

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

Case No.: AAA 01-15-0003-9055

Richard Allen and Sheri Allen, (Claimants)

-vs-

Alabama Credit Union, (Respondent)

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and oral hearings having been waived in accordance with the Rules, and having fully reviewed and considered the written documents submitted to me, do hereby, AWARD, as follows:

FINDINGS OF FACT:

Sheri and Richard Allen, husband and wife, the Claimants in the above styled cause, rented a car from Hertz place of business in Daphne, Alabama, on October 11, 2014. (The Allens will hereinafter be referred to as the Claimants). They rented the car in question because their own car was being repaired. They expected to have use of the car for a week but due to delays in the repair of their car, they may have had the rental car for a longer but unspecified time. The invoice they received from Hertz stated that the rate for such rental was Twenty-five dollars (\$25.00) daily but additional charges and/or a higher rate would apply if the car was returned early or late or to a different location. No list of the amount(s) of said higher rates and/or additional charges was shown on the Hertz invoice given the Claimants at the time of rental on October 11, 2014. The estimated charge on the original ticket was Two hundred sixty eight dollars and eleven cents (\$268.11).

Claimants offered their Visa debit card, which had been issued to them by the Alabama Credit Union, for the charges expected to be incurred during the period of rental of the Hertz car. (The Alabama Credit Union will hereinafter be referred to as the Respondent).

Respondent sent Claimant a notice that their Visa card would expire and no longer be valid after October 27, 2014, but sent them a new Master Card debit card as a replacement for the Visa one.

Respondent approved charges from Hertz against Claimants' Visa account in the amount of Four hundred and seventy-eight dollars (\$ 478.00) between October 7th and 8th, 2014, before the Claimants rented the car in this case. Respondent then approved various charges from Hertz against Claimants' account but denied a charge on October 14, 2014, citing Not Sufficient Funds. Respondent continued to approve varying amounts of charges from Hertz from October 15th through November 12, 2014, approving a final charge of a total of Fifteen hundred sixty two dollars and twenty-one cents (\$ 1,562.21) on November 12, 2014, after said Visa debit card had expired.

Respondent transferred funds from Claimants checking account on several occasions and applied said funds to Claimants' debit card account although Claimants' had not entered into an Overdraft protection plan with Respondent. There was no evidence of intermittent charges from Hertz on the Claimants'

Alabama Credit Union bank account statement for activity between 10/1/14-10/31/14 so Claimants did not know that Hertz was making charges during that time.

Claimants discovered the Hertz charge of Fifteen hundred sixty two dollars and twenty-one cents (\$ 1,562.21) on their Alabama Credit Union account statement on December 12, 2014, and called the Respondent to give verbal notice of an error and to begin the dispute process. Claimants emailed a Dispute form supplied by the Respondent within twenty-four (24) hours of discovering the disputed charge.

Respondent initiated an investigation immediately and informed Claimants on December 23, 2014, that no error had been made on their account relating to the Hertz charges.

Respondent wrote Claimants on December 22, 2014, on January 1, 2015 and again on January 26, 2015, first informing them of being overdrawn and then of their checking account being closed. In each letter, Respondent referred to the Claimants' Overdraft Privilege which had never been executed. Claimants were charged NSF fees six (6) times for being overdrawn.

Claimants retained counsel and a Notice of Arbitration was filed. Respondent has denied all charges.

CONCLUSIONS OF LAW:

CLAIM I: Violation of the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. 205,

Unauthorized Transactions

Claimants and Respondent had entered into a Membership and Account Agreement (hereinafter referred to as the Agreement) which included a mandatory arbitration provision. The provision is governed by the Federal Arbitration Act. The American Arbitration Association (hereinafter referred to as the AAA) Consumer Rules apply.

Regulation E applies to any electronic fund transfer that authorizes a financial institution to debit or credit a consumer's account. (See 12 C.F.R. 2053(a). The term electronic fund transfer means any transfer of funds that is initiated through an electronic terminal, telephone, computer or magnetic tape for the purpose of ordering, instructing or authorizing a financial institution to debit or credit a consumer's account. The charges in dispute fall under Regulation E since they were electronic debit card transactions.

