IN THE COURT OF APPEALS OF IOWA

No. 9-859 / 09-0427
Filed February 10, 2010

EVERCOM SYSTEMS, INC.,
Petitioner-Appellee,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellant,

and

OFFICE OF CONSUMER ADVOCATE,
Intervenor-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

The Iowa Utilities Board and the Office of Consumer Advocate appeal from a district court ruling on judicial review reversing a decision of the Board that found Evercom Systems, Inc. committed a cramming violation and imposed a civil penalty. **REVERSED AND REMANDED.**

David Lynch, General Counsel, and Mary Whitman, Assistant General Counsel, Iowa Utilities Board, Des Moines, for appellant.

Bret A. Dublinske of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellee.

John R. Perkins, Consumer Advocate, and Craig F. Graziano, Office of Consumer Advocate, Iowa Department of Justice, Des Moines, for intervenor-appellant.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

The Iowa Utilities Board (Board) concluded that a telephone company impermissibly charged a consumer for unauthorized collect calls made to his number. The Board affirmed the imposition of a $2500 penalty against the company. On judicial review, the district court reversed the agency decision. As we conclude the agency decision was not "irrational, illogical, or wholly unjustifiable" and was supported by substantial evidence, we reverse the district court and remand for entry of an order affirming the Board's decision.

I. Background Facts and Proceedings

Evercom Systems, Inc. provided telephone service to inmates at the Bridewell Correctional Facility in Bethany, Missouri. In one day, five collect calls were made from the facility to a business telephone line belonging to Ken Silver. The day after the calls were made, Silver received an automated message from a division of Evercom informing him that more than $50 in collect calls had been charged to his account in a twenty-four hour period. A block was placed on Silver's telephone line, and he was instructed to contact Evercom.

Silver called Evercom and denied all knowledge of the calls. He was directed to send a fax to Evercom's head office. He did so, explaining that all of his business's "incoming daytime calls go through a central operator & she has not received nor accepted any collect calls from any correctional facility." After receiving no response to his fax, Silver called Evercom again. Evercom informed him that his claim would be investigated and the investigation would take approximately fifteen days to complete. The day after conveying this information, Evercom addressed a form letter to Silver stating,

> Your request to investigate collect calls billed to your telephone number from Correctional Billing Services, a division of Evercom Systems, Inc., has been received to determine the validity of the charges. After a thorough investigation, no equipment problems or other billing failures that would result in inaccurate charges were found at the correctional facility where the calls originated. Therefore, no credits will be issued to your account for these particular telephone calls.

Silver did not receive this letter, as it was sent to an incorrect address. Silver was billed $78.21 for the collect calls.[1]

Silver filed a complaint with the State, which was forwarded to the Board. Evercom subsequently concluded that the charges were generated by third-party fraudulent activity and credited Silver for the collect call charges. In light of Evercom's action, the Board issued a proposed resolution of the complaint that simply made note of the credit. The Board did not determine whether Evercom violated a statute or rule.

Dissatisfied with this result, the Office of Consumer Advocate (OCA) petitioned the Board for a determination that Evercom committed a violation and for imposition of a civil monetary penalty. The Board found reasonable grounds for further investigation, and OCA's petition proceeded to a hearing before an administrative law judge (ALJ).

In a proposed decision, the ALJ explained that Iowa Code section 476.103 (2005) prohibits unauthorized changes in service, including "the addition or

[1] Patrick and Paula Allen also received a telephone bill from Evercom that included $103.61 in collect call charges. These calls also originated at the Bridewell Correctional Facility. Like Silver, the Allens immediately called Evercom and denied receiving or accepting the collect calls. Evercom noted there were "no problems at the facility," and sent the Allens the same form letter it had attempted to send Silver. This appeal involves only Silver's complaint.

deletion of a telecommunications service for which a separate charge is made to a consumer account." The ALJ further explained that

> [t]he unauthorized addition or deletion of a telecommunications service for which a separate charge is made to a consumer account is commonly called "cramming," which is defined in the Board's rules as: "the addition or deletion of a product or service for which a separate charge is made to a telecommunications customer's account without the verified consent of the affected customer." 199 IAC 22.23(1).

