

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Eugene Reich

93-01842

Name of Respondent

Shearson Lehman Brothers, Inc.
Winston Zabiela

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on May 7, 1993, Claimant Eugene Reich, by and through his counsel, Thomas J. Hannahan, Sole Practitioner, New York, NY, alleged that on or about July 31, 1987, Claimant opened an IRA account by depositing \$22,854.72 and at the time Claimant was a retired 68 year old. Claimant further alleged that on or about August 20, 1987 there was purchased in that account 8,000 units at \$1.00 a unit of the commodity Trend Timing Fund II and although the primary goals of this fund was to provide high profit potential through speculative trading of commodities futures, whereby Respondents represented to Claimant that this was a suitable investment for his IRA account. Claimant contended that on or about August 31, 1987 there was purchased for the account \$15,000.00 of Shearson Lehman special portfolio option income portfolio whereby this investment sought primarily to achieve high current return by investing in stocks and options and again, Respondent Winston Zabiela recommended this investment by representing to Claimant that it was suitable for his IRA account. Claimant further contended that when Respondent Winston Zabiela left Respondent Shearson Lehman Brothers, Inc., in approximately October, 1988, the new broker informed him that these investments were unsuitable for his account. Claimant further contended that at this point the investment had declined approximately \$4,728.64 and it was agreed to redeem these funds and make other investments, however, because the funds were redeemed "early" there was a charge for this. Claimant asserted that Respondent Shearson Lehman Brothers, Inc., by and through Mr. Lawrence Napoli, agreed that it was unfair for Claimant to pay this charge whereby it was agreed to have the redemption fee of \$608.00 credited to Claimant's account. Claimant further asserted that Respondents Shearson Lehman Brothers, Inc. and Winston Zabiela's inappropriate handling of his funds caused him to sustain losses, thus Respondents should be held liable.

Respondent Shearson Lehman Brothers, Inc., by and through their in-house counsel, Ann Parry, maintained that in 1987 Claimant Eugene Reich opened a Shearson IRA Custodial Account at Respondent Shearson Lehman Brothers' Melville, New York branch office and Respondent Winston Zabiela was the Financial Consultant assigned to the account and subsequently, on August 20, 1987 Claimant purchased 8,000 units at \$1.00 per unit of the Commodity Trend Timing Fund II L.P. for his custodial account for a total investment of \$8,000.00. Respondent further maintained that on August 31, 1987 Claimant purchased 1058.574 shares for \$15,000.00 of Shearson Lehman Brothers Special Income Portfolio (the "Fund"), a diversified, open-ended management investment company that offered a selection of managed investment portfolios, for his custodial account whereby the Fund was designed for long-term investors and not for investors who intended to liquidate their investment after a short period of time. Respondent contended that on or about September 25, 1987, Claimant received a dividend payment in the amount of \$21.17 which was reinvested into the Portfolio, thus, increasing the number of Claimant's shares to 1,060. Respondent further contended that in or about December, 1987, the price of the Portfolio dropped with the result that the market value of \$15,000.00 investment fell to \$11,956.00 and Claimant received a dividend payment which was reinvested into the Portfolio, increasing the number of shares to 1,095.00. Respondent asserted that on January 22, 1988, Claimant redeemed his shares of the Portfolio for \$11,944.28 and because Claimant had only held the shares for approximately five months, far short of the five-year period necessary for the waiver of redemption fees, his account was subject to a redemption fee in the amount of \$608.00. Respondent further asserted Claimant's argument for an award is based solely on the fact that he lost money due to conditions in the market when he authorized the sale of the Portfolio whereby Claimant lost faith in the investment and chose to sell it even though the market value of the Portfolio had declined. Respondent further maintained that if Claimant had held his shares and had reinvested dividends and capital gains back into the Premium Fund, the market value of Claimant's shares today would be approximately \$28,788.00. Respondent further contended that when Mr. Napoli took over Claimant's account in September 1988 and allegedly told Claimant that "these investments were unsuitable for him", had he sold the shares at that time, his loss would have been \$536.69 yet Claimant chose not to sell the shares either at that time or in May 1989 when their market value had increased to \$9,243.00, had Claimant sold in May 1989, he would have made a \$1,243.00 profit, instead he waited until August 14, 1990 to sell the shares, incurring a \$1,716.17 loss, clearly Claimant failed to mitigate his damages. Respondent further asserted that they submit that they acted at all times in a professional and ethical manner in accordance with all exchange and governmental regulations and that it violated no duties owed to Claimant concerning the handling of his account, thus the claim should be dismissed.

Respondent Winston Zabiela failed to file an Answer to the Statement of Claim.

RELIEF REQUESTED

Claimant Eugene Reich requested the sum of \$4,728.64 in actual damages plus interest and costs.

Respondent Shearson Lehman Brothers, Inc. requested the claim be dismissed in its entirety.

Respondent Winston Zabiela failed to file an Answer to the Statement of Claim.

OTHER ISSUES CONSIDERED & DECIDED

In accordance with Section 13 of the National Association of Securities Dealers, Inc., the Respondent Winston Zabiela was served a copy of the Statement of Claim by regular mail on July 15, 1993 and given an opportunity to respond, which he failed to do. Respondent Winston Zabiela was notified on September 24, 1993, via certified mail, that his Statement of Answer was overdue. The certified mail was returned to the NASD, "unclaimed". This correspondence was re-sent regular mail and was not returned to the NASD. Respondent Winston Zabiela was notified on October 7, 1993, via certified mail, of the selected arbitrator pursuant to Section 21 of the NASD Code of Arbitration Procedure. The certified mail was returned to the NASD, "unclaimed". This correspondence was re-sent regular mail and was not returned to the NASD.

Respondent Zabiela failed to file an Answer to the Statement of Claim.

Pursuant to the By-Laws of the NASD the arbitrator determined that Respondent Winston Zabiela was required to submit to this arbitration proceeding and is, therefore, bound by the arbitrator's ruling and determination.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Eugene J. McCabe, Esq., was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on May 4, 1993, by the Respondent Shearson Lehman Brothers, Inc. on September 1, 1993 and not by the Respondent Winston Zabiela as required by Sections 12 & 13 of the NASD Code of Arbitration Procedure.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The Respondent Shearson Lehman Brothers, Inc. is liable and shall pay to the Claimant Eugene Reich the sum of \$2,364.32 in damages.
2. The Respondent Winston Zabiela is liable and shall pay to the Claimant Eugene Reich the sum of \$2,364.32 in damages.
3. The Claimant's request for interest is denied.
4. The \$125.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Eugene Reich shall be retained by the NASD, Inc. Respondent Shearson Lehman Brothers, Inc. is liable and shall pay to the Claimant the sum of \$62.50, as partial reimbursement. Respondent Winston Zabiela is liable and shall pay to the Claimant the sum of \$62.50, as partial reimbursement.

AFFIRMATION

I, EUGENE J. McCABE, ESQ., do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



Signature of Arbitrator

DATE OF DECISION: December 29, 1993

STATE OF: *New Jersey*

SS:

COUNTY OF: *Morristown*

On this 17 day of December 1993, before me personally appeared Eugene J. McCabe, Esq. to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Anna Goelin

ANNA GOELIN
Notary Public of New Jersey
My Commission Expires July 18, 1994