Claimants assert that the charge made by Hertz on December 12, 2014, in the amount of \$1,562.21 against their account with Respondent was unauthorized. Respondent claims that since the Claimants presented their debit card to Hertz when they rented a car on October 11, 2014, that any subsequent charges were authorized. It is clear from the ticket obtained from Hertz when the Claimants obtained the car on October 11, 2014, that the anticipated rental would be at the rate of \$25.00 a day. The same ticket shows an entry that reads "...Net Due \$268.11" which would indicate eleven days' anticipated use at the stated rate but there is no evidence submitted by either party as to when the car was returned or if other fees or charges were made.

Claimants allege that they did not authorize the transaction on December 11, 2014, nor did they receive a benefit from it and that, therefore, the charge was unauthorized under 12 C.F.R.205.2 (m). Respondent alleges that Claimants' initial authorization was ongoing and that they did receive a benefit. Certainly

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Claimants received the benefit of the use of the car while they had it but since there is no proof of when their use ended, the use time is uncertain.

What is not uncertain, however, is a showing from Respondent's records that the last charge by Hertz for the car was on or before November 11, 2014, in the amount of \$1,562.21. (Respondent's Ex. 100, p.2.) That single record is most revealing. It shows that the Claimants were charged \$ 475.00 by Hertz on October 7, 2014, and \$3.00 on October 8, 2014, several days *before* the Claimants got the car from Hertz. Even if Claimants had called to reserve a car for their later use, what are these charges for? Charges of \$ 67.00 and \$ 68.00 for October 12th and 13th respectively were approved by Respondent and then, on October 14, 2014, Respondent denied a charge stating NSF. At that point, Claimants were already charged \$ 613.00 for four (4) days' car use when the amount should have been \$100.00 at the most. Under the agreement Hertz had with Visa, Hertz should have contacted the Claimants and asked for another form of payment as soon as they received a "decline response". (See Respondent's Ex. 105, p. 11). There is no evidence that Hertz contacted the Claimant about another form of payment.

Respondent informed Claimants that their Visa debit card would expire and no longer be valid for use after October 27, 2014, and sent them a debit Master Card as a replacement for the Visa. Claimants immediately contacted Hertz with oral information about their new card but were told that they would have to present the card physically to the Hertz office for it to be used for charges for the rental car. All of this communication took place before the Visa card expired and no charges other than the final charge on November 11, 2014, were made to the Visa card. Respondent approved the final charge on November 11, 2014, although the Visa card had expired by that time.

It is a violation of common sense that a consumer, the Claimants in this case, would authorize unsubstantiated charges such as those imposed by Hertz against their account with Respondent when the anticipated charges were only \$ 25.00 a day and the use period could not have been longer than October 11, 2014, to November 11, 2014, a total of thirty-two (32) days. If the use period were the full thirty-two days, the charges would have been no more than \$800.00 rather than the \$1,562.21 actually charged. However, since there is **no proof** of how long the use period was, the anticipated charge of \$ 268.11 on the original Hertz ticket is the only charge the Claimants are going to be held responsible for and all other charges are hereby ruled unauthorized.

In any action which involved a consumer's liability for an unauthorized electronic fund transfer, the burden of proof is upon the financial institution to show that the electronic fund transfer was authorized. 15. U.S.C. 1693(g). Respondent has failed to provide reasonable evidence that the charges were authorized and, therefore, has violated 12 C.F.R. 205.

CLAIM II: Violation of the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. 205,

Time- Denial:

Claimants notified the Respondent on December 12, 2014, as soon as they learned of the charges made by Hertz and approved by Respondent for the use of the rental car obtained on October 11, 2014. Under the requirements of 12 U.S.C. 205.11(c) (1), a

Financial Institution must investigate promptly and determine whether an error occurred within 10 business days of receiving notice of error. The institution shall report the results to the

consumer within 3 business days after completing its investigation and correct the error within one business day after determining the error occurred.

Under the requirements of 12 U.S.C. 205.11(c) (2),

If the financial institution is unable to complete its investigation within 10 business days, the institution may take up to 45 days from receipt of notice to investigate and determine whether an error occurred, provided the institution provisionally credits the consumer's account in the amount of the alleged error within 10 business days of receiving the error notice.

