

the order at 4:53 AM on June 17. At that time, you were told the order had been entered incorrectly, which resulted in the Globex Control Committee busting the erroneous trade. You were also told the order was 30 basis points off the market at that time, and would need to be reinstated. The order was not executed in the Globex session.

Additionally, in a conversation with the U Desk at approximately 7:20 AM, you were given four fills from the Globex session. You asked specifically about order 922, stating that there were 2 orders at that price. Although you stated that there were five orders, and you were looking for five fills, only four were given. You ended the conversation, again without mentioning the conversation with the Night Desk Supervisor.

During the 7:20 AM conversation, you did not indicate there was a problem with order 922 during the Globex session. Although you have stated [apparently in his telephonic complaints] that you were "legally given a fill," it should be noted that verbal fill reports are given to Lind-Waldock customers as a service. The Commodity Futures Trading Commission, in Rule § 1.33(b)(1) mandates written confirmations of daily activity. It is the written confirmation, not the verbal report, which is considered to be the trade confirmation. A copy is enclosed.

As you requested, Time & Sales was requested from the Chicago Mercantile Exchange. As shown on the enclosed copy, at 4:50:46 AM, an offer at 5932, your price, was posted. 2 seconds later, the price was cancelled by the Globex Control Committee. This was explained to you in the 4:53 AM conversation, when you were also told the order was 30 points off the market. As you can see, your price was not reached during the remainder of the Globex session. The regular day session [sic], the market opened higher, and again, your order was not elected.

Due to these factors, no adjustment to your account is warranted, as CME Rule 540 A, paragraph 2, prohibits members from guaranteeing the terms of execution of orders. As your order was not entitled to a fill, we cannot adjust your account.

Attached to the Purcell letter were several pages of documents, including the applicable June 16/17 CME Time and Sales report; a copy of the ticket for order number 922; a page from the CME Rulebook containing Rule 540 Parts A, B, and C; account statements; and a July 14, 1998, memo from Purcell to the Lind-Waldock legal department containing Purcell's summary of the problem and his recommendation to reject any adjustment. That memo also includes several pages of analysis of the trades done by Leckrone that night and a trading log prepared by Purcell.

Thus, Lind-Waldock admits the mistake in entering the original order but claims that Leckrone did not properly inform the clerk about the original problem when he called to check about 922 during the night. Purcell's letter and memo reflect his apparent conclusion that Leckrone and the clerk were both confused about what orders Leckrone had called about, and that this confusion was caused by Leckrone—or at least that Leckrone should have cleared it up.

As he put it, he did “not believe the customer was dilligent [sic] in informing us of a discrepancy in his account.” Thus, Mr. Purcell decided that no adjustments should be made in response to Leckrone’s complaint.

The tape itself was not submitted by Lind-Waldock. Complainant filed in the Office of Proceedings a request for all tapes during discovery, but he apparently did not serve a copy on Lind-Waldock. After complainant submitted a verified statement, a conference call was held with the parties to discuss evidentiary issues, to inform Lind-Waldock that the tape would need to be submitted, and to consider settlement possibilities. During that conversation, it was stipulated among the parties that trading ticket 922 includes a timestamp “5:02 a.m.” vertically over the word “Order” at the top (the copy in the original record is not legible; the time was read from the original ticket by respondent’s counsel).¹

No settlement was reached. The tape has now been filed by Lind-Waldock. It includes two calls, the first one informing Leckrone of the cancelled order (the details of which are adequately set out above in Purcell’s letter), and the 7:20 a.m. call where Leckrone was checking on whether he had been filled on order 922. The following transcript of the body of the 7:20 call was prepared by the undersigned from Lind-Waldock’s tape:

Clerk: What’s that account number?

Leckrone: 866850.

Clerk: How can I help?

Leckrone: I was wondering if you had a fill for me from, uh, Globex, on order number 922. Buying two September Australians at a price of 59-uh-32 or better?

Clerk: Well, uh [unintelligible: sounds like: “uhhhh” or “yeah” followed by “– well, what I see we don’t have anything”]

Leckrone: Okay.

Clerk: What was that ticket number?

Leckrone: 922.

Clerk: Yeah, you bought two September Australians at 5932.

