



## AMERICAN ARBITRATION ASSOCIATION

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Case Number: 01-20-0015-3859

In the Matter of the Arbitration between

Kathy Noling (“Claimant”)

-vs-

US Bank, N.A. (“Respondent”)

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### INTERIM AWARD OF ARBITRATOR

I, Robert M. Gippin, 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 by the parties, each represented by counsel, do hereby, AWARD on an interim basis, as follows:

#### **FACTUAL BACKGROUND**

The Arbitrator has admitted and considered all of the evidence and arguments submitted by the Parties to date. All objections to the evidence are overruled. The evidence and cited authorities were given the weight the Arbitrator considered appropriate, which ranged considerably. For the most part, the Arbitrator found the Respondent’s evidence as to disputed matters to be more credible, as is reflected in the narrative below. Nevertheless, the evidence and the applicable authorities warrant this Interim Award against the Respondent.

Claimant Kathy Noling (“Ms. Noling”) was issued a ReliaCard prepaid debit card by Respondent U.S. Bank (“the Bank”), that was activated on May 26, 2020 (“the Card”). The purpose of the Card was for Ms. Noling to receive unemployment compensation payments from the State of Ohio. The relationship between the parties as to the Card was governed by the terms of a ReliaCard Cardholder Agreement (the “Cardholder Agreement”) effective 6/1/2018 and a Prepaid Online and Mobile Financial Services Agreement effective 01/01/2017 (the “Online Financial Services Agreement”) (together, “the Agreements”).

Ms. Noling began to use the Card soon after it was activated, without incident until the events described below.

On or about August 28, 2020, Ms. Noling contacted the Bank to dispute certain Roku charges made on the Card that she said were unauthorized. She did so again on or about August 31, 2020, as to further Roku and Netflix charges. On September 16, 2020, the Bank put a hold on the Card because of the disputed transactions that suggested unauthorized use of the Card.

On September 16, 2020, there was a \$156.00 balance on the Card that would have been available for Ms. Noling to use absent the hold. The balance increased by a deposit on September 17, 2020, to \$456.00; on September 18 to \$756.00; on September 19 to \$1,056.00; on September 22 to \$1,356.00 and finally on September 23 to \$1,656.00. There were no further deposits to the Card thereafter.

Ms. Noling requested on September 16, 2020 for the Card to be reactivated, when she learned of the hold. She was told by the Bank's representatives that she would need to fax the following documents to the Bank: (1) a valid, non-expired government identification; (2) a valid social security card, and (3) tax documents from 2019.

Ms. Noling was unable to provide the requested information and so informed the Bank on several occasions on and after September 16, 2020. She instead transmitted her Ohio identification card, birth certificate, a Paramount Advantage health insurance card, and an Ohio Edison energy bill on two occasions (September 28 and October 11, 2020 – a letter to her from the White House about her economic impact payment also was included the second time).

On October 12, 2020, a Bank Representative told Ms. Noling for the first time that the Card could be reactivated if she only submitted her Ohio identification card and a “selfie” via the Bank's website. Ms. Noling did so on October 13, 2020. No explanation by the Bank was offered then or in these proceedings as to why Ms. Noling was incorrectly given more difficult reactivation information requirements before then. The Arbitrator finds that the failure to give Ms. Noling the correct information at the outset was unjustified.

Despite having received the necessary information from Ms. Noling, the Bank did not reactivate the Card until October 29, 2020. No explanation was offered by the Bank then or in these proceedings for the delay. Nor was any information provided as to the Bank's internal process for reactivating a card that had been put on hold once the customer had provided the necessary information. The Arbitrator finds that the delay was unjustified and was unreasonably long. Thereafter, to December 7, 2020, Ms. Noling drew down all but \$1.31 of the balance on the Card, which apparently remains active.

There is no credible evidence that Ms. Noling was ever denied access to information about the Card account, or any required notices, or was cut off in conversations with Bank staff. She must have known why the hold had been put on the Card (her transaction disputes suggesting unauthorized activity).

## **LEGAL ANALYSIS**

The Bank's conduct in this matter is primarily analyzed under the Agreements, the federal Electronic Funds Transfer Act (“EFTA”) and Bank Secrecy Act and the Ohio Consumer Sales Practices Act (OCSPA). Three provisions of the EFTA are particularly applicable: 15 U.S.C. §§1693f, 1693h(a)(1) and 1693m (the latter two sections will be referred to as “the EFTA Provisions”). There is no basis for any claim under Ohio common law for money had and received. The error notification provisions of 15 U.S.C. §1693f were not invoked and are not applicable.

