

# **NASD Arbitration & Mediation**

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## **N.A.S.D. AWARD**

### **NATIONAL ASSOCIATION OF SECURITIES DEALERS**

In the Matter of the Arbitration Between

Name of Claimant

Richard J. Burke

96-01404

Name of Respondent

Gregory Roth

Gary L. Stark

### **CASE SUMMARY**

In a case filed with National Association of Securities Dealers Regulation, Inc. on March 29, 1996, claimant Richard Burke ("claimant") who appeared Pro Se, alleged that respondent Gregory Roth ("Roth") churned his investment in order to generate commissions for himself. Claimant further alleged that Roth had been telephoning him for about two years, with strong assurances that he could make him money. Claimant also alleged that he told Roth that he was retired and was in no position to invest where the risk factor was high. Claimant asserted that Roth assured him that he had access to investments which were well situated for his investment objectives. Claimant further asserted that he did a background check on Roth with the NASD, which revealed no problems. Claimant also asserted that in January 1996, he invested \$20,000.00 with Roth and gave him power of attorney to invest the money according to his best judgment. Claimant contended that Roth called several times to assure him that the investments were all profitable and that he should immediately invest more money. Claimant further contended he told Roth that until he received the profits from the first \$20,000.00, he would not be sending additional funds. Claimant also contended that Roth became angry, and stated that he was closing the account and sending him a check. Claimant alleged that when he received the check it was only for \$18,837.50, a loss of \$1,162.50. Claimant further alleged that Roth stated the loss was his fault because he had supplied too little money and required him to buy and sell too quickly. Claimant also alleged that Roth did not act in his best interest nor did he inform him truthfully about the situation. Claimant asserted that respondent Gary Stark ("Stark") was the Managing broker whom Roth reported to and lent his support to Roth's actions.

Respondents Roth and Stark (collectively referred as "respondents") who appeared Pro Se, maintained that claimant had been contacted seven times in the last three years. Respondents further maintained that claimant indicated to Roth that he was unhappy with an account he had at another firm and wanted a program or a system that would show him higher returns. Respondents also maintained that claimant went on to say that he was an aggressive and conservative investor and that his portfolio size was \$500,000. Respondents contended that they had spent many hours explaining the fundamentals of Biovail @ \$25, DLVRY (cortecs) @ \$21, MDRX @ \$25, Corrections of America (CXC) @ \$43. Respondents further contended that they offered claimant these securities, so that he would have an opportunity to review them in advance.

Respondents also contended the usual block size is 500 per share, but claimant decided to put \$5,000.00 in each stock, which is the equivalent of 200 shares, 230 shares, 160 shares, and 120 shares respectively. Respondents maintained that claimant knew going into the program that the block sizes were too small for him to yield any kind of substantial dollars short term. Respondents further maintained that claimant agreed to purchase four issues and go on a percentage price movement based scenario, and that if he was comfortable would either transfer his entire account worth of \$100,000.00 or better, or would add monies to the account.

Respondents further maintained that when claimant opened his account Roth called him twice a week and updated him on all four issues for three weeks in a row. Respondents also maintained that in the following weeks Roth explained to claimant that the account was doing fine and would he consider adding additional dollars to the account so Roth could pick up block sizes. Respondents contended that claimant was very condescending after this remark and suggested to Roth that this had been a waste of his time. Respondents further contended that claimant and Roth jointly agreed to close the account and forward him the proceeds.

### **RELIEF REQUESTED**

Claimant Richard Burke requested \$1,162.50 in actual damages.

Respondents Gregory Roth and Gary Stark requested that the claims of the claimant be dismissed in their entirety.

### **AWARD**

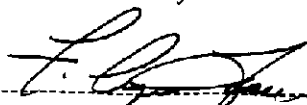
Pursuant to Section 10302 Code of Arbitration Procedure, a single Public Arbitrator, Frank Conger Fawcett was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the claimant Richard Burke on April 15, 1996 and by respondents Gregory Roth on May 23, 1996 and by respondent Gary Stark on May 22, 1996.

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 claims of claimant Richard Burke against respondent Gregory Roth and Gary Stark are dismissed in their entirety.
2. Each party shall bear their respective costs.
3. The \$50.00 filing fee previously deposited with National Association of Securities Dealers Regulation, Inc. shall be retained by the Association.

**AFFIRMATION**

I, Frank Conger Fawcett, 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.

A handwritten signature in dark ink, appearing to read 'F. Conger Fawcett', is written over a horizontal dashed line.

Frank Conger Fawcett

Date of Decision: November 27, 1996

BURKE v. ROTH and STARK  
NASD Arbitration No. 96-01404

ARBITRATOR'S AWARD

It is, frankly, difficult for the Arbitrator to discern the substance of the Claimant's complaint. Certainly the amount of brokers' commissions and charges involved in the matter are in the aggregate large in comparison to the total investment sum and the modest profits generated. This would however seem attributable more to the very short time-frame of the investment experience, with both purchases and sales taking place within the span of a mere five weeks, than to anything else. The per-transaction costs, generally in the range of about 2.7%, do not appear excessive; and even those that are higher, at 3%+, being not specifically challenged (nor explained), do not appear so high as to be beyond the realm of reason. (The one even higher percentage charge, on the second Biovail sale, works out when combined with the first Biovail sale to a 3%+ figure for the two together.) As for the short time-frame itself, although the Claimant suggests that Respondent Roth unilaterally "closed the account," he does not tie his complaint to this; moreover, Mr. Roth's letter's statement that it was a joint decision is the more likely and plausible.

The Claimant's objection to the initial \$20,000 investment being broken up into four (not five) subdivisional parts would seem to be answered by the fact that, presumably, the Claimant acquiesced in this not-unreasonable investment strategy as presented by Respondent Roth. (Moreover, insofar as transactional costs are represented in largest part by brokers' commissions, calculated as a percentage of the principal sum involved in the transaction, it is not clear that this subdivision added, on the sums involved, any material additional cost.)

The Claimant's real loss occurred with one particular stock, which dropped a quarter of its market value in the one week held, but the Claimant (quite properly) does not make an issue of this. Even with transaction costs, the remaining investments -- notwithstanding the very short holding-periods involved -- netted a small profit.

While thus exonerating the Respondents from liability, the Arbitrator is nevertheless perplexed by their final, June 4th submission, objecting to the "non-evidentiary" nature of the Claimant's presentation, as being neither under oath nor subject to cross-examination. That is the customary nature of the Simplified Arbitration Procedures. And, it bears stating, the Respondents' own "factual" representations as set forth in their Answer's Exhibits "A" and "B" are of no greater "evidentiary" dignity than the Claimant's statements.

The Claimant's claim is denied. The parties shall bear their own costs.