Claimants assert that Respondent did not respond to them in a timely manner in denying their claim. Respondents allege they did respond well within the 10 business days allowed by statute. Respondent's letter of December 23, 2014, denying the Claimants' allegation is a classic example of malfeasance. The letter opens with the following sentence and then continuing within the body of it:

I spoke with our dispute rep about your dispute and she stated that since Hertz did obtain several authorizations totaling \$1,336.00 before the Visa was no longer valid, they have the right to collect on those authorizations plus 15% which totals \$1,536.40. The only potential dispute rights we would have on this would be the difference of the charge of \$1,562.21 which is \$25.81 unless you have proof that the charges were paid by other means....

While the receipt from Hertz does have a total of \$268.11 it does state that higher rates may apply. ...

The only thing we can do is order a copy of the receipt from Hertz to see if they will provide us with a list of the detailed charges. (Emphasis added).

In a case where exorbitant charges are in issue and an institution is under the requirement of Federal Statutes and Regulations to do an investigation, wouldn't the first step be to obtain the charges from the merchant with a full explanation of what each charge represents? In spite of Respondent having sent the letter from which excerpts above have been taken within the required time, it is obvious that Respondent **never** did a thorough investigation of Claimants' dispute and has, therefore, failed to meet the requirements of 12 C.F.R. 205(c)(1).

Furthermore, Respondent says in the letter cited above that Claimants are subject to an additional 15% charge of alleged "authorized" charges and submitted the Agreement between Visa and Hertz as proof of authority to charge said 15%. Nothing in the paperwork between Hertz and Claimants mentioned such a charge and Claimants were not parties to the contract between Visa and Hertz. Therefore, the 15% charge is inappropriate in this case and does not apply.

CLAIM III: Violation of the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. 205,

Time- Investigative Documents

In Respondent's letter of December 23, 2014, no mention is made of the Claimants' right to request documents on which Respondent relied in making its decision that no error had occurred. Claimants' counsel wrote Respondent on May 29, 2015, requesting copies of any and all documents on which Respondent had relied in making its decision to deny Claimants' disputed charges. Respondent wrote Claimants' counsel, on June 26, 2015, stating "Enclosed are copies of the requested documentation.

These were previously provided to Mr. and Mrs. Allen some time ago” yet there is no proof that such production had occurred. Furthermore, even if Respondent did not receive Claimants’ counsel’s letter until June 1, 2015, it had not responded with documents before June 26, 2015, well beyond the time allowed by the Statute. When Respondent did answer Claimants’ counsel’s letter, it included, in its Exhibit 100, correspondence between Claimant, Richard Allen, and the Respondent, and its own internal records of the charges from Hertz. In its Exhibit 101, pages 1 and 2, Respondent included a copy of Claimants’ Basic Checking History but it does not show any charges prior to November 15, 2014, beyond the dates at issue in this case. Therefore, it is of no relevance to any investigation of claims made in this matter.

It is noteworthy that Respondent had **still** not gotten or at least not produced an itemized statement from Hertz explaining the charges at issue here. Although Respondent had not relied on an itemized statement from the merchant, it would have shown a good faith attempt to understand the charges after the fact and show some concern about resolving a matter with a customer...but that did not happen.

Therefore, Respondent’s inaction by not providing Claimants with documentation in a timely manner which would support its decision to deny their dispute when Claimants had requested such is in violation of 12 C.F.R. 205.

CLAIM IV. Violation of the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. 205.17,

Respondent Did Not Provide Segregated Notice

12 C.F.R. 205(17) requires that a financial institution holding a consumer’s account shall not assess a fee or charge on a consumer’s account for paying an ATM or one-time debit card transaction pursuant to the institution’s overdraft service unless the institution provides a notice in writing segregated from all other information, describing the institution’s overdraft service.

From the evidence presented, the Respondent did not provide a notice in writing segregated from all other information, describing the institution’s overdraft service. Respondent did, however, treat Claimants’ account *as though it did have overdraft protection* although Claimants had not chosen to participate in that plan. Respondent then charged Claimants’ account with NSF fees when the account was overdrawn.

Respondent argues that 12 C.F.R. 295.17 does not apply because it alleges the charge(s) were neither at an ATM nor a one-time debit. However, a car rental business does not typically charge a customer for the period of rental until the car is returned. Claimants’ evidence includes his banking account statement for the period of 10/1/14-10/31/14 where no charges from Hertz appear although apparently Respondent was authorizing charges against this account throughout this period.

