

SW /bjh

Decision No. 73978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HERMAN L. FOSTER,

Complainant,

vs.

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,

Defendant.

Case No. 8689
(Filed September 18, 1967)

Herman L. Foster, in propria
persona, and Robert A. Doyle,
for complainant.
Robert E. Michalski, for
defendant.

O P I N I O N

Herman L. Foster, an individual, doing business with his wife, Delmar Leven Foster, under the fictitious firm name of Foster's Fashions, of 4375^{1/} South Central Avenue, Los Angeles, alleges that the Pacific Telephone and Telegraph Company (Pacific) published his advertisement in the August, 1966 yellow pages without his having approved in advance the copy of said ad, and that he had been billed at the rate of \$79 per month therefor.

In its answer, Pacific admitted that it had billed the complainant for the 12 months' period, August, 1966 through July 1967, plus \$4.75 per month for an extra listing in the

^{1/} Incorrectly stated in the complaint as 4377.

Los Angeles white pages directory, for a total of \$1,001.52 (sic)^{2/}, but that Foster had signed an advertising order on February 24, 1966, after having discussed the makeup and layout of said yellow pages advertisement with Pacific's sales representative.

Public hearings were held before Examiner Warner on November 21 and 22, 1967, in Los Angeles.

Exhibit No. 1 is a customer's copy of Pacific's advertising order detailing the monthly rate, the item of type listing and the line of information, together with the monthly billing and the date of issue of the yellow pages directory. Said exhibit contains complainant's signature as owner of Foster's Fashions and the date of placing of the order as February 24, 1966. The back of the order contains a statement of terms and conditions, and indicates that, upon acceptance by the company (defendant), the order shall constitute the entire contract between the advertiser and the company.

Exhibit No. 2 is an office copy of the data contained on Exhibit No. 1. Its purpose is to cancel complainant's advertising in the August, 1967 yellow pages directory. The date of cancellation is May 2, 1967.

Exhibit No. 3, marked for identification, was withdrawn.

Exhibit No. 4 is a copy of a letter from defendant to the complainant informing him that Pacific's yellow pages customer service representative, as of the date of the letter, December 8, 1966, had been unsuccessful in contacting complainant by telephone

^{2/} The correct amount should be \$1,005.00.

regarding his advertising in the August, 1966 Los Angeles classified directory; requesting a telephone call response to the letter; and informing the complainant that if the response were not forthcoming by December 16, 1966, defendant's business office would have no alternative but to follow through on payment of advertising charges in question.

Exhibit No. 5 is a letter to complainant from defendant's yellow pages customer service representative dated October 17, 1966, forwarding copies of the signature contracts authorizing the advertising appearing in the August, 1966 directory.

Exhibit No. 6 is page 2207 from the 1966 yellow pages directory containing complainant's advertising in the lower right-hand corner.

Exhibit No. 7 is a copy of defendant's advertising order, Exhibit No. 1, marked up by defendant's sales and clerical personnel as it cleared various departments of defendant.

Exhibit No. 8 is the original of defendant's form X-280-S (3-56) copy sheet, which defendant's advertising sales representative testified she prepared in complainant's presence on February 24, 1966; the preparation took about an hour and a half; after complainant had left, she cut out a portion of complainant's business card and pasted it with scotch tape on the copy sheet and attached the cutout from page 977, 13th edition, from defendant's book entitled "Action Art Work for Display Advertising Popular Cuts for Yellow Pages"; proof was to be sent to Mr. Foster at his mailing address; complainant discussed all

the items of advertising including the lines to be carried, including, among other things, the phrases "Originals by Delmar Leven", "BankAmericards", "Lay Aways", "Parking Available", and "Corner Vernon & Central".

Exhibits Nos. 9 and 9-A are copies of the proof of complainant's ad mailed to him with instructions to note any corrections, and return within five days. Said exhibits were mailed on the 11th of March, 1966. Closing date for the directory was April 29, 1966.

Exhibit No. 10 is a copy of defendant's tariffs relating to classified telephone directory advertising which, although issued May 1, 1967, did not differ materially from those applicable to the period of this complaint, viz., February, 1966 through August, 1967.

Exhibit No. 12 is a copy of complainant's business card.

Exhibit No. 13 is a copy of the closing portion of defendant's advertising sales training guide.