The ALJ found as "an undisputed fact" that "no one from [Silver's business], including Mr. Silver, received or accepted any collect calls from the Bethany, Missouri, number." The ALJ concluded "there is no question that a cramming violation occurred and that Evercom violated Iowa Code § 476.103 and 199 IAC 22.23 when it billed Silver for the five unauthorized collect calls." The ALJ assessed a civil penalty of $2500.

Both Evercom and the OCA appealed the ALJ's decision to the Board. Evercom asserted the ALJ erred in finding a violation and assessing a civil penalty, while the OCA argued the ALJ should have assessed a larger civil penalty. The Board affirmed the ALJ in all respects.

Evercom petitioned for judicial review. Following a hearing, the district court reversed the Board's decision. The court began by noting the analysis under section 476.103 and Iowa Administrative Code rule 199-22.23

> is a two-step process. First, it should be determined if there has been a violation of the statute and the Iowa Administrative Code; and, if so, what are the facts and circumstances which should be taken into account to assess an appropriate penalty?

The court found

> that the agency has mixed the two-step analysis into one step. Instead of focusing separately on what Evercom did or did not do

> which caused the initial charges to begin with, the Agency appears to have been more focused on assessing a civil penalty against Evercom based upon its responsiveness or non-responsiveness to Mr. Silver.

The court further found "that even though neither Mr. Silver nor anyone in his company authorized the five collect phone calls on January 24, 2006, the evidence as presented to Evercom indicated at the time that they were authorized." For that reason, the court concluded that the Board erred in finding a violation of section 476.103 and rule 199-22.23. Alternately, the court stated that even if Evercom violated section 476.103 and rule 199-22.23 in billing Silver for the fraudulent collect calls, the civil penalty assessed by the Board was not reasonable given the absence of "intentional wrongdoing."

The Board and the OCA appealed.

II. Analysis

A. Violation

The key question is whether the agency correctly concluded that Evercom committed a cramming violation.

On this question, the appellants first take issue with the district court's determination that the Board misapplied the applicable statutory test. The Board asserts that it "did, in fact, engage in the very same two-step analysis that the District Court describes." In evaluating this assertion, we apply the "irrational, illogical, or wholly unjustifiable" standards of review set forth in Iowa Code sections 17A.19(10)(*l*) and (m). *Office of Consumer Advocate v. Iowa Utilities Bd.*, 744 N.W.2d 640, 643 (Iowa 2008).

Section 476.103 requires the Board to first find a violation of the statute before considering whether a civil penalty should be assessed. *See* Iowa Code § 476.103(4)(a) ("[A] service provider who violates a provision of this section [or] a rule adopted pursuant to this section . . . is subject to a civil penalty."). The Board acknowledged this two-step analysis and, in addressing Evercom's argument that it did not engage in intentional wrongdoing, applied the two-step analysis to the facts. Specifically, the Board's final order stated,

> Here, the Board agrees with the ALJ that Evercom did not directly intend to cram the complainant, but that lack of intent is not relevant to the question of whether a cram occurred. . . . *The question of intent comes into play in the second step of the analysis, determining whether any other remedial measures, such as civil penalties, are appropriate*.

(Emphasis added.) Similarly, the ALJ's proposed decision, which the Board affirmed, stated,

> Evercom's lack of intent is more relevant to the issue of civil penalties rather than to the question of whether there was a violation of the statute and rule.

Based on these statements, we conclude the Board's interpretation of section 476.103 and its application of the two-step analysis to the facts was not "irrational, illogical, or wholly unjustifiable."

The appellants next challenge the district court's determination that Evercom did not violate the applicable statute and rule. Specifically, the Board asserts "the District Court erroneously substituted its judgment for the Board's on a finding of fact." In evaluating this argument we apply the substantial evidence standard of review. *See* Iowa Code § 17A.19(10)(f)(1) (defining "substantial evidence" as the "quantity and quality of evidence that would be deemed

sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance").

