



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

**OFFICE OF
PROCEEDINGS**

VIA FEDERAL EXPRESS

November 29, 2001

Mr. Kenneth L. Wade
2104 N. Water
Decatur, IL 62526

Michael Nacarrato, Esquire
A.G. Edwards & Sons, Inc.
One North Jefferson
St. Louis, MO 63103

Re: Kenneth L. Wade v. A.G. Edwards & Sons, Inc.
CFTC Docket No. 00-R101

Dear Parties:

Enclosed is a copy of the decision in your reparations case. This decision will automatically become a Final Order of the Commission thirty-five (35) calendar days after the date of this letter unless a Notice of Appeal¹ and proof of service² is mailed by you or another party to the Commission within 20 days of the date of this letter.

The Right to Appeal

As provided in Commission Regulation 12.401, any party may appeal this decision to the Commission. To file an appeal, you must mail to the Office of Proceedings an original and one copy of both a Notice of Appeal and proof of service, along with the \$50 filing fee. Copies **must** also be provided to all other parties. The documents and the fee **must** be mailed to us within twenty (20) calendar days of the date of this letter.

This 20-day reply deadline already includes a 5-day grace period (added to the 15 days provided in the CFTC Reparations Rules) to allow time for this to reach you through the mails. The CFTC Reparations Rules do not allow for additional delays. Therefore, in order for your appeal to be considered, you must mail your appeal documents and the filing fee to us within 20 calendar days of the date of this letter, regardless of when you actually received this letter. For your convenience, we have enclosed sample formats for the Notice of Appeal and proof of service.

¹The requirements for a Notice of Appeal are found in the CFTC Reparations Rules at 12.401.

² The requirements regarding proof of service can be found in the CFTC Reparations Rules at 12.10(2).

Summary of the Appeal Process

If you choose to appeal, you must mail an original and one copy of your brief to the Office of Proceedings within thirty (30) calendar days of the date you mailed your Notice of Appeal. Copies must be provided to all other parties. If you do not file a brief, your appeal will not be considered and the initial decision will stand.

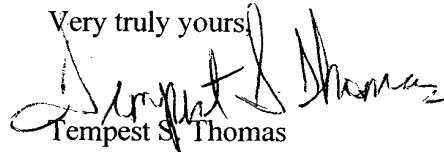
The other parties are allowed, but not required, to file an answering brief to your appeal brief. Any party who decides to file an answering brief must mail it to the Office of Proceedings and to all other parties within thirty-five (35) calendar days of the date indicated on the proof of service attached to the appeal brief. This 35-day answering deadline includes a 5-day grace period (added to the 30 days provided in the CFTC Reparations Rules) to allow time for appeal briefs to reach the other parties through the mails.

After briefs by all the parties have been filed, an appeal is ready for decision by the Commission. As a general rule, reparations appeals are decided on a "first in, first out" basis. The time required for deciding appeals varies from case to case and is largely dependent on the complexity of the issues presented. Most appeals are decided within six to nine months after briefs have been filed. When the Commission reaches a decision, all parties will be notified by the Office of Proceedings.

If There Is No Appeal

If there is no appeal and the decision becomes a Final Order and the respondent loses, the respondent has fifteen (15) calendar days, or such time as provided in the Order, whichever is longer, within which to make full payment of the reparation award. The respondent then has an additional fifteen (15) calendar days to mail to the Office of Proceedings documentary proof that the award has been satisfied. If the losing party is registered with the Commission and does not satisfy the reparation award within the required period, the registration of the losing party is automatically suspended from registration and the party is prohibited from trading in the contract markets until the award is satisfied. If the complainant wants to collect the award and the respondent refuses to pay, the winning party may request a certified decision package from the Office of Proceedings which must be taken to federal district court for enforcement of the award as provided by Section 14 (d) of the Commodity Exchange Act. The Commission does not have the authority to pursue the collection of the award.

For more detailed information concerning your appeal rights, you may consult Sections 12.10, 12.11, and 12.400 through 12.408 of the CFTC Reparations Rules.

Very truly yours,

Tempest S. Thomas
Proceedings Clerk

Enclosures

reviewed the transaction at his desk. He seeks reparations in the amount of \$8,814.70, representing his trading loss and the reparations filing fee (*see* calculation of damages on statement dated 10/14/98 attached to complaint).¹

Respondents contend that the complainant's original order was placed as a "buy" and that the local branch manager reversed the credit after respondent's exchange manager listened to a tape of the order. Respondent attaches to its answer as an exhibit an affidavit from the exchange manager, Mike Barton, stating that he personally listened to the tape on August 3, 1998 and that complainant said "buy" not "sell" when he placed his order. The affidavit also states that, "[c]onsistent with A.G. Edwards' policy" the tape has been destroyed and is no longer available.

