

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Robert L. Gritzke
Richard Gritzke
Bertha Gritzke

Consolidated No.s [REDACTED]
92-01186

Name of Respondents

Shearson Lehman Hutton, Inc. n/k/a
Shearson Lehman Brothers, Inc.
Roger Bach
Michael Rago

REPRESENTATION OF PARTIES

For Claimants: Matthew D. Wayne, Esq., and Robert Vanasco, Esq. of Fishman & Merrick, Chicago, Illinois.

For Respondents Shearson Lehman Brothers, Inc. and Roger Bach: Thomas M. Knepper, Esq. of Neal Gerber & Eisenberg, Chicago, Illinois.

Michael Rago failed to appear.

CASE INFORMATION

Robert L. Gritzke's Statement of Claim filed: March 7, 1991.

Claimant's Submission Agreement signed on: February 22, 1991.

Joint Statement of Answer filed by Respondents, Shearson Lehman Brothers, Inc. and Roger Bach on: April 18, 1991.

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Respondent Shearson Lehman Brother, Inc.'s Submission Agreement signed on: April 1, 1991.

Respondent Roger Bach's Submission Agreement signed on: April 18, 1991.

Amended Statement of Claim filed: December 5, 1991.

Joint Answer to the Amended Claim filed: November 25, 1991.

Richard Gritzke's and Bertha Gritzke's Statement of Claim and Motion to Consolidate filed:
April 3, 1992.

Claimants' Submission Agreement signed on: March 31, 1992.

Joint Answer, Opposition to Request for Consolidation, and Request for Summary Dismissal
with Award of Attorneys' Fees filed by Respondents Shearson Lehman Brothers, Inc. and Roger
Bach on: June 1, 1992.

Respondent Shearson Lehman Brothers, Inc.'s Submission Agreement signed: May 8, 1992.

Respondent Roger Bach's Submission Agreement signed: June 18, 1992.

Claimants' Response to Respondents' Opposition to Claimants' Motion to Consolidate filed:
June 19, 1992.

Letter filed on behalf of Claimant Richard Gritzke withdrawing his claim relating to trading
losses on: July 21, 1992.

HEARING INFORMATION

Pre-Hearing conference date: April 2, 1992. One (1) session.

Hearing dates: December 1, 1992. Two (2) sessions.
December 2, 1992. Two (2) sessions.

January 11, 1993. Two (2) sessions.
January 12, 1993. Two (2) sessions.
January 13, 1993. Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant, Robert L. Gritzke ("Claimant") alleged: Unauthorized trading in his account, in May and July of 1988, by Respondent Michael Rago ("Rago"), an account executive with Respondent Shearson Lehman Brothers, Inc. ("SLB"); commission over-charge by Rago and SLB; and failure to supervise Rago by SLB and Respondent Roger Bach ("Bach"). The allegations of unauthorized trading arose out of purchases of 1,000 shares of Ashland Oil common stock, 8,000 shares of Aristech Chemical Corp., and 10,000 shares of Zenith Electronics Corp. common stock. Claimant alleged that, upon receipt of the confirmations, he had immediately informed Rago that the transactions had been in error, and requested they be corrected. Claimant further alleged that Rago had assured him the trades would be corrected. Claimant also asserted that it was not until two (2) weeks after Rago had been terminated from SLB, in July of 1990, that SLB closed the Zenith Electronics position. Lastly, Claimant alleged that the Ashland Oil and Aristech Chemical Corp. positions had never been closed.

In their joint Answer, SLB and Bach denied the allegations set forth in Claimant's Statement of Claim. In addition, SLB and Bach asserted that Claimant's transactions had been approved by him prior to execution and confirmation to Claimant. SLB and Bach further asserted that recovery by Claimant was precluded under the principals of ratification, waiver, estoppel, and the Claimant's willful and deliberate and persistent refusal to exercise a reasonable degree of care for the maintenance and preservation of the assets in his account.