Iowa Code section 476.103(1) authorizes the Board to "adopt rules to protect consumers from unauthorized changes in telecommunications services." Section 476.103(2) includes within the definition of a "[c]hange in service" "the addition or deletion of a telecommunications service for which a separate charge is made to a consumer account."

As noted, the district court found that the collect calls were authorized. The court reasoned that the calls "appeared" to Evercom "to have been normal collect calls." The court's finding that the calls were authorized is at odds with the Board's acceptance of the ALJ's fact finding that "no one at [Silver's business] received or accepted any collect calls from the Bethany, Missouri, telephone number." The agency found that this fact was undisputed and, as we can discern no record evidence to the contrary, we conclude the agency's fact-finding is supported by substantial evidence.

We turn to the district court's focus on Evercom's belief that the calls were authorized. As the Board points out, the statute simply prohibits "unauthorized changes in telecommunications services." *Cf.* Iowa Code § 476.51(2) (providing a public utility that "willfully" violates a provision of chapter 476 is subject to a civil penalty). The statute does not include an intent requirement. Similarly, the rule that prohibits cramming does not include an intent requirement. *See* Iowa Admin. Code r. 199-22.23(2) (stating "[u]nauthorized changes in telecommunications service, including but not limited to cramming and slamming,

are prohibited"). Because a cramming violation may be found irrespective of the violating party's intent, we agree with the appellants that Evercom's "reasonable belief" about the collect calls was irrelevant. For the same reason, it did not matter that the calls were fraudulently made by a third party without Evercom's knowledge or that Evercom's system designed to detect telephone fraud was inadvertently rather than purposefully turned off. All that mattered was whether Silver authorized the collect calls that were billed to his account. *See* Iowa Admin. Code r. 199-22.23(5) (clarifying in a 2007 amendment to the rule that "[w]here the additional charge is for one or more specific telephone calls, examples of internal records a carrier may submit include call records showing the origin, date, time, destination, and duration of the calls, and any other data the carrier relies on *to show the calls were made or accepted by the customer*, along with an explanation of the records and data") (emphasis added)); *see also Iowa Elec. Light & Power Co. v. Utilities Bd.*, 442 N.W.2d 99, 100 n.1 (Iowa 1989) (noting an amendment to an administrative rule "merely restated the original meaning for purposes of clarification"). As noted, the evidence that Silver did not authorize the calls was undisputed.

We conclude that the agency's interpretation and application of the law with respect to whether there was a violation was not irrational, illogical, or wholly unjustifiable and its pertinent finding of fact was supported by substantial evidence. Accordingly, we reverse the district court's conclusion that Evercom did not violate section 476.103 and the implementing rules. We find the remaining arguments raised by the parties concerning whether there was or was not a violation unpersuasive or unnecessary to decide.

B. Civil Penalty

OCA takes issue with the district court's reversal of the civil penalty award. Our review of the penalty is to determine whether there was "an irrational, illogical, or wholly unjustifiable application of law to the facts." *Insituform Techs., Inc. v. Employment Appeal Bd.*, 728 N.W.2d 781, 801 (Iowa 2007).

Iowa Code section 476.103(4)(a) allows the Board to assess a civil penalty against a telecommunications service provider that violates a provision of the statute or its corresponding rules. The maximum authorized penalty for each violation is $10,000. *See* Iowa Code § 476.103(4)(a). Paragraph "b" of that subsection sets forth factors for the Board to consider in determining the amount of the penalty, if any. *Id.* § 476.103(4)(b).

The Board thoroughly considered those factors in arriving at a $2500 civil penalty. Specifically, the Board balanced Evercom's poor investigation of Silver's complaint against the absence of intentional wrongdoing by the company. We conclude the Board's balancing of the competing factors was not irrational, illogical, or wholly unjustifiable. Accordingly, we reverse the district court's rejection of a penalty.

III. Disposition

We reverse the district court decision and remand for entry of an order affirming the Board's decision. *See Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 248-49 (Iowa 2006).