The only conduct of the Bank giving rise to liability was 1) the failure to inform Ms. Noling at the outset that the hold on the Card could be lifted if she just supplied her Ohio ID and a “selfie” on the Bank's website and 2) the Bank's subsequent failure to lift the hold for 16 days after she did so. These will be referred to hereafter as “the Misconduct.”

The Misconduct violated the Agreements and the EFTA Provisions. The Bank had a contractual obligation to inform Ms. Noling correctly how to revalidate the Card to lift the hold and then to lift the hold promptly. The incorrect validation information and failure to lift the hold promptly resulted in failures to make electronic fund transfers in violation of 15 U.S.C. §1693h(a)(1). None of the exceptions within that subsection applied.

There is no basis for any other of Ms. Noling's claims. Without limitation, there was no obligation as to initial validation or notice of the hold. The Bank was obligated under the Bank Secrecy Act to put a hold on the Card for investigation and revalidation once Ms. Noling reported unauthorized transactions. The length of the hold for that purpose was not unreasonable; indeed, the investigation was apparently completed so that the Card could have been reactivated as of September 16, 2020, the same day the hold was imposed.

The Misconduct did not violate the OCSPA, not being the sort of misrepresentation or deceptive practice in the course of an ongoing consumer relationship that is subject to protection under those statutes.

Ms. Noling suffered actual damage from the Misconduct, though it was minimal, consisting of interest on the funds that she could not use while the Card was on hold. No other rate has been suggested by either party, so the Arbitrator has used the Ohio statutory judgment rate of 5%.

Under the EFTA Provisions, but not the Agreements, Ms. Noling is also entitled to statutory damages and an award of attorney fees and costs of litigation. The Bank did not demonstrate as required by 15 U.S.C. §1693m(c) that the Misconduct resulted from bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, or that any error was resolved promptly pursuant to 15 U.S.C. §1693m(e). Indeed, the Bank has never conceded that there was any error. Nor did the Bank demonstrate as provided in 15 U.S.C. §1693m(d) that the incorrect validation information and reinstatement delay were the result of good faith compliance with any regulatory provisions.

### **CALCULATION OF INTERIM AWARD**

A daily interest rate of .0137% must be used under these circumstances. Ms. Noling was denied the use of \$1,650.00 for 35 days (September 23 to October 29, less one day between when she was told she could submit an Ohio ID copy and a "selfie" and when she did so), for which the interest is \$7.91. She was denied the use of \$1,350 for one day (September 22), for which the interest is \$0.18. She was denied the use of \$1,056.00 for three days (September 19 to September 21), for which the interest is \$0.43. She was denied the use of \$756.00 for one day (September 18), for which the interest is \$0.10. She was denied the use of \$456.00 for one day (September 17), for which the interest is \$0.06. She was denied the use of \$156.00 for one day (September 16), for which the interest is \$0.02.

The total interest for lost use of funds, the amount of Ms. Noling's actual damage, is \$8.70.

15 U.S.C. §1693m(a)(2)(A) and (b)(1) establish a range of \$100.00 to \$1000.00 per violation as statutory damages, to be awarded under stated criteria. Here the Arbitrator finds two separate violations: 1) the incorrect statement of necessary revalidation information and 2) the unexplained and unreasonably long delay in lifting the hold after the revalidation information was provided.

Applying the factors set forth in subsection (b)(1), while the Misconduct was not shown to have been intentional, the misinformation was persistently provided over a period of about a month and the hold was not lifted for over two weeks after the revalidation information was provided. The Misconduct was

necessarily of a particularly aggravating nature to Ms. Noling, who was dependent on the funds on the Card for basic living needs during the pandemic.

The Arbitrator notes that the Bank still does not acknowledge any error as to the Misconduct, but also notes that its procedures at least finally put Ms. Noling in contact with an employee who could and did promptly accomplish the first step in getting the hold lifted, by giving Ms. Noling the correct, much simpler revalidation information procedure.

The Arbitrator finds that statutory damages of \$250.00 per violation are appropriate under the circumstances of this case, for a total of \$500.00.

As provided in the Scheduling Order of February 2, 2021, Claimant's counsel shall within one week from the date of this Interim Award submit its evidence to support an award of attorney fees and costs of litigation. Respondents' counsel shall submit its response within one week after that. No other evidence or argument shall be submitted.

The administrative fees of the American Arbitration Association (AAA) totaling \$1,900.00 shall be borne by Respondent, and the compensation of the arbitrator totaling \$1,500.00 shall be borne by Respondent, pursuant to the EFTA Provisions cited above.

The sums finally awarded shall be paid on or before 10 days from the date of the Final Award.

This Interim Award is in full settlement of all claims submitted to this Arbitration, other than as stated above. All claims not expressly granted herein or to be considered subsequently are hereby denied.

March 25, 2021

/s/ Robert M. Gippin  
Robert M. Gippin, Arbitrator