In his Amended Statement of Claim, Claimant alleged fraud on the part of SLB and Rago for conducting an "Ask an Expert" television program, on which Rago appeared, and had "canned" questions phoned in to Rago for him to answer. Claimant asserted that due to the show, Claimant opened an account with SLB and Rago. Claimant also alleged a breach of fiduciary duty and excessive trading by Rago and SLB through excessive transactions in Claimant's account done for the sole purpose of generating commissions.

Respondents, SLB and Bach denied the allegations set forth in Claimant's Amended Statement

of Claim. SLB further asserted that Claimant made a conscious decision to make no complaint to SLB management, even when requested by Bach to let him know how Bach could be of assistance to the Claimant.

Claimants, Richard Gritzke and Bertha Gritzke ("Claimants") alleged a breach of fiduciary duty and excessive trading in their accounts for the sole purpose of generating commissions for Rago and SLB. Claimants also alleged a failure to supervise Rago's activities on the part of SLB and Bach. Claimants further alleged that Rago had exercised de facto control over their accounts through the use of sales tactics, of which SLB and Bach were aware, and which they did nothing to stop.

Respondents SLB and Bach denied the allegations contained in Claimants' Statement of Claim. SLB and Bach asserted that at no time over a period of four and one-half years had SLB received a complaint by, or on behalf of, Claimants concerning any issue that Claimants have raised in the Statement of Claim.

RELIEF REQUESTED

Claimant requested an award of:

Count I - \$90,589.33 plus interest, costs and attorneys' fees against SLB and Rago.

Count II - \$7,933.15 plus interest, costs and attorneys' fees.

Count III - \$90,589.33 plus interest, costs, and attorneys' fees against SLB and Bach.

Count IV - Such damages in an amount to be proven at hearing, plus punitive damages in the amount of \$500,000.00, interest, costs, and attorneys' fees against Rago and SLB.

Count V - \$162,616.06, plus punitive damages in the amount of \$500,000.00, interest, costs, and attorneys' fees against Rago and SLB.

Count VI - \$162,616.06, plus punitive damages in the amount of \$500,000.00, interest, costs, and attorneys' fees against Rago and SLB.

SLB and Bach requested that the Statement of Claim and Amended Statement of Claim filed by Robert L. Gritzke be denied, and that forum fees be assessed against the Claimant.

Claimant, Richard Gritzke requested an award of \$31,251.00, margin interest charges to his account, punitive damages, pre-judgement interest, and a reimbursement of his costs and expenses associated with this claim, including reasonable attorneys' fees and NASD filing fees.

Claimant, Bertha Gritzke requested an award of \$30,217.00, all margin interest charges to her account, punitive damages, pre-judgement interest, and a reimbursement of her costs and expenses associated with this claim, including reasonable attorneys' fees and NASD filing fees.

SLB and Bach requested summary dismissal of the Statement of Claim filed by Richard Gritzke and Bertha Gritzke. SLB also requested an award reimbursing it for its attorneys' fees incurred in connection with the dismissal.

OTHER ISSUES CONSIDERED & DECIDED

In their Statement of Claim filed with the NASD on April 3, 1992, Claimants also made a Motion to consolidate their case (92-01186) with Claimant's previously filed case (No. 91-00732). After review of the request, and the response filed on behalf of SLB and Bach, the Director allowed the consolidation.

In their Answer filed in case number 92-01186, SLB and Bach requested dismissal of the claim. After review of the Answer and Motion, and the Statement of Claim, the undersigned arbitrators denied the motion.