Complainant denied that the advertising copy had been prepared in his presence and contended that defendant's representative had promised to send him copy proof for his review before concluding the advertising order. He testified that late in 1965 he had received a small business loan to start a women's apparel shop at Vernon and Central Avenues; had inquired of the telephone company regarding advertising and had signed the advertising order after making a visit, at defendant's request, to the Yellow Pages directory offices at 3636 Beverly

Boulevard. He then became engaged in other phases of setting up his business which was, among other things, to sell custom made dresses designed by his wife under her designer's name, Delmar Leven, and that he was out of the state until September, 1966. He had not known of the appearance of his advertisement in the August, 1966 directory until it was pointed out to him by a friend. He called defendant to object to the payment of the monthly rate on the grounds that he had not placed such an order. Defendant's representative insisted on payment and threatened to disconnect his telephone. He talked with defendant's sales representative in November, 1966 while her supervisor was also on the telephone to assist in clarifying the disputed order.

Defendant's supervisor testified that complainant said that he did not intend to pay the amount due because business was bad.

Based on the record, the Commission finds as follows:

1. Herman L. Foster, an individual, signed an advertising order for space advertising in the August, 1966 yellow pages directory and in the June, 1966 white pages listing totalling \$79 and \$4.75 per month, respectively. He placed said orders on February 24, 1966, in the presence of Pacific Telephone Company's directory sales representative, and instructed her and consulted with her regarding the contents of his advertising order.

2. a. Pacific's advertising order constitutes a contract and the only contract between the advertiser and the company, as stated on the reverse of the company's advertising order form,

a customer's copy of which was given to complainant at the time the order was placed.

b. A relief supervisor of defendant's sales representative testified that she walked by the latter's desk and noticed that the preparation of the orders was taking place in complainant's presence. She stated that she particularly remembered the circumstances because personal visits by advertisers are rare (only about one order per month since most orders are taken by telephone), and the complainant's orders were the subject of discussion among other office telephone directory sales representatives immediately after complainant's departure.

3. Complainant is an experienced business man and has placed orders for merchandise with the full understanding of his obligations to meet payments when due. Some orders are placed with suppliers with the understanding that payment for merchandise only becomes an obligation when merchandise has been accepted. This is not true with respect to the contract and order which complainant placed with the defendant.

4. Defendant has in no way violated its tariffs.

5. Complainant's advertisement was prepared correctly by defendant.

6. Defendant cancelled complainant's advertising order for the August, 1967 directory pursuant to the terms contained on the order that it was "for one issue only".

7. The amount of \$1,005.00 is past due to defendant from complainant for 12 months' advertising in the yellow pages

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of the August, 1966 directory pursuant to the advertising orders,
Exhibits Nos. 1 and 2.

The Commission concludes that the record will not support
any finding of misrepresentation, error, or violation of its tariffs
by defendant, and that the complaint should be dismissed.

O R D E R

IT IS ORDERED that this complaint is dismissed.

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

Dated at San Francisco, California, this 9th
day of APRIL, 1968.

John E. Mitchell
President

Augustine
William J. Lyons Jr.
David P. Maroney
Commissioners

WILLIAM M. BENNETT, COMMISSIONER, Dissenting Opinion

This order arises from the anachronism known as corporate immunity. It is in reality private immunity giving the Pacific Telephone and Telegraph Company immunity from mistake or civil wrong. This is an odd doctrine in 1968 particularly in view of the developments in case law of this State and other jurisdictions which have substantially curtailed indeed in some cases eliminated sovereign immunity. It seems odd that a private public utility telephone corporation enjoys immunity from mistake while the sovereign State of California has been deprived of immunity status in many fields.

I do not quarrel necessarily with the facts of either of these cases but I do object vigorously to the continuance of the notion and to the partnership arrangements between this Commission and the telephone company that they are protected from lawsuit and that we are sentinels against liability brought into that partnership by a tariff filing. I can find no justification either in the past or the present for giving immunity from mistake to a private entity. So far as I am concerned immunity cannot be justified on any rational basis and it is high time that it be case aside. What persuasive reason can be advanced in support of the proposition that when the telephone company makes a mistake it is not to be held accountable for its wrong doing? And it is no comfort that this Commission which possesses no expertise in the field of civil liability or civil damages has volunteered to work out a meaningless noncompensatory formula. Note today's order in the Conlee case which gave to plaintiff therein the magnificent sum of .88 cents and not by way of cash payment but by way of a credit allowance. We do not even leave to the complainant the option to taking money payment--instead we dictate a credit on the bill.

William M. Bennett
/s/ WILLIAM M. BENNETT

WILLIAM M. BENNETT
Commissioner

Dated: San Francisco, California
April 9, 1968