

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Keith M. & Lori B. Nickoloff

92-00415

Name of Respondents

Dean Witter Reynolds Inc.
Jack S. Gilbert

REPRESENTATION

For Claimant: Keith M. Nickoloff.

For Respondent: Kathleen Kaczor, Esq. of Damon and Morey.

CASE INFORMATION

Statement of Claim filed: February 4, 1992.

Claimant's Submission Agreement signed on: January 28, 1992.

Statement of Answer filed by Respondents, Dean Witter Reynolds, Inc. and Jack S. Gilbert on:
March 20, 1992.

Respondents, Dean Witter Reynolds Inc. and Jack S. Gilbert did not submit complete, fully executed Submission Agreements but stated on the record that they submit to this arbitration proceeding.

HEARING INFORMATION

Hearing Date/Session: November 4, 1992 - One Session.

Hearing Location: Hyatt Regency - Buffalo, NY

CASE SUMMARY

Claimants, alleged that an unauthorized trade of short-selling of 500 shares of Cablevision Systems was made in his account with Respondent, Dean Witter Reynolds, Inc. ("Dean Witter") by Respondent, Jack S. Gilbert ("Gilbert").

Claimants alleged that they objected to the transaction as soon as they received their monthly account statement and closed their account shortly thereafter.

Respondents maintained that the Claimants authorized the short sale and that the sale was unsolicited. Respondents maintained that the order was executed based on the authorization he received in a telephone conversation with Claimant, Keith Nickoloff. Respondents maintained that the pattern of the Claimants' trading was very similar to this transaction at issue, tending to refute the claim that the instant transaction was unauthorized.

RELIEF REQUESTED

Claimant requested damages in the amount of \$5,250.00 plus interest, related commissions and costs.

Respondents requested that the Claim be dismissed in its entirety.

AWARD

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

The claim is hereby dismissed in its entirety.

In this proceeding, Claimants, Keith and Lori Nickoloff, assert that Respondents, Jack Gilbert and Dean Witter Reynolds, Inc. ("DWR") executed an unauthorized short sale of Cablevision Systems, Inc. on November 12, 1990, which settled on November 19, 1990. Claimant Keith Nickoloff testified that he objected to the trade immediately after receiving his monthly statement, in mid-December 1990. At the time of the questioned transaction, and for some weeks and months thereafter, Mr. Nickoloff was quite busy at his work. He testified that the end of the year is a very busy time for him, and that he often works 70 hours a week. He offered those job pressures as part of the reason he did not pursue a resolution to this problem more expeditiously.

Mr. Nickoloff was an honest and forthright witness. His career successes are a further indication of his integrity. However, Mr. Gilbert was also honest and forthright. Both witnesses testified to what they each perceived to be the truth.

If the trade was unauthorized, as Claimants allege, Mr. Gilbert would have had to deliberately fabricate it; there are too many steps to the process, and too many people involved, for the trade to have been executed by accident. I find it unlikely that Mr. Gilbert would jeopardize his job, his license, and his reputation for the sake of the nominal commission he earned from the questioned trade. While there is evidence that Mr. Gilbert and DWR made several mistakes in handling the Nickoloffs' account over the years, there is no evidence of any intentional wrongdoing, except for Claimants' allegations about the questioned trade. Given Mr. Gilbert's credibility, the insignificant benefit he obtained from the trade, and the serious risks he would have had to consciously take if he executed an unauthorized trade, I find that the trade in question was not unauthorized.

That finding is not easy to square with my impression that Mr. Nickoloff was also testifying truthfully, or at least truthfully as he recalls that time period. However, given the hours and energy he had to devote to his job at that time, it is not unlikely that he simply failed to recall authorizing the trade in question. There had been a short sale of the same security about two weeks previous to the questioned trade. By early or mid-December, when Mr. Nickoloff first questioned the trade, he may well have blended the two transactions in his own mind. Moreover, Mr. Nickoloff struck me as a person of sufficient principle that if he truly and unequivocally believed the trade had been unauthorized, he would have pursued the matter with vigor. Whatever the job pressures, and whatever his feelings of helplessness and powerlessness, Mr. Nickoloff is a person who would have done what is necessary to right a wrong without delay. The inference to be drawn is that at the outset of the problem, in December 1990, Mr. Nickoloff may have had at least some doubt as to whether he authorized the trade.

In sum, I find that while Mr. Nickoloff was testifying to what he believes to be the truth, in fact the trade had been authorized. Thus, my award is for respondents. The claim is hereby denied.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

Non-refundable filing fee:	\$ 75.00
Hearing Session fees:	\$200.00 (1 Session x \$200.00)

1. Total forum fees are hereby equally assessed against the Claimants and Respondents.
2. Accordingly, Claimants are hereby assessed forum fees in the amount of \$137.50. Claimants are entitled to offset this amount with the \$275.00 Claimants previously deposited to the NASD.
3. Respondents are hereby assessed forum fees in the amount of \$137.50. Respondents are directed to reimburse to the Claimants the sum of \$137.50.

Arbitrator's Signature
Name

John M. Hinchcliff

Public Chairperson

Executed on

~~Date of Decision:~~ 12-7-92

Date of Decision: December 10, 1992

STATE OF NEW YORK S.S.:
COUNTY OF TOMPKINS

On this 7th day of December, 1992, before me personally appeared John M. Hinchcliff known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

Dawn M. L. Torde

DAWN M. L. TORDEL
Notary Public, State of New York
No. 4974956
Qualified in Tompkins County
Commission Expires November 26, 1994