

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Leonard Franklin Schaefer,

Claimant,

and

No. 96-02676

Lehman Brothers Inc.,

Respondent.

REPRESENTATION OF PARTIES

Claimant Leonard Franklin Schaefer was represented by Stephen L. Schaefer, Esquire, located in Austin, Texas.

Respondent Lehman Brothers Inc. was represented by Jack D. Ballard, Esquire of Ogden, Gibson, White & Brooks, LLP, located in Houston, Texas.

CASE INFORMATION

Claimant Leonard Franklin Schaefer's Statement of Claim was filed on or about June 21, 1996. Claimant Leonard Franklin Schaefer's Submission Agreement was signed on June 18, 1996.

Respondent Lehman Brothers Inc.'s Statement of Answer was filed on or about August 19, 1996. Respondent Lehman Brothers Inc.'s Submission Agreement was signed on July 12, 1996 by Thomas E. Hommel, Senior Vice President of Lehman Brothers Inc.

HEARING INFORMATION

A pre-hearing conference was held on December 16, 1996 for one (1) session.

The hearing was held on: April 16, 1997 for two (2) sessions; and on April 17, 1997 for one (1) session.

The hearing was held in Houston, Texas.

CASE SUMMARY

Claimant Leonard Franklin Schaefer ("Claimant") brought this action to recover monies that accrued in two of his deferred compensation and/or retirement plans entitled the Financial Consultant Deferred Compensation Plan ("FCDCP") and the Recognition Award Plan ("RAP") with Respondent Lehman Brother Inc. ("Respondent").

According to Claimant, he began working for Respondent in April of 1988, in Houston, Texas as a broker, and had attained the position of Vice President when his position was terminated by Respondent in June of 1995. Claimant asserted that during this time his FCDCP account grew to \$18,194 and his RAP account grew to almost \$64,577, excluding interest and appreciation, which represented payments to Claimant of bonuses and monies as a reward for distinctive productivity. Claimant stated that the plans were structured so that any participating broker could not gain possession of the monies until five years beyond the date the bonuses were earned, or, in the alternative, they could be obtained in the event of the participant's retirement, disability, or death, or, in some cases, financial hardship. However, Claimant disclosed, a distribution could not be had if the participating broker was terminated for cause.

Claimant alleged that in April of 1995, Respondent suddenly, unexpectedly, and unilaterally announced that it was closing its Houston, Texas office. Claimant stated that he was extended an offer to stay on, albeit in another city. According to Claimant, this was not an option for many reasons, including the schooling of his five year old son at a special school in Houston acclaimed for its success with impaired children, the entrance into which was initiated by physician's direction.

Claimant reported that upon the announcement of the closing of the Houston branch, which occurred just prior to the vesting of monies due Claimant, he made demand upon Respondent for the monies and bonuses due him. He argued that, were the office not closed, he had every intention of continuing his relationship for years to come, and that Respondent was taking away his ability to fulfil the original terms of the agreement with respect to the earning, accrual, and collection of the bonuses. Claimant stated that Respondent refused to pay because the five year threshold was not met.

Respondent denied the allegations set forth in the Statement of Claim. Respondent contended that the terms of both profit sharing plans provide that the contributions are forfeited in the event of a "separation from service" within five years from the time of the award is granted. Respondent reported that the plan documents define "separation from service" as "termination of a Participant's employment with the Company other than by reason of his Retirement, Disability or death." According to Respondent, Claimant's employment terminated in June of 1995 when Lehman Brothers Inc. closed its retail branch office in Houston, Texas. Consequently, Respondent further contended, it was not liable to Claimant for the contributions that have not vested because, under the terms of the plans, he forfeited them upon the termination of his employment. Respondent asserted that Claimant's personal circumstances prevented him from continuing his employment with the company

and caused him to forfeit the contributions that were not vested.

Respondent also asserted the affirmative defense that Claimant's claims were preempted by ERISA, 29 U.S.C.A. § 1001 *et seq.*

RELIEF REQUESTED

Claimant Leonard Franklin Schaefer requested an award for the monies Lehman Brothers Inc. now holds in trust for him which were earned and credited to his Financial Consultant Deferred Compensation Plan and the Recognition Award Plan accounts during all material times, said sums exceeding \$83,000.00, plus all accrued interest, appreciation, and costs incurred in preparing and presenting this claim, including attorney's fees and arbitration costs.

Respondent Lehman Brothers Inc. requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

At the conclusion of the Claimant Leonard Franklin Schaefer's presentation of his direct case in the hearing, Respondent Lehman Brothers Inc. moved for a directed verdict. Following oral arguments, the undersigned panel of arbitrators granted this motion.

The parties have agreed that the Award in this matter may be executed in 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 original(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

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. The Statement of Claim is hereby denied in its entirety and dismissed with prejudice;
2. Other than forum fees, which are addressed below, the parties shall bear their own costs of arbitration including attorney's fees; and
3. Any claims and requests for relief not specifically awarded here are, and each of them, hereby denied and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300, and there were three (3) hearing sessions x \$600 = \$1,800. Total forum fees are thus \$300 + \$1,800 = \$2,100. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (the "Code") a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to § 10205(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500 and shall **retain** as forum fees the hearing session deposit in the amount of \$600 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant Leonard Franklin Schaefer.

Claimant Leonard Franklin Schaefer is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution additional forum fees in the amount of \$1,500.

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$300 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by respondent Lehman Brothers Inc.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

Thomas A. Thornhill, Jr.
Thomas A. Thornhill, Jr.
Chairperson, Industry Arbitrator

April 24, 1997
Dated:

David L. Baker
David L. Baker
Panelist, Industry Arbitrator

April 24, 1997
Dated:

Nick Sacaris
Nick Sacaris
Panelist, Industry Arbitrator

April 24, 1997
Dated:

Date Award was served on the parties: April 28, 1997