¹ Lind-Waldock did not, it appears, send a copy of the tape to complainant when it sent the tape here. Lind-Waldock has been directed to send a copy to complainant.

Leckrone: Okay. 'Cause I had a second order that was doing the same thing. And I want to make sure that it was, uh, the -- the latter order that was, uh, filled.

Clerk: Well, now, let me see here. Long two. You sold two at 5940. You bought two at 5925. Right?

Leckrone: Right. I should be long two at 5932. I made, uh, three trades last -- or four trades last night and this would be the fifth. I want to make sure it's right and try to order --

Clerk: Fine. Well, you bought two at 5925 and you bought two at 5932...

Leckrone: Right.

Clerk: You sold two at 5940.

Leckrone: Right.

Clerk: Sold two at 5942.

Leckrone: Right. And then last night I should have bought, uh, you're checking if I bought two at 5932.

Clerk: Well--I already [voice rising] GAVE you that one. Are you saying you've done another one?

Leckrone: No. Okay. That's order number 922, then.

Clerk: Right.

Leckrone: Okay. That's what I wanted to know.

Clerk: Right. You've--You bought a total of eight altogether then. Correct?

Leckrone: Yes, sir. Just checking on positions.

Clerk: Right.

Leckrone: Thank you very much.

Clerk: Okay.

Leckrone: Bye bye.

The above transcript clearly demonstrates that the clerk specifically confirmed that 922 had been filled—and he did so not just once, but twice. Initially, when Leckrone asked about number 922 and went on to mention the order's terms, the clerk told Leckrone he was filled in a position on those terms, and then confirmed when Leckrone asked if that was 922. Thereafter, the clerk reviewed a series of trades with Leckrone, and Leckrone repeated (twice) his efforts to avoid confusing 922 with the other 5932 long position. That led the clerk to again list the trades, and Leckrone specifically mentioned after the listing of trades that he was still trying to determine whether an additional long order at 5932 was filled. The clerk then told Leckrone that he “already gave” that confirmation to Leckrone, and, which is only apparent upon hearing the tape, he sounded highly irritated that Leckrone would keep asking. Thereafter, the clerk *again* confirmed that this was the fill on 922. Leckrone then apparently gave up. The clerk then asked Leckrone to confirm that he had *bought* a total of eight contracts. Leckrone agreed, explained that he was just trying to check his position, and the conversation ended.

Purcell's analysis, carried over into this litigation, improperly attempts to lay the blame for the mistaken confirmation on Leckrone. Purcell, and Lind-Waldock, are incorrect if they believe that their company is not responsible for the information its clerks orally provide to customers or that the company has no duty to correct problems stemming from providing false information.² Here, where the customer attempted to confirm an order in the preferred fashion—by asking about a specific ticket number—the clerk made a number of mistakes that *in toto* amount to recklessness: first, by ignoring the fact that he could not find the ticket number; second, by satisfying himself he could match the order by reference to its terms; third, by confirming an order ticket was filled without knowing if that in fact was true; fourth, by ignoring the clear intent of the customer to avoid making a mistake when he had two orders with the same terms; fifth, by becoming impatient when the customer tried again to determine whether he had a second position at 5932; sixth, by mistakenly confirming the customer's resulting reasonable conclusion that the clerk was talking about 922 when in fact he apparently had no information about that order number; seventh, by mistakenly totaling the number of contracts traded by the customer as having been *bought* and by asking the customer to confirm a total of eight (he had, in fact, only *bought* four); and eighth, by ignoring the customer's comments to determine if he was currently long two contracts (all the other orders had balanced out).

² Purcell's implication in the letter that under CFTC Rules, Lind-Waldock could not be held to any confirmations other than written confirmations is such a bald abdication of a broker's duty to provide accurate information to its customer no matter how that information is transmitted that it is hard to see how a compliance director could have made such a mistake. He would have been more accurate had he stated that oral confirmations obviously may have mistakes that may have to be corrected, and that written confirmations are *more* reliable. Rule 1.33 simply requires that written confirmations be sent to customers under the circumstances and containing the information in the Rule. Nothing in CFTC Rule 1.33 says that a broker's duty to provide a written confirmation protects the broker from the consequences of providing false information by telephone. It would be interesting to determine if Purcell and Lind-Waldock believe that customers who are mistakenly credited with substantial profits in a written confirmation may take those profits as their own. It would also be interesting to determine whether Lind-Waldock informs its day-trading customers when they open their accounts that the company believes it has no obligation to stand behind information provided by telephone to enable them to engage in such trading. Similarly, the letter misstates the CME rule cited therein, which expressly states that a member is not prohibited from making adjustments to correct for mistakes and negligence on the member's part.