As to the order ticket submitted by complainant with his answer that clearly shows a "sell" order, and that complainant attested was attached by the wire operator to the confirmation of a buy, respondent speculate (Answer, ¶ 2) that complainant handed the sell ticket in after the buy order was placed.

Discussion

The statute of limitations in reparations is two years, and complainant here filed his petition for reparations within the time limit. Unfortunately, waiting almost until the end of the time period has resulted in the loss of the best evidence that would resolve this issue, *i.e.*, the tape recording of the disputed order. One can easily question why, when a dispute existed that required "going to the tape" to resolve, A.G. Edwards chose to destroy the sole evidence supporting its determination that complainant was in the wrong here. The administrative costs of keeping a single tape of a disputed transaction are far outweighed by the value that such evidence would have if a complaint ever were to be raised. On the other hand, complainant did wait so long to file a claim after leaving the company in 1998 that it perhaps might not have been unreasonable for respondent to believe that he had accepted their determination in this matter. No adverse inference is drawn from the simple fact that the tape was not retained.

On the other hand, the affidavit from Barton regarding the tape recording is not nearly as dispositive as respondent urges. Even at face value, the affidavit contains no details supporting its reliability. For one thing, Barton does not address the timing of the order that he listened to; since it is undisputed that complainant placed an earlier buy order in the same index futures contract Barton might have confused the two orders.² Barton's affidavit does not demonstrate even an awareness

¹ The reparation award granted below on page 3 separates the filing fee from the trading losses.

² The statement in the text is clearly conjecture, not to be confused with a factual finding. It is significant that no evidence exists that Barton or any other employee of respondent ever made the tape available to complainant to hear, and it can be safely concluded that had they done so that point would have been made here. Since two orders were placed, if Barton indeed had relied on the first one rather than the disputed one, complainant was never granted an opportunity to correct the mistake. Destruction of evidence, and submission of an affidavit that amounts to little more than "I've listened to the evidence so therefore the Court doesn't have to hear it", invites conjecture as to numerous explanations. That is why the affidavit's proposed conclusions are not compelled by its factual contents.

that another order had been placed, nor does it indicate any details about the alleged buy order except that Barton claims to remember it was a buy. Finally, as discussed in footnote 2, Barton apparently never made the tape available to complainant or played it for him, as might be expected since a formal objection had been lodged and a credit already had been made that required reversal.

Under the circumstances, the affidavit is found to be of minimal reliability and not a substitute for reviewing the other evidence of record.

Upon consideration of all of that evidence, it is determined that respondent A.G. Edwards will be held liable for this order. Order ticket number 2706767 and complainant's un rebutted affidavit that the wire operator was responsible for comparing the written order ticket with the wire confirmation together establish that a market sell order was placed and erroneously confirmed. Respondent's invitation to the Court to speculate about how complainant could have falsified a trade ticket depends upon an argument that the branch office was so lax in supervision that a broker could easily fabricate an order ticket and falsify records already verified by other personnel. More importantly, the record is silent as to whether an investigation was undertaken, or disciplinary action was imposed, by respondent if in fact it ever had determined that its employee Wade had committed a crime by falsifying trading records – obviously among the most serious of offenses.³

Under the circumstances, respondent – having retained in its records an order ticket that it suggests was illegally prepared and is inaccurate, and having purged from its records the only evidence that it claims is correct – will not prevail in this matter. The erroneous attribution of the loss from the buy transaction into complainant's account, and the failure to execute complainant's actual sell order, violated Section 4d of the Commodity Exchange Act and caused complainant's trading losses.

Reparation Award

Violations having been found, respondent A.G. Edwards is ORDERED to pay reparations to complainant Kenneth Wade in the amount of \$8,764.70, plus prejudgment interest compounded annually at the rate of 2.35% from September 15, 1998 to the date of payment, plus costs of \$50.00 (complainant's filing fee).

Dated: November 29, 2001


JOEL R. MAILLIE
Judgment Officer

³ If respondent's tape indeed had uncovered such a blatant violation by complainant, as well as revealing definitively that complainant had knowingly sought to cheat his employer, it seems highly unlikely that the tape would have been destroyed without a copy somehow finding its way into complainant's compliance file. One could doubt that A.G. Edwards' "policy" requires destruction of evidence of employee misconduct.