On April 3, 1992, the previous Chairman, Theodore Wroblewski, ruled on Claimant's Motion to Compel in NASD case No. 91-00732 and ordered the Respondents to produce certain documents and information. After notification, by the Claimant, that the Respondents had failed to produce documents on a timely basis, Claimant filed a Motion for Sanctions on May 4, 1992. On May 12, 1992, the Chairman ordered the Respondents to produce all documents and information no later than June 4, 1992. On August 4, 1992, Claimant again informed the NASD of the Respondents' failure to produce the ordered documents, and requested that the sanctions requested in his May 4, 1992, letter be granted. On September 21, 1992, the Chairman's Order granting the requested sanctions was served on the parties. The sanctions that were granted are

as follows:

1. A finding that all facts and evidence contained in the non-produced documents and information shall be construed in a light most favorable to Claimant and that Respondents shall be precluded at hearing from presenting any documents or defenses in opposition to the aforementioned findings in favor of Claimant; and

2. A finding that Claimant has established the truth of all allegations in the Statement of Claim and the Amended Statement of Claim which may have been corroborated by the information contained in the non-produced documents.

On December 1, 1992, the panel, with the undersigned Chairman, allowed the sanctions, previously entered by Theodore Wroblewski, to stand. In addition, it was made clear by Claimant's attorney that the sanctions only applied to case number 91-00732 as to how Rago took down stock and put the stock into accounts. The panel allowed Respondents to cross-examine Claimant's witnesses only on subjects covered by their testimony.

On October 19, 1992, SLB and Bach filed a request for pre-hearing conference and to file a Supplemental Answer. After review of the request, the response, and deliberation prior to December 1, 1992, the arbitrators denied the request for a pre-hearing conference and also denied the request to Supplement Respondents' Answer.

Upon review of the file, the undersigned panel has determined that Respondent Michael Rago has been properly served with the Statement of Claim pursuant to Sections 13 and 25 of the Code of Arbitration Procedure ("the Code"). The panel also determined that Respondent Michael Rago had received due notice of the hearing as required under Section 26 of the Code, and that the arbitration of the matter would proceed pursuant to Section 29 of the Code.

Respondent Michael Rago did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 8 of the Code, is required to submit to arbitration, and therefore is bound by the determination of the arbitration panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed by counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Michael Rago is liable for, and shall pay to Claimant, Robert L. Gritzke the sum of \$90,500.00 as satisfaction of his claims herein. Claimant, Robert L. Gritzke's claims against Respondent Roger Bach are hereby denied and dismissed with prejudice.
2. Claimants, Bertha Gritzke's and Richard Gritzke's claims are hereby denied and dismissed with prejudice.
3. Respondent Shearson Lehman Brothers, Inc. is liable for, and shall pay to Claimant Robert L. Gritzke the sum of \$7,933.15 as satisfaction of his claims herein.
4. Claimant Robert L. Gritzke's claims for punitive damages are hereby denied and dismissed with prejudice.

OTHER COSTS

5. Each party shall bear its own costs and attorneys' fees.
6. Forum fees shall be allocated as set forth more fully below.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

1 pre-hearing conference session X \$300.00 = \$300.00

10 hearing sessions X \$750.00 = \$7,500.00

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Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$150.00, and shall retain the hearing session deposit in the amount of \$500.00 previously paid to the NASD by Claimant Robert L. Gritzke.

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$150.00, and shall retain the hearing session deposit in the amount of \$500.00 previously paid to the NASD by Claimants Richard Gritzke and Bertha Gritzke.

Additional forum fees in the amount of \$3,150.00 are assessed against Claimant Robert L. Gritzke.

Additional forum fees in the amount of \$4,150.00 are assessed against Respondent Shearson Lehman Brothers, Inc.

Fees are payable to the National Association of Securities Dealers, Inc.

CONCURRING ARBITRATORS

Dated:

January 27, 1993

/s/Henry X. Dietch
Henry X. Dietch
Presiding Chair
Public Arbitrator

February 4, 1993

/s/Haralyn H. Isaac
Haralyn H. Isaac
Public Arbitrator

January 22, 1993

/s/Daniel C. Kriser
Daniel C. Kriser
Industry Arbitrator

Date of Service by the NASD:

Feb 5, 1993