics alleged are briefly (1) a notice of intention by the respondent on November 30, 1955, to deliver 650,000 bushels of wheat on its short contracts in the December 1955 future and the delivery thereof, and (2) the offering down of prices of December 1955 futures on November 30, 1955, by Walter D. Farmer, a floor broker acting for the respondent, and the sale by him for the respondent's account of December 1955 wheat futures at prices which made effective respondent's purchase contracts with Commodity Credit Corporation. The manipulation alleged on January 26, 1955, is that Walter D. Farmer, a floor broker acting for Continental, sold 5,000 bushels of March 1955 wheat futures at $ 2.35-1/2 per bushel to his son Winfried Farmer when prices were $ 2.35-3/4 - $ 2.35-5/8 and at or about the same time bought the same quantity of the same future from his son at $ 2.35-5/8 for the respondent, the sale making effective a purchase contract of the respondent with Commodity Credit Corporation.

The respondent filed an answer which, generally speaking, admitted the transactions set out in the complaint but denied any manipulative intent and stated that the transactions were legitimate commercial operations.

Hearing was held on August 14, 15 and 16, 1956, in Kansas City, Missouri. Following the presentation of the complainant's case, the respondent filed a motion to dismiss and the complainant replied. The referee denied the motion to dismiss and the hearing resumed on December 10, 1956, and continued each day thereafter until it was closed on December 15, 1956. As part of its case, the respondent put on an expert witness, Dr. Thomas E. Hieronymous, Associate

Professor of Agricultural Marketing, University of Illinois. He took the stand on Friday, December 14, 1956. His direct examination was concluded about 5 p.m. on that day. Counsel for the complainant asked for a recess of the hearing in order to study the testimony before cross-examination and to decide whether rebuttal evidence should be submitted. The referee denied the request in the interests of expediting the proceeding

and scheduled the next day, Saturday, December 15, 1956, for cross-examination. Cross-examination was had on that day. On December 15, 1956, the referee again repeated his ruling that he would not delay the case by a recess to enable the complainant to prepare rebuttal evidence and since the complainant had no rebuttal evidence ready, the hearing was closed after the fixing of time for the filing of briefs.

II

The proceeding is now before me because the complainant has filed a petition to reopen the hearing to introduce evidence in rebuttal to the testimony of Dr. Hieronymous. Section 0.21 of the rules of practice under the Commodity Exchange Act (17 CFR 0.21) provides for the filing of such petitions with the Secretary. The petition describes the evidence sought to be introduced as follows:

"Such evidence consists of testimony and exhibits which will rebut testimony offered by the respondent in its defense. The evidence to be submitted includes an analysis of all trading in the December 1955 wheat future on the Kansas City Board of Trade on November 30, 1955, an analysis of all re-deliveries on that date by traders who received delivery of wheat, and an analysis of the relationship of such trading and re-deliveries to the price movements which occurred at 10:34 a.m. and 11:57 a.m. on that day. The evidence to be submitted also includes an analysis of prices and price movements on the Chicago Board of Trade and the Kansas City Board of Trade on the first notice day in the December future over a period of years, demonstrating the abnormality of the price movements in Kansas City on November 30, 1955, which was the first notice day in the December 1955 wheat future. It also includes an analysis of the technique of "spreading" or moving hedges forward by buying a near future and selling a more distant future, and price relationships between the futures involved.

"The above evidence, together with other evidence which the complainant will offer, is not cumulative of any material now in the record but is solely in rebuttal of defense testimony the nature of which could not have been anticipated, and which required lengthy investigation, study, and analysis. Such evidence will refute testimony for the respondent

that the price movements in December wheat futures which occurred at 10:34 and 11:57 a.m. on November 30, 1955, were normal and usual, and that sales of the December wheat future by the respondent on that day could not have been intended to depress the price of the future because the respondent was, at the same time, engaging in spreading transactions which necessarily tended to raise the price of the December future."

The petition states that the evidence sought to be introduced is not cumulative and was not supplied at the hearing because of the ruling of the referee described above. The respondent filed an answer to the motion.

In general, Dr. Hieronymous offered what were in his opinion normal legitimate reasons for the activities which the complainant regards as manipulative in nature and intent. He said that he had studied the complaint, the answer, the motion to dismiss and the reply, the transcript of the hearing for the days when he was not present and other materials he considered germane. His testimony involves complicated and intricate phases of future trading, and he offered affirmative evidence that the respondent's trading on November 30, 1955, had a bolstering instead of a depressing effect upon wheat futures prices.

No prehearing conference was held and there was no prehearing exchange of exhibits or of information as to the experts to testify and as to what their testimony would be. While Dr. Hieronymous was present in the hearing room during some of the days of the hearing when respondent presented evidence, there is nothing in the record to indicate that complainant's counsel was notified that Dr. Hieronymous was to testify. In addition, the witness' opinion testimony was based upon highly technical and abstruse matters of futures trading. We think that while the referee's efforts to expedite the proceeding are commendable, n1 it was not reasonable to expect that under the circumstances the complainant should have been ready with rebuttal evidence at the close of Dr. Hieronymous' testimony. It has been the usual practice in proceedings of this kind to allow a respondent a recess when requested for study of the testimony of complainant's expert witnesses in order to prepare adequately

for cross-examination and the preparation of respondent's case. See *e.g., In re G. H. Miller and Company,* 15 Agric. Dec. 1015 (15 A.D. 1015) (1956); *In re Great Western Distributors, Inc.,* 10 Agric. Dec. 783 (10 A.D. 783) (1951), *aff'd,* 201 F.2d 476 (7th Cir. 1953).

n1 For recent recommendations in this connection, such as the reduction of opinion evidence to writing prior to the hearing where permitted by the Administrative Procedure Act, see the Report of the President's Conference on Administrative Procedure (1955), pp. 89-41, 78-81.

It may very well be that reopening of the hearing is required by Section 7(c) of the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*) which provides in part that "Every *party* shall have the right to present his case or defense by oral or documentary evidence, *to submit rebuttal evidence,* and to conduct such cross-examination as may be required for a full and true disclosure of the facts." [Emphasis supplied.] The definition of "party" in section 2(b) of that act includes a government "agency." As might be expected, an adequate opportunity "to prepare and submit appropriate rebuttal evidence" is what is meant. S. Rep. No. 752, 79th Cong., 1st Sess. (1945). "Rebuttal evidence" includes evidence offered by a proponent in opposition to evidence introduced by an opponent following proponents case in chief. See 6 Wigmore, Evidence § 1873 (3d ed. 1940); 6 Jones, Commentaries on Evidence § 2503 (2d ed. 1926). We are convinced that under the circumstances disclosed we would be compelled to reopen the hearing if the petitioner for reopening were a private party instead of a government agency. It would seem that the same result should follow here since the government agency as a party is given the same rights by the applicable language of Section 7(c) of the Administrative Procedure Act as a non-government party.

At any rate, we think that the proper administration of the act and accordingly the public interest would be better served by having the rebuttal materials in the record, and the petition to reopen is, therefore, granted.

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