

ORIGINAL

Decision No. 77521

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

L. BERT EDWARDS

Complainant,

vs.

THE GENERAL TELEPHONE COMPANY, A Corporation,

Defendant.

Case No. 8971
(Filed September 22, 1969)

L. Bert Edwards, in propria
persona.
A. M. Hart, Donald J. Duckett
and Walter Rook by Walter
Rook, for defendant.

O P I N I O N

This case involves a disputed telephone bill of \$1,657.26. The dispute concerns telephone calls that were charged to complainant because of the use of complainant's credit card number. Complainant asserts that he did not authorize the telephone calls or the use of his credit card number to make the telephone calls and, therefore, is not liable for the charges. Public hearings were held before Examiner Robert Barnett at Los Angeles on January 20 and 21, 1970.

To fully understand this case one needs to know how telephone credit cards are obtained and used. Telephone credit cards enable representatives of business firms and others, while away from home office or residence, to make calls on a credit basis. Charges are included in the regular monthly telephone bill for their home office or residence. Credit cards are applicable in the United States, including Alaska and Hawaii, Canada, Puerto Rico, Mexico, and other countries. Credit cards are issued by General Telephone, The Bell System, and independent companies, and are honored by almost all telephone companies in the United States and in many foreign countries. Credit cards are issued to those applicants whom the issuing company considers good credit risks. Upon approval of credit a credit card number is assigned to a subscriber. This number is usually a ten digit plus one letter number. The number is changed yearly, in December.

General has no tariffs covering the issuance or use of credit cards. Nor is there any written agreement entered into between General and the credit card subscriber. General mails to its subscriber a card which shows the subscriber's area code and his credit card number. The card also gives instructions on how to place a credit card call. To place a call the subscriber dials the operator and says "This is a credit card call. My card number is (here he gives card number)." Then the subscriber tells the operator which telephone number he wishes to call. No identification other than the credit card number is required to be given by the calling party.

From the operator's point of view, when a request for a credit card call is placed she is to secure the credit card number prior to advancing the call to prevent the called party from hearing the credit card number. She then marks a special toll ticket with the credit card number. She is to observe whether the credit card number contains the proper coded numbers in their proper order. If the credit card number does not meet the proper specifications she is to inform the calling party of this fact and ask for the correct number. If the calling party cannot give a correct number his call will not be accepted on a credit card basis. Except in special circumstances, which are not applicable in this case, if a credit card number appears valid no further check is made by the operator. The operator has no way of knowing whether the credit card number has been lost, stolen, or canceled.

Complainant's Testimony

Complainant testified that he was first issued a credit card in December 1967. On October 28, 1968 he received a telephone bill dated October 25, 1968 in the amount of \$208.24. This bill was approximately \$100 more than his average telephone bill had been and, thinking it an error, he called General and requested that they check the bill. Complainant has a note book in which he records all his business telephone calls. On October 30, 1968 he left for Mexico City on business. While in Mexico City he conducted business with his associate Mr. William Butchko and met socially with Mr. Stanley Gerbovaz, a person associated in business dealings with Mr. Butchko. The Butchko-Gerbovaz business dealings were not connected in any way with the business dealings between complainant and Mr. Butchko. Complainant left Mexico November 16, 1968.

On December 2, 1968 complainant called General and said that certain calls on his November 25, 1968 bill were unauthorized and he requested that his current credit card be canceled and a new one issued. On December 27, 1968 a new credit card was issued to complainant. On January 17, 1969 complainant paid all telephone charges up to and including the billing date of December 26, 1968. He testified that he did this despite the fact that he disputed many of those calls because he didn't want his telephone service disconnected. On January 27, 1969, after receiving his January 25 bill complainant talked to a representative of General and stated that many calls on his bill were unauthorized. On January 28 complainant again spoke to General and was told that a new card would be issued that day and complainant would have no liability after January 28, 1969 for calls charged to the old card. At this time he told General that Mr. Gerbovaz^{1/} might have been the person making the unauthorized telephone calls. On January 29, 1969 he again called General and told them that Mr. Butchko had been authorized to make some calls and that perhaps Mr. Butchko's lawyer had made some of the unauthorized calls. On February 20, 1969 General issued a new credit card to complainant and canceled his old credit card as of February 19. On April 28 he told General that Mr. Gerbovaz promised to pay for the calls not authorized by complainant.

^{1/} At the time of the hearing it was rumored that Mr. Gerbovaz was in jail in Mexico.

