

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

James J. Burke

vs.

Case #
93-04410

Name of Respondents

Fahnestock & Co., Inc.
Harold Fain

REPRESENTATION

James J. Burke ("Claimant") represented himself at the hearing.

For Respondents, Fahnestock & Co., Inc. ("Fahnestock") and Harold Fain ("Fain") (collectively "Respondents"), Charles E. Padgett, Esq., Senior Vice President with Fahnestock & Co., Inc., located in New York, New York.

CASE INFORMATION

Statement of Claim was filed on December 6, 1993.

Claimant's Submission Agreement was signed on October 20, 1993.

Joint Statement of Answer was filed by Fahnestock and Fain on April 19, 1994.
Respondents did not execute Submission Agreements.

HEARING INFORMATION

Hearing Date/Session: November 15, 1994 - One session

Hearing Location: NASD offices located in Boston, Massachusetts.

CASE SUMMARY

Claimant commenced this arbitration to recover damages as a result of his order to purchase 10,000 shares of a new issue called Alda Inc. at 9:15 A.M. on June 8, 1993 at the opening. Claimant alleges that Respondents failed to place his order before the opening and charged \$22.00 per share plus commission. Claimant also alleges that he did not authorize the purchase over the opening price and that Respondents overcharged him \$28,500.

Respondents deny liability and state that Fain believed that he could fill the order at the start of trading. Respondents state that Fain had been unable to purchase the stock when it opened through either the market maker or the underwriter. Respondents state that they had to go to the street to purchase such a large order. Respondents contend that Claimant was not charged a commission.

RELIEF REQUESTED

Claimant sought damages in the following amounts.

- a. Aggregate securities losses: \$18,506.00, this represents the difference between the actual purchase price of (\$22.10) and the actual sale price (\$20.25), plus the service charges of (\$6.00). Claimant also requested an award of interest from June 8, 1993.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies and agreed to receive conformed copies of the Award while the original remain on file with the NASD:

Claimant submitted an affidavit which he stated his attorney had instructed him to prepare and file at the time of the hearing. That document was submitted as Claimant's exhibit No. 4; the Respondents' attorney objected to its admission into evidence. The Arbitrator has determined that the document No. 4 is not considered as an exhibit. Mr. Burke was present, testified, and was subject to cross-examination.

AWARD

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

Fahnestock through its agent Mr. Fain should have notified Mr. Burke when he placed his order that since Fahnestock was neither a market maker nor an underwriter of this new issue, Mr. Burke might not be able to have his order filled. Fahnestock through its agent Mr. Fain should have informed Mr. Burke that small orders would be filled automatically. And Mr. Fain should have contacted Mr. Burke for further instructions when he learned that the price of the stock had gone up by two dollars (\$2.00) per share.

Damages are awarded for James J. Burke, Jr. against Fahnestock Co., Inc. in the amount of **TWENTY-EIGHT THOUSAND FIVE HUNDRED SIX DOLLARS AND ZERO CENTS (\$28,506.00).**

The claim for interest is denied.

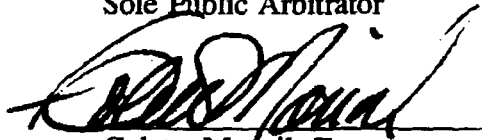
FORUM FEES

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fees are assessed.

Non-refundable Filing Fee: \$100.00 -
Hearing Session Fee: \$300.00 (1 session x \$300.00 per session)
Total Fees: \$400.00

1. The NASD has received and shall retain \$100.00 non-refundable filing fees paid by the Claimant;
2. The NASD has received and shall retain the \$300.00 hearing session deposit paid by the Claimant;
3. Forum fees in the amount of \$400.00 are assessed against the Respondent. Fahnestock who shall satisfy the fees by reimbursing Claimant \$400.00.

Sole Public Arbitrator



Colette Manoil, Esq.

Date of Decision: December 29, 1994