

AWARD

NASD REGULATION, INC., OFFICE OF DISPUTE RESOLUTION

In the Matter of the Arbitration Between© National Association of
Securities Dealers Inc.Name of Claimant

1996

Dean Witter Reynolds, Inc.

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96-03997

Name of RespondentsOppenheimer & Co., Inc. ;
David A. Melby**REPRESENTATION**

For Claimant: Dean Witter Reynolds, Inc. ("Dean Witter") was represented by Ronald P. Kane, Esq. of Gornberg, Kane & Fischer, Ltd., located in Chicago, Illinois.

For Respondents: Oppenheimer & Co., Inc. ("Oppenheimer") was represented by Lloyd S. Clareman, Esq. of New York, New York.

David A. Melby ("Melby") was represented by James A. McGurk, Esq. of the Law Offices of James A. McGurk, located in Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed: September 9, 1996.

Claimant's Submission Agreement signed on: September 4, 1996 by Ralph Schiavo, Vice President and Senior Attorney, Dean Witter Reynolds, Inc.

Statement of Answer filed by Respondent Oppenheimer on: September 16, 1996.
Respondent Oppenheimer did not file an executed Submission Agreement.

Statement of Answer filed by Respondent Melby on: September 17, 1996.
Respondent Melby did not file an executed Submission Agreement.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: September 18, 1996 for Three (3) sessions;
September 19, 1996 for Two (2) sessions; and

September 23, 1996 for Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant alleged that Melby breached his employment agreement with Dean Witter by misappropriating Dean Witter records for use in soliciting clients after his employment terminated on August 30, 1996. Melby was hired by Oppenheimer, who Dean Witter alleged assisted in this activity and interfered with the contractual relations between Melby and Dean Witter. Based upon the above allegations, Dean Witter asserted the following claims: breach of contract; tort-conversion; breach of fiduciary duty; unfair competition; and interference with contractual relations.

Oppenheimer denied the material allegations of the Statement of Claim, alleging that of the roughly two hundred accounts serviced by Melby while at Dean Witter, approximately 173 of the accounts were the result of Melby's work, personal contacts and leads, and were not provided by Dean Witter. In addition, Oppenheimer alleged that as a matter of law, the customer list allegedly taken does not constitute a protected trade secret, and that because the brokerage business is highly competitive, all firms, including Dean Witter, are engaged in aggressively recruiting suitable brokers who are interested in leaving other firms.

Melby also denied the material allegations of the Statement of Claim, asserting that he developed his own customer list, and that only thirty-three of the his accounts were a result of "broker of the day" calls or were obtained from Dean Witter. In addition, Melby alleged that he received no confidential training information from Dean Witter, that no near-permanent relationship existed between Dean Witter and his clients; and that the attempts to enforce his covenant are improper attempts to restrain competition.

RELIEF REQUESTED

Claimant requested entry of an injunction order enjoining Respondents from engaging in certain activities with any clients Melby had contact with while employed by Dean Witter, including contact or soliciting, notifying the customer of the termination of Melby's employment with Dean Witter, or using any records of Dean Witter. In addition, Dean Witter requested an award of compensatory damages, attorneys' fees and costs.

Respondent Oppenheimer requested that all claims in the Statement of Claim for injunctive and/or compensatory relief be denied in all respects and that the hearing costs be assessed against the Claimant. At hearing, the Panel granted Oppenheimer's Motion to Amend the pleadings to allow Oppenheimer to claim for attorneys' fees against the Claimant, Dean Witter.

Respondent Melby requested that the Panel deny each claim and prayer for relief asserted by Dean Witter and award Melby his attorneys' fees and costs in connection with the court proceeding and arbitration.

OTHER ISSUES CONSIDERED & DECIDED

Respondents Oppenheimer and Melby did not file executed submission agreements, but are required to submit to arbitration pursuant to Section 10201 of the Code of Arbitration Procedure.

On September 19, 1996, the Panel extended the terms, with certain exceptions, of the Temporary Restraining Order entered by the United States District Court for the Northern District of Illinois until the entry of the final decision by this Panel.

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 originals remain on file with the NASD.

AWARD

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

1. The Temporary Restraining Order, as modified by order of this Panel on September 19, 1996, is dissolved;
2. Respondent Dean Witter Reynolds, Inc.'s claims for monetary damages, attorneys' fees and costs are hereby dismissed and denied;
3. Respondent Oppenheimer & Co., Inc.'s claim for attorneys' fees is hereby dismissed and denied;
4. Respondent David Melby's Claim for attorneys' fees is dismissed and denied;
5. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
6. Any relief not specifically awarded is hereby denied.

OTHER COSTS

Claimant Dean Witter Reynolds, Inc. is liable for and shall pay to the NASD Regulation, Inc.,

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Office of Dispute Resolution the member surcharge of \$350.00 required pursuant to Section 10333 of the Code of Arbitration Procedure.

In addition, Respondent Oppenheimer & Co., Inc. is liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution the member surcharge of \$350.00 required pursuant to Section 10333 of the Code of Arbitration Procedure.

The NASD Regulation, Inc., Office of Dispute Resolution shall retain the \$2,500.00 expedited hearing surcharge paid by Claimant Dean Witter Reynolds, Inc. pursuant to Section 10205(h) of the Code of Arbitration Procedure.

FORUM FEES

Pursuant to Section 10205(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Seven (7) hearing sessions x \$600.00 per session = \$4,200.00.

The NASD Regulation, Inc., Office of Dispute Resolution shall retain the \$500.00 non-refundable claim filing fee and the \$600.00 hearing session deposit previously paid by Claimant Dean Witter Reynolds, Inc. In addition, Claimant Dean Witter Reynolds, Inc. is liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution the sum of \$1,500.00 as forum fees.

Respondent Oppenheimer & Co., Inc. is liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution the sum of \$2,100.00 as forum fees.

Concurring Arbitrators' Signatures
Name

Date

/s/ Bradford S. Allen, Esq.
Bradford S. Allen, Esq.
Public Arbitrator
Chairperson

September 74, 1996

/s/ John J. Enright, Esq.
John J. Enright, Esq.
Public Arbitrator

September 24, 1996

/s/ Charles E. Staley
Charles E. Staley
Industry Arbitrator

September 24, 1996

For NASD Regulation, Inc. Use Only
Date of Decision: September 24, 1996