REVERSED AND REMANDED.

Potterfield, J. concurs. Mansfield, J., dissents.

MANSFIELD, J. (dissenting)

I respectfully dissent. I believe the Board acted outside its legal authority in turning this mundane disagreement over $78.21 in charges, that resulted from intentional third-party fraud, into a $2500 civil penalty proceeding.

This case involves a billing dispute between Evercom and a business (Quality Services Corp., whose president is Mr. Ken Silver). The charges were for five collect calls supposedly made to Quality Services on January 24, 2006, totaling $78.21. The charges occurred because an inmate at a Missouri correctional facility, where Evercom provides service, engaged in "glare fraud" in coordination with an unknown person outside the facility. This is a form of fraud that can occur when one person dials in on a trunk at the same moment that another person is dialing out on a trunk. If the timing and circumstances are right, the two callers will simultaneously seize the trunk line and talk to each other, while the charges are billed to a third number even though the third number is not even a party to the telephone call. Although Evercom has a proprietary system to prevent glare fraud, it had been inadvertently left off.

Evercom investigated Quality Services' initial dispute of the charges, and at first declined to reverse them. When the customer renewed its dispute of the charges, however, Evercom conducted a more thorough investigation. On March 22, 2006, Evercom was finally able to obtain from the correctional facility the recordings of the calls in question. These made it clear that "glare fraud" had occurred involving an inmate at the institution, and Evercom promptly reversed the charges. This occurred less than six weeks from the date the customer received its bill including the $78.21 charge.

In the meantime, however, Quality Services had filed an informal complaint with the Iowa Utilities Board. Board staff contacted Evercom, which advised both the customer and the Board on April 17, 2006, that it had determined the charges were due to third-party fraud and that they had been reversed. Board staff were willing to leave the matter at that, but the Office of Consumer Advocate filed a formal petition with the Board seeking a civil penalty. This ultimately resulted in the Board's decision to impose a $2500 penalty on Evercom pursuant to Iowa Code section 476.103 (2005) and Iowa Administrative Code rule 199-22.23.

I do not believe section 476.103, as enacted by the Iowa Legislature, allows for this outcome. The law in question is entitled, "Unauthorized change in service—civil penalty." It authorizes the Iowa Utilities Board to "adopt rules prohibiting an unauthorized change in telecommunications service." A change in service is defined to include "the addition or deletion of a telecommunications service for which a separate charge is made to a consumer account." *See* Iowa Code § 476.103(2)(a) & (3). Here there was no addition or deletion of a service; at most, there was an improper charge.

To put it simply, section 476.103 deals with the situation where a customer receives a service that he or she did not authorize or approve. The purpose of this law was to address the situation where unscrupulous telephone providers foist services on customers that they did not authorize or want, such as a change of providers, call waiting, call blocking, calling service plans, calling cards, etc. As telecommunications service became more deregulated, competitive, diversified, and fragmented, there arose a greater risk that this could occur. All

of us can recall how events unfolded a few years back when choice suddenly came to a previously highly regulated, monopolistic telecommunications industry. We were bombarded in our homes with solicitations to change our telephone service, agree to new plans, and so forth.[2] Hence, the decision to enact section 476.103 in 1999.

However, that has nothing to do with what happened here. This customer did not receive a service at all. Rather, there was an innocent billing error due to third-party fraud. Billing errors are ubiquitous in our society. They occur in all lines of commerce. Usually, they are addressed and resolved by the parties. That was apparently occurring here, without the Board's involvement. As a backstop, if the parties had been unable to resolve their dispute, Iowa has a civil justice system that, in my biased opinion, generally works well. I do not believe the legislature intended to give the Iowa Utilities Board a roving commission, backed by the considerable expertise and resources of the Office of Consumer Advocate, to impose substantial penalties on one specific group of companies—telecommunications providers—for isolated, innocent billing errors.[3]

I also do not believe Iowa Administrative Code rule 199-22.23, the Board's rule implementing section 476.103, authorized the Board's action in this case. That rule defines "cramming" as "the addition or deletion of a product or service for which a separate charge is made to a telecommunication customer's account

[2] In *Office of Consumer Advocate v. Iowa Utilities Board.*, 744 N.W.2d 640, 641-42 (Iowa 2008), the supreme court discussed one such scenario: a residential customer who was solicited by a telemarketer to change his long-distance service to a new provider.

