

NATIONAL ASSOCIATION OF SECURITIES DEALERS

ROBERT A. WALL,)	NASD Arbitration No. 90-
)	00397
Claimant,)	
)	DECISION OF ARBITRATOR
and)	
)	and
DEAN WITTER REYNOLDS INC. and HUGO)	AWARD
ROSAS)	
)	
Respondents.)	
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I.

SUMMARY OF PLEADINGS

This case was filed with the National Association of Securities Dealers, Inc. ("NASD") on February 5, 1990. Claimant alleged that Respondents failed to execute his verbal and written order on August 18, 1989 to liquidate his commodities account.

Respondents by answer denied the allegations and maintained that an instruction to liquidate was not issued on August 18, 1989.

II.

RELIEF REQUESTED

Claimant requested damages in the amount of \$27,000, reasonable attorney's fees and for all costs of arbitration.

Respondents requested dismissal of the claim in its entirety, and an assessment of costs against Claimant.

III.

SUMMARY OF PROCEEDINGS

On January 24, 1991 the undersigned arbitrator heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on January 22, 1990 and by

Respondent on April 30, 1990.

The hearing was conducted in Los Angeles, California and lasted two (2) sessions.

The Arbitrator, having considered the pleadings, the testimony, and the evidence presented at the hearing, has determined in full and final resolution of the issues submitted as follows:

IV.

DECISION

The monthly statements and other evidence adduced at the hearing indicated that the account was actively traded. The customer's ability to engage in active trading was not in question. It was not disputed that the broker made trading decisions for the account and individual trades in the account were not questioned.

Two issues were presented.

The first, set forth in the pleadings, was whether the Respondents failed to promptly carry out instructions given by Claimant to liquidate the account.

On this issue, the Arbitrator finds in favor of Respondents.

The second, raised by evidence presented at the hearing, was whether the information given claimant by Respondents in monthly statements and otherwise as to the value of Claimant's

account was misleading.¹

On this issue the Arbitrator finds in favor of Claimants.

The evidence indicated that on a regular basis Claimant or Claimant's representative would inquire of Respondents Dean Witter Reynolds, Inc. ("Dean Witter") as to "how am I doing" or the "equity" in the account.

Routinely Claimant was given, by Respondent's representative, figures obtained from Dean Witter computer runs showing the "equity" in his account. Claimant kept a running total of the equity figures and believed that such figures represented the true value of his account.

In fact, the "equity" as computed by Dean Witter and shown in both computer runs and, unaccountably, on monthly statements, did not reflect the cost of buying in options. As a result, during the time in question, the "equity" figures given the customer overstated the value of the account by approximately \$26,000.

Respondents, at hearing, made three arguments.

First, Respondent Rosas claimed that he prefaced his commentaries as to the equity in the account with the assertion that the equity figure did not include the cost of buying in options. This assertion was denied by Claimant.

On this issue, the Arbitrator finds for Claimant. All of

¹ This issue was raised by Respondents in conjunction with their argument that the "equity" in Claimant's account had been reduced to about \$6,000 to \$7,000 at the time Claimant allegedly gave the first instruction to liquidate the account. Therefore, according to Respondents, even if they failed to comply with the initial instruction to liquidate the account, the failure did not cause Claimant significant damages.

Claimant's actions, including his arguments or claims in connection with the complaint, appear predicated on the belief that the "equity" in his account represented the account's net value without deduction for additional costs, such as the cost of buying in options. Had Claimant been fully apprised of these costs, it is unlikely that Claimant would have kept equity runs as produced at the hearing. It is also likely that Claimant, who attempted to keep good records of the account status, would have requested the broker to provide information regarding the cost of buying in options. It is also unlikely that the Claimant would have been surprised at the hearing to discover that the "equity" in his account had evaporated as of the date he gave the initial instruction to liquidate the account. - .

Second, Respondents asserted that the Dean Witter monthly statements were prepared in compliance with Commodity Futures Trading Commission ("CFTC") Rule 1.33. The arbitrator does not find this argument persuasive. CFTC Rule 1.33 does not purport to be exclusive as to the information which must be provided to customers. A broker, particularly one with substantial responsibilities in an account, has a fiduciary obligation to the customer to disclose all material facts relevant to trading decisions. See, e.g., Gordon v. Shearson, Haden, Stone, CFTC Law Report, Para. 21,016 (1980), affirmed sub nom, Shearson Loeb Rhoades, Inc. v. CFTC, (9th Cir. 1982). Rule 1.33 was not intended to change this law or obfuscate the status of an account.

When customers ask for the value of their account or "how they are doing," they are entitled to receive precise

information. The term "equity" is defined in common terminology as the money value of an interest in property in excess of claims or liens against it. See, Webster's Dictionary. In this context, it would have included a deduction for the cost of buying in options. The Claimant should not have to bear the risk of loss if Respondents utilized a narrower definition than that commonly employed.

Third, Respondents argued that the claimant could have computed the net value of his account, including the cost of buying in options, by calculating, on a regular basis, profits and losses on individual transactions. The sum so obtained would have disclosed the costs of buying in options.

The ability of a customer to ascertain the necessary information through the performance of his own computations would not, of course, of itself, provide a defense to the broker. See, e.g., Sudol v. Shearson, Loeb, Rhoades, Inc., CFTC Law Rprt., Para. 22,112 (April, 1984).

Further, few customers in an actively traded account have the computer resources of a broker or can tally on a daily or regular basis the value of all profits and losses. If the broker assumes the duty of telling the customer how the account is doing, then the broker also assumes the duty of supplying correct information and, as a general matter, and as indicated previously, when the term "equity" is used, that would involve supplying the customer with information as to all liabilities against the account (including the cost of buying in options), not just selected liabilities.

The parties provided very little information relating to

the manner in which the claimed damage figure was matched against the alleged failure of the broker. However, it appears clear that, absent correct information, the decision by the customer to continue trading was tainted. Further, in this particular case the damages claimed by the customer also approximates the commissions earned in the account.

At the same time, even though the representative supplied the customer with "equity" figures from the broker's computer runs, the primary failure appears to be institutional and not that of the representative.

Accordingly, the arbitrator makes the following award:

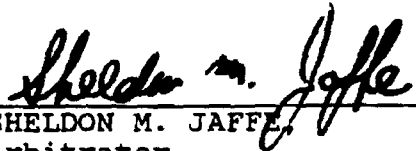
1. The claim against Hugo Rosas is dismissed;
2. In the claim against Dean Witter Reynolds, Inc., "an" award is rendered in favor of claimant in the amount of \$26,000;
3. The parties shall each bear their respective costs including attorneys' fees.
4. In accordance with Section 43 of the NASD Code of Arbitration Procedure, the NASD shall retain the \$400 filing fee previously deposited by the Claimant.

DATED: MARCH 21, 1991

LAW OFFICES OF SHELDON M. JAFFE

DATE SERVED: 03/22/91

BY:


SHELDON M. JAFFE
Arbitrator