

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Howard Nesse

Claimant

vs.

Merrill Lynch, Pierce, Fenner
& Smith, Inc. and John P. Cody

Respondents

AWARD

CASE NO. 88-00075

SUMMARY OF ISSUES

Claimant Howard Nesse filed this claim on January 12, 1988 against Merrill Lynch, Pierce, Fenner & Smith, Inc. and Account Executive John P. Cody. Claimant alleged damages incurred in his commodities-trading account resulting from Respondents' breach of fiduciary duty, negligence, fraud, failure to execute a stop-loss order, violation of Rule 10(b)-5, violation of Section 20 of the Securities Exchange Act of 1934, excessive commissions charged, and failure to supervise. Specifically, Claimant alleged that Cody was not a qualified commodities trader, that Cody failed to obtain commission discounts upon Claimant's repeated requests due to the volume of his trading and intentionally deceived Claimant as to the reasons the discount was denied, and that Cody failed to follow Claimant's instructions to place a stop-loss order to protect Claimant's long position in silver resulting in a loss. Claimant further alleged that Merrill Lynch failed to exercise reasonable care in supervising Cody, and was negligent in allowing Cody, a securities broker, to handle Claimant's sophisticated and complex commodities trades.

Respondents jointly and individually denied each and every allegation and maintained that Cody is an experienced and fully qualified commodity account executive, that Claimant's account and Cody were properly supervised by Merrill Lynch, and that all orders given by Claimant were accurately and promptly placed and that the best executions possible under the prevailing circumstances were obtained. Respondents further maintained that Claimant is an experienced trader and was provided with a Risk Disclosure Statement as required by the Commodity Exchange Act when he opened his account. Respondents further maintained that Claimant requested and was granted a discount on his commissions, that as a discount is not required to be given, Claimant was not defrauded nor was any duty to him breached, and that Claimant was not charged excessive commissions. Additionally, Respondents maintain that the Securities Exchange Act of 1934 does not apply to commodity trading.

DAMAGES AND RELIEF REQUESTED

Claimant requested damages for commission overcharges in the amount of \$314,784.00, for failure to execute stop-loss order in the amount of \$153,500.00, interest, punitive damages, attorneys' fees and costs. Respondents requested dismissal of the claim and costs.

DAMAGES AND RELIEF AWARDED

On May 10 and 11, and June 29, 1989 in a hearing held in six sessions in Los Angeles, California, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on December 8, 1987 and by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. on September 9, 1988 and John P. Cody on December 19, 1988. The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has determined in full and final resolution of the issues submitted for determination as follows:

1. Claimant Howard Nesse is hereby awarded the sum of Fifty Thousand Dollars and Zero Cents (\$50,000.00) in satisfaction of his claims assessed jointly and severally against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and John P. Cody.
2. The parties shall each bear their respective costs including attorneys' fees.
3. Pursuant to Section 43 of the National Association of Securities Dealers, Inc. (NASD) Code of Arbitration Procedure, the NASD shall retain the \$1,000.00 filing fee previously deposited by the Claimant.
4. Pursuant to Section 43 of the NASD Code of Arbitration Procedure, Respondents are jointly and severally assessed the sum of \$1,500.00 representing forum fees to be paid to the National Association of Securities Dealers, Inc. directly.

OTHER ISSUES

Claimant withdrew his claim for damages resulting from lost profits at the hearing.

The parties stipulated to the execution and service of this award in counterpart copies.

PRESIDING ARBITRATORS

DATE SERVED: 08/11/89

Herman R. Friedberg
Herman R. Friedberg

rd

The parties stipulated to the execution and service of this award in counterpart copies.

PRESIDING ARBITRATORS

DATE SERVED: 08/11/89

Herman R. Friedberg

Delores I. Smith

Delores I. Smith

George L. Maison, M.D.

Stephen Brixey, Jr.

Benjamin Franklin Sanford

The parties stipulated to the execution and service of this award in counterpart copies.

PRESIDING ARBITRATORS

DATE SERVED: 08/11/89

Herman R. Friedberg

Delores I. Smith

George L. Maison, M.D.

Stephen Brixey, Jr.
Stephen Brixey, Jr.

Benjamin Franklin Sanford

The parties stipulated to the execution and service of this award in counterpart copies.

PRESIDING ARBITRATORS

DATE SERVED: 08/11/89

Herman R. Friedberg

Delores I. Smith

George L. Maison, M.D.

Stephen Brixey, Jr.

Benjamin F. Sanford
Benjamin Franklin Sanford

The parties stipulated to the execution and service of this award in counterpart copies.

PRESIDING ARBITRATORS

DATE SERVED: 08/11/89


George L. Maison, M.D.