[3] Iowa Code section 476.103 authorizes a penalty of "not more than ten thousand dollars per violation." Because the $78.21 charge was for five separate collect calls, both the Board and the OCA take the position that the maximum possible penalty could have been $50,000.

without the verified consent of the affected customer." Again, this customer did not receive a product or service. As the Board's administrative law judge stated, in a fact finding quoted by my colleagues in the majority, "It is an undisputed fact that no one from the Quality Services Corporation, including Mr. Silver, *received* or accepted any collect calls from the Bethany, Missouri, number shown on the Qwest bill on January 24, 2006." (Emphasis added.)

Finally, I have some trouble squaring the Board's action here with its resolution of the three cases described in *Office of Consumer Advocate v. Iowa Utilities Board*, 770 N.W.2d 334 (Iowa 2009). There the Board refused even to docket Office of Consumer Advocate petitions for penalty proceedings. All of those cases involved garden-variety billing disputes. However, residential consumers rather than businesses were involved, and in one of them the amount of the improper charge was much higher ($988.55) than the amount here. Most importantly, in my view, those cases involved situations where a service was actually provided to the customer (albeit one that the customer did not authorize), thereby more arguably bringing the cases within section 476.103 and rule 199-22.23. Nevertheless, the Board did not go forward in any of those cases, and the supreme court approved the Board's decision not to go forward, noting, "In each of the three cases at issue, the Board specifically found that there was no violation of the statute—only mistakes or miscommunications." 770 N.W.2d at 342. [4]

[4] In fairness to the Board, I am not sure that it specifically found no violation of the statute in all *three* cases. In two of the cases, I read its orders as indicating that civil penalty proceedings are not warranted for "inadvertent errors" or "a miscommunication or a misunderstanding," even if a technical violation of the statute may have occurred.

I acknowledge that the Board's interpretation of section 476.103 is entitled to deference. *Office of Consumer Advocate*, 744 N.W.2d at 643. We are bound to follow that interpretation unless it is irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(*l*); *Office of Consumer Advocate*, 744 N.W.2d at 645. However, regardless of the standard of review, "the interpretation and final construction of a statute, or an agency rule interpreting a statute, is an issue for the courts to decide." *Office of Consumer Advocate*, 744 N.W.2d at 643. I cannot read either section 476.103 or Iowa Administrative Code rule 199-22.23 (especially the version that was in effect in 2006) and get to the same destination as my colleagues.[5]

For the foregoing reasons, I respectfully dissent and would affirm the judgment of the district court.

See Office of Consumer Advocate v. McLeodUSA Telecommunications Servs., Inc., Docket No. C-06-277, "Order Denying Petition for Proceeding to Consider Civil Penalty" at 5 (Iowa Utilities Board April 6, 2007); *Office of Consumer Advocate v. Qwest Corp.*, Docket No. C-06-168, "Order Denying Petition for Proceeding to Consider Civil Penalty" at 7 (Iowa Utilities Board June 4, 2007). The supreme court notes that the Board has discretion whether or not to levy a penalty for a violation. 770 N.W.2d at 340, 342. But my point remains that those cases were closer to a violation than this one is.

[5] The Board may not be of one mind on this issue. I note that one member, who did not participate in this case, has questioned the applicability of Iowa Code section 476.103 to "routine billing disputes." *See Office of Consumer Advocate v. AT&T Communs. of the Midwest*, Docket No. FCU-08-9, "Order Docketing Request for Formal Proceedings" at 10 (Iowa Utilities Board May 23, 2008) (dissenting opinion). Admittedly, the facts of that proceeding are somewhat different from this one.