The evidence submitted by Respondent, or, actually the lack thereof, supports the position that Respondent did not provide a notice in writing segregated from all other information, describing the institution’s overdraft service.

Therefore, Claimants’ position that the final charge IS a one-time debit and the provisions of the statute do apply is affirmed.

CLAIM V: Violation of the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. 205.17,

Respondent Did Not Provide an Opportunity to Opt-In

12 C.F.R. 205(17) requires that a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service unless the institution provides a reasonable opportunity for the consumer to affirmatively consent, or opt-in, to the institution's payment of ATM or one-time debit transactions.

The Respondent did not provide a reasonable opportunity for Claimants to affirmatively consent, or opt-in, to Respondent's payment of ATM or one-time debit transactions yet posted the \$1,562.21 Hertz charge on an expired debit card. Such action is a violation of the above cited statute.

CLAIM VI: Violation of the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. 205.17,

Claimant Did Not Opt- In

12 C.F.R. 205.17 requires that a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service unless the institution obtains the consumer's consent, or opt-in, to the institution's payment of ATM or one-time debit transactions.

Respondent did not obtain the Claimants' consent, or opt-in, to Respondent's payment of one-time debit card transactions.

Respondent apparently transferred deposits and occasionally available funds to pay the Hertz billing while refusing to pay Claimants' charges for medical insurance, automobile insurance and car tag expenses, all without authority to do so as might have been possible if Claimants had participated in Respondent's overdraft program. Such action is a violation of the above cited statute.

CLAIM VII: Violation of the Electronic Funds Transfer Act, Regulation E, 12 C.F.R. 205.17,

Claimant Not Provided Confirmation of Consent in Writing

12 C.F.R. 205(17) requires that a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service unless the institution provides the consumer's consent in writing which includes a statement informing the consumer of the right to revoke such consent.

The Respondent did not provide the Claimants' with confirmation of their consent in writing which included a statement informing them of their right to revoke such consent to Respondent's payment of ATM or one-time debit transactions. However, Respondent posted the \$1,562.21 Hertz charge on an expired debit card. Such action is a violation of the above cited statute.

AWARD:

Claimants had an estimated charge of Two hundred and sixty-eight dollars and eleven cents (\$268.11) from Hertz at the time they took possession of the rental car on October 11, 2014. They had a balance of One hundred two dollars and seventy-three cents (\$102.73) in their checking account from which payment for the Hertz bill would ultimately be paid. Claimants owe Respondent One Hundred sixty-five

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dollars and thirty-eight cents (\$165.38) for the balance of the Hertz bill. Said amount may be offset by the following:

Respondent owes Claimant One hundred seventy-two dollars (\$172.00) for improperly charged NSF fees plus interest at the rate Respondent was paying on November 12, 2014, to the present date.

Pursuant to 15 U.S.C. 1693(m), Respondent is hereby ordered to pay Claimants One thousand dollars (\$1,000.00) for each of Claimants' claims I, II, III and Five hundred dollars (\$500.00) for each of Claimants' claims IV, V, VI and VII for a total of Five thousand dollars (\$5,000.00) in penalties.

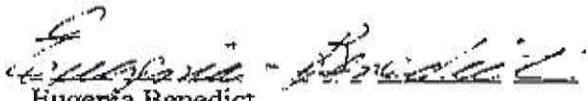
Pursuant to 15 U.S.C. 1693(m), Respondent is hereby ordered to pay Claimants' attorney's fees and all costs of this action. Claimants' attorney shall submit his professional charges to the AAA and to Respondent's counsel by November 30, 2015, for payment by December 11, 2015.

The administrative fees of the American Arbitration Association (AAA) totaling \$1,700.00, and the compensation of the arbitrator totaling \$750.00 shall be paid by Respondent no later than December 11, 2015. Therefore, Respondent shall reimburse Claimant the sum of \$200.00 previously incurred when filing this claim.

All payments are to be made within fourteen (14) business days of the date of this Award, that date being December 11, 2015.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

SO ORDERED this 23rd day of November, 2015.


Eugenia Benedict
Arbitrator