

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Vincent Napoleon
John Yates
Tanya Stamm

94-00907

Name of Respondent(s)

Barnett Securities Inc.

REPRESENTATION

For Claimants, Vincent Napoleon ("Napoleon"), John Yates ("Yates") and Tanya Stamm ("Stamm"): Curtis Carlson, Esq. of Carlson & Bates, P.A., Miami, FL.

For Respondent, Barnett Securities, Inc. ("Barnett"): Peter W. Homer, Esq. of Homer & Bonner, P.A., Miami, FL.

CASE INFORMATION

Statement of Claim filed: March 8, 1994.

Claimants' Submission Agreements were all signed: June 17, 1994.

Respondent, Barnett's, Statement of Answer filed: August 29, 1994

Respondent's Submission Agreement signed: August 22, 1994 by Sheldon Levine, Director of Compliance.

HEARING INFORMATION

On August 28, 1995 and September 22, 1995, in Ft. Lauderdale, Florida, Pre-hearing Conferences lasting one (1) session each were conducted via telephone conference call with arbitrator Steven A. Hurst.

On September 26, 27, 28, 1995, in Ft. Lauderdale, Florida, hearings lasting seven (7) sessions were conducted.

CASE SUMMARY

Claimants alleged that between the last day of the previous production month and their last day of work they earned commissions but were not paid. Claimants further allege that commissions they earned were withheld from them pursuant to Barnett's policy of withholding 10% of the commissions earned on non-proprietary mutual fund products even though the SEC and/or NASD found that practice improper; Barnett announced it would discontinue the practice and pay a higher payout temporarily.

Respondent denied all allegations of wrongdoing and alleged that the Claimants are not entitled to any additional compensation under either aspects of their claim for a number of reasons; that Claimants accepted all the benefits of and profited from the compensation plan in effect during the subject time; that the written policy in effect in August 1993 required that brokers be employed through the last working day of the business month to be eligible for incentive compensation for that month; that, although this policy changed in March 1994, (after Claimants left), it was consistently enforced during the time it was in effect; and, that because Claimants voluntarily terminated their employment and chose to leave the employ of the Claimants are not entitled to any incentive compensation for the month of August 1993.

With respect to the claim for increased commissions on the sale of non-proprietary mutual funds, Respondents' policy during the September 1992-August 1993 time frame was to pay a 10% lower commission on the sale of nonproprietary mutual funds; that this policy (which was in writing and specifically known to Claimants) was a common practice in the brokerage industry at the time and is legal and permissible under current broker/dealer regulations; that this policy was eliminated in February 1994; that the new policy operated only prospectively; and, that Claimants are not entitled to a retroactive higher payout.

Respondent alleged the affirmative defenses of waiver, estoppel, forfeiture, bad faith/unclean hands, failure to state claim, consent, statute of limitations and good faith.

RELIEF REQUESTED

Claimants requested actual damages of approximately \$100,000.00, vacation pay, interest, attorney's fees and costs.

Respondent requested that all claims against them be dismissed.

OTHER ISSUES CONSIDERED AND DECIDED

- (1) Respondent's Motion to Dismiss/Summary Judgement was denied.
- (2) Respondent's Motion to Amend Affirmative Defenses was denied.
- (3) The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- (1) Respondent, Barnett, is found not liable and, therefore, all claims against it are hereby dismissed.
- (2) Claimants' requests for vacation pay, interest, attorney's fees and costs are denied.

OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including attorney's fees.

FORUM FEES

- (1) Pursuant to Section 44(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$5,850.00 (two (2) pre-hearing conferences x \$300.00 plus seven (7) sessions \$750.00).
- (2) Claimants are hereby assessed \$2,925.00 for which the NASD shall retain the \$750.00 previously deposited in partial satisfaction thereof, leaving a balance due to the NASD of \$2,175.00 payable to the National Association of Securities Dealers, Inc.

(3) Respondent, Barnett is hereby assessed \$2,925.00 payable to the National Association of Securities Dealers, Inc.

(4) The NASD shall retain the non-refundable filing fee of \$500.00 paid by the Claimants.

Fees are payable to the National Association of Securities Dealers, Inc.

Arbitrators Signatures

15/
Steven A. Hurst

Industry

15/
Richard D. Longacre

Industry

15/
Gustavus L. Pearthree

Industry

Date of Decision: 9/19/95