Complainant did not pay any part of the bills issued on January 25, 1969, February 24, 1969, March 26, 1969 and April 7, 1969, until April 28, 1969. On that date the total amount due was \$2,276.26 and complainant paid \$619, being the amount for which he felt responsible. In May 1969 a final bill was rendered for the amount of \$1,657.26 (The amount in dispute) plus \$307.13 in new charges. The \$307.13 bill is not disputed.

Complainant stated that he did authorize Mr. Butchko to use his credit card number. He gave Mr. Butchko the number, not the card. He gave Mr. Butchko his credit card number about August 1968 and he also gave Mr. Butchko the credit card number issued in December 1968. He never authorized Mr. Gerbovaz to use either his card or his credit card number. He never had any business dealings with Mr. Gerbovaz. After February 20, 1969 when he received his new credit card only one unauthorized call was made either on the old credit card number or on the new credit card number. Each time he called General since January 1969 he was told General was investigating the unauthorized use of his credit card.

General's Testimony

A customer representative of General testified that complainant first contacted her on October 28, 1968 and questioned certain toll calls shown on the bill of October 25, 1968. On November 12 the witness called complainant's wife and told her that an investigation of the toll charges had been made and that in the company's opinion complainant was liable for the charges. On November 20 the witness spoke to complainant who denied responsibility for certain calls but General refused to make any adjustment. General again checked the disputed calls. On January 13, 1969 General contacted complainant and informed him that General was holding him responsible for all calls made on his credit card. On January 17 complainant paid the total billing as of December 25, 1968. On January 27, 1969 complainant called and disclaimed toll calls on the bill of January 25, 1969. On January 28 complainant again called and stated that the toll calls previously disclaimed were authorized as they had been made by either plaintiff's partner or the partner's lawyer. On February 19, 1969 complainant again called and requested a new credit card, which was issued the same day.

A security officer for General testified that his office began an investigation of complainant's charges on May 12, 1969. As part of his investigation he interviewed both complainant and Mr. Butchko. Complainant stated to him that the only person having permission to use his credit card was Mr. Butchko. Complainant further stated that the unauthorized calls were made by Mr. Stanley Gerbovaz who did not have permission to use the credit card. Mr. Butchko stated that he did not give anyone permission to use complainant's credit card. The witness then investigated all of the disclaimed telephone calls. His investigation took the form of calling the telephone numbers and asking the persons who answered if they recalled talking to Edwards, Butchko, or Gerbovaz. Some of the numbers called did not answer; some of the parties who answered refused to give information; but most of the parties contacted did give some information concerning the nature of the telephone calls. Based on his investigation, the witness concluded that many of the disclaimed calls were made by Butchko but that the majority of the calls were made by Gerbovaz. Many individuals contacted stated that Gerbovaz and Butchko were partners.

The witness introduced Exhibit No. 6 which comprised his notes of conversations with parties who received the disclaimed calls. Some random excerpts from those notes are: on calls to Mr. Jack Schreiber, "Mr. Schreiber stated that Gerbovaz was the person who called him and he knows Butchko. As far as he is concerned Butchko and Gerbovaz are partners. The calls were made to him regarding some business deal with both subjects which did not come off. He was taken for a little money. (No he does not know Edwards)." On calls to Keatons Mortuary the notes show: "Thirteen calls to this number. Mr. Frank Keaton is a friend of Warren Bolton (Saturn Airways) and director of Cal Marine Title Co. He and Bolton were involved in a business deal with Gerbovaz and Butchko who were partners. There were other people involved also. He does not know Edwards. Gerbovaz was the person making the calls." Fifty-six calls went to Warren C. Bolton. The investigator's notes show, "Bolton received most of the calls from Gerbovaz. Two or three times he spoke to Butchko after speaking to Gerbovaz. Gerbovaz would call talk a few minutes then let Butchko talk. Bolton and Keaton were doing business with Gerbovaz and Butchko. The business deal did not jell. Butchko and Gerbovaz could not produce anything. The only time Bolton ever heard the name Edwards was when Gerbovaz stated that Edwards had cut out the usage of the telephone credit card. Gerbovaz called Bolton collect a couple of times. After that which were refused Gerbovaz stopped calling."

Discussion

General's position is that the credit card holder is responsible for all telephone calls placed through the use of his credit card number until the credit card holder requests cancellation of the card or until the credit card holder notifies the company that the card has been lost or stolen. General reasons that the credit card holder is in a position to protect the use of the credit card. General claims it is in no position whatsoever to protect against misuse after the number has been stolen until it has been notified because it deals over the phone and it has no way of really knowing. The only way General can deal with its credit card customer is through the telephone operator over the telephone. There is no face-to-face checking of identification or anything else. In fact, use of the credit card is irrelevant as it is the credit card number that is important. General asserts that the credit card subscriber is responsible for calls made with his number even when the number is obtained without knowledge of the credit card holder such as, when the credit card holder makes a call from a telephone booth giving his number to the operator and the number is overheard by someone standing outside the booth who copies the number and later uses it. General feels that the credit card holder must protect the secrecy of his number. In the case at bar General claims that complainant is liable for all calls made on his credit card number because the calls were made either by a person authorized to make credit card calls, Mr. Butchko, or by a person authorized by Mr. Butchko to make credit card calls on complainant's card, Mr. Gerbovaz, or because complainant was negligent in protecting the secrecy of the credit card number.