Leckrone, of course, could have insisted over the clerk's impatience that the clerk do his job—by checking on the actual order represented by ticket number 922. Of course, he had already identified the ticket number at least three times and mentioned three other times what his concern was. Lind-Waldock, to prevail in this case, would have to establish that its employee's errors were *de minimis* and that Leckrone's failure to make a seventh inquiry was the sole proximate cause of the clerk confirming to him that 922 was filled. That is an impossible burden where, as here, the clerk ignored all of Leckrone's attempts to clarify the matter and where the clerk's obvious testiness prevented further inquiry. Under the circumstances here, Lind-Waldock's defense is frivolous.

It will be noted that Purcell's letter focuses not only on the confusion about the number of fills, but also on Leckrone's failure to tell the clerk about the earlier cancellation of order number 922. Apparently, Purcell believed that the order was never reinstated (and, in his summary of trades attached to the internal memorandum he wrote to the legal department, he says "there is no indication it was ever reinstated by the customer"). However, the 5:02 a.m. timestamp occurred some nine minutes after the cancellation was told to Leckrone. That timestamp has no reason to have occurred absent some further activity occurring with the trading ticket, and tends to confirm Leckrone's un rebutted averment in the complaint that he reinstated the order after being informed of the cancellation. Thus, there was no reason to discuss the cancellation with the clerk when he called back to determine if he had a fill on 922. Thus, too, Lind-Waldock's reliance on the earlier problems (caused, one should note, by its own mishandling of the original buy order as a sell order) does not relieve it of the consequences of its clerk's mistakes, reckless conduct, and impatience.

Having relied upon the erroneous fill confirmation by quickly (seventeen minutes thereafter: *see* Purcell's trading log) going short to liquidate the position at the market, Leckrone is entitled to damages stemming from the short position he had mistakenly assumed. As noted above, that position itself was offset when he learned of his actual trading status. His losses on the short position are as follows: He sold at 6095 and later offset at 6147. The parties agreed in the conference call that the value of the difference, 52 points at \$10 per point, would be \$1,040 for the two contracts involved. In addition, the trade involved commissions and fees that would not have occurred had Leckrone not mistakenly made the trade. It appears that Leckrone was paying \$28 per round turn contract in commissions, as well as 20 cents per round turn contract in NFA fees. Thus, commissions and fees for this trade appear to have totaled \$56.40 (*see* statement dated June 17, 1998).

Leckrone has not shown, however, that he is entitled to the value of a fill on order 922, because the market indeed never returned to the 5932 level. Nor is he entitled to damages beyond those attributable to the particular position he assumed as a direct result of the mistaken confirmation given him. Any other profits he *thought* he had earned and any other trades he made during the same period of time in other contracts are not relevant to the trade he made in direct reliance upon the false information given him by Lind-Waldock's clerk.

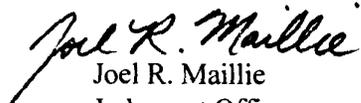
Lind-Waldock's actions go beyond mere negligence.³ The insistence of the clerk that he was confirming order 922 by confirming a trade under that ticket's terms but failing to check on the

³ *See Do v. Lind-Waldock & Company*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,516 (CFTC September 27, 1995) (broker liable for recklessly failing to ascertain status of customer order).

order when the customer repeatedly, but futilely, tried to direct the clerk's attention to that particular order number, is found to constitute reckless transmission of false information to Leckrone, and is further found to constitute a direct violation of Section 4b(a)(1)(ii) of the Commodity Exchange Act.

Violations having been found, respondent Lind-Waldock is ORDERED to pay reparations to complainant Joe H. Leckrone in the amount of \$1,096.40, plus prejudgment interest on that amount compounded annually at the rate of 4.966 % from June 17, 1998, to the date of payment, plus \$125.00 in costs as complainant's filing fee.

Dated: July 30, 1999


Joel R. Maillie
Judgment Officer