Complainant claims that he is liable only for calls made by himself or Mr. Butchko, and only those calls made by Mr. Butchko in furtherance of the business of complainant. He disclaims liability for all calls made by Mr. Butchko that did not concern complainant, and for all calls made by Mr. Gerbovaz since he had no authority to use the credit card whatsoever and none of the calls placed by Mr. Gerbovaz benefited complainant.

Before discussing the law applicable to this case we must first determine the facts. Although there are discrepancies between the facts as testified to by the complainant and the facts as testified to by General's witnesses there are few outright contradictions in the testimony. To the extent that there are discrepancies and contradictions we resolve them as follows:

Findings of Fact

1. Complainant was issued a telephone credit card in December 1967. There was no contract between complainant and General binding complainant to pay for unauthorized charges. On October 23, 1968 he received a telephone bill dated October 25, 1968 in the amount of \$208.24. Complainant thought there were errors on this bill and he called General and asked them to investigate.

2. On or about November 12, 1968 a representative of General had a conversation with complainant's wife at which time the representative said that General had made an investigation of the toll charges and that in the company's opinion complainant was liable for those charges.

3. On or about November 20, 1968 complainant and a representative of General again had a discussion concerning unauthorized toll calls. In this discussion General refused to make any adjustments on the toll billing. Complainant stated that there were unauthorized calls on his billing but complainant did not request that his old credit card be canceled and a new one issued.

4. On or about December 27, 1968 as part of its normal business practices General issued a new credit card to complainant.

5. On January 17, 1969 complainant paid all telephone charges up to and including the billing date of December 26, 1968. These charges are not in issue in this proceeding.

6. On January 27, 1969 complainant again talked to a representative of General and stated that many calls on his January 25 bill were unauthorized.

7. On or about January 28, 1969 complainant called General and told them that Mr. William Butchko had been authorized to make some of the disputed calls and that perhaps Mr. Butchko's lawyer had made other of the disputed calls. Complainant did not request a new credit card at this time.

8. On February 19, 1969 complainant again called General and at this time requested a new credit card which was issued on February 20, 1969.

9. Complainant did not pay any part of the bills issued on January 25, 1969, February 24, 1969, March 26, 1969 and April 7, 1969, until April 28, 1969. On that date the total amount due was \$2,276.26 and complainant paid \$619. In May 1969 a final bill was rendered for the amount of \$1,657.26 (The amount in dispute) plus \$307.13 in new charges. The \$307.13 bill is not disputed.

10. Complainant, prior to October 1968, authorized Mr. William Butchko to use his telephone credit card and gave Mr. Butchko the credit card number. Notwithstanding the trouble complainant was having with misuse of his credit card when his new credit card for 1969 was issued by General complainant gave that credit card number to Mr. Butchko and authorized Mr. Butchko's use of the number.

11. Complainant did not authorize Mr. Stanley Gerbovaz to use either his telephone credit card or his credit card number; nor was complainant negligent in protecting his credit card or his credit card number.

12. Mr. William Butchko did not authorize Mr. Gerbovaz to use complainant's credit card or credit card number.

13. Mr. Stanley Gerbovaz used complainant's credit card number. He obtained the number by unknown means and had no authority to use the number.

14. General had notice that complainant's 1968 credit card and credit card number were being used in an improper manner as of November 20, 1968. At that time General should have either canceled the credit card and credit card number or issued a new credit card and credit card number. By not doing so General acted in a negligent manner.

15. General had notice that complainant's 1969 credit card and credit card number were being used in an improper manner as of January 27, 1969. At that time General should have either canceled the credit card and credit card number or issued a new credit card and credit card number. By not doing so General acted in a negligent manner.

16. Complainant is liable for all calls made by Mr. William Butchko and Mr. Butchko's attorney. Complainant is not liable for calls made by Mr. Stanley Gerbovaz which appear on bills rendered after December 26, 1968.

The finding that complainant never authorized Gerbovaz to use his credit card number and the finding that General was negligent require some discussion.

Evidence negating a finding of authorization is the direct evidence by complainant that he did not authorize Stanley Gerbovaz to use either his telephone credit card or his credit card number; that upon receipt of his telephone bills complainant promptly notified General that there was unauthorized use of his credit card; and that upon investigation by General it was discovered that the calls made by Gerbovaz had nothing to do with complainant or complainant's business, and that many of the called parties had never heard of complainant.

Evidence supporting a finding of authorization amounted to no more than a showing that complainant and Butchko were partners on certain business deals and that Butchko and Gerbovaz were partners on different business deals. From this evidence General would have us draw the inference that either complainant authorized Gerbovaz, or Butchko authorized Gerbovaz, or complainant was negligent in permitting Butchko to use his card and thereby provide access to Gerbovaz. General asks too much based upon the meager evidence it presented. There is no evidence that complainant authorized Gerbovaz or was negligent in permitting Butchko to use the credit card. Certainly the mere use of the credit card is no evidence that Gerbovaz was authorized to use the card; nor is mere access sufficient evidence to show that complainant or Butchko was negligent, or that Butchko authorized Gerbovaz's use of the card. From the fact of the Butchko-Gerbovaz partnership we can just as readily draw the inference that Gerbovaz, having access, appropriated the credit card number in some unknown and unauthorized manner. There is no evidence that Butchko had authority to authorize others to use the credit card number, and in any case, we are not persuaded that Butchko authorized Gerbovaz. On this record we find that Gerbovaz did not have authority to use complainant's credit card, and that complainant was not negligent in protecting his credit card and credit card number.

Having found that Mr. Gerbovaz had no authority to use complainant's credit card the question of liability for unauthorized use remains. No cases have been found involving civil liability for unauthorized use of a telephone credit card. However, there is a growing body of case law which concerns liability for the unauthorized use of the more conventional kind of credit cards, such as BankAmericard and Master Charge, that can be applied to this case. (See annotation, Liability of Holder of Credit Card or Plate for Purchases Made Thereon by Another Person, 15 ALR 3d 1086 and cases collected; Comment: The tripartite Credit Card Transaction: A Legal Infant (1960) 48 California Law Review 459, 479-488; and Credit Cards (1967) 21 University of Miami Law Review 811.)

The California Civil Code section on credit cards, although not in force at the time of the events in the case at bar, sheds light on the proper path to follow:

Sec. 1718. (Unauthorized use of credit card: Definitions.)

(a) As used in this section:

(1) "Credit card" means any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by a card issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value, either on credit or in consideration of an undertaking or guaranty by the issuer of the payment of a check drawn by the cardholder.

(2) "Accepted credit card" means any credit card which the cardholder requested in writing or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor or services on credit. A renewal credit card shall be deemed to be accepted if it is issued within one year after a prior card has been paid for or used. A credit card issued in connection with a merger, acquisition, or the like of card issuers or credit card services in substitution for an accepted credit card shall be deemed to be an accepted credit card.

(3) "Card issuer" means the business organization or financial institution which issues a credit card, or its duly authorized agent.

(4) "Cardholder" means the person or organization identified on the face of a credit card to whom or for whose benefit the credit card is issued by a card issuer.

(5) "Unauthorized use" means a use of a credit card by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use and from which use the cardholder received no benefit.

(b) The cardholder is not liable for any unauthorized use of a credit card which has not become an accepted credit card.

(c) If an accepted credit card is lost or stolen after the credit card has reached the cardholder, and the cardholder notified the card issuer within a reasonable time by telephone, telegraph, letter or any other reasonable means after discovery of the loss or theft or after the time in which a reasonable man in the exercise of ordinary care would have discovered the loss or theft, the cardholder is not liable for any unauthorized use of the credit card.

(d) This section applies only to credit cards originally issued or renewed on or after the effective date of this section. (Added by Stats 1969 ch 904 Sec. 1.)

The facts as we have found them in this case show that Mr. Gerbovaz used complainant's credit card number without having actual, implied, or apparent authority for such use and from which use complainant received no benefit. Also, the facts show that complainant notified General within a reasonable time by telephone after discovery of the misuse. Therefore, if Civil Code Section 1718 had been in force at the time of the events in question complainant would not be liable for any unauthorized use of his credit card. We are of the opinion that the principles set forth in Section 1718 should be applied to this case as a matter of general law.

In addition, case law supports our conclusion that complainant is not liable for unauthorized charges under the facts in this case. One applicable legal principle is that a promise to pay for unauthorized charges, even restricted to charges made prior to notifying the company of the card's disappearance, cannot be implied in a situation where there is no contract between the parties binding the credit issuer to pay for unauthorized charges. (Thomas v Central Charge Service, Inc., (Dist Col App 1965) 212 A.2d 533, 15 ALR 3d 1083.) Further, if the issuer, his agents, or his associates in the venture are careless in some manner or if they exhibit bad faith, resulting in losses from unauthorized use of credit cards, the holder of the card may not be held liable for such use, regardless of whether there is a contract between the parties which provides for his liability. (Gulf Refining Co. v Williams Roofing Co. (1945) 208 Ark 362, 186 SW 2d 790.)

And the holder of a credit card is not liable for unauthorized use made thereon by a third party where the carelessness of the card issuer contributed most to the loss, under the principle that where one of two innocent parties must suffer because of the actions of a third party, the one whose negligence or conduct occasioned the loss must bear it. (Humble Oil and Refining Co. v Waters (1963 La App) 159 So 2d 408; Union Oil Co. v Lull (1960) 220 Or 412, 349 P 2d 243; and Socony Mobile Oil Co. v Greif (1960) 10 App Div 2d 119, 197 NYS 2d 522.)

The evidence pointing to General's negligence is clear. General was promptly and constantly notified by complainant that there was a misuse of the credit card. These complaints came early enough during the course of this activity for General to have protected itself and its customer. The first complaint came in October 1968 when the amount of unauthorized calls was only about \$100; additional complaints came monthly. General's investigation in November 1968 was nothing more than perfunctory when considered in the light of General's complete investigation in May 1969. If General had made any of the calls in November 1968 that it made in May 1969 it would have discovered exactly what was taking place, that is, that Mr. Gerbovaz was making personal calls on complainant's credit card number. General's failure to make this kind of an investigation at the earliest possible time after notice leaves no doubt in our mind that General failed in its duty of care to protect its customer. At the very least, General should have changed the credit card numbers as soon as it was notified that there was a possibility of unauthorized use.

In our opinion, because of the manner in which telephone credit cards are issued and used, General must be held to a high standard of care in safeguarding its credit card customers. The use of telephone credit cards differs in many significant respects from the more conventional kind of credit cards such as Master Charge and BankAmericard. First, the user does not need the credit card, all he needs is the credit card number; second, there is no face-to-face confrontation between the seeker of credit and the supplier of the service; third, no signature or other kind of identification is required to obtain the credit; fourth, neither the company giving the credit (i.e. General) nor the company performing the service (e.g. Pacific Tel and Tel) makes any check at the time service is requested to see if the credit card number is valid. Even when a credit card has been revoked the telephone operators handling the credit card call have no way of knowing this; no lists of invalid numbers are distributed. And, in the nature of the business, it would be almost irrelevant if such lists were made as all an illegal user of telephone credit need know is the particular code in force during the year he is making the telephone calls. With the code number the illegal user can use a friend's telephone number, a stranger's telephone number, or a fictitious telephone number; fifth, there is no limit on the amount of charges that can be incurred on any particular telephone call or during any particular billing month. For all these reasons, the telephone company issuing the credit card must act promptly and do all in its power to prevent the misuse of credit cards and, when such misuse is found, to insure that a customer is not billed for calls he did not make or authorize.

The record in this case contains evidence of hundreds of disputed telephone calls. As a result of our findings many of these calls are to be the responsibility of complainant, but many are not. It is extremely difficult for us, on this record, to separate these calls. Therefore, we will set the matter down for hearing limited solely to determining which of the disputed calls were made by Mr. Gerbovaz. Those calls are not the responsibility of complainant and the charge for those calls should be deducted from the \$1,657.26 disputed telephone bill. Prior to hearing we expect complainant and defendant to meet at a convenient time to attempt to determine by agreement the charges applicable to Mr. Gerbovaz's calls. At the hearing any charges still disputed will be resolved.

Conclusion of Law

Based upon the findings of fact we conclude that complainant was erroneously charged for telephone calls made by Mr. Stanley Gerbovaz and that complainant's disputed telephone bill should be reduced by the amount erroneously charged.

O R D E R

IT IS ORDERED that:

1. Submission of this case is set aside and further hearing is set for Monday August 31, 1970 at 10 am. in the Commission Courtroom in Los Angeles for the sole purpose of determining the amount of charges billed to complainant for calls made by Mr. Stanley Gerbovaz, such amount to be deducted from the disputed bill of \$1,657.26.

2. Prior to August 31, 1970 complainant and defendant shall meet in a mutually convenient place and attempt in good faith to determine which of the disputed charges were incurred by Mr. Stanley Gerbovaz. Those charges which cannot be determined by agreement will be the subject of the hearing on August 31, 1970.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 21st day of JULY, 1970.



Chairman





Commissioners

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.